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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002008-MR

BRYAN K. MILLER — APPELLANT

v.

APPEAL FROM BATH CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 02-CI-00244

CARLA D. MILLS MILLER — APPELLEE

OPINION
AFFIRMING IN PART
AND VACATING AND REMANDING IN PART

** ** ** ** **

BEFORE: BARBER, MINTON, AND DYCHE, JUDGES.

BARBER, JUDGE: This appeal stems from a dissolution of marriage proceeding originating in Bath County, Kentucky. On October 25, 2002, Appellee, Carla D. Mills Miller (Carla) filed for a divorce from Appellant, Bryan K. Miller (Bryan). The parties were married on December 31, 1997 and had two children. Both children were still very young at the time of the parties' divorce.

During the marriage, the parties enjoyed a comfortable lifestyle due to their joint efforts. Carla and Bryan each testified to working lengthy hours, at least 60 hours a week, for the family. They employed a full-time nanny to care for the children during the week. At the time of separation, Bryan owned a successful car lot selling used automobiles while Carla worked in sales for a printing company. Bryan always earned substantially more than Carla during the latter part of the parties' marriage.

The parties were continuously before the trial court over the financial obligations of Bryan to Carla,[1] as well as, custody and visitation of the parties' children. The court held final hearings on April 6, 2004; June 16, 2004; and August 11, 2004. Following the hearings of April 6, 2004 and June 16, 2004, a bifurcated decree[2] was entered July 12, 2004, which dissolved the parties' marriage and gave Carla sole custody of the children with Bryan having reasonable visitation. All issues relating to the distribution of property, assignment of

[1] An agreed temporary order was entered on December 11, 2002, whereby Bryan agreed to continue paying the mortgage on the marital home while Carla lived there with the children. Bryan also agreed to pay $1,900 per month in child support to Carla for the parties' two children.

[2] The decree was prepared by Bryan's attorney.

debt, and permanent child support were reserved for the August 11, 2004 hearing.[3]

Following the August 11, 2004 hearing, the court entered a post decree order September 1, 2004. The post decree order found that Carla had annual income of $36,000 and imputed an annual income to Bryan of $89,098 for child support purposes. Based on these income figures, the court calculated a child support obligation of $1,624.26[4] per month to Bryan. All issues related to the parties' marital assets and debts were not heard because Bryan had filed for bankruptcy prior to the hearing.

Bryan now appeals the court's award of sole custody to Carla in the decree as well as the calculation of child support in its post decree order. Bryan makes four arguments in his appeal: (1) the trial court erred in awarding sole custody of the parties' children to Carla; (2) the trial court abused its discretion in imputing $89,098 potential annual income to Bryan; (3) the trial court erred by concluding that Carla has only $36,000 income; and (4) the trial court erred in its finding that $667 per month employment-related child care was incurred. We now turn to Bryan's first argument.

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[3] The delay was due primarily to the parties' impending filings for bankruptcy.

[4] The amount also included Bryan's pro-rated portion of additional monthly child care costs of $667 plus the children's health insurance premium cost of $198 per month.

Bryan contends that the trial court erred in awarding sole custody of the parties' children to Carla rather than awarding the parties joint custody. As part of his argument, Bryan states that the trial court did not properly consider certain factors, specifically: (1) the parties' communication with each other during their extended cooperation; (2) the ability to reach an agreement for joint custody on a temporary basis; (3) the fact that intermediaries were available to facilitate exchanges and communication; and (4) no consideration of the likelihood of future cooperation between the parties that might result from an award of joint custody.

Bryan failed to file a written request for findings on these factors he now alleges the court should have considered pursuant to Ky. CR 52.02. Therefore, Bryan waived this argument. Ky. CR 52.04. We now turn our attention to the remainder of Bryan's argument and examine whether the trial court erred in its award of sole custody to Carla.

The applicable statute to guide trial courts in awarding custody is KRS 403.270, which states in pertinent part:

> (2) The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:
>
> (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;

> (b) The wishes of the child as to his custodian;
>
> (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
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> (d) The child's adjustment to his home, school, and community;
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> (e) The mental and physical health of all individuals involved;
>
> (f) Information, records, and evidence of domestic violence as defined in KRS 403.720;
>
> . . .
>
> (5) The court may grant joint custody to the child's parents, or to the child's parents and a de facto custodian, if it is in the best interest of the child.

The legislature has authorized Kentucky trial courts to make an award of joint custody[5] if it is in the best interest of the child. Fenwick v. Fenwick, 114 S.W.3d 767, 775 (Ky. 2003). Joint custody must be accorded the same dignity as sole custody and trial courts must determine which form would serve the best interest of the child. Id., (citing Squires v. Squires, 854 S.W.2d 765 (Ky. 1993)). In addition to the statutory considerations, the Kentucky Supreme Court has noted that the likelihood of future cooperation between the parties regarding decisions pertinent to raising the child is a relevant

[5] In a joint custody arrangement, unless otherwise agreed to by the parties or decreed by the court, both parties have equal rights and responsibilities for major decisions concerning their child including, but not limited to, education, health care, and religious training, and the parents will consult with each other on these major decisions. Fenwick supra 114 S.W.3d at 778.

factor in determining whether to award joint custody. Id. at 775-776.

Which party in the best interest of the children should have custody is a factual determination to be made by the court. Batchelor v. Fulcher, 415 S.W.2d 828, 830-831 (Ky. 1967). Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Ky. CR 52.01. Accordingly, our review is limited to whether the findings of the trial court are clearly erroneous or whether the trial court abused its discretion in awarding sole custody to Carla. Cherry v. Cherry, 634 S.W.2d 423, 425 (Ky. 1982).

Findings of fact are not clearly erroneous if supported by substantial evidence. Black Motor Company v. Greene, 385 S.W.2d 954 (Ky.App. 1964), (citing Massachusetts Bonding & Insurance Co. v. Huffman, 340 S.W.2d 447 (Ky. 1960)). Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. Secretary, Labor Cabinet v. Boston Gear, Inc., a Div. of IMO Industries, Inc., 25 S.W.3d 130, 134, (Ky. 2000). Additionally, the test for abuse of discretion is whether the trial judge's decision was arbitrary,

unreasonable, unfair, or unsupported by sound legal principles. Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

In the decree, the trial court found the following:

> 8. There is considerable testimony concerning the discord between the parties including domestic violence and an emergency protection order entered by the Bath District Court. As a result of this discord the parties have been unable to discuss visitation schedules or be around each other for visitation exchanges. It is apparent that the parties' marriage is irretrievably broken and that there is no reasonable prospect of reconciliation.
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> 9. Due to the extended discord between the parties and lack of communication ability, it is not in the parties' best interests for them to share joint custody.
>
> 10. From the testimony given, although conflicting, [Carla] has served as the children's primary care giver to a greater extent than [Bryan] as reflected by the testimony in the record.

The trial court then awarded sole custody of the children to Carla in its judgment. Judge William B. Mains also verbally stated his findings to the parties at the end of the June 16, 2004 hearing. Judge Mains stated that joint custody was not an option in this case, because joint custody implies that the parents can work together and that was not possible in the parties' situation. He did acknowledge that Bryan had a close relationship with his children. Judge Mains further

stated that Carla had been the primary care giver and had shown a greater interest in the children than Bryan.

After a review of the record and the lengthy trial videos, we do not believe that the trial court either erred or abused its discretion in awarding Carla sole custody of the parties' children. Each party had numerous witnesses on his or her behalf. The trial court ultimately determined that it would be in the children's best interest for their mother to have sole custody. We agree.

We believe there was substantial evidence presented by both parties to support the court's custody award. It was obvious that the parties shared a mutual animosity for one another. The parties' feelings towards one another had been in that state for at least the entire duration of the divorce according to the parties' and witnesses' testimonies.

Joint custody presumes parties can rise above their differences for the good of their children. Cooperation is an essential element of any joint custody situation and neither party appeared to be able to do so. The parties' relationship is an element the court should consider before making a custody determination. The trial court, in part, felt due to the parties' relationship that sole custody to Carla was in the best interests of the children. Further, testimony from nearly every witness supported that Carla had been the primary caregiver for

the parties' children. Therefore, we believe the trial court's award of sole custody was not clearly erroneous.

We are also unable to see that the trial court abused its discretion. It is clear from the trial video that Judge Mains actively listened to all testimony given and even asked his own questions of most of the witnesses presented. We do not believe he took the custody matter lightly. We believe he gave it the attention it deserved. We believe Judge Main's decision was neither arbitrary, unreasonable, unfair, or unsupported by sound legal principles. As such, we do not believe that the trial court abused its discretion. Therefore, we find no basis to reverse the trial court's award of sole custody of the parties' children to Carla.

Bryan next argues that the trial court abused its discretion in imputing $89,098 potential annual income to him. Kentucky Revised Statute 403.212(2)(d)[6] allows a court to base child support on a parent's potential income if it determines that the parent is voluntarily unemployed or underemployed. Polley v. Allen, 132 S.W.3d 223, 226 (Ky.App. 2004). The court must consider the totality of the circumstances in deciding

[6] Kentucky Revised Statute 403.212(2)(d) states in relevant part: If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income . . . 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 level 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 to impute income to a parent. Id. at 227. If the court finds that earnings are reduced as a matter of choice and not for reasonable cause, the court may attribute income to a parent up to his or her earning capacity. Snow v. Snow, 24 S.W.3d 668, 673 (Ky.App. 2000).

The hearing of August 11, 2004 was devoted solely to the matter of child support. Each party submitted significant evidence relating to their respective financial situations.

Bryan had a bachelor's degree in accounting from Morehead State University. Following graduation in 1993, he sold cars for a few years then turned to the insurance industry. Bryan began selling insurance in 1998 and was quite successful. As a result, he purchased an Allstate franchise in 1999. In 2000, he sold his franchise and focused all of his attention to a used car lot at the end of that year. Bryan was also successful with his car lot. On his 2000 joint tax return, Bryan reported a net profit of $42,147[7] for his car lot.[8] The following year, Bryan reported a net profit of $92,707 from his car lot on the parties' joint tax return.[9] In 2002 Bryan filed

[7] All net profit figures are from Schedule C, line 31, of the respective tax returns.

[8] Additional income reported on the parties' 2000 joint tax return was $24,961 for Carla's printing service company; $4,948 for Bryan Miller Boat Sales; and $41,334 for wages.

[9] Additional income reported on the parties' 2001 joint tax return was $25,788 for Carla's printing service company and $36,072 for Bryan Miller Insurance (buy-out payments).

separately from Carla and reported a net profit of $125,034 from his lot.[10] Bryan's 2003 tax return, however, reflected a dramatic change. In 2003, Bryan reported a net income of $26,563 from the car lot. At the hearing, Bryan testified that he had closed his car lot and was working at an auto garage where he earned $325 per week.[11]

Carla presented expert testimony from Harvey Faulkner, a certified public accountant with thirty-three years experience, to review Bryan's financial records for years 2000 through 2003 in order to attribute an appropriate level of income to Bryan for child support purposes. Mr. Faulkner did a retail dealer based analysis on Bryan's car lot.[12] Based on his analysis, Mr. Faulkner concluded that Bryan should be imputed an adjusted profit for child support guidelines of $231,483 per year.[13] Mr. Faulkner also testified about suspicious dramatic increases in expenses on Bryan's 2003 tax return versus prior years.

Bryan did not produce an expert of his own to refute Mr. Faulkner's calculations. However, Bryan explained the

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[10] Additional income reported on Bryan's 2002 separate tax return was $19,360 for Bryan Miller Insurance (buy-out payments).

[11] Bryan provided documentation of his current position and pay rate to the trial court.

[12] Mr. Faulkner stated he did a retail dealer based analysis due to information provided by Bryan at his deposition taken March 5, 2003.

[13] Mr. Faulkner's report was submitted into evidence.

variances in his 2003 tax return versus prior years to the court. He further testified that he no longer operated the car lot and was employed at an auto garage doing minor repair work. Bryan provided check stubs showing he earned $325 gross wages per week. Bryan testified that he was forced to take the low paying job in order to properly care for his children.[14]

In its post decree order,[15] the trial court found that Bryan was "capable of earning much more income since he has an accounting degree and substantial experience in car sales[16] and life insurance sales" and found he had "an imputed annual income of $89,098." The written order does not go into any further detail as to how the trial court arrived at this figure. In the trial video, Judge Mains verbally gave his findings to the parties, which included an explanation of the imputed income figure. Judge Mains stated he took Mr. Faulkner's average business net income of $81,435[17] then added back in deducted vehicle and meal expenses of $7,663[18].[19]

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[14] Bryan was referring to not only the parties' two children, but also a young daughter from a prior marriage.

[15] Carla's attorney prepared the post decree order.

[16] Bryan still had his dealer's license at the time of the August 11, 2004 hearing.

[17] The average was based on the average of 2001 business net income of $92,707; 2002 business net income of $125,034; and 2003 business net income of $26,563. These figures were taken directly from Schedule C, line 31 of each year's federal tax return.

[18] This total came from Mr. Faulkner's three year average of Bryan's deductible meals from Schedule C, line 24d and the IRS add-back amount of

As stated earlier, findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Ky. CR 52.01. We believe the findings of the court related to Bryan's imputed income are supported by substantial evidence. Specifically, the calculations relied upon by the court were taken from Bryan's tax returns as well as the testimony of Mr. Faulkner. We believe this was appropriate. Therefore, we affirm the finding of the trial court that Bryan's imputed annual income for child support purposes was $89,098.

Bryan's third argument is that the trial court erred by concluding that Carla had only $36,000 annual income. In its post decree order, the trial court found that Carla had $36,000 annual income but gave no additional explanation. There was also no further explanation by Judge Mains when he delivered his oral findings to the parties on August 11, 2004.

Kentucky Revised Statute 403.212(f) states "Income statements of the parents shall be verified by documentation of both current and past income. Suitable documentation shall include, but shall not be limited to, income tax returns, pay

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$5,600 (amount same for all 3 years) for an employer provided vehicle. This addition was made in accordance with KRS 403.212(2)(c).

[19] Judge Mains also stated that it was very clear that Bryan was capable of making more money. He continued by stating Bryan had voluntarily divested his business, and that it was no coincidence that the decrease in income occurred at the same time as the divorce.

stubs, employer statements, or receipts and expenses if self-employed." Neither this subsection nor any other provision of the guidelines explicitly requires a party to file an income statement that establishes his or her gross income. Schoenbachler v. Minyard, 110 S.W.3d 776, 783 (Ky. 2003). However, the Kentucky Supreme Court has interpreted KRS 403.212(2)(f) as a requirement that parties file fully-documented income statements in dissolution cases that present child custody issues. Id. at 784.

This does not mean that trial courts may consider only documented income when determining child support. Id. A trial court may consider income not susceptible to documentation if such income is properly established by the evidence. Id. It is not possible to document some income, such as unreported income, especially cash income. Id. Income calculations for guideline purposes necessarily must include all income of the parents, both documented and undocumented. Id. Although KRS 403.212(2)(f) imposes a mandatory obligation on the parties to report and verify their income and earnings with documentation, if a party fails to comply with this obligation, the burden remains on the opposing party to prove such income and earnings. Id. at 785.

The only instance in which Carla's income was estimated at $36,000 occurred when Carla testified that she

hoped to earn between $36,000 to $40,000 in 2004. We found no additional support for this figure in the record. Carla also testified that her estimated income for 2004 was $1,200 to $1,500 per month[20] from her employment at VoluForms[21] and an additional $2,000 to $2,500 per month from Cowboys.[22] Bryan presented no evidence refuting Carla's estimates as inaccurate.

Carla testified that her income from Cowboys was paid in cash. She did not present any copies of check stubs or employer statements to the court to support any of her estimated 2004 earnings. Carla reported gross wages of $26,657 from VoluForms on her 2003 tax return.[23] Carla's 2002 tax return was not a part of the record.

We do not believe that the trial court's finding that Carla's income is $36,000 is supported by substantial evidence in the record. Even taking Carla's lowest estimates of her monthly income, it is still higher than $3,000 per month. We believe it is necessary to remand for additional proof on Carla's income. Carla should provide documentation of her VoluForms earnings. It may not be possible for Carla to present documentation of her income from Cowboys due to it being

[20] Carla testified she was paid 40% of any profits made from jobs she sold.

[21] Carla testified that she was paid by check but it did not contain her year-to-date information.

[22] Carla testified that as of the hearing date she worked Wednesday and Thursday nights dancing at the club.

[23] Carla testified that the income listed on her return was from VoluForms.

entirely cash based. We leave the calculation of Carla's Cowboys income to the discretion of the trial court. Therefore, we vacate and remand to the circuit court to take additional proof related to Carla's income and amend its child support award, if necessary.

Bryan's final argument is that the trial court erred in its finding that $667 per month employment related child care was incurred. Kentucky Revised Statute 403.211(6) states "The court shall allocate between the parents, in proportion to their combined monthly adjusted parental gross income, reasonable and necessary child care costs incurred due to employment, job search, or education leading to employment, in addition to the amount ordered under the child support guidelines."

There was no explanation in the post decree order where the amount of child care expenses came from, the same being simply included in the attached child support worksheet. Also, Judge Mains did not state the basis of this amount in his verbal findings on August 11, 2004. Following a review of the record, we do not believe that the trial court's finding of child care expenses is supported by substantial evidence.

The only proof of child care expenses was Carla's testimony that when the children were in school, the fee was $25 per day Monday through Friday and $30 for Thursday evening.

Carla also testified that she paid in cash and could have gotten receipts, but had chosen not to do so.

While there is no specific requirement that such expenses be documented, we believe justice requires parties to provide proof of such expenses before including it in a child support calculation. Therefore, we vacate and remand with instructions for the trial court to require verification of child care expenses for the parties' two children and amend its child support award, if necessary.

For the reasons set forth above, we believe the trial court was neither clearly erroneous nor abused its discretion when it awarded sole custody of the parties' children to Carla; the trial court was not clearly erroneous when it imputed annual income of $89,098 to Bryan for child support purposes; but the trial court did err in its calculation of Carla's income and the parties' children's child care expenses for child support purposes. Therefore, we affirm the Bath Circuit Court's award of sole custody of the parties' children to Carla as well as the trial court's imputation of annual income of $89,098 to Bryan for child support purposes. We vacate and remand for additional proof on Carla's income and the parties' child care expenses for purposes of the child support calculation.

ALL CONCUR.

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