

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001248-ME

SCOT M. CRANSTON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE HUGH SMITH HAYNIE, JUDGE
ACTION NO. 99-FC-005689

JANICE CRANSTON (NOW COOPER)

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON AND NICKELL, JUDGES; KNOPF,¹ SENIOR JUDGE.

NICKELL, JUDGE: Scot Cranston has appealed from the Jefferson Circuit Court, Family Division's, denial of his motion pursuant to CR² 59.05 to alter, amend or vacate its May 13, 2009, order denying his motion to reduce his child support

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 21.580.

² Kentucky Rules of Civil Procedure.

obligation for his minor daughter and finding him in contempt for failing to pay child support, failing to pay uncovered medical bills, and failing to provide medical insurance for the child. After a careful review of the record, the arguments of the parties, and the law, we affirm.

Scot and Janice Cranston (now Cooper) were divorced in 1999 following a fourteen-year marriage. Three children were born to the marriage. In the divorce proceedings, Scot was to pay eighty percent of the child support for the children. He was earning approximately \$100,000.00 per year as a salesman in the medical device industry and Janice was unemployed. By 2007, two of the children had reached the age of majority and Scot was paying \$933.00 monthly in support of the parties' fifteen-year-old daughter.

In early September of 2007 Scot quit his job to start a business venture marketing an invention he had created. Unfortunately, the business failed in short order and Scot was forced into personal bankruptcy in April 2008. In May 2008 Scot allowed health insurance coverage on his minor daughter to lapse by failing to make the required premium payments. Sometime in late 2008, he obtained employment at a day spa earning approximately \$14.25 per hour.³ On November 17, 2008, Scot moved for a reduction in his child support obligation based on his decreased income. At that time, he was three months in arrears on his child support obligation. The parties were unable to reach an amicable resolution

³ Scot testified he was employed as the director of operations at the spa. He stated his job duties included running the day-to-day operations, dealing with staffing issues, meeting with customers, and generally attempting to "grow the business."

of the child support issue through court-ordered mediation. In January 2009 Janice moved the court to hold Scot in contempt for his failure to pay child support, failure to pay unreimbursed medical expenses, and failure to provide health insurance coverage for their youngest child. A hearing on the contempt motion was scheduled for May 7, 2009, and both parties were ordered to personally attend.⁴

Prior to the hearing, Scot made some payments toward his arrearage. Despite these payments, he was seven months in arrears at the time of the hearing. The trial court heard testimony from Scot and Janice. Janice testified regarding the amounts of support past due and owing for the parties' daughter, the amount of unreimbursed medical expenses owed to her by Scot, and Scot's failure to maintain health insurance on the child.

Scot testified regarding his failed business venture, his personal bankruptcy, and his inability to obtain employment in the medical device industry following the closing of his business. He testified he failed to pay child support for the seven months he was in arrears because he had no income from which to pay. He stated that at the time of the divorce and for the next five years, he had faithfully paid nearly \$4,000.00 per month in combined maintenance and child support. He further testified he had voluntarily paid the expenses of his eldest daughter's attendance at Penn State University including tuition, room and board,

⁴ Following the divorce, Scot moved to Florida where he still resides. The trial court denied his motion to attend the contempt hearing telephonically.

books, and travel costs. Scot stated he intended to remain in his position at the day spa so that he could work to “grow the business” and earn more income. On cross-examination, Janice’s attorney introduced numerous bank statements⁵ indicating Scot had the ability to pay his support obligation but chose not to do so. Scot indicated all of the funds in the questioned accounts were deposited by his current wife from her employment and that he had no income whatsoever during the time periods covered by the statements. He did not dispute his failure to comply with the trial court’s orders.

Following the hearing the trial court took the matter under advisement. On May 13, 2009, the trial court issued an order finding Scot was voluntarily underemployed and, under the direction of KRS 403.212(d), imputing income to him equal to the amount he earned in the medical device field.⁶ Based on the imputed income, the trial court found there was not a change of fifteen percent in the support obligation as required by KRS 403.213(2) and thus denied Scot’s motion to modify the child support obligation. The trial court further found Scot had willfully disregarded its orders and found him in contempt for failing to pay child support, failing to pay uncovered medical expenses, and failing to maintain health insurance on the child. The court imposed a conditionally

⁵ The bank statements presented to the trial court were from Scot’s joint checking account with his current wife.

⁶ Based on tax returns presented during the hearing, the trial court imputed to Scot an income of \$10,000.00 per month—an amount it felt was the average of his monthly income during the three years prior to leaving his medical device sales job.

discharged jail sentence for the contempt and awarded Janice a judgment for \$6,599.79 plus interest for Scot's arrearages. Finally, the trial court denied Janice's motion for attorney's fees. Scot's motion to alter, amend or vacate the order was denied by order entered on June 12, 2009. This appeal followed.

Before this Court, Scot contends the trial court erred in denying his motion to reduce his child support obligation. In support of his contention, he argues the trial court did not have sufficient evidence before it to conclude he "could obtain a job selling medical devices at an income comparable to that which he earned previously," and thus the court erred in imputing income to him substantially higher than his actual salary. He next contends the trial court erred in finding him to be in contempt. He states the court erroneously concluded he had the ability to pay his support and other obligations but refused to do so. We disagree.

As a preliminary matter, we must note Scot's noncompliance with the mandates of CR 76.12. Pursuant to CR 76.12(4)(c)(iv), briefs before this Court must contain a "Statement of the Case" setting forth the facts and procedural events surrounding the issues presented in the appeal "with ample references to the specific pages of the record, or tape and digital counter number in the case of untranscribed videotape or audiotape recordings." This section of Scot's brief is devoid of citations to the record. Further, pursuant to CR 76.12(4)(c)(v), all arguments presented must have "ample supportive references to the record" and are to "contain at the beginning of the argument a statement with reference to the

record showing whether the issue was properly preserved for review and, if so, in what manner.” The argument portion of Scot’s brief contains a singular citation to the record and no statements regarding whether the issues presented were preserved for appellate review. Although noncompliance with CR 76.12 is not automatically fatal, we would be well within our discretion to strike Scot’s brief for its omissions and noncompliance. *Elwell v. Stone*, 799 S.W.2d 46 (Ky. 1990). However, due to the important nature of the matter presented herein, we have chosen to review the issues presented on the merits. We caution counsel that such latitude may not be extended in the future.

Scot first contends the trial court erred in denying his motion to reduce his child support obligation. He alleges using his current actual income would easily result in more than a fifteen percent difference in his child support obligation and the trial court erred in imputing income to him of \$90,000.00 more than his actual pay. Janice counters that the trial court was correct in its decision based on Scot’s voluntary underemployment. We agree with Janice.

To qualify for a reduction in child support, a party must show a substantial and continuing material change of circumstances. KRS 403.213(1). Pursuant to KRS 403.213(2), a rebuttable presumption of a material change in circumstances arises when application of the Kentucky Child Support Guidelines to the finances of the parties at the time of filing of a motion for modification would result in a change in the obligation of fifteen percent or more. In calculating the amount of support due, trial courts must use each parent’s gross monthly

income. KRS 403.212. However, if the court finds a parent to be voluntarily underemployed, the calculation is based on that parent's potential income which is based on "employment potential and probable earnings level based on [the party's] recent work history, occupational qualifications, and prevailing work opportunities and earnings levels in the community." KRS 403.212(2)(d).

There is no question that had the trial court utilized Scot and Janice's actual incomes the total child support obligation would be significantly reduced, easily in excess of the fifteen percent required to invoke the presumption of a material change in circumstances. However, based on the trial court's determination that Scot was voluntarily underemployed and its resultant decision to impute income to him equivalent to the amount he was earning in the medical device industry, the trial court found no such material change existed. We must therefore consider the propriety of the trial court's determination.

"[W]hether a child support obligor is voluntarily underemployed is a factual question for the family court to resolve. Certainly, the findings of a family court cannot be disturbed by this Court if they are supported by substantial evidence." *Gossett v. Gossett*, 32 S.W.3d 109, 111 (Ky. App. 2000) (citing CR 52.01). "There are few matters over which the trial court has more discretion than cases involving domestic relations issues." *Commonwealth v. Marshall*, 15 S.W.3d 396, 400 (Ky. App. 2000). Scot argues the trial court had no evidence before it to support a finding there were any jobs available in the medical device field as Janice failed to present any such testimony. However, Scot fails to

appreciate that the burden of proof on this issue was his. *See Galloway Motor Co. v. Huffman's Adm'r*, 281 Ky. 841, 137 S.W.2d 379, 384 (1939) (“burden of proof is on the party who would be defeated if no evidence were offered on either side”). Although Scot stated he had tried unsuccessfully to obtain employment in his prior field, he offered nothing other than speculation that no positions were available. He offered no testimony regarding the number of positions for which he applied, the companies from which he sought employment, the possibility of obtaining a job in the future, or any evidence supporting his position the “the medical device industry just dried up.”

A trial court’s decision may not be based on speculation, but must be supported by “evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.” *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky. App. 2002). Scot introduced no such evidence in support of his motion for a reduction in his child support obligation and therefore failed to satisfy his burden of proof. The trial court took judicial notice that the economy was “somewhat troubled at this time” but found Scot was clearly capable of earning significantly more than he was making at the day spa and that his current position was unsuitable based on his work history. Scot presented no evidence to the contrary. Thus, as the trial court had no evidence of substance before it supporting Scot’s position, we cannot hold it was an abuse of the trial court’s broad discretion to deny the motion.

Next, Scot contends the trial court erred in finding him in contempt. He argues his failure to pay the court-ordered child support and other expenses was due to his complete inability to pay, not an unwillingness or refusal to do so amounting to a willful disregard of his obligations. Although we sympathize with Scot's financial plight in light of the current dismal state of the economy, we cannot say the trial court abused its discretion. "When a court exercises its contempt powers, it has nearly unlimited discretion." *Meyers v. Petrie*, 233 S.W.3d 212, 215 (Ky. 2007) (citing *Smith v. City of Loyall*, 702 S.W.2d 838, 839 (Ky. App. 1986)). Again, the trial court's decision will not be disturbed absent a showing of an abuse of discretion. *Id.* (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

Scot admits he failed to pay his support obligation, maintain health insurance on his daughter, or pay for uncovered medical expenses. However, he contends his failure was due to his complete inability to pay rather than a willful disregard of the trial court's orders. "An inability to comply must be shown clearly and categorically by the defendant. Defendants so claiming must also prove they took all reasonable steps within their power to insure compliance with the order." *Campbell County v. Kentucky Corrections Cabinet*, 762 S.W.2d 6, 10 (Ky. 1989) (internal citations and quotation marks omitted). While Kentucky recognizes the defense of impossibility, a party must prove a "lack of fault to defeat the contempt charge." *Id.* (citation omitted).

The trial court had the opportunity to review Scot's financial statements for the time period during which he made no support payments and failed to satisfy his other obligations. It was also privy to the knowledge that Scot waited approximately nine months after the failure of his business and until he was three months in arrears before filing his motion for modification of the support order. After its review, the trial court found Scot was capable of making at least partial payments on his obligation, he had the ability to substantially comply with the orders but chose not to do so, and he did not resume making payments until after the contempt motion had been filed. Based on these facts, the trial court concluded Scot had not taken "all reasonable steps to comply" and otherwise willfully violated the court's orders. In light of the facts before the trial court, we are unable to conclude there was an abuse of discretion in its finding Scot was in contempt and we will thus not disturb that finding on appeal.

For the foregoing reasons, the judgment of the Jefferson Circuit Court, Family Division, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Richard Cooper
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