RENDERED: July 8, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001776-MR

CHARLES E. VONSCHLUTTER, JR. APPELLANT

v. APPEAL FROM FAYETTE FAMILY COURT
HONORABLE TIMOTHY NEIL PHILPOT, JUDGE
ACTION NO. 03-CI-01336

BRENDA VONSCHLUTTER APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

GUIDUGLI, JUDGE: Charles E. VonSchlutter appeals from findings of fact, conclusions of law and order of the Fayette Family Court in an action he initiated to dissolve his marriage with Brenda VonSchlutter. He contends that the trial court erred in its award of maintenance, attorney fees, and computation of

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

child support. For the reasons stated below, we affirm the order on appeal.

Charles and Brenda were married in 1976. The marriage produced three children, one of whom is still a minor. Early in the marriage, Brenda worked as a beautician while Charles sought to obtain an associates' degree from Eastern Kentucky University. Charles later took a job at an automobile dealership parts department, where his income increased from $7,600 per year in 1982 to $16,660 per year in 1990.

Charles also received income from coal royalties which had been gifted to him by his family. This income ranged from $6,700 or so per year in the late 1970s up to approximately $65,000 per year in the mid 1990s. During the latter years, Charles and Brenda apparently used these royalty proceeds as their primary source of income, though Charles also worked as a self-employed handyman and construction contractor earning up to $19,000 per year. In 1998, Charles inherited $125,000 in securities and cash upon the death of his grandmother. Brenda stopped working outside the home in 1989 after the birth of the parties' third child, but returned to the workforce in 2001 where she earned about $16,000 per year. In 2002, the coal and gas royalties diminished to about $10,000 per year.

At the time of dissolution, Charles was employed part-time as a church custodian working fewer than 20 hours per week. Brenda was earning $1,645 per month.

On July 6, 2004, the Fayette Circuit Court rendered an order styled "Opinion, Findings of Fact and Conclusions of Law" which addressed the classification of certain property as either marital or non-marital, the extent and duration of maintenance, and child support. It awarded maintenance to Brenda in the amount of $600 per month until such time that she might remarry. It went on to order Charles to pay $5,500 in attorney fees, and awarded to Brenda child support in the amount of $245.66 per month.[2] The child support award was based in part on the court's finding that Charles was voluntarily underemployed. It imputed to him an income in the amount of $2,000 per month. The parties' motions to alter, vacate or amend the opinion were denied, and this appeal followed.

Charles first argues that the trial court abused its discretion and committed reversible error in its award of maintenance to Brenda. Specifically, he contends that her income exceeds her monthly expenses; that the court improperly imputed income to Charles for purposes of calculating the award; that it failed to take into account Charles' inability to meet

[2] This figure was increased to $300 by way of an order rendered on August 18, 2004 to reflect the amount originally indicated by the court during the final hearing.

his own financial needs; that the award resulted from improper gender bias; and, that the award constitutes an abuse of discretion because Brenda is employed full-time and earns more than Charles has ever earned. In sum, Charles seeks an order reversing the trial court's award of maintenance.

As the parties are well aware, maintenance is governed by Chapter 403.200. It states as follows:

> (1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:
>
> (a) Lacks sufficient property, including marital property (apportioned to him, to provide for his reasonable needs; and
>
> (b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.
>
> (2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:
>
> (a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

> (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
>
> (c) The standard of living established during the marriage;
>
> (d) The duration of the marriage;
>
> (e) The age, and the physical and emotional condition of the spouse seeking maintenance; and
>
> (f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

In order to properly award maintenance, the elements of both KRS 403.200(1)(a) and 403.200(1)(b) must be met.[3] In other words, there must be a finding that the spouse seeking maintenance lacks sufficient property, including marital property, to provide for his or her reasonable needs; and, that spouse must be unable to support himself or herself through appropriate employment according to the standard of living established during the marriage.

In the matter at bar, the parties income throughout the marriage came primarily from "coal money" generated by the properties of Charles' family. This income diminished to about $10,000 per year, requiring the parties to generate their own income. The Family Court found that Brenda's actual monthly

[3] Drake v. Drake, 721 S.W.2d 728 (Ky.App. 1986).

income was $1,645 per month, and that Charles worked fewer than 20 hours per week as a church custodian. It also found that Charles suffered no health problems and had a degree from Eastern Kentucky University. These findings are supported by the record.

Based on these findings, the court concluded that Brenda was unable to support herself according to the standard of living established during the marriage. It also determined that Charles was underemployed because he was capable of finding full-time employment earning $24,000 per year. We find no basis for tampering with these conclusions. A reviewing court may not alter a trial court's maintenance award unless the court abused its discretion or based the award on findings of fact which are clearly erroneous.[4] While Charles contends that Brenda's actual income is somewhat higher than the amount found by the trial court, we cannot conclude that the court's finding was clearly erroneous because evidence exists in the record to support the finding. Similarly, there is no dispute that Charles was engaged in part-time employment at the time the trial court rendered its opinion, and that he is capable of securing a full-time position. Since the record supports the trial court's findings and the conclusions of law drawn therefrom, we find no error on this issue.

[4] Perrine v. Christine, 833 S.W.2d 825, 826 (Ky. 1992); Browning v. Browning, 551 S.W.2d 823, 825 (Ky.App. 1977).

Charles next argues that the trial court abused its discretion when it ordered him to pay $5,500 of Brenda's attorney fees. He maintains that Brenda filed numerous frivolous motions that wasted valuable time and resources and inflated her attorney fees. He contends that when this fact is considered in light of his limited income, the award constitutes an abuse of discretion and must be reversed.

KRS 403.220 addresses attorney fees in dissolution proceedings. It states as follows:

> The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment.

Allocation of court costs and attorney fees is entirely within discretion of trial court.[5] We cannot conclude that the record supports Charles' assertion that the trial court abused its discretion on this issue. The trial court expressly considered the financial resources of both parties as the statute requires. The award of attorney fees was reasonable given the complexity of tracing the parties' assets and

[5] Tucker v. Hill, 763 S.W.2d 144 (Ky.App. 1988).

addressing the other issues raised during the course of the proceedings. The court did not abuse its discretion on this issue, and we find no error.

Charles' final argument is that the trial court erred when it based his child support obligation on imputed income. He maintains that there was no evidence in the record to support the conclusion that he is voluntarily underemployed, and that it was improper to impute to him a level of income which exceeds the highest income he has ever earned. He seeks an order reversing this finding and remanding the matter for recalculation of child support based on his actual income.

We find no error on this issue. KRS 403.212(2)(d) states as follows:

> If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income, except that a determination of potential income shall not be made for a parent who is physically or mentally incapacitated or is caring for a very young child, age three (3) or younger, for whom the parents owe a joint legal responsibility. Potential income shall be determined based upon employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community. A court may find a parent to be voluntarily unemployed or underemployed without finding that the parent intended to avoid or reduce the child support obligation.

Whether a child support obligor is voluntarily underemployed is a factual question for the trial court to resolve.[6] Such a finding cannot be set aside on appeal if it is supported by substantial evidence.[7]

As we stated above in addressing the maintenance issue, it is uncontroverted that Charles was working part-time when the order on appeal was rendered; that he earned an associate's degree from Eastern Kentucky University; and, that he suffers no health problems which would prevent him from working full time. While the coal money allowed both parties to limit the extent of their employment, those funds have now dwindled and the parties' economic circumstances obviously have changed.

These facts, each of which is contained in the record, constitute substantial evidence in support of the trial court's finding that Charles is voluntarily underemployed. The trial court's imputation of a $2000 income per month represents a 40 hour work week at an hourly wage of $12.50. When considered in light of the entire record, this imputation is not unreasonable and does not run afoul of KRS 403.212(2)(d) or the supportive case law. As such, we find no error.

[6] Gossett v. Gossett, 32 S.W.3d 109 (Ky.App. 2000).

[7] Id.; CR 52.01.

For the foregoing reasons, we affirm the July 6, 2004, Opinion, Findings of Fact and Conclusions of Law of the Fayette Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Sharon K. Morris
James Michael Morris
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BRIEF FOR APPELLEE:

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