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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002319-ME

ROBBIE GENE ROBINSON — APPELLANT

v.

APPEAL FROM CAMPBELL FAMILY COURT
HONORABLE D. MICHAEL FOELLGER, JUDGE
ACTION NO. 99-CI-00925

SANDRA STEELE-ROBINSON — APPELLEE

AND NO. 2007-CA-000726-ME

ROB GENE ROBINSON — APPELLANT

v.

APPEAL FROM CAMPBELL FAMILY COURT
HONORABLE D. MICHAEL FOELLGER, JUDGE
ACTION NO. 99-CI-00925

SANDRA STEELE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, KELLER AND MOORE, JUDGES.

ACREE, JUDGE: Robbie Robinson appeals from numerous orders of the Campbell Family Court relating primarily to his child support obligation and his failure to make timely payments to his former spouse, Sandra Steele (formerly Sandra Steele-Robinson). Both parties are proceeding *pro se*, although Sandra is a member of the practicing bar in Ohio. We have carefully considered all issues raised on appeal, and we affirm the orders of the family court.

This case has a convoluted history, fraught with bitterly contested legal proceedings at every step of the way. Consequently, we begin by examining some of the more significant interactions between the parties in the legal arena. Rob and Sandra were divorced in December 2000, however, the exact terms of their dissolution took some additional time to hammer out. In July 2001, they entered into a post-dissolution settlement agreement which addressed issues such as custody of their three minor children, child support, and allocation of expenses related to the children's enrollment in private school. The settlement agreement was accepted by the court the following month and incorporated in a post-dissolution decree. Pursuant to this agreement, Rob and Sandra were awarded joint legal custody of the children with no designation as to primary residential custodian. Instead, a shared parenting schedule was approved.

In October 2004, Sandra filed a motion claiming that Rob was withholding parenting time with their two sons by refusing to comply with the terms of the 2001 agreement regarding the amount of time they were to spend in their mother's home. The following month, she filed criminal charges against him. In January 2005, Sandra filed a motion to enforce her visitation and requested the first increase in child support since the original order was entered. The family court ordered Rob to return to the scheduled parenting time, appointed a guardian *ad litem*, and ordered Rob to have no contact with Sandra.

Sandra obtained an Emergency Protective Order against Rob in Kenton County in April 2005, and also filed a motion with the Campbell Family Court to address his numerous violations of its orders. A hearing was held May 13, 2005. The family court declined to hold Rob in contempt, or to issue a Domestic Violence Order. In addition, it entered an order changing the scheduled parenting time of the parties' two sons so they would reside primarily with Rob and have visitation with Sandra. Their daughter was ordered to alternate weeks with each parent, although she was allowed to spend two nights during her father's week at her mother's home. Sandra filed a notice of appeal with this Court because there were no affidavits supporting a request to modify the parenting schedule.

While Sandra's appeal was pending, Rob filed a motion to terminate his child support obligation and wage assignment, based on the May 2005 order granting him additional parenting time with the parties' sons. After a hearing, the

family court entered an order temporarily suspending his child support obligation. Rob filed a subsequent motion to have Sandra held in contempt for failing to pay one-third of the children's tuition for August and September 2005. He later requested an order reimbursing him for numerous expenses, such as clothing, sporting equipment, etc. Neither of these motions was successful.

On July 7, 2006, the family court entered the first of the orders from which appeal is taken. The order reinstated Rob's full child support obligation, regardless of any change in parenting time, denied his request to hold Sandra in contempt for her failure to pay one-third of the children's tuition for the past school year, and ordered Rob and Sandra to split tuition 80%/20% thereafter.

Rob filed a motion to alter, amend, or vacate and, on September 11, 2006, a motion for Kentucky Civil Rule (CR) 11 sanctions against Sandra based on statements about his travel schedule in one of her motions. The next three orders appealed were entered in October 2006. On October 10th, the trial court overruled Rob's motion to amend, alter, or vacate the July 2006 order. Another order, entered October 24th, denied Rob's motion for CR 11 sanctions. The last of these orders, entered October 26th, struck an improper exhibit in Rob's reply memorandum.

Rob filed a notice of appeal of the orders entered July 7, 2006, and October 10, 24, and 26, 2006. That case was assigned the number 2006-CA-002319-ME. Meanwhile, he had filed an unsuccessful motion for emergency relief

from his child support obligation and requested that Sandra be denied visitation, which this Court refused to grant.

The remainder of 2006 saw plentiful litigation between the parties. During this period of time, the parties' oldest child turned eighteen. Rob filed a motion to reconsider the family court's refusal to sanction Sandra. The guardian *ad litem* filed a report detailing concerns expressed by the parties' daughter about her father's behavior towards her mother. Sandra filed a motion asking for custody of their remaining minor son to be returned to her and for Rob's visitation to be supervised. As grounds for this motion, she alleged that Rob had engaged in a continual campaign of stalking behavior involving their sons, his own girlfriend, and their eldest son's girlfriend. She claimed that Rob installed a GPS tracking system on her car without her consent and, further, he was arrested and charged with a felony due to his illegal actions in accessing her computer. Finally, on December 8, 2006, Sandra received the first of the child support payments Rob had been ordered to commence two months earlier. She subsequently filed a motion to enforce the child support provisions of the October 10, 2006, order, which was heard on December 27, 2006.

The family court entered an order on January 10, 2007, setting the child support arrearage for the time period of June 2005-July 2006 at $17,450.00, and awarding this sum to Sandra as a lump sum judgment. The arrearage for July-December 2006 was set at $6,000.00, and Rob was ordered to pay Sandra an additional $375.00/week until this arrearage was paid off. The family court denied

Rob's request to calculate the arrearage from October 2006, rather than July 2006. Further, Rob was found to be in contempt of the court's orders, however, no sanctions were imposed provided that he continue timely payments on his arrearage each week henceforth.

On February 2, 2007, this Court vacated the order entered May 13, 2005, and ordered the family court to reinstate the agreed upon shared parenting arrangement from 2001. A week later, Sandra filed a second contempt motion, this time seeking to have Rob held in contempt for failure to comply with the January 2007 order. On March 26, 2007, the family court entered an order amending the July-December 2006 arrearage to $7,500.00 due to an error in counting the number of weeks involved and increasing the number of weeks Rob was ordered to pay an additional $375.00 accordingly. Both parties had made requests to adjust the lump sum arrearage, and these requests were denied. The trial court also refused to amend its finding that Rob was in contempt.

Rob appealed from the January and March orders, and this appeal was assigned the case number 2007-CA-000726-ME. This appeal was consolidated with his earlier appeal in order that all issues between the parties on appeal might be cohesively addressed.

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Most of Rob's claims in this appeal stem from the family court's order of July 7, 2006. This order reinstated the full child support obligation contained in the 2001 separation agreement, despite the change in parenting time. Further, the

family court refused to hold Sandra in contempt for her failure to pay her share of tuition and fees related to the children's extracurricular activities. Finally, the order found the separation agreement to be unconscionable with regard to the percentage of tuition assigned to each party and adjusted the terms accordingly.

Rob's first argument on appeal is that the family court ignored Kentucky Revised Statute (KRS) 403.212(2)(h) and (6)(a)-(b) in setting child support. The cited sections of this statute govern child support between parties with a split custody arrangement. We first note that the family court's May 13, 2005, order did not designate Rob as primary residential custodian for the boys. Rather, the motion referred to a modification of the parenting schedule. Rob fails to mention that this Court vacated the so-called split custody arrangement and ordered a return to the previous joint custody arrangement.

KRS 403.212, the same statute cited by Rob in support of his argument contains a provision addressing situations, like the one at hand, where the parties' combined gross monthly incomes exceeds the upper limit of the child support guidelines. "The court may use its judicial discretion in determining child support in circumstances where combined adjusted parental gross income exceeds the uppermost levels of the guideline table." KRS 403.212(5). This Court has previously stated "we will not second-guess the [family] court absent some gross error or abuse." *Peggler v. Peggler*, 895 S.W.2d 580, 582 (Ky.App.1995). We note that Rob filed a motion to amend, alter, or vacate the July 2006 order and requested additional findings of fact. The family court entered a new order in

response to the motion addressing, among other things, the decision to continue Rob's obligation to pay Sandra child support.

> In considering the totality of the circumstances, i.e., the parties' incomes, the parenting time, the financial needs of the children and the lifestyle created by both parties, the Court finds that the amount awarded by this Court ($1,625.00 per month) does not result in a windfall to [Sandra], nor does it constitute an "award of maintenance". There was no evidence introduced to prove that the expenses of [Sandra's] household had or has been significantly reduced, notwithstanding the change in parenting time. **Adkins v. Adkins, Ky.App. 574 S.W.2d 898 (1978)**.

Order of the Campbell Family Court, entered October 10, 2006. (emphasis in original). Although we are uncertain that *Adkins* adequately addresses the issue at hand, we do note that the family court's position is supported by the more recent decision of the Kentucky Supreme Court in *Rodney P. v. Stacy B.*, 169 S.W.3d 834, 838 (Ky. 2005).

More importantly, we note that Rob bargained for the amount of child support set by the trial court and agreed not to request such a decrease, despite allocation of parenting time.

> In accordance with paragraph (D) of the Court's Temporary Order entered on April 18, 2000, Rob shall continue to pay to Sandra the sum of $375.00 per week for child support. The weekly amount of $375.00 was and is based upon the factors set forth in paragraph (D) namely that Sandra has an average gross monthly income of $3,750.00; that Rob has an average gross monthly income of $12,500.00; that Rob pays $128.00 per month for medical insurance coverage for the parties' three minor children, and that a reduction of $50.00 per week in the child support amount prescribed by the Kentucky

> Child support guidelines has been made to compensate Rob for the additional nights he has the children each month. **At no time on or after the date of signing the Separation and Property Agreement shall Rob seek more than this $50.00 per week reduction to compensate him for the additional nights he has the children each month.**

Separation Agreement of July 18, 2001, accepted by the trial court August 2, 2001, (emphasis supplied). Sandra urges us to consider that Rob was represented by counsel when he signed the agreement promising not to seek any reduction in his child support based on additional parenting time.

Our statutes provide support for parties who voluntarily enter into a separation agreement. However, the terms of an agreement pertaining to custody, child support, and visitation do not bind the trial court. KRS 403.180(2). Typically, a trial court will refuse to accept a settlement agreement where the parties have agreed to child support which is less than that provided for by the child support guidelines. (*See*, *Tilley v. Tilley*, 947 S.W.2d 63 (Ky.App. 1997)). In this case the trial court accepted all provisions of the settlement agreement, including those addressing custody, child support, and visitation. Rob bargained away his right to request a reduction in his child support in 2001, and the family court determined that he should still be held to that bargain in 2006.

Rob's second argument is that the family court's July 7, 2006, order was arbitrary, unreasonable, unfair, and unsupported by sound legal judgment. As we have already discussed the circumstances supporting the family court's

decision to continue Rob's child support obligation to Sandra, we decline to adopt his view that the trial court abused its discretion.

He next challenges both the July 7th and October 10th orders, claiming that they contain insufficient findings of fact supporting the child support award. The child support amount for 2005 was decreased to $1,100.00 per month. This reduction appears to offset the fact that Sandra was not required to pay her portion of the children's school tuition for part of that year. The $1,625.00 per month child support obligation, which was reinstated as of January 2006, was the same amount ordered by the time of the post-dissolution settlement order and agreed to by Rob in 2001.

After the trial court reinstated Rob's child support obligation in its July 7, 2006, order he filed a motion pursuant to CR 59.05 to alter, amend, or vacate the order. He also requested specific findings supporting the child support orders pursuant to CR 52.02. The family court obliged in its order entered October 10, 2006, pointing out that it had determined Rob's income based on information he submitted about his average income for the previous four to five years. Further, the October 10th order notes that the parties stipulated their combined average income exceeded the upper limit of the Kentucky child support guidelines. KRS 403.211(3)(e) lists parental income in excess of the child support guidelines as a finding which justifies deviation from the child support guidelines. Thus, we disagree with Rob's contention that the family court's orders were not sufficiently supported by its findings.

Rob also takes issue with the family court's decision to hold part of the settlement agreement unenforceable. In its order of July 7, 2001, the family court addressed a contempt motion filed by Rob due to Sandra's failure to pay a portion of the children's tuition and school fees. The 2001 agreement provided that the children would attend private school until they graduated from high school. Rob agreed to pay two-thirds of the related expenses, with Sandra paying the balance. In future years, the proportion of school expenses to be paid by each parent would be adjusted based on their respective gross incomes. However, Sandra would never be obligated to pay more than fifty percent and Rob would never be obligated to pay more than two-thirds.

During the period in question, the family court had temporarily suspended Rob's child support obligation. The family court noted that Rob's income for the previous year had been at least $132,000.00, while Sandra had earned only $46,000.00. Thus, the motion to hold Sandra in contempt was denied. The terms of the 2001 agreement regarding tuition and school fees were found to be unconscionable due to the disparity in the parties' incomes. Rob was ordered to pay all of the remaining tuition and fees for extracurricular activities for the 2005-2006 school year. Thereafter, the parties were ordered to split these expenses 80%/20% beginning in August 2006. "It would appear that in cases of this nature the trial court is in the best position to evaluate the circumstances surrounding such an agreement." *Peterson v. Peterson*, 583 S.W.2d 707, 712 (Ky.App. 1979). Thus, we afford a high degree of deference to the family court's determination of

unconscionability. Rob has not met the burden of showing that the family court's decision on this issue was an abuse of discretion.

Rob also requests that we vacate the portion of the family court's order of October 24, 2006, denying his request for CR 11 sanctions against Sandra. The basis for his request was comments she made which allegedly misrepresented the impact of his work-related travel on their shared parenting schedule, both in a hearing and in a signed pleading. We note first of all that CR 11 only applies to written materials, thus any statements made in court do not furnish grounds for sanctions. Further, the purpose of sanctions is to prevent a party from engaging in conduct which is intended to accomplish "any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." CR 11. Rob makes no argument in his brief that Sandra's alleged false statements met any of the standards set forth in CR 11. Finally, our review of a trial court's denial of CR 11 sanctions is still governed by *Clark Equipment Co., Inc. v. Bowman*, (Ky.App. 1988) 762 S.W.2d 417, 420, which limits "our review . . . to a determination of whether the trial court abused its discretion." We perceive no such abuse in this case.

Finally, we have examined the remaining issues raised by Rob's brief in 2006-CA-002319-ME and we do not find grounds for reversing any of the four orders appealed from therein.

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Rob's second appeal addresses alleged errors in two orders from the family court, dated January 10, 2007, and March 26, 2007. The first of these orders denied as untimely Rob's motion to reconsider the family court's October 24, 2006, order, set child support arrearages, and found Rob in contempt without sanctions for failure to pay his child support. The second order corrected the arrearage amount for July-December 2006 due to an error in counting the number of weeks involved, acknowledged the timeliness of Rob's motion to reconsider the October 24, 2006, order, and denied his request to amend the contempt finding against him. There were still no sanctions imposed.

Rob presents two arguments on appeal. The first issue pertains to his child support arrearages. Rob argues the family court's order of January 10, 2007, incorrectly calculated the amount of child support he owed for the period between June 2005 and July 2006. The family court had previously ordered child support of $1,100.00 per month in 2005 and $375.00 per week after July 7, 2006. Rob noted that he paid $1,625.00 monthly for the first five months of 2005, thus, he considers himself entitled to a credit for overpayment of $525.00 per month based on one phrase in the family court's July 7, 2006, order which reads "the Court therefore orders child support from [Rob] to [Sandra] for the year 2005 in the amount of $1,100.00 per month." In order to assess this claim, it is helpful to review the surrounding facts.

The settlement agreement wherein Rob agreed to pay Sandra $1,625.00 per month in child support was entered in 2001. Sandra did not request

an increase in child support until January 2005. In support, she pointed out the fact that Rob's income continued to be significantly more than hers and the children's financial needs became more difficult to meet as they grew older. Instead of granting her request, the family court's May 2005 order improperly altered the parenting schedule, placing the boys almost exclusively in their father's home and considerably increasing the time their daughter spent with her father. Consequently, in June 2005, the trial court temporarily suspended Rob's child support obligation, and he ceased to pay any support at all to Sandra. Even after the July 7, 2006, order was entered, Rob ignored the child support obligation placed on him by the family court.

When the arrearage for 2005 was finally calculated in January 2007, the family court clearly stated that Rob was required to pay Sandra $1,100.00 per month effective June 2, 2005. Indeed, as Sandra points out the family court could not retroactively decrease the amount of child support during the period from January-May 2005 before the parenting schedule was altered. The family court's intention that the $1,100.00 per month child support obligation be applied to the months in which Sandra had received no child support was clearly reflected by its calculation of $7,700.00 owed for June-December 2005. Further, in response to Rob's CR 59 motion wherein he claimed the family court failed to credit him for overpayment in the first half of 2005, the family court's March 2007 order found that the arrearage had been correctly determined in the prior order. These factual findings are binding upon this Court "unless clearly erroneous, and due regard

shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01. We see nothing in the record of the proceedings below that would cause us to believe the family court committed clear error.

Rob also complains that he was not given sufficient credit for payments made under a wage assignment during the period between July and December 2006. The family court, in its order entered January 10, 2007, noted that Sandra had provided evidence of one payment of $375.00 made in June 2005, and two payments of $750.00 made in December 2006. The order of March 26, 2007, shows that the family court clearly considered evidence submitted by Rob as to the amount of his arrearage and rejected it. We do not perceive any clear error in this determination.

Lastly with regard to his child support arrearage, Rob argues CR 62.01 sets the date from which his arrearage should be calculated as October 10, 2006. Rob filed a CR 59 motion asking the family court to alter, amend, or vacate the July 7, 2006, order reinstating his child support obligation. The family court did not deny the motion until October 10, 2006. Because CR 62.01 operates "to stay the execution of or any proceedings to enforce a judgment pending the disposition of any such motion[,]" he contends the date on which his motion was denied was the proper date from which to begin calculating his arrearage. As the family court correctly pointed out, Rob's CR 59 motion did stay the execution of the order. As a consequence, Sandra was unable to collect any child support from him while it was pending. However, the effective date of the order remained July

7, 2006. Therefore, in its January 2007 order, the family court treated Rob's arrearage after July 7, 2006, as a separate matter and did not include it in the lump sum judgment. Rob fails to show any error in the family court's approach.

Rob's second argument on appeal is that the family court deprived him of his right to a hearing before finding him in contempt. The Campbell County Child Support Agency filed a motion on Sandra's behalf asking that Rob be held in contempt for failure to pay his child support as ordered. According to the accompanying affidavit, he was $23,950.00 in arrears at the time. The motion was noticed for a hearing on December 12, 2006. The hearing was continued to December 27th due a conflict with the guardian *ad litem's* schedule. The docket sheet noted that Sandra and Rob's counsel both agreed to the rescheduled date.

Sandra renewed the contempt motion prior to the second hearing, and the certificate of service indicates that Rob's counsel was served with notice of the time and date for the contempt hearing. Rob's counsel then filed a notice of abstentia stating that counsel had agreed to the rescheduled hearing without consulting his client and that Rob planned to vacation in Florida with his children during that week. Counsel stated that Rob wished to be present at any hearing and suggested that any issues which needed a hearing could be addressed on February 13, 2007, at another hearing already scheduled to take place.

Nevertheless, Rob and his counsel were present in court on December 27, 2006, when the family court was scheduled to hear Sandra's contempt motion. As previously stated, the family court found Rob in contempt, but declined to

impose sanctions beyond the requirement that he remain current with his child support payments and the additional weekly payments towards his July - December 2006 arrearage. Rob's subsequent CR 52.02 motion complained that the family court did not take testimony at the December 27th hearing before finding him in contempt. Further, his counsel claimed to have been unaware that the issue of contempt was being addressed that day and requested an opportunity to present evidence and make arguments prior to a contempt finding against Rob. The family court's subsequent order of March 26, 2007, indicates that the court reviewed the evidence presented and still found that Rob did not comply with the child support orders. Thus, the finding of contempt was deemed appropriate.

On appeal, Rob essentially rehashes the argument about counsel's misunderstanding the nature of the December 27th hearing. This contention is not supported by the evidence in the record. Rather, the evidence of his consistent failure to meet his child support obligations supports the family court's finding of contempt. This Court will not disturb the exercise of a lower court's contempt power absent an abuse of discretion. *Myers v. Petrie*, 233 S.W.2d 212, 251 (Ky.App. 2007).

For the foregoing reasons, the orders of the Campbell Family Court from which these consolidated appeals have been taken are affirmed.

ALL CONCUR.

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