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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000114-MR

WILLIAM DAVID ISON — APPELLANT

v.

APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JAMES A. KNIGHT, JUDGE
ACTION NO. 83-CI-00224

CONNIE J. ISON CARTER — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from an order increasing appellant's child support obligation from $100 a month to $253 a month. Appellant argues that the evidence did not support such an increase. We do not agree and, thus, affirm.

Appellant, William Ison, and appellee, Connie Ison Carter, were divorced in 1984. The decree, which incorporated the parties' settlement agreement, granted custody of the parties' only child, born in 1982, to appellee and required appellant to pay $100 a month in child support. On September 9, 1996, appellee filed a motion to increase child support. Appellant's response to the motion alleged there was no basis for

an increase under the Kentucky Child Support Guidelines (KRS 403.212) and that if the guidelines were applied to appellant's current income, child support would actually be reduced to sixty dollars ($60) per month.

On May 13, 1997, a hearing was held before the domestic relations commissioner. Appellant and his current wife, Lorie Ison, who keeps the books for appellant's business, testified at this hearing that appellant is self-employed as a truck driver and that his business has operated at a loss for several years. They testified that they and their four-year-old child live off of Lorie's meager earnings as a bank teller. They offered into evidence their 1994 and 1995 tax returns, which showed that appellant had operated his trucking business at a $2600 loss in 1995. The 1994 return shows that the Isons together had a gross income of $36,255, but there was apparently no schedule C filed for appellant's business that year and no business income or loss was listed. Other records of appellant's business were included in the record.

On October 15, 1997, the commissioner entered his order recommending that appellant's child support obligation be increased to $253 a month. The commissioner found that appellant had a contract to haul freight and that his business earned $2,000 per week. The commissioner noted that fuel, insurance, and repairs are paid from this income. The commissioner found that appellant's gross income for child support purposes was $1,500 per month. The income of appellee, who was unemployed at the time, was imputed at minimum wage, $893 a month.

Appellant filed exceptions to the commissioner's recommendations. As a result, the circuit court conducted a de novo hearing on November 24, 1997. The only testimony offered at the hearing was that of Lorie Ison. Lorie testified that her husband's business had lost money for the last several years. She stated that it was presently losing $500 a week and that from January, 1997 through November 24, 1997, his business had lost over $22,000. When asked why her husband remained in the business, she replied, "he just keeps hoping that it'll get better." Appellant also offered into evidence documentation of expenses of appellant's business, as well as the living expenses of his family and copies of loans he and his current family were forced to obtain to meet their living expenses. Although appellant maintains in his brief that his 1996 tax return showed that his business grossed $116,894, but operated at a loss of $113, we cannot find the 1996 tax return anywhere in the record. As of the date of the hearing in 1997, Lorie Ison testified that the business had grossed $62,998, but had operating expenses of $85,867. Appellee presented no evidence at the hearing. On November 26, 1997, based on "the testimony and evidence presented at the Hearing", the court issued an order increasing child support to $253 a month. Although the court did not specifically adopt the recommendations of the commissioner, it made reference to the child support worksheet attached to the commissioner's order. The court also noted in its order:

> [I]t is apparent that the Petitioner [appellant] had previously paid only ONE HUNDRED ($100.00) DOLLARS per month for the past thirteen years. It is also apparent

> from the record that the Petitioner is able to pay the required amount of child support in the amount of TWO HUNDRED FIFTY-THREE DOLLARS ($253.00) per month.

Appellant did not move for more specific findings. The appeal of this order is now before us.

Appellant's primary argument is that there was no evidence to support an increase in his child support obligation. Although the court did not explicitly state that it was adopting the findings of the commissioner, it is clear from the court's decision that it was indeed adopting those findings since it referred to the commissioner's worksheet and ordered the commissioner's recommended increase in child support. In any event, appellant did not move for more specific findings, thus, he waived any error regarding the adequacy of the court's findings. CR 52.04.

The main issue we must then decide is, was there sufficient evidence that appellant's income for purposes of determining child support was $1500 a month? A trial court's findings of fact in a domestic action will not be reversed unless they are clearly erroneous — i.e. not supported by substantial evidence. CR 52.01; Ghali v. Ghali, Ky. App., 596 S.W.2d 31 (1980). In reviewing the record, the evidence establishes that appellant's business suffered a loss in 1995. As to 1996, we could not find appellant's tax return. As to 1994, the tax return did not reflect losses since no schedule C was filed. Assuming that appellant's business is now losing money as appellant and his wife allege, that does not mean the court must

automatically determine his child support based on an income of $0. Under KRS 403.212(2)(d), if the court finds that the parent is voluntarily underemployed, child support shall be calculated "based on a determination of potential income". KRS 403.212(2)(d) further provides in part:

> Potential income shall be determined based upon employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community . . . A court may find a parent to be voluntarily unemployed or underemployed without finding that the parent intended to avoid or reduce the child support obligation.

Although the court did not specifically find that appellant was voluntarily underemployed, appellant waived the issue of the adequacy of the court's findings as stated earlier, and we are nevertheless free to affirm the lower court for different reasons than those given by the lower court. See Jefferson County Bank v. Insurance Company of State of Pennsylvania, 251 Ky. 502, 65 S.W.2d 474 (1933).

There was evidence that appellant at one time had driven a truck for a company, but quit to start his own business, which, according to the evidence, has steadily lost money. While we applaud appellant's entrepreneurial spirit, his child should not be made to suffer in the process as a result of this decision. In our view, if appellant has the skills to operate his own truck-driving business which has gross receipts of over $100,000, we do not think it was error to impute an income of

$1500 a month ($18,000 a year) to him. While appellant is free to start his own business which loses money, he still has an obligation to his child which is based on what he is capable of earning. We believe that is the purpose of KRS 403.212(2)(d), which now explicitly excludes the bad faith requirement previously read into the statute by this Court. See Redmon v. Redmon, Ky. App., 823 S.W.2d 463 (1992); Keplinger v. Keplinger, Ky. App., 839 S.W.2d 566 (1992); and McKinney v. McKinney, Ky. App., 813 S.W.2d 828 (1991).

In imputing $1500 a month in income to appellant, it results in a greater than 15% increase in child support as required by KRS 403.213 in order to warrant a modification of child support. Accordingly, the court did not err in increasing appellant's child support obligation to $253 a month.

Appellant's second argument is that the circuit court considered inappropriate factors in his decision to increase appellant's child support. In particular, appellant points to the following finding: "[i]t is also apparent from the record that the Petitioner is able to pay the required amount of child support in the amount of TWO HUNDRED FIFTY-THREE DOLLARS ($253.00) per month." We see nothing wrong with this finding in light of appellant's voluntary underemployment. If KRS 403.212(2)(d) applies, the court must estimate what the parent would pay based on his income potential.

For the reasons stated above, the judgment of the Lawrence Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Nelson T. Sparks
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BRIEF FOR APPELLEE:

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