RENDERED: NOVEMBER 20, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002023-MR

MICHAEL STEPHEN FINCK — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. MERRILL, JUDGE
ACTION NO. 96-FC-003618

WILMA MARLENE FINCK — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MOORE, AND VANMETER, JUDGES.

VANMETER, JUDGE: Michael S. Finck appeals from an order entered by the Jefferson Circuit Court, Family Division, regarding his child support obligation. We affirm.

Michael and appellee Wilma Marlene Finck divorced in 1997. The parties were awarded joint custody of their two sons, who initially spent equal time

with each parent. In 2003 and 2005 the court entered child support orders pertaining to the older child, who at that time was living exclusively with Wilma. However, the court declined to enter a support order pertaining to the younger child, who continued to split his time between the parties.

In January 2008, Wilma filed a motion seeking child support for the younger child,[1] claiming that he primarily resided with her. Michael disagreed, asserting that the child continued to divide his time between the parties. After a hearing the trial court concluded, for purposes of the motion, that the younger child in fact still split his time between the parties. The trial court found, and the parties do not dispute, that Wilma earned $40,000 per year or $3333.33 per month. Michael, who derived his income through owning and renting real estate, provided the court with a copy of his 2006 federal income tax return which reflected a gross annual income of $55,096 after the deduction of losses, depreciation and other expenses. However, the court rejected Michael's deduction of depreciation costs for purposes of calculating child support, noting that in a January 2008 real estate loan application, Michael

> reported gross monthly income in the amount of $9,330.38 per month, and said document was filed "not jointly" indicating, further, that the gross monthly income reported is purported to be that of [Michael] alone. Further, [Michael's] income tax return from 2006 reflects revenues, profits, etc. which appear to be consistent with the amount reported on the loan application.

[1] At this point the younger child was fifteen years old, while the older child was twenty-one.

The court concluded that the best evidence of Michael's income was the $9,330.38 figure used in his "attempt to secure a sizable loan just months prior to this hearing[.]" The court therefore used that figure when calculating the parties' relative child support obligations and directing Michael to pay Wilma $497 per month. This appeal followed.

First, Michael contends that the trial court abused its discretion when calculating his gross monthly income at $9,330.38. He alleges that although applicable underwriting guidelines permitted depreciation expenses to be added back into his income for purposes of qualifying for an FHA loan, KRS[2] 403.212(2)(c) required the court to deduct depreciation expenses from his income when calculating child support. We disagree.

KRS 403.212(2)(c) provides in part that for purposes of calculating child support, gross income should be calculated as

> gross receipts minus ordinary and necessary expenses required for self-employment or business operation. Straight-line depreciation, using Internal Revenue Service (IRS) guidelines, shall be the only allowable method of calculating depreciation expense in determining gross income. . . . Income and expenses from self-employment or operation of a business shall be carefully reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support obligation. In most cases, this amount will differ from a determination of business income for tax purposes.

Although straight-line depreciation expenses therefore may be deducted when determining gross income for purposes of calculating child support, we are not

[2] Kentucky Revised Statutes.

persuaded by Michael's argument that KRS 403.212(2)(c) mandates the deduction of such expenses. Indeed, the statute expressly cautions the trial court to "carefully review" evidence of self-employment income and expenses in order to determine a parent's available gross income, noting that usually the amount available will differ from the parent's business income for tax purposes.

Here, Michael's 2006 federal tax return shows a total rental income of $271,375. He spent a total of $173,671 on nonrefundable, out-of-pocket expenses such as repairs, supplies, taxes, utilities, insurance, mortgage interest, and legal or professional fees. He then deducted another $42,608 as real estate depreciation expenses, leaving him with a reportable rental income of $55,096. Other than the self-reporting provided by his January 2008 loan application, nothing in the record suggests that Michael's 2007 income differed significantly from his 2006 income.

Michael admitted below that the applicable FHA underwriting guidelines allowed depreciation expenses to be added back into his income for purposes of calculating his loan eligibility. Such provisions support the conclusion that real estate depreciation expenses may constitute paper losses without reducing an owner's actual income. *See generally* Louise E. Graham, James E. Keller, *Domestic Relations Law* § 24:21 (2d ed. 2002). Here, the addition of Michael's depreciation expenses to his 2006 reported rental income yields a total of $97,704. Similarly, the inclusion of depreciation expenses in his January 2008 loan application yielded a yearly income of $111,964.56. Given the absence of evidence to show that Michael's available income was actually lessened by

reportable real estate depreciation amounts, the trial court did not err by calculating child support based on total income of $9,330.38 per month or $111,964.56 per year.

Michael also contends that the trial court erred by finding that his child support obligation was subject to modification based upon "a material change in circumstances that is substantial and continuing[,]" as required by KRS 403.213(1). We disagree.

Pursuant to KRS 403.213(2),

> [a]pplication of the Kentucky child support guidelines to the circumstances of the parties at the time of the filing of a motion or petition for modification of the child support order which results in equal to or greater than a fifteen percent (15%) change in the amount of support due per month shall be rebuttably presumed to be a material change in circumstances.

As the parties originally agreed to equally share time with the children, neither the property settlement agreement nor the original final judgment required the payment of child support. In August 2003, the court awarded child support only as to the older child, as he was living exclusively with Wilma. According to the record, in 2003 Wilma grossed $36,756 per year, while Michael grossed $55,344 per year.

As discussed above, in May 2008 the trial court found that Wilma earned $40,000 per year, while Michael earned $111,964.56 per year. Thus, while Wilma's yearly income increased by several thousand dollars between 2003 and 2008, Michael's income more than doubled in the same time period. As a result,

according to the child support guidelines set out in KRS 403.212, the parties' total monthly child support obligation was $1,123, of which Michael's share was $896. Offsetting Michael's obligation against Wilma's share of $313, the court correctly calculated that Michael was obligated to pay Wilma child support of $497 per month for the younger child. KRS 403.212(6).

The record shows that in 2003, the parties' respective child support obligations were totally offset against one another insofar as the younger child was concerned. However, Michael was ordered to pay child support at the rate of $628 per month for the older child, who was living exclusively with Wilma. For purposes of this appeal, whether we calculate Michael's 2003 monthly child support obligation for the younger child at $0, at $628, or at any point in between, a 15% increase in the 2003 obligation amounts to considerably less than the 2008 calculation of Michael's child support obligation for the younger child. Thus, Michael's claim that the evidence did not support a finding of a substantial, continuing and material change in circumstances, reflected by a 15% change in the amount of child support due each month, lacks merit.

The order of the Jefferson Circuit Court, Family Division, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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