

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2003 Term

No. 30411

FILED
July 1, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

REBECCA LYNN C.,
Plaintiff Below, Appellant

v.

MICHAEL JOSEPH B.,
Defendant Below, Appellee

Appeal from the Circuit Court of Ohio County
Hon. Ronald E. Wilson
Case No. 88-C-734

REVERSED AND REMANDED

Submitted on Rehearing: March 11, 2003
Filed: July 1, 2003

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The Opinion of the Court was delivered PER CURIAM.

JUSTICE DAVIS dissents and reserves the right to file a dissenting opinion.

SYLLABUS

“The duty of a parent to support a child is a basic duty owed by the parent to the child, and a parent cannot waive or contract away the child’s right to support.” Syllabus Point 3, *Wyatt v. Wyatt*, 185 W.Va. 472, 408 S.E.2d 51 (1991).

Per Curiam:

In this case we review a ruling by the Circuit Court of Ohio County that dismissed a mother's petition seeking to modify an order that had been entered in a paternity action. The order that the mother sought to modify terminated the duty of a biological father to pay child support, based on a lump-sum payment to the child's mother.¹ We reverse the circuit court's dismissal of the petition and remand for further proceedings.

I.

This case involves a child ("B.L.C.") who was born in May of 1988. The child's mother ("R.L.C.") is the appellant in this case, and the child's father ("M.J.B.") is the appellee; we use initials for privacy reasons.

The child's father and mother were never married and did not live together, and the father denied paternity after the child was born. The mother instituted paternity proceedings in circuit court. A paternity test showed that the appellant M.J.B. was the child's father, and the circuit court so found in the paternity proceeding, setting child support at \$300.00 per month. Visitation was granted to the father, and the father was required to be responsible for reasonable health care insurance coverage for the child. The parties were

¹This case was originally argued before this Court on November 6, 2002, and an opinion was issued on November 27, 2002. On January 16, 2003, we granted the appellant's petition for rehearing. Re-argument was on March 11, 2003, and this opinion is the result upon rehearing.

ordered to share any uncovered medical expenses. On June 7, 1990, the court entered judgment for the mother in the amount of \$7,200.00 for child support from June 1, 1988, to May 31, 1990, and for birth expenses of \$1,541.38, for a total judgment of \$8,741.38.²

Thereafter, following discussions between the father and the mother, the father prepared a “letter agreement” proposal whereby the father would pay a total payment of \$35,000.00 to the mother, this sum to include the past-due support earlier ordered. In exchange, the mother would waive any claim to past or future child support of any sort. The money was payable as follows: \$15,000.00 on or before September 1, 1990; \$6,666.68 on or before March 1, 1991; \$6,666.68 on or before September 1, 1991; and \$6,666.68 on or before March 1, 1992. The agreement also provided that the father would agree to voluntarily terminate all of his parental rights and to execute any necessary consent to an adoption of the child. *See note 6 infra.*

The mother agreed to the proposal, and on November 14, 1990, a hearing before the Circuit Court of Ohio County was held for entry of an agreed order in the paternity proceeding. The father was represented by counsel, but apparently did not attend the hearing; the mother was not present at the hearing, nor was she represented by counsel. The child was not present nor represented by counsel or by a guardian *ad litem*. The child advocate’s office did not appear, nor did it receive notice. The court entered an order incorporating the terms that were set forth in the proposed agreement. Payments pursuant

²Our recital of the instant case’s procedural history before the lower court is somewhat simplified, in order to focus on the main issues before us.

to the agreement were apparently made on schedule, and apparently the father did not have any contact with the child thereafter.

Subsequently, in October of 1994, the child was diagnosed with Type I juvenile brittle diabetes, a condition that requires monthly medical treatment at a apparent current approximate monthly cost of \$250.00 over and above the mother's health insurance payments. In January of 1996, the mother, apparently having been advised that the lump-sum agreement that she had entered into was legally unsound, filed (in the original paternity proceeding) a "Petition for Order to Set Aside Provisions in Settlement Agreement Regarding Waiver of Child Support Obligation of [M.J.B.] and for Order to Institute Current Child Support." The appellee father filed a response, requesting that the petition be dismissed.

On July 12, 1999, a hearing was held on the mother's petition before a family law master.³ The master issued a Recommended Order on January 4, 2001, denying the mother's petition and granting the father's motion to dismiss. The mother sought review by the circuit court, which affirmed the recommended decision on July 2, 2001. This is the ruling that we review in the instant case. We set forth other pertinent facts in our discussion.

II.

³Pursuant to *W.Va. Code*, 51-2A-1 [2001], the family law master system was replaced by a Family Court system, effective and operable on January 1, 2002. The reasons for the lengthy delay in the court's hearing and ruling on the mother's petition are not apparent from the record.

Although the lower court made certain findings of fact and conclusions of law in connection with its ruling, we do not find in the record before this Court either the transcript of any hearings or copies of any written stipulations upon which those findings and conclusions are based. This Court is not obliged to give weight or deference to findings and conclusions of a lower court when we are unable to find support for those findings and conclusions in the record. *Cf. Ruble v. Office of Secretary of State*, 192 W.Va. 134, 138, 451 S.E.2d 435, 439 (1994) (in reviewing a contested case, a court is required to examine the record of the proceeding below to ascertain whether there is evidence to support the lower tribunal’s decision). In any event, our decision in the instant case turns essentially on matters of law, which this Court determines *de novo*.

The appellee father contends that because the lower court ratified the lump-sum child support payment and the “voluntary termination” of his parental rights in the paternity proceeding — and stated that the same would be in the best interests of the child — that as a consequence, the appellant does not and cannot have any further duty to provide support for his child.⁴

⁴We note that we reach our decision in the instant opinion by assuming — purely *arguendo* and for purposes of our ruling herein — that the circuit court in the first instance had the authority to consider the issue of termination of parental rights in the context of a paternity proceeding. We also note that we have recognized, in the context of an area of law that is largely governed by statute — neglect or abuse proceedings — that the termination of parental rights may not necessarily operate to eliminate an obligation to provide child support. *See Syllabus Point 7, In Re Stephen Tyler R.*, ___ W. Va. ___, ___ S.E.2 ___ (2003) (No. 30654, Slip Op., _____, 2003).

The appellee also contends that because the child's mother "bargained for" the lump-sum agreement, she (and through her assent, the parties' child) should be "held to the terms of the bargain." However, on this latter point, our cases are clear that even the best-intentioned parents cannot "bargain away" their children's right to ongoing support from their parent. "The duty of a parent to support a child is a basic duty owed by the parent to the child, and a parent cannot waive or contract away the child's right to support." Syllabus Point 3, *Wyatt v. Wyatt*, 185 W.Va. 472, 408 S.E.2d 51 (1991). See also *Runner v. Howell*, 205 W.Va. 359, 518 S.E.2d 363 (1999).⁵

⁵We stated in *Kimble v. Kimble*, 176 W.Va. 45, 341 S.E.2d 420 (1986):

In *Armour v. Allen*, 377 So.2d 798, 799-800 (Fla. Dist. Ct. App. 1979), the court noted:

The law is clear that the parents may not contract away the rights of their child for support. Neither may the mother waive the child's right to support by acquiescing in the father's non-payment of support. Child support is a right which belongs to the child. It is not a requirement imposed by one parent on the other; rather it is a dual obligation imposed on the parents by the State.

See also *Smith v. Smith*, 125 Cal. App. 2d 154, 164, 270 P.2d 613, 621 (1954) ("A parent may not by any act, conduct, or arrangement of whatever sort shift from his shoulders the legal responsibility and moral duty to support his minor child. It is an absolute, inalienable right enjoyed by the child which no form of contract between the parents, nor change of the domestic circumstances of either of them, may effect."); *Weaver v. Garrett*, 13 Md. App. 283, 287, 282 A.2d 509, 511 (1971) ("Child support is not a debt, but a duty."); *Sayre v. Sayre*, 129 Mich. App. 249, 252, 341 N.W.2d 491, 492 (1983) ("[M]ichigan law does not allow parents to bargain away the rights of their children."); *Hart v. Hart*, 539 S.W.2d 679, 682 (Mo. Ct. App. 1976) ("[T]he parties are not authorized to make an

(continued...)

As to the lower court's ratification of the parties' agreement, a review of the entire record, and especially the absence in any of the lower court proceedings of either a guardian *ad litem* for the child or the child advocate office, leads to the inescapable conclusion that the child's independent interests were not properly represented or protected. In this regard, we note that we stated in *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 406, 387

⁵(...continued)

agreement to settle or compromise child support payments. The payments are for the benefit of the child.”). Furthermore, as the court observed in *Lang v. Lang*, 252 So.2d 809, 812 (Fla. Dist. Ct. App. 1971), “[T]he basic right of the minor child to be supported by its parents is not affected by an agreement between the parties with respect to such obligations; children are not chattels whose rights can be bargained away by parents’; such agreements will be evaluated with the best interest of the child as its criteria.” The custodial parent’s role as trustee for the child beneficiary was also noted by the court in *Ditmar v. Ditmar*, 48 Wash.2d 373, 374, 293 P.2d 759, 760 (1956), which stated that, “[A] mother has no personal interest in child-support money and holds it only as a trustee She cannot waive the children’s rights in the support money.” See also *Linton v. Linton*, 166 Ind. App. 409, 422, 336 N.E.2d 687, 695 (1975) (“The custodial parent has been analogized to a trustee of the benefits intended for the child.”).

176 W.Va. at 49-50, 341 S.E.2d at 424-425.

While the appellant father contends that the appellee mother consulted an accountant before agreeing to the \$35,000.00 sum, we cannot see how any accountant could accurately calculate or foresee the possibilities of future medical or other special needs of a child, or the possible relative changes in the financial status of parents over time. In the instant case, it seems that the appellee father has substantial financial means, and that the \$35,000.00 figure is less than he would have been expected to pay during the child’s minority under the child support guidelines, even leaving aside the question of the child’s medical costs. The appellee father asserts that the appellant mother wanted the child’s father entirely out of her and the child’s life, and that he was agreeable to this — and that this desire was a primary motivation for their initial agreement. But such a motivation, however understandable it might be between adult parties, cannot trump the rights of a child, particularly where there was no independent advocacy for those rights before the court that approved the agreement.

S.E.2d 866, 873 (1989) — a case that was decided before the 1990 order that ratified the parties' lump-sum agreement — that the involvement of a *guardian ad litem* in a paternity proceeding was “. . . *necessary* to protect the child's interests . . .” (emphasis added).⁶

For the foregoing reasons, we conclude that the circuit court erred in refusing to set aside the 1990 limitation of the appellee's child support obligation to \$35,000.00. We therefore reverse the lower court's order and remand the case for proceedings consistent with the following principles, which we adopt and prescribe in the belief that they will enable this contentious matter to come to a more rapid conclusion:

1. The \$35,000.00 paid by the appellee is to be applied to child support at \$300.00 per month since the child's birth. Taking into account the birth expenses, inflation, and the child's added medical costs as roughly balancing and compensating for reasonable interest, we calculate that this sum covers a period of ten years from the child's birth, or until May of 1998, and the lower court should use this calculation unless it can determine from readily available evidence obtained without extensive discovery, etc., that this calculation is grossly erroneous and inequitable, in which case it may be adjusted by the court;

⁶As noted, the lump-sum agreement stated that the father would agree to execute a consent to any future adoption of the child. However, both at the time of the parties' agreement and thereafter, the record indicates that there was in fact no pending or intended adoption proceeding. We have specifically held that the execution of a consent to adoption alone does not terminate a duty of child support, although we have also held that there may be circumstances in which a person who has relied upon an anticipated adoption may be relieved from a child support obligation. *See generally Kimble v. Kimble, supra*. But the instant case does not give rise to such issues, and nothing in this opinion is addressed to or should be taken as speaking to adoption-related issues.

2. The lower court on remand should appoint a guardian ad litem for the child. The court should then ascertain and enter judgment for the appellant for past-due child support (including half of the child's uninsured medical expenses) from the child's tenth birthday in May of 1998 to the present, according to the ordinary principles of child support calculation — based upon the parties' incomes, expenses, etc. during that period. No interest should be added. Hopefully this calculation can be made without extensive litigation — and we recognize that due to the passage of time, the lower court may have to do some approximating to achieve a fair result. A reasonable payment plan should be ordered, if the appellee cannot afford to pay any sum of back support that is due;

3. The lower court should then calculate a present/future child support obligation of the appellee in the same fashion as in other child support cases, including dealing with the issue of medical insurance, if it is available; and

4. If other issues arise regarding the child and the parties, they are in the first instance committed to the sound discretion of the lower court, guided by the principles enunciated in this opinion. We express no opinion on possible issues like custody, visitation, inheritance, etc., as they have not been raised by the parties. We do, however, conclude that the circuit court has the authority to enter any appropriate order necessary to permit or facilitate the child's coverage under the appellee's health insurance.

III.

The order of the circuit court dismissing the mother's petition is reversed, and this case is remanded for further proceedings consistent with this opinion.

Reversed and Remanded.