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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2006-CA-000055-MR

LARRY BAIR — APPELLANT

v.

APPEAL FROM CARTER CIRCUIT COURT
HONORABLE KRISTI GOSSETT, JUDGE
ACTION NO. 94-CI-00334

CHRISTINE MCGLONE BAIR — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON AND VANMETER, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

ABRAMSON, JUDGE: In 1992, Larry and Christine Bair were awarded temporary legal custody of their infant grandson as the result of a dependency, neglect or abuse action filed in the Carter District Court.[2] Two years later, during October 1994, Larry and Christine separated. Christine eventually filed for divorce on November 23, 1994. As a part of their divorce proceeding,

[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 Kentucky Revised Statutes (KRS) 21.580.

[2] *In re: S.K.B.*, Carter District Court, Case Number 92-CI-00048.

Christine and Larry entered into a Separation Agreement which provided:

> Wife shall have the sole care, custody, and control of the parties' infant grandchild. Said care, custody and control of the parties' infant child shall continue with respect to said child until said child reaches the age of eighteen or sooner becomes emancipated.

The Agreement further stated that:

> Husband shall pay to wife the amount of $320.00 per month, representing child support.
>
> Husband shall maintain health insurance on the infant child and he shall pay one-half (1/2) all uninsured medicals, dental, optical, and pharmacutical [sic] expenses of said child.

Separation Agreement, Record on Appeal (R.A.) pp. 6-7. With the parties' mutual assent, the Carter Circuit Court included the agreed-upon custody and child support provisions in its January 10, 1995 order dissolving the parties' marriage.

On February 28, 1996, Larry sought a modification of the trial court's child support order entered appurtenant to the dissolution of divorce. Though he argued that changes in his and his former wife's respective financial conditions warranted a modification, the court ultimately found that the parties' circumstances had undergone little change. The court further found "that given the voluntary entry into the [separation] agreement, there is not enough evidence to set aside the

agreement at this time." Findings of Fact, R.A. p. 67. Larry did not appeal the decision.

Approximately nine years later, on September 1, 2005, Larry moved to terminate his child support obligation. Larry argued that as a grandparent, he had no legal obligation to provide support for his grandchild. He also contended that the trial court did not have subject matter jurisdiction to rule on custody and child support because it failed to include the child's biological parents as parties to the action.

Following an evidentiary hearing held on November 4, 2005,[3] the trial court denied Larry's motion. In its order entered on December 7, 2005, the trial court stated:

> The parties accepted custody of their grandchild and [Larry] chose to continue financially supporting that child after the parties' divorce. This choice and this agreement was reduced to writing and said writing constitutes a contract. The parties had an order from 1992 of legal custody and the lack of notice to the biological parents in no way precluded the parties from resolving the issue of custody as between themselves.
>
> [Larry] further argues that this court did not have subject matter jurisdiction to determine custody and child support of the subject child since the child was the parties' grandchild and not a child produced of the marriage. Again the court finds this argument unpersuasive. The parties had an order of legal custody of this child that they received during the marriage. The

[3] The record does not contain either a recording or a transcript of this hearing.

> circuit court does have subject matter jurisdiction to determine matters of custody. The fact that the question of custody was resolved as part of a dissolution of marriage action and not as part of a separate petition is irrelevant.
>
> Finally, [Larry] argues that the biological parents should be joined as parties to this action and that their incomes should be considered when determining [Larry's] child support obligation. While this court believes that the biological parents should certainly financially support their children, the fact is that [Larry] has waited more than 10 years post decree to move for such relief. The court concludes that joinder at this time is not the appropriate mechanism by which [Larry] may obtain relief from the biological parents.
>
> [Larry] did not file a motion to modify child support based upon any change of financial circumstances. The court concludes that [Larry] should not be relieved of his contractual obligation undertaken more than 10 years ago. [Larry] chose to accept custody of his grandson and later chose to continue financially supporting that child after the parties herein were divorced. The court concludes that no reason has been presented that would justify relieving [Larry] from this obligation. It is certainly in the child's best interest to continue receiving financial support from [Larry].

Findings of Fact, Conclusions of Law and Order, R.A. pp. 103-105. Larry has now appealed the trial court's judgment.

Contrary to Larry's assertions, this matter is not an appeal from a separate and distinct child custody proceeding. Nor was the proceeding before the trial court one in which the

presence of the child's parents was required to invoke that court's jurisdiction. Rather, this appeal challenges the power of the circuit court to enforce a separation agreement between two divorcing parties as to how they will implement the temporary legal custody of their grandchild that *both* share through a prior award made by the district court. Because we find no error in the trial court's decision regarding these private arrangements, we affirm.

Although Larry questions the trial court's jurisdiction to award *custody* of his grandson, he is not actually challenging that court's judgment awarding physical custody of the child to Christine. He agrees that Christine should have physical custody of the child. Rather, he challenges only the court's authority to require him to pay child *support*. This distinction is important. The law pertaining to a court's jurisdiction to decide issues of child support is independent of the more stringent restrictions placed on a court's jurisdiction over child custody determinations. *Hall v. Hall*, 585 S.W.2d 384 (Ky. 1979). While we agree with Larry that Kentucky law does not impose a requirement on grandparents to provide support for their grandchildren, it is impossible for any statutory scheme to anticipate every situation that may arise. Thus, this Court has previously recognized that trial courts must have great flexibility in

fashioning appropriate child support orders for matters not otherwise addressed by our statutes. *Brown v. Brown*, 952 S.W.2d 707 (Ky. App. 1997). In fact, we have recently acknowledged that though the obligation to support a child is limited by our state's statutes, parties are free to agree otherwise in writing. *Mattingly v. Mattingly*, 164 S.W.3d 518 (Ky. App. 2005).

Reviewing this matter in light of these principles, we find no error committed by the trial court. We do not agree with Larry's contention that the trial court lacked subject matter jurisdiction to resolve this issue. He argues that the lack of jurisdiction arose from the trial court's failure to include the child's biological parents as parties before determining any custody and support issues. However, in making this argument, we believe that Larry fundamentally misstates the nature of the trial court's jurisdiction and mischaracterizes the nature of the proceeding before it.

As the parties readily acknowledge, they were awarded temporary custody of their grandson as the result of a dependency, neglect or abuse action initiated against the child's parents in the Carter District Court. Such actions, as well as the power to make any temporary custody determinations therein, are within the exclusive jurisdiction of the district

court.[4] *See* KRS 620.070-090. Because of this, when the Carter Circuit Court resolved the custody and support issues in the Bairs' divorce proceeding, it was not undertaking a reexamination of the district court's temporary custody decision. Rather, the circuit court merely implemented the parties' *own agreed upon arrangements* for handling amongst themselves, the temporary custody previously granted them now that they were divorcing.

Further, because at the time of their divorce both Larry and Christine were physical custodians of their grandson and providing for his support, and further because they both sought an order from the court relative to child support, the circuit court was clearly empowered by KRS 403.211(1) to entertain matters of child support between them *regardless* of whether it had jurisdiction to award or modify custody.[5] In fact, because KRS 403.211 conferred jurisdiction on the trial court to resolve the child support issue between Larry and Christine, the court was required to address the matter prior to granting them the decree of dissolution. *See* KRS 403.140(1)(d). We, therefore, find no error in the court's conclusion that

[4] In some counties the family court exercises this district court jurisdiction.

[5] KRS 403.211(1) provides that "[a]n action to *establish* or enforce child support may be initiated by the parent, custodian, or agency substantially contributing to the support of the child." (Emphasis added.)

Larry should continue to bear the contractual support obligation which he committed to ten years earlier.

Finally, Larry asserts that if this Court affirms the judgment of the trial court, he will have no recourse against his grandchild's parents because he is no longer a "parent, custodian, or agency substantially contributing to the support of the child." KRS 403.211(1). This is not correct. Though the trial court ordered that, as between them, Christine would have physical custody, it did not alter the fact that Larry as well as Christine is a temporary custodian of the child. Under these circumstances, he has the right pursuant to KRS 403.211(1) to seek child support from the child's parents. The fact that he chooses not to do so is irrelevant to the circuit court's power to address his obligation to provide support vis-à-vis Christine.

Accordingly, we affirm the judgment of the Carter Circuit Court.

VANMETER, JUDGE, CONCURS.

GUIDUGLI, SENIOR JUDGE, CONCURS IN PART AND DISSENTS IN PART, AND FILES SEPARATE OPINION.

GUIDUGLI, SENIOR JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur in part and dissent in part. At the oral argument, Larry conceded that per the separation agreement he voluntarily entered, he is obligated to pay child

support for his grandson. However, he seeks to have the amount owed reduced by having the natural parents pay their fair share. But the family court rejected his motion to join the natural parents for the sole purpose of determining each party's child support obligation. In so ruling, the family court held "[w]hile this court believes that the biological parents should certainly financially support their children, the fact is that [Larry] has waited more than 10 years post decree to move for such relief. The court concludes that joinder at this time is not the appropriate mechanism by which [Larry] may obtain relief from the biological parents." The family court did not set forth the "appropriate mechanism" by which Larry could pursue child support from the biological parents. The majority herein has concluded that a separate action in district court pursuant to KRS 403.211(1) is that mechanism. However, Larry has argued, and I agree, that he is not a listed party under KRS 403.211(1) to bring such an action. Larry is not a parent, custodian, or agency substantially contributing to the support of the child. The majority concludes that Larry is a custodian pursuant to the 1992 district court order. The circuit court order granting Christine sole custody took precedence over the district court order and Larry is no longer legally considered a custodian. Surely had he tried to exercise custodial rights over the child after the divorce, he would not have prevailed or could have

been charged criminally for interfering with Christine's legal rights had he kept the child as a "custodian" under the district court order.

So according to the circuit court and the majority of this court, Larry has no legal remedy to bring the biological parents into court so that they can be ordered to finally pay something towards the support of their child. I believe the family court should have granted Larry's motion to join the natural parents in this case for the sole purpose of determining their legal obligation to support their child. After all, this is the family court and matters pertaining to custody, child support, visitation, etc., should be handled there. The fact that Larry waited ten years should have nothing to do with his right to join the natural parents who have owed a legal obligation from day one.

I believe the family court erred by not joining the biological parents in this matter and thus precluded Larry the opportunity to have all responsible parties pay child support as legally obligated. The family court is the proper court to handle these matters, and I respectfully dissent from the majority opinion that fails to recognize that fact.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

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BRIEF AND ORAL ARGUMENT FOR APPELLEE:

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