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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000404-MR

COMMONWEALTH OF KENTUCKY, *EX REL*.,
SHARON ARLINGHAUS APPELLANT

APPEAL FROM KENTON CIRCUIT COURT
v. HONORABLE LINDA R. BRAMLAGE, SPECIAL JUDGE
CIVIL ACTION NO. 95-CI-01815

STEVE ARLINGHAUS APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MINTON AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.[1]

MINTON, JUDGE: The Commonwealth of Kentucky, *ex rel*., Sharon Arlinghaus, appeals from an order of the Kenton Circuit Court reducing Steve Arlinghaus's monthly child support obligation. Sharon has presented nothing to show that the trial court's decision to reduce Steve's child support was contrary to the evidence or the law. Therefore, we affirm.

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[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Steve and Sharon divorced in 1996 when three of their five children were minors. While the divorce was pending, Steve and Sharon entered into a property settlement agreement. Section 8.07 of that agreement provided that the $727.00 per month child support owed by Steve to Sharon was subject to annual review by application of the child support guidelines found at KRS 403.213. Furthermore, that section of the agreement provided that "[f]or the year[s] 1996 through 1999, the parties agree, income from the Investment Properties as identified in Section 10.01 shall be excluded from computation of child support." But the next sentence of the agreement provided that "'[i]ncome' referred to herein, shall include income from all sources with reference to the Investment Property, including capital gains." The circuit court incorporated the settlement agreement into its decree of dissolution of marriage.

Steve's child support obligation was reduced in 1997 and, again, in 1999, each when one of the children reached the age of majority. The court's 1999 order set Steve's child support obligation at $445.00 per month. In November 2003, however, the trial court granted Sharon's motion to increase Steve's child support obligation, largely due to an increase in his income, and raised his monthly obligation to $529.53.

In December 2004, Steve filed a motion to reduce the amount of child support, citing a reduction in his wages due to his prior unemployment and recent opening of his own real estate company. After averaging Steve's 2004 income with his 2003 income, the court determined that Steve's monthly earning capacity was $3,295.00 per month, a significant drop from the $4,479.00 monthly income it found him to have in November 2003. So the court granted Steve's motion and reduced his child support obligation to $350.62 per month. This appeal followed.

As best we can decipher Sharon's brief, she makes three arguments. First, she contends that the trial court erred by failing to include Steve's disability payments when determining his monthly income. Second, she argues that the trial court erred by failing to take Steve's rental property income into account in determining his monthly income. Finally, she argues that the trial court should have found Steve to be voluntarily unemployed. We reject each of these arguments.

We agree with Sharon that Steve's disability payments must be taken into account in determining his monthly gross income, because KRS 403.212(2)(b) requires disability payments to be included in assessing a person's gross income for child support calculation purposes. But we disagree with Sharon's contention that the trial court failed to take Steve's disability payments into account. The order in question recites

that it took into account the income Steve received "from all sources in 2004[.]"

Furthermore, the mathematics required to reach the court's conclusions show that Steve's disability payments were considered. The court found that Steve's earning capacity was "3,295.00 per month by averaging the income he received from all sources in 2004 with the average monthly income imputed to him in 2003 of $4,479.00." The mathematical formula used by the trial court is as follows: $4,592.00 (unemployment payments) + $2,700.00 (disability payments) + $18,044.00 (real estate business income) = $25,336.00 (total 2004 income). $25,336.00 + $53,748.00 ($4,479.00 monthly income from 2003 x 12 months) = $79,084.00 (combined 2003 and 2004 income) / 24 (total months in 2003 and 2004 combined) = $3,295.17 (average monthly income from 2003 and 2004). Thus, it is clear that the trial court took Steve's disability payments into account in arriving at his $3,295.00 monthly earning capacity.

Next, we agree with Sharon that Steve's rental property income should have been taken into account in determining his child support obligation because the settlement agreement's three-year window for excluding such income had expired. But the 2004 Form 1040 Schedule E, Supplemental Income and Loss from rental real estate, provided by Steve, showed that he had $2,301.00 in rental real estate losses in 2004. Although

the Schedule E submitted by Steve bears a notation that it is not final, the circuit court has the sole authority to choose what evidence to believe; and there is no tangible proof that the form submitted by Steve is inaccurate, especially in light of the fact that Steve submitted Schedules E from earlier years that also showed rental real estate losses. And as noted above, the trial court's order expressly stated that it took Steve's income from all sources into account in determining his child support obligation. So we reject Sharon's argument that the trial court should have added additional income from rental properties in assessing Steve's monthly income.

Finally, Sharon argues that the trial court erred by not finding Steve to be underemployed because he turned down a job paying $40,000.00 per year. But a $40,000.00 annual salary represents a $3,333.00 monthly income, a figure very near the $3,295.00 monthly income found by the trial court for Steve. And Steve testified that his search for higher paying employment was unsuccessful, which led him to open his own real estate company. That company did not produce large revenue during its infancy, which resulted in a diminution of Steve's income. So the trial court did not err by refusing to find Steve to be underemployed because there was evidence to support his

contention that his change of occupation, and concomitant decrease in income, was done in good faith.[2]

We may only disturb a trial court's assessment of child support if that assessment represents an abuse of discretion.[3] There is ample support in the record for the trial court's findings, and the legal conclusions of the trial court are consistent with the law. Therefore, we must affirm.

For the foregoing reasons, the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Gabrielle Summe Covington, Kentucky	Steve Arlinghaus, *Pro se* Villa Hills, Kentucky

[2] *See* 16 L. GRAHAM & J. KELLER, KENTUCKY PRACTICE, DOMESTIC RELATIONS LAW § 24.27 (2d ed. West Group 1997) ("[i]n the past, parents have been permitted employment changes under a good faith standard. If the obligor showed that his change in occupation was not related to an attempt to avoid child support, then his income was determined through his current employment because he was not underemployed.").

[3] Wilhoit v. Wilhoit, 521 S.W.2d 512, 513 (Ky. 1975).