

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003101-MR

LORI OWENS

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JERRY BOWLES, JUDGE
ACTION NO. 96-FC-00541

SCOTTY OWENS; and
HON. JERRY BOWLES

APPELLEES

OPINION
AFFIRMING IN PART
AND REVERSING IN PART AND REMANDING

*** **

BEFORE: COMBS, DYCHE, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from an order entered pursuant to the appellant's motion for modification of child support, enforcement of a portion of the parties' property settlement agreement, and attorneys' fees. Upon reviewing the appellant's arguments in light of the record herein and the applicable law, we affirm as to the attorneys' fees issue and reverse and remand as to the court's ruling failing to include the payments for appellee's company car as part of appellee's gross income for purposes of determining child support and as to the court's refusal to order appellee to pay for the children's

health insurance coverage pursuant to the property settlement agreement.

The parties were divorced on November 1, 1994 and three children were born of the marriage. The parties' property settlement agreement, which was incorporated into the decree, provided that the parties would have joint custody of the children, with the appellant, Lori Owens, having primary physical custody. Appellee, Scotty Owens, agreed to pay appellant \$986.00 a month in child support and agreed to reimburse Lori for the cost of the children's health insurance which was to be provided through Lori's health insurance plan with her employer. At some point, Scotty fell behind on his child support and was not paying Lori for the children's health insurance. Consequently, on March 29, 1996, Lori moved for modification of child support because the child support set out in the parties' agreement was no longer consistent with the child support guidelines based on Scotty's current income. In said motion, Lori also asked that the court order appellee to pay her for the children's health insurance for which she was paying through deductions from her paychecks.

On April 4, 1996, a hearing on the matter was held before Judge Henry Weber. On the date of the hearing, Judge Weber made verbal findings on the record and ordered one of the parties to prepare an order consistent with the findings. Because the parties could not agree on Judge Weber's verbal findings, no order was ever entered by Judge Weber. Eventually, the matter was transferred to a different division of the

Jefferson Family Court to Judge Jerry Bowles. On May 6, 1997, Judge Bowles set the matter for a fifteen-minute hearing. At this hearing, Judge Bowles stated that he would review the videotape of the original hearing to determine what decisions Judge Weber had actually made on the record. On June 10, 1997, the court entered its findings of fact and conclusions of law based on the April 4, 1996 hearing. The court increased child support to \$1115.00 per month based on a finding that Lori's current monthly income was \$4,015.00 and Scotty's was \$5,533.00. On the issue of health insurance premium arrearages, the court declined to grant Lori reimbursement for the children's health insurance because it found that the proof submitted by Lori on this issue at the hearing was insufficient to make such a judgment. Thereafter, Lori moved to alter, amend, or vacate the court's order and also requested attorneys' fees. From the order denying this motion, Lori now appeals.

Lori first argues that the trial court erred in failing to include in the determination of Scotty's gross income for purposes of determining child support the \$420.00 lease payment made by Scotty's employer for the 1996 Grand Cherokee provided to him by his employer. Lori maintains that including this figure in his gross income would have increased her child support by \$56.72. In support of her position, Lori cites to KRS 403.212(2)(c) which provides in pertinent part:

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.

A trial court's findings in a domestic matter will not be overturned unless they are clearly erroneous. Ghali v. Ghali, Ky. App., 596 S.W.2d 31 (1980); CR 52.01. The evidence regarding the \$420.00 payment for the lease on Scotty's company car was not disputed at the hearing. Due to the mandatory language in the above statute and the fact that the statute specifically mentions company cars, we believe the court was clearly erroneous in not counting the company car as part of Scotty's gross income in the determination of child support. Accordingly, we reverse on this issue and remand for a recalculation of child support, including the monthly value of the company car as part of Scotty's gross income.

Lori next argues that the trial court erred in refusing to award Lori the health insurance premiums she paid for her children which Scotty was required to pay in the property settlement agreement. In reviewing the evidence submitted by Lori in support of her claim, there was conclusive evidence that Lori was paying for health insurance for her children out of her paycheck (employee plus dependent coverage). The evidence further revealed that the cost of the coverage for her and the children was \$329.00 a month. However, said evidence was unclear as to the net cost to Lori of the dependent coverage versus single coverage, the amount for which Scotty would be responsible. There was evidence in the form of a letter dated March 27, 1995 in which Scotty conceded that he owed Lori \$106.50

per month for the children's health insurance. In our view, because the evidence did establish that Lori was paying for the children's health insurance, the trial court's failure to order Scotty to pay some amount for this coverage or to take further evidence to conclusively determine this amount was in error. Accordingly, we reverse and remand for a determination of the net cost to Lori of the children's health insurance and an order requiring Scotty to pay the same.

The final issue for our review is Lori's claim that she is entitled to attorneys' fees per the property settlement agreement which provided that any party who breaches the property settlement agreement must pay the other party's attorney's fees incurred to enforce the provisions of the agreement. The court refused to require Scotty to pay Lori's attorneys' fees because Lori admitted that the attorney who initiated the action herein refunded Lori's attorney's fees. The court further found that the subsequent attorney's fees were the result of complications by the court which was not within the purview of the default clause of the parties' agreement. From our review of the record, we cannot say that the court's ruling was in error. Lori should not be entitled to attorneys' fees that she did not actually have to pay.

For the reasons stated above, the judgment of the Jefferson Family Court is affirmed in part and reversed in part and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Donald H. Smith
Louisville, Kentucky

BRIEF FOR APPELLEE:

Michael de Bourbon
Pikeville, Kentucky