

Commonwealth Of Kentucky
Court of Appeals

NO. 2007-CA-000245-MR

PHILLIP FRAZIER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE HUGH SMITH HAYNIE, JUDGE
ACTION NO. 83-FP-004751

COMMONWEALTH OF KENTUCKY; CABINET FOR
HEALTH AND FAMILY SERVICES; AND
BARBARA COLLIER

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

MOORE, JUDGE: Appellant Phillip Frazier appeals an order from the Jefferson Family Court denying his motion to amend, alter, or vacate. Frazier sought relief from an order requiring him to pay \$30.00 per week of child support for his twenty-four year old disabled child. After a careful review of the record, we affirm the order of the family court in accordance with Kentucky Revised Statute (KRS) 405.020(2).

FACTUAL BACKGROUND

Phillip Collier was born to the parties on April 19, 1982. Phillip was diagnosed with autism as a child and continues to have an autistic condition as an adult.¹ Appellant Frazier and Appellee Collier lived together until Phillip was approximately seven years of age but then discontinued living together. The parties were never married, however Frazier signed an affidavit dated December 5, 1983, attesting that he is the father of Phillip. Thereafter, the court entered an order of support requiring Frazier to pay \$10.00 per week² in child support for Phillip until he became eighteen years of age or emancipated pursuant to KRS 403.213(3).³ It is unclear from the record exactly when Frazier's child support obligation terminated.⁴ Having failed to pay child support pursuant to the court order, on May 16, 2003 an agreed order was entered wherein Frazier agreed to pay \$60.00 per week toward child support arrearages only.⁵

¹ The record does not reveal exactly when Phillip was first diagnosed with autism, yet it does state that he has been receiving Social Security Insurance since he was approximately four years old.

² The amount of child support increased to \$20.00 per week on September 11, 1990, and then increased to \$30.00 per week on November 6, 2006.

³ Kentucky Revised Statute 403.213(3) states, "Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child shall be terminated by emancipation of the child unless the child is a high school student when he reaches the age of eighteen (18). In cases where the child becomes emancipated because of age, but not due to marriage, while still a high school student, the court-ordered support shall continue while the child is a high school student, but not beyond completion of the school year during which the child reaches the age of nineteen (19) years. Provisions for the support of the child shall not be terminated by the death of a parent obligated to support the child. If a parent obligated to pay support dies, the amount of support may be modified, revoked, or commuted to a lump-sum payment, to the extent just and appropriate in the circumstances. Emancipation of the child shall not terminate the obligation of child support arrearages that accrued while the child was an unemancipated minor."

⁴ The Order dated May 17, 2001, would indicate that child support terminated when Phillip was nineteen, yet the Release of Wage Garnishment states that support discontinued in 2003 when Phillip was twenty-one year old.

⁵ Frazier was often in arrearages; in 2003, Frazier owed a total of \$6853.49 in arrearages.

Phillip turned eighteen on April 19, 2000, and received a special education certificate at twenty-one years of age from Butler High School.⁶ At the latest, support discontinued after Phillip received his special education certificate in 2003, however payment for arrearages continued. Subsequently on September 11, 2006, the Jefferson County Attorney's Office, on behalf of Collier, requested a hearing to modify Frazier's child support order for purposes of including an amount for current support due to the adult child's disability pursuant to KRS 405.020(2).⁷ At this time Phillip was twenty-four years of age. On November 6, 2006, a hearing was held where both parties were sworn in and testified regarding Phillip's autistic disability and his dependency.

Testimony from Collier on November 6, 2006, revealed that Phillip was a twenty-four year old male with autism who received a special education certificate when he was twenty-one years of age from Butler High School. Through the school system, Phillip was allowed to work with assistance during his 11th and 12th grades in order to determine what jobs would best fit his skills. He was able to obtain a position at Papa John's Pizza folding boxes, with the assistance of a job coach from Seven Counties Services Incorporated. Phillip is only able to work for approximately two hours per day as he has a tendency to wander off. Phillip works five days per week, at a salary of \$5.45 per hour. Phillip has never worked more than a two-hour shift.

⁶ Based on evidence from the record, the special education certificate Phillip received signifies the completion of high school for a child with a disability, who can not obtain a high school diploma.

⁷ Pursuant to KRS 405.020(2) which states, "The father and mother shall have the joint custody, care, and support of their children who have reached the age of eighteen (18) and who are wholly dependent because of permanent physical or mental disability. If either of the parents dies, the survivor, if suited to the trust, shall have the custody, care, and support of such children."

Phillip lives with his mother and stepfather and is not allowed to be left at home alone. Phillip can dress, bathe, and feed himself but can not prepare meals. Phillip can ride the bus to and from work alone as the bus comes directly in front of his residence. Phillip can not cross the street alone, can not drive, can not be sent to the grocery store alone, and can not initiate conversation. Outside of traveling to Papa John's for work, Phillip must be accompanied by his mother or another adult if he needs to go anywhere.

Frazier disputes that his son's disability is as severe as indicated by Collier. Frazier acknowledges that Philip has autism, but Frazier states that the severity of the dependency is a result of Collier's limiting what Phillip is allowed to do. Frazier implies that Collier is exaggerating Phillip's condition because Collier is not employed and is dependant on the income Phillip receives for his disability.⁸ Frazier states that he has been told by Phillip's sisters that Phillip can microwave meals and that Phillip has been left at home alone. Frazier admits that he does not think that Phillip will be able to obtain gainful employment and that he has not had much contact with Phillip over the years.

According to Frazier, the last time he saw Phillip was for approximately 25 minutes a year prior to the November 6, 2006 hearing. Prior to that, Frazier states that he saw Phillip in 2002. Collier disputes that Frazier had contact with Phillip in 2005 or 2002, and states that Frazier has not seen Phillip in ten years.

Phillip was not present at the November 6, 2006 hearing because he was at work. Collier indicated that a neighbor would assist Phillip after he finished his shift, until she returned home from the hearing.

⁸ Collier states that she is awaiting a decision on her SSI and therefore does not work. Collier states that she is married and receives financial support from her husband.

No medical records were available at the hearing for review to determine the severity of Phillip's autism.⁹ However, Collier provided all of Phillip's medical and educational records to the child support office. Both Seven Counties and the Social Security Administration have determined Phillip to be disabled.¹⁰ The school system conducted yearly evaluations to determine the status of Phillip's autism.

On November 16, 2006, the court exercised its discretion under KRS 405.020(2) and entered an order requiring Frazier to pay \$30.00 towards arrearages¹¹ and \$30 for current child support based on Phillip's continued dependency upon his parents as a result of his disability. The court determined that because of Frazier's limited contact and based on Collier's constant contact, that Collier was in a better position to determine the severity of Phillip's disability.

Frazier then moved to alter, amend, or vacate the Court order on November 16, 2006, stating that Phillip is not wholly dependent on his parents due to his independent resources from SSI and lack of physical disability as compared to Phillip's mental disability. Collier, through the Jefferson County Attorney, filed a response requesting that the current support order remain in effect because Frazier did not present any additional information that was not available at the previous hearing. On January 22, 2007, Frazier obtained a hearing for a motion to set aside the order requiring him to continue to pay child support for Phillip. The family court denied the motion to alter, amend, or vacate the order deciding that Phillip was wholly dependent on his parents as a

⁹ Pursuant to KRS 405.020(2), the disability must make the child wholly dependent.

¹⁰ Phillip receives \$483.00 per month from Social Security Insurance and in the past has received as much as \$600 per month.

¹¹ The total amount of arrearages owed by Frazier on November 6, 2006 is not clear from the record. However, in 2003, Frazier owed a total of \$6853.49 in arrearages.

result of his disability. As such, the court determined that the facts set forth on November 6, 2006, were sufficient to meet the standard of “wholly dependent” as set forth in KRS 405.020(2) and qualified in *Abbott v. Abbott*, 673 S.W.2d 723 (Ky. App. 1973).¹² This appeal ensued.

Frazier contends that child support should cease as outlined in KRS 403.213(3) because Phillip is past the age of emancipation, has his own financial resources and is not “wholly dependent” as required by KRS 405.020(2) and further described in *Abbott*. Collier maintains that Phillip is wholly dependent per KRS 405.020(2) and therefore the order for child support from Frazier should remain in effect.

STANDARD OF REVIEW

We review the family court’s determination regarding a motion to alter, amend, or vacate the child support order for abuse of discretion. *See Bickel v. Bickel*, 95 S.W.3d 925, 927-28 (Ky. App. 2002). We can not substitute our judgment for the family court’s if there is substantial evidence supporting the court’s decision to deny Frazier’s motion to alter, amend or vacate the order based on Phillip being wholly dependent on his parents. *Id.* at 928. Further, we may not set aside the family court’s factual findings unless they are clearly erroneous. *See Wheeler v. Wheeler*, 154 S.W.3d 291, 296 & n.16 (Ky.App. 2004).

ANALYSIS

Pursuant to KRS 405.020(2), parents shall have joint support of a child who is wholly dependent because of permanent physical or mental disability. “Wholly

¹² The version of KRS 405.020(2) relied upon by the *Abbott* court has been recodified by placing portions into two sections, KRS 405.020(1) and (2). These changes, however, do not materially alter the substantive validity of the rulings in the *Abbott* decision.

dependent” is not expressly defined within the statute; however, guidance is found in *Abbott*, 673 S.W.2d 723.

In *Abbott*, the father challenged an order requiring continuing child support for an adult child who was considered to be severely mentally retarded. *Id.* at 725. The court held that KRS 405.020(2) was controlling and that child support for the mentally handicap child should continue past the age of majority due to the child’s disability. *Id.* at 726. Wholly dependent was determined by a totality of the circumstances as opposed to looking at only financial dependency or the severity of the disability. The *Abbott* court suggested that wholly dependent is determined in terms of needed care, comfort, and nurture. *Id.*

The family court concluded that Phillip was wholly dependent based on the testimony of the parties as well as the assessments of Seven Counties Services Incorporated and the Federal Government.¹³ We agree.

Applying the law to the facts of this case, the record states that Phillip lives with Collier, his mother, and needs adult supervision at most all times. He can not cross the street alone, can not be left at home alone, can not prepare his own meals, and must have a job coach standing over him in order to deter him from wandering away from his place of employment. Phillip can not drive, but can ride the bus to and from work alone.¹⁴ Both parties agree that Phillip is unable to obtain gainful employment due to his disability. Phillip requires constant care, comfort, nurturing and support from an adult

¹³ The order signed November 8, 2006, states that Phillip receives a disability check from the Social Security Administration.

¹⁴ Case law suggests that Phillip is supervised during his bus ride to and from work because the common carrier bus driver is under a duty of greater care to handicap passengers if the driver is aware of the handicap. *Montgomery v. Midkiff*, 770 S.W.2d 689 (Ky. App. 1989).

due to his disability and is therefore wholly dependent on his parents under KRS 405.020(2).

Frazier then argues that determining Phillip to be wholly dependent is erroneous because the contention is not supported by substantial evidence. Frazier states that Phillip does not have any physical disabilities and that his limitations are a result of Collier's coddling. Frazier believes the record should be supported by medical records or an interview with Phillip as opposed to mere testimony of the parties.

The extensive testimony in the record demonstrates that Phillip requires continued care, comfort, and nurturing from his parents making him wholly dependent on his parents as described in *Abbott*. Although Phillip can dress, bathe, and feed himself, he can not be left alone to perform these tasks. And, while Phillip has a job, he can not be left alone to perform his job. Phillip also can ride the bus alone, but only because it comes directly in front of his residence and because there is someone assisting him once he is off the bus.

The record does not indicate that Phillip has any physical disabilities, however both parties attest to the fact that Phillip has autism that has deemed him disabled by the Social Security Administration since he was four years old.¹⁵ In *Abbott*, the adult child was considered wholly dependent based on his severe mental disability even though there was no physical disability. Likewise, Phillip is wholly dependent based on his mental disability even though he does not have any physical disabilities. Although there is no evidence to support the parties' testimony regarding the extent of Phillip's mental disability, Collier provided Phillip's medical and education records to the

¹⁵ In addition to the disability determination by the Social Security Administration, the school system, and the Seven Counties Services Incorporated, have determined that Phillip has a disability.

County Attorney's office for review. The sworn testimony of the parties is sufficient to demonstrate that Phillip's disability makes him wholly dependent on his parents.

Thus, there is substantial evidence in the record to support the trial court's conclusion. Consequently, we can not say the trial court's findings are clearly erroneous.

The family court allowed both parties to provide testimony regarding the extent of Phillip's disability. Based on her constant care, the family court determined that Collier was in the best position to provide testimony on Phillip's dependency.¹⁶ Based on the record, we will not second guess the family court's determination that Phillip is wholly dependent on his parents.

We finally address Frazier's assertion that Phillip has his own financial resources and is not in need of child support. The provision in KRS 405.020(2) states in part:

The father and mother shall have the joint custody, care, and support of their children who have reached the age of eighteen (18) and who are wholly dependent because of permanent physical or mental disability.

The use of the word "shall" indicates that the obligation for support is binding on Frazier, absent some statutory exception. Although Phillip receives financial assistance from Social Security Insurance and a small salary from his job at Papa John's, financial dependency is not the only factor that the court in *Abbott* relied on to determine whether the adult child was wholly dependent. Moreover based on his disability, Phillip would not be able to earn a wage on which he could

¹⁶ The record is in dispute as to whether it has been one year, two years, or ten years since Frazier has had contact with Phillip. Nonetheless, it is undisputed that Frazier has had little contact with his son.

live independently. Thus, we find the family court did not err in ordering continued child support.

Based on the foregoing, we conclude the family court did not abuse its discretion under KRS 405.020(2) because there is substantial evidence supporting that Phillip is a wholly dependent individual. Therefore, the decision of the family court to deny the motion to alter, amend, or vacate the order of November 6, 2006 is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Paul J. Mullins
Louisville, Kentucky

BRIEF FOR APPELLEE

Barbara Collier:

Gerald McDaniel
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