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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

No. 1996-CA-001809-MR

ROBERT ALLISON FLETCHER — APPELLANT

v.

APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DAVID C. BUCKINGHAM, JUDGE
ACTION NO. 93-CI-0038

CAROL LEE FLETCHER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE. Robert Allison Fletcher (Bob) appeals from orders of the Marshall Circuit Court that were made final upon the entry of an order on May 28, 1996. Bob raises issues concerning the trial court's calculation of child support and the award of sole child custody to his ex-wife, Carol Lee Fletcher (Carol). We affirm.

This case has a long and convoluted procedural history and a voluminous record. To better understand the issues on

appeal, it is helpful to review some of that history. In an August 29, 1994 recommended order, the Domestic Relations Commissioner (Commissioner) recommended that the parties have joint custody of their children, Harold Robert Fletcher (DOB, 3-11-86) and Lee Robinson Fletcher (DOB, 8-30-87), with Carol having primary physical possession of the children. Both Bob and Carol filed exceptions. On September 19, 1994, Carol filed a motion to set child support. This same day, the trial court sustained Carol's exceptions and remanded the matter to the Commissioner for further findings on "the remaining issues before the Commissioner." Following a motion by Bob concerning the exceptions, the trial court entered another order on October 17, 1994, remanding this matter to "the Commissioner for an evidentiary hearing on all remaining matters." The Commissioner recommended, on October 20, 1994, that Bob's temporary child support obligation be set at $1,580.00 per month. Bob filed exceptions, to which Carol responded. The trial court adopted the Commissioner's recommended order on November 30, 1994.

A final hearing was held on May 16, 1995, at which time the Commissioner heard further evidence from the parties as to the issues of joint custody, permanent child support, and other issues not pertinent to this appeal. Additionally, the parties filed memoranda concerning the issues to be addressed at the hearing.

On June 21, 1995, the Commissioner filed recommended findings of fact and conclusions of law supporting an

interlocutory decree of dissolution. On August 4, 1995, the trial court adopted the Commissioner's recommended findings of fact and conclusions of law and made them a part of the decree of dissolution. The trial court dissolved the parties' marriage, but reserved for a future ruling "all matters related to child custody, child support, and visitation", as well as other matters not pertinent to this appeal.

On September 8, 1995, the Commissioner filed a recommended order "on the issues of custody, child support, visitation" and other issues not raised on appeal. The Commissioner awarded Carol sole custody, care and control of the two children and awarded Bob visitation. In support of his recommendation, the Commissioner stated as follows:

> 1. . . . Carol . . . shall have the sole custody, care and control of the parties' two minor children, Harold Robert Fletcher . . . and Lee Robinson Fletcher. . . .
>
> 2. By agreement of the parties, the Court appointed Pam Haines with Psychological Associates of Paducah as the Court's expert witness to evaluate this case. It was the recommendation of Ms. Haines, in her written report and in her sworn testimony, that [Carol] should have the sole custody, care and control of the two minor children born to the parties. It was her opinion that [Bob] was not capable of providing the structure that the children needed and that he could not exercise parental responsibility on a day-to-day basis for the children. The Court heard extensive testimony from [Carol], as well as from [Bob], regarding his day-to-day involvement with the children. The Court heard the testimony of the witnesses presented live by [Carol], and reviewed the deposition testimony of the witnesses presented by [Bob].

3. The Court has reviewed the requirements of KRS 403.270 and finds that it is in the best interest of both children that their mother shall be their custodian. The Court has reviewed specifically the provisions of KRS 403.270(3), and finds that it is not in the best interest of the children to grant joint custody to both parents. The Court finds that there is no history of cooperation between the parties during this period of separation. Also, the Court finds that the great geographic distance between the homes of the parties militates against joint custody. The Court has reviewed the decision in Mennemeyer vs. Mennemeyer, 887 SW2d 555 (Ky.App. 1994), as well as the provisions of Squires vs. Squires, 854 SW2d 765 (Ky. 1993). Sole custody to [Carol] is in the best interest of these children, not joint custody.

4. The Court has had the benefit of the testimony of its expert witness, and has specifically reviewed the wishes of both parents; the stated wishes of the children; the interaction and interrelationship of the children with their parents, with each other, and with other significant persons in their lives; as well as the adjustments of the children to home, school and community; and lastly the Court has given consideration to the mental and physical health of both parents. All the provisions of KRS 403.270 have been considered.

5. The Court finds credible the opinion of its expert witness that [Bob] extensively coached the children as to what to say in their sessions with the Court's expert, and even with the Court. That became apparent during the in camera session that the Commissioner had with the children. The evaluations of the mental health of each parent that were performed by the Court's own expert witness also strongly supported determination that [Carol] be granted the sole custody of the children, and that is the Commissioner's recommendation.

6. The Court does not find persuasive the testimony of [Bob's] expert, John Gilman.

> This expert admittedly did not have the benefit of an interview with [Carol]. In light of this, as well as the Court's belief that the children were subjected to coaching, whether direct or indirect, this expert presented himself more as an advocate rather than one exercising independent judgment.
>
> 7. The Court has given equal consideration to each parent in this matter, and finds an award of sole custody to [Carol] to be in the best interest of the children.

The Commissioner further awarded Carol child support in the amount of $1,500.00 per month and found as follows:

> 14. The Commissioner has struggled with a determination of the appropriate support payment in this matter. As will become even more clear later in this Recommended Order, the Court had insufficient evidence on which to determine the adjusted gross income of [Bob].
>
> 15. It is the opinion of the Commissioner that never was there so much testimony taken, with so little evidence being provided. There was virtually no evidence provided regarding [Bob's] income from investments, various trusts, or other sources, including his relationship (however it might be characterized) with "Uncle Buck's Venison" in New Hampshire. This is in spite of the fact that the Commissioner took a <u>five-month recess</u> between the date the final hearing started in December 1994 and its ultimate conclusion in May 1995 to allow [Bob] to gather precisely that financial information.
>
> 16. In the sworn Disclosure Statement filed by [Bob] on August 8, 1994, [Bob] indicated that he had income of $160,000.00 per year. A specific finding was made by former Commissioner Charles Brien that [Bob] had an annual income of $160,000.00 per year.
>
> 17. [Bob] took exceptions to the Commissioner's Order, and by an Order of the Circuit Court on November 30, 1994, those Exceptions were denied by Circuit Judge David

Buckingham, who made a judicial determination in his Order to the effect that "The Respondent does, in fact, have an annual income of at least $160,000.00 per year. He acknowledged this in the hearing before the Commissioner."

18. Subsequently, the Commissioner ordered [Bob] to supplement his Disclosure Statement at least thirty (30) days prior to the May 1995 hearing, and to file an amended Disclosure Statement. [Bob] did file such an amended Disclosure Statement in April 1995, and set out exactly the same information in exactly the same language that had led to the November 30, 1994, finding by Judge Buckingham, that [Bob] had an annual income of "at least" $160,000.00

19. However, it now seems clear that [Bob] has absolutely no idea what his annual income is. Nor has he provided sufficient information to the Court to allow the Court to make that determination. Under KRS 403.212(2)(f), [Bob] had a duty to prove his income. The burden of proof fell on [Bob] to prove his annual income, not on [Carol]. The provisions of that statute mandate that the "income statements of the parties shall be verified by documentation of both current and past income." [Bob] knew he was coming to a final hearing before the Commissioner regarding the fixing of child support, and he knew that his income was going to be an issue before the Court. It had been an issue before and remained an issue. The statute imposed the duty upon [Bob] to verify "by documentation" both his current and past income. [Bob] did not meet that burden.

20. Very often the documentation of a party's current and past income consists of information that is solely within the control of that party. This is especially so where that party is self-employed. This is obviously the reason that the statute requires any parent to "verify by documentation" the statements that he may make regarding his income.

21. However, the statute does not allow a party to defeat the goals of the Kentucky child support statutes by merely failing to provide the required documentation. Instead, the Court is required under KRS 403.211(5) to act even in those situations.

22. Under KRS 403.211(5), "when a party has defaulted . . ." or if "the Court is otherwise presented with insufficient evidence to determine gross income," the Court has a specific duty to act. In fact, the statute says that "the Court shall order child support based on the needs of the child or the previous standard of living, whichever is greater."

23. However, the Court finds that the $160,000.00 annual figure shown on [Bob's] Disclosure Statement of April 1995 is only an expectancy, and not a statement of income. The Court specifically finds that there is insufficient evidence to determine the adjusted gross income of [Bob], because of his failure to provide adequate information to the Court regarding that.

24. The Court specifically finds that a child support award in the amount of $1,500.00 per month is necessary based upon the previous standard of living of the children. The Court is required to set child support at the greater of either the previous standard of living or the needs of the child. In this case, the previous standard of living of the children is the greater.

25. These are children who have enjoyed the benefit of vacations in New England on a regular basis, ski-mobiles, renovated rustic lodges and camps, extensive vacations, cross-country jet flights, and a father who appears to have a virtually unlimited source of funds to spend on them.

26. During his testimony, [Bob] stated that he had spent the sum of $70,000.00 in a single six-month period from the middle of 1994 to the end of 1994, but that he could not account for that money. When the former marital residence in Kentucky was sold, most

> of the proceeds of that property went to [Bob] on his claim of a non-marital investment in the home. There was approximately $150,000.00 distributed to him as his non-marital property, upon agreement of [Carol]. (The Court makes no finding that this was in fact an appropriate distribution of marital/non-marital proceeds from the sale of the house. The Court merely notes that [Carol] agreed to this amount). At the final hearing, [Bob] testified that he had spent $70,000.00 of those funds in a six-month period, and had no idea where any of it had gone. [Bob] has a tremendous amount of completely disposable funds that are available to him. At the rate of $1,500.00 per month, that $70,000.00 would have paid his entire child support obligation for almost four years.

Bob filed exceptions to the Commissioner's recommendations on September 18, 1995, and Carol filed a response on October 2, 1995. On October 10, 1995, the trial court adopted the Commissioner's recommendations.

The parties continued to file numerous other motions in attempts to resolve miscellaneous issues. On April 19, 1996, the Commissioner filed a recommended order "resolv[ing] all of the remaining issues in this case." Bob filed exceptions concerning the amount of child support, reimbursement of the escrow account, "the ruling concerning the New Hampshire property", commissioner's fees, expert witness fees, and attorney's fees. On May 28, 1996, the trial court overruled said exceptions stating "[t]hat this is a final and appealable order." This appeal followed.

Carol incorrectly claims that this appeal should be dismissed as untimely filed. While the issues on appeal were

addressed by interlocutory orders, the law is clear that the judgment to be appealed is the final judgment, which in this case was entered on May 28, 1996.

> When the remaining claim or claims in a multiple claim action are disposed of by judgment, that judgment shall be deemed to readjudicate finally as of that date and in the same terms all prior interlocutory orders and judgments determining claims which are not specifically disposed of in such final judgment.

Kentucky Rules of Civil Procedure (CR) 54.02(2). See also Blair v. City of Winchester, Ky.App., 743 S.W.2d 28, 31 (1987); and Employers' Liability Assurance Corp. v. Home Indemnity Co., Ky., 452 S.W.2d 620, 623 (1970).

The first two issues raised by Bob are (1) whether the trial court erred in basing the child support on his expected income rather than his actual income, and (2) how any excess payment of child support should be credited. Bob is simply mistaken when he claims that the child support was "based on an expectancy or future contingency." To the contrary, the trial court's findings, as quoted from previously at paragraphs 14 through 26, were quite clear that the child support was based on "the previous standard of living" of the children pursuant to KRS 403.211(5). Bob has failed to demonstrate that this finding was clearly erroneous; thus, it must be affirmed. CR 52.01; Cherry v. Cherry, Ky., 634 S.W.2d 423 (1982). Since we affirm the trial court's setting of the child support, there was no payment of excess child support and the second issue is moot.

The third issue raised by Bob is whether the trial court erred by granting Carol sole custody of the children instead of granting the parties joint custody. First, we note that Bob's brief fails to comply with CR 76.12(4)(c)(iv) in that it does not contain "ample supportive references to the record." Bob states, "[i]t is clear from the evidence presented that the children in this situation will benefit most from input by both parents. Thus[,] joint custody is the best for the children." However, Bob fails to provide any citation to the record as to any evidence supporting his position. The trial court's findings, as quoted previously at paragraphs one through seven, are not clearly erroneous. Thus, once again, we must affirm. CR 52.01; Cherry, supra.

The judgment of the Marshall Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Hon. Rita Lynn Cartee
Paducah, KY

BRIEF FOR APPELLEE:

Hon. Scott Alan Hoover
Hon. J. V. Kerley
Paducah, KY