

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001351-MR

RAYBURN HILDABRAND

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE PATRICIA WALKER FITZGERALD, JUDGE
ACTION NO. 99-FC-009749

KIMBERLY A. HILDABRAND

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE: Rayburn Hildabrand, Jr. appeals from an order of the Jefferson Family Court denying his motion to alter, amend, or vacate a February 19, 2003, order addressing maintenance, child support, and attorney fees. For the reasons stated herein, we affirm the order on appeal.

Rayburn and Kim were married in Jefferson County on September 14, 1985. The marriage produced three children. Kimberly filed a petition in Jefferson Family Court seeking to dissolve the marriage. Thereafter, all issues arising from the

divorce were resolved by way of a property settlement agreement executed on November 20, 2000. Both parties were represented by counsel. The property settlement agreement was accepted by the trial court and incorporated into a decree of dissolution rendered November 22, 2000.

When the property settlement agreement was executed, Rayburn was employed as a sales contractor for FedEx Custom Critical. His average salary derived from 1099 forms for the preceding three years was \$115,000 per year. Kim worked approximately 30 days per year as a substitute teacher, but devoted most of her time as a stay-at-home mother.

The property settlement agreement stated that Rayburn agreed to pay \$1,412 per month in child support and \$2,250 in maintenance until September, 2004. Beginning in October, 2004, the child support obligation rose to \$1,549 per month, and maintenance was reduced to \$740 per month. The agreement went on to provide that the maintenance obligation could be reduced if Rayburn's income for all sources fell below \$95,000.

In February, 2002, Rayburn filed a motion to reduce the child support and maintenance obligation claiming that he had suffered a reduction in income. The following month, Kim moved for an award of attorney fees and also moved to hold Rayburn in contempt for failing to pay preschool, medical and

orthodontic expenses of the children as required by the agreement.

A hearing on the matter was conducted by a Domestic Relations Commissioner. At issue was whether Rayburn's income had fallen below the \$95,000 threshold established in the property settlement agreement. Rayburn offered proof that his gross income before taxes and deductions was \$129,000 in 1999, \$134,600 in 2000, and \$95,000 in 2001. After business expenses were deducted, he argued that his adjusted gross income in 2001 was \$54,987. Kim questioned the business expenses and the method by which they were calculated.

Upon considering the record, the Commissioner rendered recommendations finding that Rayburn's adjusted gross income in 2001 was \$51,102. The Commissioner opined that Rayburn's average income had declined below the \$95,000 threshold set forth in the property settlement agreement, and recommended that the maintenance obligation be reduced to \$1,305. The Commissioner also recommended that child support be reduced to \$699.36 per month. The Commissioner went on to find that Rayburn should be held in contempt for failure to pay certain costs related to the children's care, and denied Kim's motion for attorney fees.

Kim filed exceptions to the Commissioner's recommendations. She maintained that the Commissioner

improperly deducted Rayburn's business expenses in calculating his income, since the parties did not factor in business expenses in arriving at the amount of maintenance set forth in the property settlement agreement. The Jefferson Family Court was persuaded by this argument, and held that the parties' income should be calculated in the same manner as the original agreement. The court entered an order to that effect on February 19, 2003. The court went on to rule that Rayburn was not entitled to a reduction in the maintenance obligation since his gross income was in excess of \$95,000. It also ruled that the slight reduction in Rayburn's income was not a substantial and continuing change of circumstances that would justify a reopening of the parties' agreement and a modification of child support. Lastly, it ordered Rayburn to pay \$2,000 towards Kim's attorney fee because of the disparity of the parties' incomes.

Rayburn responded with a motion to alter, amend or vacate the February 19, 2003, order. The trial court entered an order on June 4, 2003, denying his motion to alter, amend or vacate the February 19, 2003, order as to maintenance, but granting it as to child support. The court opinion that KRS 402.212(2)(c) allows for the deduction of business expenses from gross income when child support is calculated. It recalculated Rayburn's income to reflect a \$1,267 deduction, and found that

he was entitled to a reduction of \$230 per month (to \$1,182) in the child support obligation.

On June 11, 2003, Rayburn filed another motion to alter, amend or vacate the February 19, 2003, order. The motion was denied, and this pro se appeal followed.

We must first note that Rayburn's pro se brief fails to comply with numerous provisions of Kentucky Rules of Civil Procedure (CR) 76.12. The brief fails to contain an introduction, a statement of points and authorities, and a statement of the case and argument conforming to the statement of points and authorities. It also fails to contain a statement with reference to the record showing whether the issues were properly preserved for review and, if so, in what manner.¹ While we are aware of the difficulties of proceeding pro se and afford pro se parties a degree of latitude, we may strike a brief and dismiss an appeal for failure to comply with the civil rules.² This alone would form a sufficient basis for our decision to affirm the February 19, 2003 and June 4, 2003, orders.

Nevertheless, we have closely examined Rayburn's arguments and find no error. He first maintains that the trial court erred in denying his motion to reduce his maintenance obligation. He claims that when calculating his income for

¹ CR 76.12(4)(c)(v).

² Skaggs v. Assad, By and Through Assad, Ky., 712 S.W.2d 947 (1986); Yacom v. Jackson, Ky., 502 S.W.2d 524 (1973); Sharp v. Sharp, Ky., 491 S.W.2d 639 (1973).

purposes of his motion to alter, amend or vacate, he should be entitled to deduct business expenses. He argues that the amount of maintenance set forth in the property settlement agreement was not based on his income, but rather was simply an amount to which the parties agreed. As such, he claims that it may be modified based upon his adjusted gross income falling below \$95,000. Since his income, minus business expenses, is well below the \$95,000 threshold set forth in the property settlement agreement, he argues that he is entitled to a reduced maintenance obligation.

In examining the question of maintenance, the trial court noted that the property settlement agreement did not reflect a deduction of business expenses when the parties fixed his income in the agreement at \$115,000. Since the parties did not deduct business expenses when calculating his income in the property settlement agreement, the trial judge determined that the same method of calculating income should be used for purposes of Rayburn's motion to alter, amend or vacate. We do not believe the court erred in reaching this conclusion.

Rayburn contends that KRS 403.212(2)(c) should operate to allow him to deduct business expenses when calculating income for purposes of establishing maintenance. This statute, however, applies only to child support. It provides, in relevant part, that, "[F]or 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." It goes on to state that, "[I]ncome 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*." (Emphasis added). The statute is styled "[C]hild support guidelines; terms to be applied in calculations," and the trial court correctly concluded that it only applies to the means by which income is established for purposes of calculating child support. It does not apply to the calculation of income for the purpose of establishing maintenance. Common sense and equity also dictate that the same method of calculating income in the property settlement agreement should be used when calculating income for the purpose of reducing the maintenance obligation. Accordingly, we find no error on this issue.

Rayburn next argues that though the trial court ultimately sustained his motion seeking a reduction in child support, the court abused its discretion in failing to order an even greater reduction. The trial court relied on KRS 403.212(2)(c) which, as noted above, requires business deductions to be utilized in determining income for purposes of

establishing child support. Rayburn does not take issue with the court's reliance on this provision, but rather argues that the court improperly failed to accept all of his tendered business deductions.

We find no error in this issue because evidence is contained in the record upon which the trial court reasonably calculated Rayburn's business deductions and the resultant income figure. While the court did not accept all of the proffered deductions, Rayburn has offered little in the way of proving that the trial court's refusal to accept all of the deductions constitutes an abuse of discretion. The court found that Rayburn was entitled to a diminution of \$230 in child support per month based on the business deductions it accepted as properly proven. We regard this as a mixed question of fact and law,³ which will not be disturbed absent a showing of abuse of discretion.⁴ "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."⁵ The trial court did not engage in an arbitrary or capricious exercise of judicial power resulting in

³ The trial court resolved the factual issues regarding which deductions were proven by credible evidence, then applied its findings to the law to determine the amount of child support to which Kim was entitled.

⁴ Sherfey v. Sherfey, Ky.App., 74 S.W.3d 777 (2002), citing Bickel v. Bickel, Ky., 442 S.W.2d 575, 577 (1969).

⁵ Sherfey, citing Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679 (1994).

an unreasonable and unfair decision, and as such, we find no error.

Rayburn's final argument is that the trial court's award of attorney fees constituted an abuse of discretion. He claims that Kim should not be entitled to any attorney fees because the trial court incorrectly calculated the parties' incomes. He maintains that when his maintenance, child support, and other obligations arising from the dissolution are considered, the income differential between the parties is heavily weighed in Kim's favor. As such, Rayburn argues that he should not have to pay attorney fees to Kim and that the trial court erred in failing to so rule.

The trial court may exercise broad discretion in awarding attorney fees and costs.⁶ The award of \$2,000 in attorney fees to Kim does not constitute an abuse of discretion when taken in the context of the parties' finances, and in light of the fact that some of the fees were incurred when Kim sought reimbursement for unpaid medical expenses. Accordingly, we cannot conclude that the trial court erred on this issue.

For the foregoing reasons, we affirm the order of the Jefferson Family Court.

ALL CONCUR.

⁶ Neidlinger v. Neidlinger, Ky., 52 S.W.3d 513 (2001).

BRIEF FOR APPELLANT:

Rayburn Hildabrand, Jr.
Louisville, KY

BRIEF FOR APPELLEE:

Melanie Straw-Boone
Louisville, KY