

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

TRACY LYNN LAZAR

Appellee

v.

MARK ALAN FREEMER

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 406 WDA 2013

Appeal from the Order Entered February 4, 2013
In the Court of Common Pleas of Clearfield County
Domestic Relations at No(s): 96-65-SD

BEFORE: BENDER, P.J.E., LAZARUS, J., and MUNDY, J.

MEMORANDUM BY LAZARUS, J.

FILED: April 14, 2014

Mark Alan Freemer (Father) appeals from the trial court's order, entered in the Court of Common Pleas of Clearfield County, directing him to pay monthly support in the amount of \$1,700 for the parties' unemancipated adult son (Son).¹ After careful review, we affirm.

Appellee, Tracy Lynn Lazar (Mother) and Father were married in 1988; they adopted Son in 1989 when he was ten-days-old. The parties separated in 1996 and divorced on June 10, 1998. Mother filed a child support action

¹ In reviewing an order entered in a support proceeding, an appellate court has a limited scope of review. The trial court possesses wide discretion as to the proper amount of child support and a reviewing court will not interfere with the determination of the court below unless there has been a clear abuse of discretion. The function of the appellate court is to determine whether there is sufficient evidence to sustain the order of the hearing judge. ***Kotzbauer v. Kotzbauer***, 937 A.2d 487, 489 (Pa. Super. 2007).

against Father on October 21, 1996. Son has been diagnosed with Pervasive Development Disorder (an autistic spectrum disorder), ADHD, mental retardation, and Disruptive Disorder. Son's IQ is 48.² In September 2008, the Orphans' Court declared Son an incapacitated individual and appointed Mother plenary guardian of his estate and person.³ Father paid support for Son from the time of the parties' separation in 1996 until Son completed high school in June of 2011.⁴ On January 26, 2011, Mother filed another child support complaint; Father filed an answer denying any further support obligation or liability for Son contending that neither Mother nor Son had established that Son was not capable of meeting his reasonable needs through other sources (i.e., state and federal benefits) available to him.

After a support hearing held on June 21, 2012, the trial court found: (1) Son was an unemancipated adult incapable of supporting himself; (2) an obligation of support was owing Son; (3) a parent of an unemancipated

² Son receives social services and has a Medical Assistance card. As a special-needs individual, he receives certain publically-funded services. N.T. Hearing, 6/21/2012, at 18.

³ If Father has an issue regarding Mother's ability, as guardian of Son's estate and person, to determine what is in the best interest of Son, the proper forum for such an objection would be in Orphans' Court. **See** 20 Pa.C.S. § 5521 (duty of guardian of person under section 5521 is to assert rights and best interests of incapacitated person).

⁴ Son completed high school through the "No Child Left Behind Program," where he received a certificate for attendance in a Life Skills class.

adult cannot rely upon the availability of possible government assistance to relieve his or her parental support obligation to his or her dependent child if the parent is capable of support; and (4) the Support Guidelines authorize the imposition of \$2,147.41/month in child support from Father. However, the court determined that it would deviate from the Guideline amount and lower Father's monthly obligation to \$1,700, retroactive to January 12, 2011 (date of Mother's support complaint). Father filed a motion to reconsider the court's support order, which was granted on November 29, 2012. On reconsideration, the court changed the retroactive date for support to July 1, 2011, to credit Father for the support he paid while Son was still in high school; the remaining terms of the original support order remained unchanged.

Father appealed this order, raising the following issues for our consideration:

- (1) Whether the trial court committed an error of law in failing to construe the Mental Health and Intellectual Disability Act of 1966 in *pari materia* with the support law so as to relieve Father of any further obligation to support an adult son receiving services and benefits under the Mental Health and Intellectual Disability Act.
- (2) Whether the trial court abused its discretion in ordering Father to pay support for an adult son when such order caused him to lose benefits which already met his reasonable needs.
- (3) Whether the trial court committed an error of law when it failed to declare that the provisions of 23 Pa.C.S.A. § 4321(3) and Pa.R.C.P. 1910.3(a)(5) violated the [E]qual [P]rotection [C]lause of the [F]ourteenth [A]mendment.

Father's first two issues concern his duty to provide support to his unemancipated son in light of the fact that Son is also eligible for benefits from the state and federal government. Specifically, Father contends that section 4321(3) of the Support Act must be read in conjunction with the Mental Health and Intellectual Disability Act of 1966 ("the Mental Health Act"), 50 P.S. § 4101, *et seq.*, when a child 18-years-old or older receives services and benefits under the Mental Health Act. Father argues that if Son is determined to be unemancipated under section 4321, in which case he will be obligated to pay support, Son will forfeit all federal and state benefits.

Under the Domestic Relations Code, a parent has a continuing duty to support a child who, although when reaching the age of majority, is unemancipated because of a physical or mental condition and is unable to be self-supporting because of that condition. **See** 23 Pa.C.S. § 4321(3); **see also *Hanson v. Hanson***, 625 A.2d 1212, 1214 (Pa. Super. 1993).

The Mental Health Act authorizes reimbursement to the Commonwealth from mentally disabled persons themselves for public funds spent on their behalf. 50 P.S. § 4501. Section 4502 of the Mental Health Act states, in relevant part:

Upon the mentally disabled person attaining the age of eighteen, or any mentally disabled person over eighteen years of age on the effective date of this act, the liability under the act of the persons owing a legal duty to support him shall cease[.]

50 P.S. § 4502.

Instantly, Son receives approximately \$600 per month in supplemental security income (SSI).⁵ Mother testified that if the court were to award support to Son under section 4323, Son would lose his SSI “dollar for dollar” after the first \$65.00. N.T. Hearing, 6/21/2012, at 31, 37; 20 C.F.R. § 416.1121(b) (support payments considered unearned income for SSI purposes). Moreover, if Son’s “countable resources” exceed \$2,020/month, his waiver services (which includes medical assistance) will be terminated. **Id.** at 33, 37. However, Mother also testified that the amount of money Son receives from SSI would not cover the reasonable cost of maintaining Son in her household (food, clothing, and shelter). **Id.** at 64. Therefore, it was necessary for Son to receive support from Father in order to cover the cost of these living expenses.

We agree with the trial court’s conclusion that “liability for support of an adult-child due to unemancipation imposed under the Support Act is not the type of liability created or discussed in the Mental Health Act.” Trial

⁵ SSI was established by the federal government in 1974 to provide monthly cash benefits to blind, disabled or elderly individuals and their eligible spouses not otherwise entitled to Social Security benefits. 42 U.S.C. § 1381, *et seq.* Once a disabled child reaches 18, his or her parents’ income is no longer deemed income to the disabled child. 20 C.F.R. § 416.1165(g)(7). Therefore, at this age, a disabled adult’s income (both earned and unearned) includes any cash or in-kind support (food, clothing and shelter). SSI specifically includes support payments, made either voluntarily or court ordered, as unearned income. 20 C.F.R. § 416.1121(b). Moreover, neither public assistance nor SSI benefits shall be counted as income for purposes of determining support. Pa.R.C.P. 1910.16-2(b)(1).

Court Opinion, 6/13/2013, at 6. The two laws are mutually exclusive and serve different purposes. The former focuses on the financial obligation of a parent to his or her unemancipated adult child; the latter concerns the duties of a state to a mentally disabled individual. This line of reasoning has been employed in the juvenile delinquent context as well. **See also Erie County Office of Juvenile Probation v. Schroeck**, 721 A.2d 799, 803 (Pa. Super. 1998) (“The right of government to seek reimbursement for services provided [to a delinquent child over the age of eighteen under the Public Welfare Code and Juvenile Act] differs substantially from the child's individual right to receive support from a parent [under the support laws].”).

In **Crawford v. Crawford**, 633 A.2d 155 (Pa. Super. 1993), our Court acknowledged the fact that despite an unemancipated adult's entitlement to federal benefits, an obligor is not relieved of his or her duty to provide basic support to that same person under section 4323 of the Support Act. **Id.** at 160. In fact, the **Crawford** Court summarily rejected a Father's argument that he did not have an economic responsibility to his unemancipated adult daughter because she was entitled to benefits through state programs. Specifically, we reiterated that “[s]ociety will not step in and care for the [adult dependent] child if the parent is capable of providing support.” **Id.** at 161, citing **DeWalt v. DeWalt**, 529 A.2d 508, 512 (Pa. Super. 1987). This statement is premised on the fact that we want to relieve the public from such economic burdens. **DeWalt**, 529 A.2d at 512. **See also Schneider v. Arc of Montgomery County**, 497 F.Supp.2d 651 (E.D. Pa. 2007)

(“provision of community based social services to the developmentally disabled is a ‘creature of statute’ which began with the passage of the MH/MR Act of 1966”; neither federal Constitution nor the Pennsylvania Constitution requires that state provide services to developmentally disabled).

To determine whether an order of support is appropriate for an adult child, the test is “whether the child is physically and mentally able to engage in profitable employment and whether employment is available to that child at a supporting wage.” **Hanson**, 625 A.2d at 1214. Instantly, Father does not dispute that Son is incapable of engaging in profitable employment due to his mental infirmities. **Geiger v. Rouse**, 715 A.2d 454, 457 (Pa. Super. 1998) (“Emancipation is a question of fact to be determined by the circumstances presented in each case.”). In addition to his diagnosed disorders, Son is incapable of reading anything but exit and restroom signs, he does not understand the concept of money, and he cannot do math or concentrate on any one task for a prolonged period of time. N.T. Support Hearing, 6/21/2012, at 12-13, 86. Moreover, Son is in need of direct supervision in order to maintain his health and safety.⁶ **Id.** at 107. Due to his disabilities, Son can only maintain employment that provides him a

⁶ For ten hours a day, Son spends time with a program specialist/team leader at a direct care/special skills organization that provides hands-on services to persons eligible for special services.

monthly income of approximately \$65.00. He currently works in a structured workshop. *Id.* at 106. Based on the evidence of record, we conclude that the court's determination that Son is entitled to support is neither an abuse of discretion nor error of law. ***Caplan v. Caplan***, 583 A.2d 823 (Pa. Super. 1990) (scope of review in such support is limited to determination of whether lower court committed abuse of discretion or error of law).

Moreover, due to the trial court's decision to reduce the amount of monthly support to which Son is entitled under the guidelines, Son will continue to receive those vital services provided to him by the state, including necessary medical assistance. **See** Pa.R.C.P. 1910.16-5 (court may deviate from support indicated by guidelines if one or more of items detailed therein is found by trier of fact to warrant such deviation); **see also** ***Lesko v. Lesko***, 572 A.2d 780 (Pa. Super. 1990) (court has discretion to enter support award outside guidelines after considering unique needs of parties).

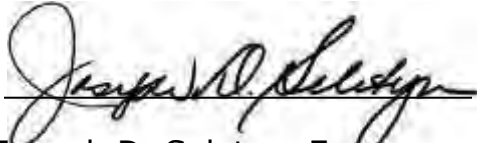
Father's final issue calls into question the constitutionality of 23 Pa.C.S. § 4321(2) and Pa.R.C.P. 1901.3(a)(5), arguing that they violate the Equal Protection Clause of the Fourteenth Amendment.

Where a party challenges the constitutionality of a statute on appeal, he or she must provide notice to Pennsylvania Attorney General, the officer charged with defending the constitutionality of such laws, that the party has filed an appeal challenging the constitutionality of a Pennsylvania statute.

Pa.R.A.P. 521. Failure to provide such notice will result in waiver of the issue on appeal. ***Md. Cas. Co. v. Odyssey Contr. Corp.***, 894 A.2d 750 (Pa. Super. 2006). Because Father has not notified the Attorney General of his claim regarding the constitutionality of section 4321 and Rule 1901.3, we find the issue waived.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/14/2014