

RENDERED: MARCH 26, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000696-ME

ALI SHAMAEIZADEH, M.D.

APPELLANT

v. APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE LARRY THOMPSON, SPECIAL JUDGE
ACTION NO. 04-CI-00256

PATRICIA SHAMAEIZADEH

APPELLEE

OPINION VACATING AND REMANDING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; DIXON, JUDGE; BUCKINGHAM,¹
SENIOR JUDGE.

COMBS, CHIEF JUDGE: Ali Shamaeizadeh² appeals from an order of the
Johnson Family Court denying his motion to alter, amend, or vacate a previous

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² In various documents in the record, Shamaeizadeh's name is also spelled as "Shamaei Zadeh." We have used the spelling that appears in his brief.

order concerning his child support obligation.³ After our review, we are persuaded that the family court erred in exercising its discretion. Accordingly, we vacate and remand.

Ali Shamaeizadeh and Patricia Shamaeizadeh⁴ are the parents of two daughters. Ali practiced medicine until 1999 when the Kentucky Board of Medical Licensure suspended his license. Ali and Patricia separated, and Ali began paying child support in June 2004.

In November 2007, in response to motions made by Ali to recalculate and reduce his child support obligation, the family court set Ali's payment obligation at \$1186 per month. This figure was based on rental income, "an imputed \$3000.00 per month from the dairy farm, and an imputed \$2000.00 per month from the selling, trading, and buying of stocks." On January 31, 2008, Ali filed another motion to reduce child support.

On March 28, 2008, the family court issued an order denying the motion to reduce child support. However, it acknowledged that one of Ali's rental properties had been destroyed by fire and reduced his child support obligation to \$1107 per month. This order stated that Ali was voluntarily unemployed and incorporated the imputed wages contained in the November 2007 order.

³ On December 9, 2009, the Court issued a show cause order as to whether the issue on appeal had become moot. Having considered the response to the show cause order, the Court concludes that the appeal is not moot and should be reviewed on the merits.

⁴ The parties were never married. Patricia legally changed her last name in a separate court action -- apparently while the couple cohabited.

Ali then filed a motion to alter, amend, or vacate the order. The court did not rule on this motion until March 2009 -- nearly a year after his filing. In its order denying Ali's motion to alter, amend, or vacate, the family court recited that its findings concerning Ali's income were not based on his potential income as a physician but on other income sources -- the dairy farm and stock trading. This appeal follows.

Preliminarily, we note that Patricia has not submitted a brief. Under Kentucky Rule[s] of Civil Procedure (CR) 76.12(8)(c), we have several options: to

(i) accept [Ali's] statement of the facts and issues as correct; (ii) reverse the judgment if [Ali's] brief reasonably appears to sustain such action; or (iii) regard [Patricia's] failure as a confession of error and reverse the judgment without considering the merits of the issue.

Because Ali has not invoked this rule by asking for sanctions, we have reviewed the record and will address the issues raised.

Ali contends that the family court abused its discretion when it imputed income to him from the dairy farm and the trading and selling of stocks. We agree.⁵

It has long been the law in Kentucky that the family court has broad discretion in determining the appropriate amount of child support owed by a parent. Accordingly, an appellate court will not disturb its findings unless the family court abused its discretion. An abuse of discretion has occurred if the

⁵ Ali's brief contains arguments relating to voluntary underemployment. Because the family court's order specifically stated that underemployment was not a factor in its decision, we shall not address this issue.

family court's "decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001).

Kentucky Revised Statute[s] (KRS) 403.212 requires child support obligations to be based on the parents' income. In order for courts to accurately determine the amount of child support owed, they require proof of the parties' income. Generally, this proof is presented by copies of pay stubs and income tax returns or similar documents. KRS 403.212(c) instructs that in cases of self-employment and rental income, it is appropriate for the parent to provide documentation showing expenses -- such as receipts. However, our Supreme Court has held that undocumented evidence of income should be considered as well. *Schoenbachler v. Minyard*, 110 S.W.3d 776, 784 (Ky. 2003). If a party fails to provide proof of his or her income, the burden of proof shifts to the other party. *Id.* at 785.

In this case, Ali consistently claimed that he did not have income beyond his rental property and a part-time job at his father-in-law's dairy farm. He submitted several years' worth of receipts related to the rental properties. In response, Patricia submitted affidavits and other documents in an attempt to prove otherwise. In accepting Patricia's argument, the family court imputed \$5000 of monthly income to Ali, which it characterized as arising from the dairy farm and trading stocks.

It is clear from the record that the parties placed the family court in an untenable situation by presenting conflicting opinions and contentions without accompanying documentation. Ali consistently testified that he did not have income; yet, Patricia presented evidence that his lifestyle was not consistent with an utter lack of income (*e.g.*, his purchase of a luxury automobile). Furthermore, the list of his assets that Ali submitted to the family court includes “other accounts or other assets which are unbeknownst,” which could have indicated to the court that he was less than forthcoming. We recognize that the court did not want to deprive Ali’s children of his support if he indeed had significant assets. However, the evidence that Patricia submitted was insufficient to prove the amount or source of Ali’s imputed income.

This situation is very similar to the one in *Schoenbachler v. Minyard*, *supra*, in which our Supreme Court held that:

[n]either a “windshield appraisal” that Appellee’s “lifestyle and property reflected an income greater than her W-2’s and tax returns indicated” nor Appellant’s bare allegations of additional income are sufficient to support the trial court’s finding of additional income. . . . “[L]imited and speculative” evidence will not suffice.

Id. at 785. Although Patricia presented many financial records of Ali’s stock accounts, the records did not indicate whether Ali actually received **income** from the accounts. On the contrary, Ali presented evidence that his stock accounts were actually losing money. Patricia offered her opinion that Ali owned an interest in his father-in-law’s dairy farm, but the record does not contain any documentation

related to the ownership of the dairy farm. Therefore, the figure of \$5000 which the court used appears to lack a meaningful evidentiary basis, rendering it arbitrary by virtue of the circumstances as they were unraveled on appeal.

Because the family court lacked sufficient evidence upon which to impute Ali's income, we remand for further consideration by the court with the admonition to Ali that he provide the court with his bank statements reflecting that he did not have the income that he contends is lacking.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

J. Fox DeMoisey
Jonathan E. Bretienstein
Louisville, Kentucky