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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002205-MR
NO. 2006-CA-002233-MR

WILLIAM GRAIG THOMERSON — APPELLANT/CROSS-APPELLEE

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE W. MITCHELL NANCE, JUDGE
ACTION NO. 04-CI-00215

JACQUELINE THOMERSON — APPELLEE/CROSS-APPELLANT

OPINION
REVERSING IN PART, AFFIRMING IN PART, AND REMANDING

** ** ** ** **

BEFORE: STUMBO AND WINE, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

STUMBO, JUDGE: William Graig Thomerson appeals, and Jacqueline Thomerson cross-appeals, from "Findings of Fact, Conclusions of Law and Decree of Dissolution," and "Supplemental Findings of Fact, Conclusions of Law, and Supplement Decree of Dissolution" rendered by the Barren Circuit Court. William (hereinafter "Appellant") contends that the circuit court erred in finding that the horse show activities of the parties' daughter constituted an "extraordinary expense" pursuant to KRS 403.211(4) and

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

in requiring him to pay 55% of the associated costs; that it erred in imputing income to him that was not proven by substantial evidence; and erred in failing to find that a credit union account was marital property. Jacqueline (hereinafter "Cross-Appellant") maintains that the trial court erred in designating certain funds as Appellant's non-marital property. For the reasons stated below, we affirm in part, reverse in part and remand the judgment on appeal.

The parties were married in Barren County, Kentucky, on April 23, 1977, and had one child, Julie Brooke Thomerson, who was born in 1991. The marriage was dissolved by way of Findings of Fact, Conclusions of Law and Decree of Dissolution rendered by the Barren Circuit Court on October 1, 2004. At the time of dissolution, Appellant was a 46-year-old contractor, and Cross-Appellant was a 45-year-old accounting specialist. They were married for approximately 27 years. Julie, who was about 14 years old at the time of dissolution, was heavily involved in show horse activities. Those activities cost around $13,000 per year.

The decree addressed the standard dissolution issues such as custody, division of property, and child support. It also expressed the court's finding that Julie's horse show activities were "extraordinary special needs" as defined by KRS 403.211(4), giving rise to an order that Appellant pay 55% of these expenses - or approximately $616 per month. The decree found certain income to be imputed to Appellant, and addressed various marital property issues.

Both parties appealed from the judgment. Appellant first argues that Julie's horse show activities are not properly characterized as "extraordinary special needs" per KRS 403.211, and that the circuit court erred in failing to so find. He maintains that there is no factual basis for such a conclusion, and that Julie simply enjoys riding horses in horse shows. He also notes that Cross-Appellant considers Julie's participation in horse shows to be a business venture from which she takes a large tax deduction each year. He complains that he is required to pay over $600 per month which is not tax deductible to him and is not considered income to Cross-Appellant, while allowing her to deduct approximately $13,440 per year from her income taxes. He seeks an order reversing the award. Cross-Appellant counters with the argument that the determination of what constitutes "extraordinary" expenses vests with the trial court, and that no basis exists for finding an abuse of that discretion.

KRS 403.211 states that,

> (3) A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption and allow for an appropriate adjustment of the guideline award if based upon one (1) or more of the following criteria:
> (a) A child's extraordinary medical or dental needs;
> (b) A child's extraordinary educational, job training, or special needs;
> (c) Either parent's own extraordinary needs, such as medical expenses;
> (d) The independent financial resources, if any, of the child or children;
> (e) Combined monthly adjusted parental gross income in excess of the Kentucky child support guidelines;

> (f) The parents of the child, having demonstrated knowledge of the amount of child support established by the Kentucky child support guidelines, have agreed to child support different from the guideline amount. However, no such agreement shall be the basis of any deviation if public assistance is being paid on behalf of a child under the provisions of Part D of Title IV of the Federal Social Security Act; and
> (g) Any similar factor of an extraordinary nature specifically identified by the court which would make application of the guidelines inappropriate.
>
> (4) "Extraordinary" as used in this section shall be determined by the court in its discretion.

The Barren Circuit Court did not make a specific finding as to which section of KRS 403.211 was applicable to the facts at bar, other than to cite KRS 403.211(4). It appears that KRS 403.211 would be applicable, if at all, by application of section (b) ("A child's extraordinary educational, job training, or special needs") and/or section (g) ("Any similar factor of an extraordinary nature specifically identified by the court which would make application of the guidelines inappropriate").

The dispositive question, then, is whether Julie's horse show activities may properly be characterized as either an extraordinary education or special need, or an activity of an extraordinary nature specifically identified by the court which would make application of the guidelines appropriate.

We must answer this question in the negative. A panel of this Court has previously ruled that a child's participation in extra-curricular activities which go beyond "common school education" do not constitute a special need for purposes of deviating from the child support guidelines pursuant to KRS 403.211. See generally, *Smith v.*

Smith, 845 S.W.2d 25 (Ky.App. 1992), wherein music lessons were found not to be a special need. This is true even where the child possesses extraordinary talent in the activity, and where the participation would benefit the child's overall development. *Id*. In *Smith*, for example, we stated that,

> The appellee argues that we cannot set aside findings of fact unless they are shown to be clearly erroneous, CR 52.01; *McKinney v. McKinney*, Ky.App., 813 S.W.2d 828 (1991), and we agree; however, the interpretation of the relevant statute is a question of law rather than fact. KRS 403.211 allows for deviation from the child support guidelines upon a finding of extraordinary educational needs. We cannot agree with the legal conclusion that the statute encompasses private music lessons in its definition of "extraordinary educational needs." As used in the statute, we believe "extraordinary educational needs" refers to those things not ordinarily necessary to the acquisition of a common school education but which become necessary because of the special needs of a particular student. While we may be of the opinion that a parent ought to seek to maximize a child's talents, we do not think the statute was intended to change the common law of this jurisdiction which requires a parent to provide only primary and secondary education. See *Miller v. Miller*, 459 S.W.2d at 83.

Julie's participation in horse show activities is analogous to the music lessons in *Smith*. Just as in *Smith*, the statutory law and case law entitle Julie to 1) "common school education", and 2) "those things not ordinarily necessary to the acquisition of a common school education but which become necessary because of the special needs of a particular student." *Id*. While Julie may very well be talented in the activity and benefit from her participation therein, the legislature has promulgated specific guidelines for the calculation of child support, and it provided exceptions from

that calculus which are both specific and limited in scope. Showing horses does not fall under those statutory exceptions, and the circuit court erred in failing to so rule. This, of course, does not mean that Julie must necessarily restrict her participation in that activity; rather, it means that the costs associated with that participation must be borne - if all at - by the voluntarily contributions of one or both parents.

Appellant next briefly argues that the trial court erred by imputing income to him which was not proven by substantial evidence. He maintains that the only additional evidence tendered at a February 3, 2006, support modification hearing consisted of 2005 income tax returns showing his income to have declined from 2004, and argues that this evidence was insufficient to justify a child support award of $519 per month.

We must first note that Appellant does not reveal at the beginning of his argument if this issue was preserved for appellate review and, if so, in what manner. CR 76.12(4)(c)(v). This fact, taken alone, would support affirming the trial court on this issue. *Skaggs v. Assad, By and Through Assad*, 712 S.W.2d 947 (Ky. 1986). *Arguendo*, even if the issue is properly preserved, we find no error. Cross-Appellant testified that Appellant's tax return did not accurately represent his income, as he often kept large amounts of cash which were never deposited into any account. For example, Cross-Appellant stated that she found $29,000 in $100 bills which Appellant had hidden, and testified that at other times Appellant had between $2000 and $8000 in cash hidden. This testimony forms a reasonable basis upon which the circuit court could conclude that

Appellant's tax return did not accurately reflect his income. The court is vested with discretion in making such a finding, which will not be set aside unless found to be clearly erroneous. CR 52.01; *McKinney*, *supra.* The circuit court's calculation of Appellant's income, and the child support derived therefrom, was not clearly erroneous.

Appellant's third argument is that the circuit court erred in finding that a $49,457.32 bank account was Cross-Appellant's non-marital property. These funds were held in a joint account belonging to Cross-Appellant and her mother, and Appellant maintains that the proof on this issue was not sufficient to overcome the statutory presumption that assets acquired during the marriage are marital property.

We find no error on this issue. Again, the issue is not shown to be preserved for appellate review. CR 76.12(4)(c)(v). Furthermore, and as with the preceding issue, proof was tendered in the form of Cross-Appellant's testimony as to the source of these funds. Cross-Appellant stated that her mother, Buelah Steenbergen, placed these funds in an account jointly held by Cross-Appellant and Mrs. Steenbergen. Mrs. Steenbergen also testified as to this fact, and stated that she left written instructions that Cross-Appellant would receive the funds in the event of Mrs. Steenbergen's death. Appellant claims that the funds were placed in the account for the purpose of hiding them in the event that Mrs. Steenbergen's husband had to live in a nursing home. He does not provide us with a citation to the record on this claim, but it would not alter the fact that evidence exists in the record upon which the circuit court reasonably relied in disposing of this issue. As such, we find no error.

Finally, Cross-Appellant argues that the circuit court erred in awarding a Hartford account to Appellant as his non-marital property. She notes that Appellant inherited $20,899.88 in July, 2000, and did not deposit these funds in the Hartford account for approximately five months. She argues that this delay prohibited the trial court from properly tracing the funds as Appellant's non-marital property. As such, she contends that the funds should have been characterized as marital property and disposed of accordingly.

Appellant testified that he received the funds from his grandmother's estate and then deposited those same funds in the Hartford account. He also produced documentary evidence in support of this claim, though Cross-Appellant challenges the veracity and probative value of this evidence. Nevertheless, Appellant's testimony and documentary evidence constitutes sufficient evidence for the circuit court to conclude that the funds were properly traced as Appellant's non-marital property. We find no error.

For the foregoing reasons, we reverse the original and supplemental Findings of Fact, Conclusions of Law and Decree of Dissolution as to Appellant's obligation to pay additional child support for Julie's horse showing activities, and remanding the matter on this issue. The Decrees are in all other respects affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT/
CROSS-APPELLEE:

Robert E. Harrison
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BRIEF FOR APPELLEE/
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