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Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-002006-MR

BRANDON COMBS — APPELLANT

v.

APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 01-CI-00094

JENNIFER COMBS (NOW SIZEMORE) — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: Richard Brandon Combs (Brandon) appeals from a post-decree order of the Jessamine Circuit Court granting the motion of Jennifer Combs (now Sizemore) for an increase in child support. Brandon contends that the additional child care costs sought by Jennifer were not necessary, and that the trial court erred by apportioning the child's dental insurance premiums between the parties. Finding no error, we affirm.

Brandon and Jennifer were married in 1993 and separated in 2001. One child, Lauren Michelle, was born to the marriage. The decree of dissolution, entered July 23, 2001, incorporated a settlement agreement which provided that the parties shall have joint custody of Lauren with Jennifer designated as the residential custodian. The decree also required Brandon to pay child support in the amount of $427.85 per month, and required Jennifer to provide health insurance for the child "so long as same is available through her employer." It appears from the record that Brandon paid the child's health insurance premiums for several months thereafter, and the trial court gave him an appropriate credit for those payments. Jennifer did not seek any amounts for child-care at that time.

On July 1, 2004, Jennifer filed a motion requesting an increase in child support to $496.54 per month. The child support worksheet attached to Jennifer's motion included $224.83 in child-care costs and $182.06 for health insurance premiums, which included both health and dental coverage.[1] Brandon objected to the increase, arguing that child-care was not reasonable and necessary because either he or family members could care for Lauren while Jennifer was working. He also argued

[1] Since Brandon does not object to Jennifer's payment of health insurance premiums, it would appear that he is no longer providing health insurance coverage for Lauren.

that dental insurance premiums were not allowable under the statute. The matter was referred to the DRC, who issued a report finding that the Jennifer's claimed expenses were reasonable under the circumstances. Thereafter, on August 26, 2004, the trial court overruled Brandon's exceptions, granting Jennifer's motion and adopting the DRC's report. This appeal followed.

The primary issues concern Jennifer's claimed expenses for child-care and for dental insurance. KRS 403.211(6) permits the trial court to:

> allocate between the parents, in proportion to their adjusted parental gross income, reasonable and necessary child care costs incurred due to employment, job search, or education leading to employment, in addition to the amount ordered under the child support guidelines.

KRS 403.213(2) provides that when applying the child support guidelines at the time of the filing of the motion to modify, a change in the amount of support due which is more than a 15% change shall be rebuttably presumed to be a material change in circumstances, while a change of less than 15% shall be rebuttably presumed not to be a material change in circumstances. However, in Olson v. Olson,[2] this Court explained that the 15% threshold for child-support modification does not apply to allocation of child-care expenses. The allocation of child care

[2] 108 S.W.3d 650 (Ky.App. 2003).

expenses is in the nature of a prepayment or reimbursement of the share of actual costs, and if the expense is not incurred the other party is entitled to be repaid the amount they had provided.[3] Accordingly, the only issue is whether the claimed expenses for child-care are "reasonable and necessary."

Brandon does not contend that the amount of the child-care expenses is unreasonable, but he argues that they are not necessary under the circumstances. Brandon states that he or a member of his family is available to care for Lauren and it is not necessary to enroll her in a day-care program. However, Brandon conceded at the DRC's hearing that the expenses for day-care during the summer were necessary. He only objects to incurring the costs for after-school care during the school year.

The DRC expressed concerns that Brandon could not consistently provide the after-school care, which would make it difficult for Jennifer to arrange for after-school care on days when he was not available. The DRC also objected to allowing Brandon's family members to provide care for Lauren, citing to "hostility" between Jennifer and members of Brandon's family. Brandon contends that these findings were not supported by the evidence.

[3] Id. at 652.

We agree with Brandon that the grounds for some of the DRC's assumptions are questionable. At the DRC's hearing, the DRC stated his belief that child-care expenses could only be paid on a weekly basis, rather than a daily basis. But at the hearing on Brandon's exceptions before the trial court, Jennifer admitted that her day-care provider only charges based on the days that the child is actually there. As for the DRC's finding of "hostility", Brandon and Jennifer were somewhat argumentative at the DRC's hearing. In addition, Brandon's mother and Jennifer's current husband, who were spectators at the hearing, both attempted to interject during the proceedings. However, the DRC's characterization of "hostility" between Jennifer and Brandon's family probably overstates the status of the relationship given the evidence.

Nevertheless, the trial court addressed these matters during the hearing on Brandon's exceptions. Jennifer conceded that she could pay for child-care on a daily basis and Brandon assured the court that he could provide his work-schedule to Jennifer at least two weeks in advance. However, the trial court remained concerned about the lack of specificity in Brandon's plans. Furthermore, the trial court discounted the DRC's finding of "hostility", stating:

> Even excluding the hostility totally, I can tell just from the inconvenience factor that and the ability to try to work out some kind

> of meaningful schedule at this point, you all can't do it. There's too much up in the air. So hostility itself didn't have any bearing on my decision.

As joint custodians, Brandon and Jennifer have equal rights and responsibilities for major decisions concerning their child, and they must consult with each other on these major decisions.[4] But Jennifer, as Lauren's residential custodian, has the primary role in minor day-to-day decisions and providing for the normal routine care and control of the child,[5] including the responsibility for arranging after-school care. Jennifer has concluded that the parties do not cooperate well enough so that it would be practical for Brandon or his family to provide after-school care on a regular basis. The trial court agreed with this conclusion. Based on the evidence of record, we must conclude that there was substantial evidence to support the trial court's finding the child-care expenses "reasonable and necessary."

Brandon also contends that the trial court erred by ordering him to pay a proportionate share of Lauren's dental insurance premiums. KRS 403.211(7)(a) allows a trial court to allocate the cost of the child's health insurance coverage between the parties. Brandon contends that health insurance coverage should not be construed to require dental insurance

[4] Fenwick v. Fenwick, 114 S.W.3d 767, 779 (Ky. 2003).

[5] Id.

coverage. However, we conclude that the term "health insurance", as used in the statute is broad enough to include dental insurance coverage, provided that the court finds it to be reasonable and available at the time the request for coverage is made.

Dental insurance coverage for Lauren is available through Jennifer's employer. While there was no evidence in the record concerning the scope of the dental insurance benefits as opposed to Lauren's needs for dental services, Brandon does not challenge the sufficiency of the evidence supporting the trial court's finding that the amount is reasonable.[6] He merely argues that the parties should decide among themselves whether dental insurance should be carried or how to apportion Lauren's dental expenses. However, KRS 403.211(8) requires the court to apportion between the parties the cost of the child's extraordinary medical expenses. "Extraordinary medical expenses" includes dental services. Thus, Brandon would be responsible for a proportionate share of Lauren's expenses for dental services regardless of whether it is paid through insurance or on a fee-basis.

[6] The trial court's order of August 26, 2004, required Jennifer to provide the health and dental insurance policies within ten days, but those policies are not included in the record.

If there were some evidence, as Brandon asserts, that the cost of the dental insurance coverage exceeds its benefit, then a court could find dental insurance coverage to be unreasonable under the circumstances. Furthermore, like child-care costs, the apportionment of health insurance premiums is in the nature of a reimbursement for actual expenses incurred on behalf of the child. As a result, it is not subject to the 15% threshold for modification. Therefore, if there is evidence that the dental coverage is not worth the cost, Brandon may file a motion to modify this amount and apportion Lauren's dental expenses in another manner. But we find no support for Brandon's argument that a court may never apportion dental insurance premiums as a means of meeting this obligation. Consequently, we affirm the trial court's order assigning Brandon a proportionate share of the dental insurance premiums.

Accordingly, the September 1, 2004 order of the Jessamine Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Brandon Combs, *pro se*
Nicholasville, Kentucky

No brief for appellee.