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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000653-MR

JULIE DIANNE CHURCH

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE MARGARET RYAN HUDDLESTON, JUDGE
ACTION NO. 01-CI-01165

RICKY LLOYD CHURCH

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART AND REMANDING

** ** * * *

BEFORE: GUIDUGLI, KNOPF, AND McANULTY, JUDGES.

GUIDUGLI, JUDGE: In this dissolution action, Julie Dianne Church has appealed from the Judgment and two subsequent orders entered by the Warren Circuit Court regarding child support, medical expenses, as well as the valuation of business and marital property. We affirm in part, vacate in part and remand.

Julie and Ricky Lloyd Church were married in Long Beach, California, on February 29, 1976. Two children were born of the marriage: Annie, born on March 30, 1986; and Michael,

born on January 24, 1989. Both Julie and Ric were self-employed, and ran a repair business in Bowling Green, Kentucky called Hi Fi Doctor. Julie and Ric separated on July 3, 2001, and Julie filed a Petition for Dissolution of Marriage on September 6, 2001. Less than three weeks later, Ric was ordered to vacate the marital home and business, and the business was eventually sold at auction during the pendency of the dissolution proceedings. The circuit court entered a bifurcated decree of dissolution on March 8, 2002, reserving the issues of the division of marital property and debts, child custody, and child support.

A hearing on the remaining issues was held on October 2, 2003, and the circuit court issued its Findings of Fact, Conclusions of Law and Judgment on December 30, 2003. The circuit court awarded the parties joint custody of the two minor children, naming Julie as the primary residential custodian. Ric was awarded liberal visitation and was ordered to pay Julie child support for both children in the amount of \$229 per month as well as an arrearage of \$4,122 dating back to the date Julie filed a motion for child support. The circuit court also found Julie to be entitled to an offset from Ric's proceeds representing one-half of the medical expenses she incurred for their children. Ric was awarded items of personal and business property, including a Kentucky Colonel Award and computer

equipment and software, all of which Julie was ordered to return to his possession. Finally, the circuit court found that Ric was not entitled to an offset from Julie's proceeds due to his discovery of 444 missing service tickets from their business.

Both Julie and Ric filed motions to alter, amend or vacate the circuit court's judgment. Ric argued that Julie was not entitled to child support as neither child lived with her, that he was entitled to a \$21,000 offset based on the discovered service tickets as well as a monetary offset for the boat awarded to him because Julie left it exposed to the elements while it was in her possession. In her motion, Julie argued that the items she was ordered to return to Ric, namely the Kentucky Colonel Award and the electrical equipment and software, were no longer in her possession.

By an order entered February 3, 2004, the circuit court denied Julie's motion, but granted Ric's motion in part. Regarding Ric's personal items, the circuit court ordered him to provide Julie with a description of the equipment and software and their respective values. Once received, Julie was ordered to give him either possession of those items or their value. Regarding custody, the circuit court did not designate either party as the primary residential custodian of Annie, and allowed Michael to decide with which parent he wished to reside by filing an affidavit. The circuit court then recalculated the

amount of back-due child support owed to be \$2,772, representing child support for Michael from July 2002 to December 2003.

Furthermore, the circuit court agreed with Ric that Julie was not entitled to an offset for the medical expenses because they were paid with marital funds. Regarding the missing service tickets, the circuit court determined that Ric had established that there was business income unreported by Julie, entitling him to one-half of the \$42,000. Finally, the circuit court ordered Julie to pay Ric \$2,000, representing the value of boat that had deteriorated while in her possession. Julie's motion to alter, amend or vacate that ruling was denied on March 1, 2004, and this appeal followed.

On appeal, Julie argues that the circuit court erred by not awarding child support for Annie, by finding \$42,000 in missing business income existed, by not ordering Ric to pay a portion of the children's medical expenses, by improperly determining the value of the boat, and by ordering her to pay for software. Ric counters each issue raised in her brief.

CR 52.01 provides that in actions tried without a jury, "the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment." The court's 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.”¹ A reviewing court is not permitted to substitute its own findings of fact for those of the trial court “where they were not clearly erroneous.”²

First, we shall address Julie’s argument regarding child support. The circuit court originally awarded joint custody, with Julie being designated as the primary residential custodian, although noting that Annie was currently living with a friend. Ric was ordered to pay Julie child support in the amount of \$229 for both children, retroactive to July 11, 2002. On reconsideration, the circuit court found that Annie had not resided with Julie during the time she sought child support and did not currently reside with her. Therefore, the circuit court did not name either party as her primary residential custodian, nor was any support awarded on her behalf. Regarding Michael’s residency, the circuit court determined that he should have a role in deciding where he was going to live. Based upon these findings, the circuit court ruled that Ric owed Julie an arrearage on child support at a rate of \$154 per month for Michael only, and that neither party was entitled to current child support for Michael until his residence was determined. The circuit court declined Julie’s request to reconsider these

¹ CR 52.01.

² Reichle v. Reichle, 719 S.W.2d 442, 444 (Ky. 1986).

rulings, noting that Annie had not lived with Julie for a substantial amount of time.

In her brief, Julie argues that there is no evidence of record to support the circuit court's finding that Annie had not lived with her during the time she sought child support, pointing to testimony that Annie did not move out until after the sale of the marital residence in September 2003. Also, Julie continued to support Annie after she left home, by paying for her medical and dental bills, for her college tuition, and for other living expenses. On the other hand, Ric continues to argue that the designation of a primary residential custodian and an award of support for Annie would be inappropriate as she did not live with either parent.

Based upon our review of the record, we agree with Julie that there is no evidence in the record to support the circuit court's finding that Annie did not live with Julie during the entire time she sought support. On the contrary, Julie testified at the October 2003 trial that Annie moved out only after the sale of their home in September, well after the July 2002 date on which she requested child support. For this reason, it appears that the circuit court's finding regarding Annie's residence during the period in question was not based upon substantial evidence of record. Accordingly, we must vacate this portion of the circuit court's ruling, and remand

the matter for a factual determination as to when Annie stopped living with Julie and, if appropriate, the entry of an award of support for Annie during the time when she actually resided with Julie.

Next, we shall address whether the circuit court erred or abused its discretion in determining that there existed \$42,000 in unreported income from the parties' business. While initially finding that Ric's discovery of the missing service tickets from a backup copy of their business records did not warrant a finding of unreported income by Julie, the circuit court reconsidered this ruling, finding that the records Ric produced at the October 2003 trial established his claim. In her brief, Julie asserts that the evidence does not support such a finding based upon previous years' gross income and the state of the repair industry. Moreover, she blames Ric for depleting the business account of money, "sabotaging" the business, and performing shoddy work. She also claims that the tickets represent a period of time both before and after she took control of the business, and those tickets after she took possession only totaled \$8,470. The pre-separation tickets, she claims, were duplicated and inflated. In his brief, Ric states that he discovered the missing tickets when he compared data from his backup copy of the repair tickets made prior to his leaving the business to the backup copy Julie provided. With

this information, he was then able to retrieve the missing tickets from the business computer's hard drive, once he received it from Julie. He points out that Julie in effect authenticated the missing tickets by contacting the various customers and asking them to verify payment, and posits that if such payments were made, then Julie failed to report the income.

We cannot perceive any error or abuse of discretion by the circuit court in awarding Ric an offset based upon his discovery of the missing repair tickets. Julie did little, if anything, to contest the tickets once Ric entered them as an exhibit during the trial. Not until the circuit court altered its first ruling and decided to award Ric an offset did Julie attempt to contest this issue, when she simply argued that no new evidence was introduced at the post-trial hearing that would support such a ruling. We must hold that the circuit court had sufficient evidence before it in the form of the recovered repair tickets to rule as it did, especially in light of Julie's failure to truly contest the introduction of and testimony concerning the tickets.

We have also reviewed Julie's three remaining arguments regarding the payment of the children's medical expenses, the valuation of the fishing boat, and the missing software awarded to Ric. We perceive no error in the circuit

court's rulings on these issues, and need not address them any further.

For the foregoing reasons, the judgment of the Warren Circuit Court is affirmed in part, vacated in part and remanded for further proceedings on the sole issue of child support.

McANULTY, JUDGE, CONCURS.

KNOFF, JUDGE, CONCURS WITH SEPARATE OPINION.

KNOFF, JUDGE, CONCURRING: I concur with the reasoning and the result reached in the majority opinion, but I write separately to add additional grounds with respect to the trial court's ruling that Ric did not owe child support for the parties' oldest child, Annie. Apparently, Annie moved out of Julie's house sometime before October 2, 2003, when she was seventeen years of age. Ric takes the position that Julie was not entitled to receive child support for periods when Annie was not living with her.

However, child support is paid for the benefit of the child, not the parent. Clay v. Clay, 707 S.W.2d 352, 353-54 (Ky.App. 1986). Moreover, parents have a legal obligation to support their own children until emancipation, completion of high school, or completion of the high school year during which the child reaches the age of nineteen. KRS 403.213(3). The trial court initially designated Julie as the residential custodian of both children. As such, she had the primary

responsibility to maintain a residence for the children and to provide their day-to-day needs. Fenwick v. Fenwick, 114 S.W.3d 767, 779 (Ky. 2003). Thus, Ric and Julie's obligations to provide support for Annie during her minority did not end simply because Annie ceased living with either parent.

Clearly, a child's emancipation is grounds for modification of child support, but it does not appear that Annie was formally declared emancipated prior to her eighteenth birthday. The fact that Annie stopped living with her mother may indicate a material change in circumstances warranting a modification of child support. KRS 403.213(1). Nevertheless, Annie's residence alone is not necessarily determinative of Ric's obligation to pay child support.

The majority correctly holds that this matter must be remanded for a determination of when Annie stopped living with Julie and for an appropriate modification of support based upon that finding. I would note that the trial court found that Julie had not been entirely honest with the court in her representations concerning Annie's residency. It is within the province of the trial court as the fact-finder to determine the credibility of the witnesses and the weight given to the evidence. Uninsured Employers' Fund v. Garland, 805 S.W.2d 116, 117 (Ky. 1991). Nevertheless, the trial court may not entirely terminate Ric's child support obligation to Annie during her

minority unless it finds that Annie was emancipated prior to her eighteenth birthday, or that Julie ceased to provide support for Annie after she moved away.

BRIEF FOR APPELLANT:

Kelly Thompson, Jr.
Bowling Green, KY

BRIEF FOR APPELLEE:

David Keen
Bowling Green, KY