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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001256-ME

MICHAEL BRIAN CHAMBERLIN — APPELLANT

v.

APPEAL FROM JESSAMINE CIRCUIT COURT, FAMILY DIVISION
HONORABLE C. MICHAEL DIXON, JUDGE
ACTION NO. 08-CI-00777

CAROLINE ELY LANDRETH
CHAMBERLIN (NOW NICHOLLS) — APPELLEE

OPINION
AFFIRMING IN PART,
AND VACATING AND REMANDING IN PART

** ** ** ** **

BEFORE: CAPERTON AND STUMBO, JUDGES; KNOPF,[1] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Michael Brian Chamberlin, proceeding *pro se*, appeals from a judgment of the Jessamine Circuit Court, Family Division, that: (1) denied his motion to modify custody of the parties' child; and (2) granted the

[1] Senior Judge William L. Knopf 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.

motion filed by his ex-wife, Caroline Ely Landreth Chamberlin (now Nicholls), for modification of his child support obligation. For reasons that will follow, we affirm the family court's denial of Michael's motion to modify custody but vacate its child support determination and remand for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

The parties were divorced in Utah on April 22, 1993. At that time, Caroline was awarded sole permanent custody of the parties' minor child, and Michael was awarded visitation rights and ordered to pay child support in the amount of $105.00 per month. According to the decree, this amount reflected a minimum wage income. Michael was also ordered to maintain insurance on the child's behalf when such was available at a reasonable cost and to otherwise pay her medical expenses as part of his support obligation. Caroline and the child moved to Jessamine County, Kentucky in 1996 and have resided there ever since. Michael is currently a resident of California.

On July 30, 2008, Caroline filed a verified petition in the Jessamine County Family Court in which she asked the court to adopt the Utah divorce decree and all other related orders and to give them full faith and credit pursuant to KRS 403.866. The court did so in an order entered on September 4, 2008, and further established that Kentucky was the home state of the parties' child under KRS 403.800.

On the same day the court entered its order, Caroline filed a motion to modify child support pursuant to KRS 403.212 and 403.213 and requested a hearing. On April 24, 2009, Michael filed a motion seeking to modify the parties' custodial arrangement and to award him joint custody of the parties' minor child. In doing so, he claimed that he had always been involved in the decision-making process concerning the child but that Caroline had recently attempted to cut him out of the child's life. In response, Caroline denied these allegations and claimed that as sole custodian, she had exercised completely autonomy when it came to parenting decisions. She also asserted that Michael's efforts to change custody were vindictive in nature and related solely to her attempt to modify child support. An evidentiary hearing on the issues of support and custody was held on May 12, 2009.

As to the matter of custody, Caroline testified that as sole custodian, she had the final say in all parenting decisions and that any input offered by Michael on such matters was taken simply as advice. She claimed that she had never called Michael or solicited any parenting advice from him and described their phone conversations as generally "contentious" and "hostile." She complained that Michael frequently yelled at her when he did not like a decision that she had made and noted that she "was never right" in his eyes when it came to her parenting style. She also testified that Michael had been to Kentucky to visit the child only four times in sixteen years. Despite her issues with Michael, Caroline testified that their child had her own cell phone and was able to talk with

her father whenever she liked. She also described her child in highly positive terms, indicating that she made good grades, was involved in many extracurricular activities, had served as the lead in multiple plays, took Advanced Placement classes, and dressed modestly.

Michael testified that he had visited his child in Kentucky on at least six or seven occasions in the previous sixteen years and that during a number of those visits he had met with her teachers and had spent time with her at school. He also noted that she visited him as often as possible during school breaks. He further indicated that he kept track of the child's grades and attendance via phone conversations with her teachers and expressed concern that she had had excessive absences. He also testified that he had had conversations with the child's dentist but could not recall speaking to any other doctors. As to the issue of decision making, Michael testified that he believed that he had been making joint decisions with Caroline as to their child's upbringing and that he had considerable input on those matters. He claimed that he had not been kept out of decisions relating to the child's education or health until the previous year, when Caroline instructed the child's school to cut off communications with him and they stopped speaking to him altogether.

As to the issue of child support, Michael testified that he was self-employed and the sole shareholder of Independent Properties, a "Subchapter S" corporation.[2] Michael's employment focused on buying properties and selling

[2] A Subchapter S corporation pays no corporate income taxes as an entity. Instead, the corporation's income or losses are divided among its shareholders and the shareholders then

them for a profit, a process commonly known as "flipping." But, he indicated that the collapse of the real estate market in California had taken a tremendous financial toll on him beginning in late 2007. Michael also testified that he did some work as a real estate agent but indicated that he had not been very successful in that area because he had been unable to make headway into becoming a listing agent for banks. He was also licensed to buy and sell cars but testified that this was a hobby and any income earned from such endeavors was minimal. Michael placed the bulk of the blame for his financial issues on the fact that Wells-Fargo Bank cut-off a $500,000.00 equity line of credit that he had maintained with the bank for years and that he had used to support his real estate transactions because of a decline in property values. He acknowledged, however, that he owed no money on the equity line at the time it was closed.

Michael's 2007 individual tax return reflected an adjusted gross income of $2,900.00. At the time of the hearing, Michael did not have tax returns for 2008, but he introduced a profit/loss statement indicating that from March 2008 to April 2009, Independent Properties' expenses exceeded its income by more than $30,000.00. Michael testified that he had a roommate from April to December 2008 in order to pay for some of his expenses. He further testified that he was forced to resort to using cash reserves from savings accounts to pay his expenses. Michael acknowledged that his financial records were somewhat difficult to follow

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report the income or loss on their personal income tax returns. *See* 47B C.J.S. Internal Revenue §§ 374 to 378 (2009).

because he frequently shifted money between his various personal and business accounts where needed. Thus, there could be significant dips or increases in each account from time to time. Michael testified that because of the state of the real estate market, he had decided to become a police officer and was close to completing training to do so.

In her testimony relating to the issue of child support, Caroline indicated that she was a stay-at-home mother who had graduated from high school and had completed one year of college. She acknowledged that she was capable of working in a restaurant or doing clerical work. She further testified that the original amount of Michael's child support obligation was based on the fact that he was unemployed at the time.

On May 12, 2009, the family court entered an order granting Caroline's motion to modify child support and denying Michael's motion to modify custody. The court's order denying Michael's motion to be named a joint custodian of the parties' child provides as follows:

> [Michael] seeks a change of custody. In Utah, [Caroline] was granted sole custody of the child. She then moved to Kentucky while [Michael] remained for a time in Utah and then moved to California. His time with the child has been six weeks each summer and either four or six trips to Kentucky for visits in sixteen years. Over sixteen years, either four or six visits will provide an opportunity for little serious involvement with the child's education and care. (Note, the Court does not draw adverse inferences regarding [Michael's] care or concern for the child from this. It is to recognize the reality that California to Kentucky is a long distance and the kind of decision making involvement alleged by [Michael]

> would be rather difficult.) He believes that he has been very involved in the decisions made regarding the child and that in effect they have practiced joint custody and shared decisions. [Caroline] tells another story. She states that his input has been in the form of advice but that there has never been shared decision making. There is disagreement as to the form of the input but it does not appear from the testimony to have been significant and, if [Caroline] is believed, it has been contentious at best. Further, there was no extrinsic evidence to support involvement by [Michael] in educational, religious, or medical decisions over the years.
>
> The child is doing well in school and her grades are high. She is very active in extracurricular activities. She has many. She has no discipline problems. She is soon to be a senior in high school, graduate and turn eighteen. There is no allegation of danger to child. She is well-integrated into the Jessamine County community through her mother, step-father and half-siblings. As to the wishes of the parents, one parent wants a change and the other does not. Fortunately, neither parent put the child in the position of having to state a preference, so her wishes are unknown. Her adjustment in the school is noted above. There is no physical or mental health issue for either parent. There is no thought given by the Court to the benefits of change of environment versus the likely harm because [Michael] does not seek a change of environment from Kentucky to California; rather, he seeks to change the form of custody. The Court sees no reason to change the form of custody that has brought forth a successful child to this point. The motion to change the form of custody is overruled.

The court's order modifying support provides as follows.

> [Caroline] is a homemaker and has seven children high school age or younger. Her last employment was at $7.00 per hour, she has a high school diploma and one year of college. Income will be attributable to her at $8.00 per hour. [Michael] is self-employed in California. He has a real estate license and is also licensed as a broker. He has been in most areas of real estate from

> "flipping" houses to running a trailer park to selling real estate. He wholesales automobiles and is a student. His income has diminished due to the market decline in California. From prior efforts, savings and investments he is able to afford to spend $7,827 per month in living expenses.
>
> Support was originally set at a little over $100 per month many years ago at the dissolution and has not been reviewed. At the time [Caroline] was working while [Michael] was unemployed. There has been a material change in circumstances of a continuing nature. Support is now set at $860 per month. A chart is attached. The effective date is the filing of the motion. Any accumulate arrearages should be paid at $40 per month without interest.

The chart referenced in the order reflects that the court effectively imputed to Michael a monthly gross income of $7,827.00 – the same amount Michael could afford to pay in living expenses, according to the court. Based on this number, the court set support at $860.00 per month, which is a considerable increase from the $105.00 per month for which Michael was formerly responsible.

Michael subsequently filed a motion pursuant to Kentucky Rules of Civil Procedure (CR) 59.05 asking the trial court to alter, amend, or vacate its support and custody orders, but the court rejected the motion. This appeal followed.

ISSUES

On appeal, Michael challenges the family court's refusal to modify custody and its modification of his child support obligation from $105.00 per month to $860.00 per month. We address each issue in turn.

1. Custody

The standards for reviewing a family court's child-custody decision are well-established and first require "a determination of whether the factual findings of the family court are clearly erroneous." *B.C. v. B.T.*, 182 S.W.3d 213, 219 (Ky. App. 2005). A finding of fact is "clearly erroneous" only if it is unsupported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). "If the findings of fact are supported by substantial evidence and if the correct law is applied, a family court's ultimate decision regarding custody will not be disturbed, absent an abuse of discretion." *B.C.*, 182 S.W.3d at 219. "Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994), *quoting Kentucky Nat'l Park Com'n v. Russell*, 301 Ky. 187, 191 S.W.2d 214, 217 (1945). Under these standards, the fact that this Court might have decided the matter differently is of no consequence in reviewing the family court's decision. *B.C.*, 182 S.W.3d at 219-20.

Modification of a custody decree in cases such as this one is governed by KRS 403.340. Specifically, KRS 403.340(3) provides that a court shall not modify a prior custody decree unless if finds that: (1) "a change has occurred in the circumstances of the child or his custodian," and (2) "modification is necessary to serve the best interests of the child." In examining these issues, courts are required to consider the following factors:

(a) Whether the custodian agrees to the modification;

(b) Whether the child has been integrated into the family of the petitioner with consent of the custodian;

(c) The factors set forth in KRS 403.270(2) to determine the best interests of the child;

(d) Whether the child's present environment endangers seriously his physical, mental, moral, or emotional health;

(e) Whether the harm likely to be caused by a change of environment is outweighed by its advantages to him; and

(f) Whether the custodian has placed the child with a *de facto* custodian.

KRS 403.340(3)(a)-(f). The factors set forth in KRS 403.270(2) to be used in determining the best interests of the child are as follows:

(a) The wishes of the child'\'s parent or parents, and any *de facto* custodian, as to his custody;

(b) The wishes of the child as to his custodian;

(c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;

(d) The child's adjustment to his home, school, and community;

(e) The mental and physical health of all individuals involved;

(f) Information, records, and evidence of domestic violence as defined in KRS 403.720;

(g) The extent to which the child has been cared for, nurtured, and supported by any *de facto* custodian;

> (h) The intent of the parent or parents in placing the child with a *de facto* custodian; and
>
> (i) The circumstances under which the child was placed or allowed to remain in the custody of a *de facto* custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a *de facto* custodian to allow the parent now seeking custody to seek employment, work, or attend school.

KRS 403.270(2)(a)-(i).

Here, the trial court was presented with testimony from only Michael and Caroline on the issue of custody. As the court acknowledged in its order, Michael insisted that he had had considerable input in the decisions made regarding the child and that despite Caroline's status as sole custodian, the two had effectively practiced an informal joint custody arrangement and had decided things together with respect to all parenting decisions. Caroline denied that this was the case and claimed that as sole custodian, she had exercised final say in all parenting matters.

As Michael acknowledges, the court was essentially presented with a "he said, she said" scenario as to the matter of custody and forced to determine which version of events it found most credible. Ultimately, it found Caroline's version of events most plausible, which it has the right to do. *See Bissell v. Baumgardener*, 236 S.W.3d 24, 29-30 (Ky. App. 2007). "A family court operating as finder of fact has extremely broad discretion with respect to testimony presented, and may choose to believe or disbelieve any part of it." *Bailey v.*

Bailey, 231 S.W.3d 793, 796 (Ky. App. 2007). We see no reason here to believe that the family court "clearly erred" in believing Caroline's version of events given that the only evidence put before it was the conflicting testimony of the parties. Moreover, the court's order reflects that it applied the applicable law in considering the issue of custody modification and gave sound reasons why a change in custody would not be in the best interests of the child. Therefore, we cannot say that the court's decision constituted an abuse of discretion. *See B.C.*, 182 S.W.3d at 219. Consequently, the portion of the family court's judgment denying Michael's request for modification of custody must be affirmed.

2. Child Support

Michael next argues that the family court erred in modifying the parties' child support arrangement and requiring him to pay $860.00 per month – a substantial increase from the $105.00 per month for which he was originally responsible. He specifically complains that the court imputed a monthly gross income of $7,827.00 ($93,924.00 a year) to him despite the fact that his tax returns, profit/loss statements, and testimony reflect a much lower amount as a result of the recent troubles in the real estate market. As noted above, the family court's order reflects that the court concluded that Michael could afford to pay $7,827.00 per month in living expenses and deemed this amount to be his monthly gross income for purposes of calculating child support. Michael argues that the court failed to properly consider and review his business income and expenses for purposes of calculating child support as required by KRS 403.212(2)(c).

Child support awards may be modified "only upon a showing of a material change in circumstances that is substantial and continuing." KRS 403.213(1).[3] "[T]he decision whether to modify an award in light of changed circumstances is within the sound discretion of the trial court." *Snow v. Snow*, 24 S.W.3d 668, 672 (Ky. App. 2000). Trial courts have also been given "broad discretion in considering a parent's assets and setting correspondingly appropriate child support." *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001). Accordingly, "[a] reviewing court should defer to the lower court's discretion in child support matters whenever possible." *Id.* That discretion, however, is not unlimited, and a trial court's decision in such matters may be overturned in cases where it has been abused. *See id.*; *see also Holland v. Holland*, 290 S.W.3d 671, 674 (Ky. App. 2009). As noted above, abuse of discretion "implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." *Kuprion*, 888 S.W.2d at 684, *quoting Russell*, 301 Ky. 187, 191 S.W.2d at 217.

Even a cursory review of the family court's child support order reveals that it is glaringly sparse. It appears from the record that the court chose to impute $7,827.00 in monthly gross income ($93,924.00 a year) to Michael based upon an interrogatory answer setting forth his monthly expenses, which totaled an amount approximate to that reached by the court. However, Michael testified that

[3] Under KRS 403.213(2), a change in circumstances is presumed to be substantial if application of the child-support guidelines to the new circumstances would result in a change in the amount of child support of 15% or more.

the interrogatory response included both personal and business expenses – including expenses for a rental property that he eventually sold at a $100,000.00 loss. He also testified that he had eliminated a number of those expenses since the interrogatory response was produced because he could no longer afford them. Thus, the listing of expenses contained within the response was no longer accurate at the time of his testimony.

The family court's order also did not provide any indication that it took Michael's tax returns – and his diminished income – into consideration in reaching its decision. Michael's 2007 individual tax return provided a personal adjusted gross income of $2,922.00 and his 2006 return reflected income of $26,832.00. He also testified that he had grossed only $26,750.00 from real estate sales in the twelve months preceding the hearing – before deducting business expenses.[4] The record also reflects that Michael's tax return for his auto sales business for the previous two years produced losses each year. In a subsequent hearing held on Michael's CR 59.05 motion, the family court noted that its support decision was based on the lifestyle that Michael had previously been able to maintain. However, under KRS 403.213(1), a trial court ultimately "must base an increase [or decrease] in child support only on the payor's current income. It may not increase a child-support award to compensate for the payor's higher income in past years if the payor's current income is substantially lower." *Snow*, 24 S.W.3d

[4] According to Michael, $14,200.00 of this amount was paid as commission to a third party.

at 673, *quoting Pearson v. Pearson*, 946 P.2d 1291, 1296 (Ariz. Ct. App. 1997). It is simply unclear from the record whether the court followed this rule of law.[5]

The fact that the family court's order reflects no consideration that it took Michael's business expenses into account in reaching its decision is also troubling. Because Michael is self-employed, the question of whether the family court properly determined his income is controlled by KRS 403.212(2)(c), which provides as follows:

> For income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, "gross income" means 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. Specifically excluded from ordinary and necessary expenses for purposes of this guideline shall be investment tax credits or any other business expenses inappropriate for determining gross income for purposes of calculating child support. 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

[5] With this said, we recognize that courts are not entirely prohibited from considering a party's past income in determining for purposes of determining whether an increase in income is continuing in nature and additional child support is merited, "particularly when such income is controlled by the party himself and is subject to possible manipulation upon the filing of the modification petition." *Snow*, 24 S.W.3d at 673, *quoting Pearson*, 946 P.2d at 1296. Indeed, if a court finds that "earnings are reduced as a matter of choice and not for reasonable cause, the court may attribute income to a parent up to his or her earning capacity. . . . Certainly, evidence of prior years' earnings is relevant to determining earning capacity." *Id.*, *quoting Pearson*, 946 P.2d at 1296 (Internal quotations omitted). We note, however, that the family court's order here provides no indication of whether it believed that Michael had been manipulating his income or that his earnings were unreasonably reduced.

> income for tax purposes. Expense reimbursement or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business or personal use of business property or payments of expenses by a business, shall be counted as income if they are significant and reduce personal living expenses such as a company or business car, free housing, reimbursed meals, or club dues.

Thus, family courts are required to "carefully review[]" an individual's "gross receipts minus ordinary and necessary expenses required for self-employment or business operation" for purposes of determining his gross income. After reviewing the family court's order and the record before us, it is unclear whether the court did so in this case. As noted, Michael offered uncontroverted testimony that a large portion of the expenses referenced by the family court in its order are related to a property that he no longer owned as of the time of the evidentiary hearing. However, the trial court's order does not address this fact.

Ultimately, our concerns with the family court's decision are substantial enough to merit a vacatur of that court's ruling and remand for further consideration. Specifically, the court's order fails to reflect that the applicable modification provisions were followed or considered. Moreover, the court imputed a considerable amount of income to Michael – in the face of other uncontroverted testimony and evidence – without providing any reason for this decision (which made review by this Court exceedingly difficult). Because of this, we cannot affirm the family court's decision.

With this said, we do not mean to suggest that the family court erred altogether in modifying child support in this case. There may be justifiable reasons to do so despite what appears to be Michael's presently sparse income. Family courts maintain "the discretion and the duty to scrutinize taxable income and to deviate from it whenever it seems to have been manipulated for the sake of avoiding or minimizing a child support obligation or when deviating from it is clearly in the best interest of the child." *Snow*, 24 S.W.3d at 672. However, those reasons have not been presented here. Thus, remand for further consideration is merited. On remand, we believe the family court retains the discretion to consider additional evidence on this issue if it deems fit and the parties wish it.

CONCLUSION

For the foregoing reasons, the judgment of the Jessamine Circuit Court, Family Division, is affirmed as to the court's child custody modification ruling and vacated as to its child support modification ruling. This case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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