

RENDERED: OCTOBER 3, 2008; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2008-CA-000293-ME

ANTHONY T. COLLIER

APPELLANT

v. APPEAL FROM FAYETTE FAMILY COURT  
HONORABLE TIMOTHY NEIL PHILPOT, JUDGE  
ACTION NO. 94-CI-03604

LISA COLLIER

APPELLEE

OPINION & ORDER  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: ACREE, CLAYTON, AND KELLER, JUDGES.

CLAYTON, JUDGE: This is an appeal from a decision of the Fayette Family Court on a motion to modify child support.

### FACTUAL SUMMARY

The Appellant, Anthony T. Collier and the Appellee, Lisa Collier, were divorced in July of 1995. They had two (2) children and on September 21, 2007, Anthony moved the Fayette Family Court to modify his child support

obligation based on one (1) of the children reaching the age of majority. Lisa subsequently moved the court to require that Anthony provide his tax returns. Specifically, she was concerned he was misrepresenting the income of his homebuilding business, Collier Custom Homes, Inc. She also moved for attorneys' fees and for a continuance on Anthony's motion so she could review his tax documents. After a hearing, the family court judge entered an Order overruling Anthony's motion for modification, granting Lisa's motion for attorneys' fees and sustaining her motion for an increase in child support. Anthony then filed this appeal.

#### STANDARD OF REVIEW

A trial court has discretion to deviate from the Kentucky Child Support Guidelines "where their application would be unjust or inappropriate." Kentucky Revised Statutes (KRS) 403.211(2); *Redmon v. Redmon*, 823 S.W.2d 463, 465 (Ky. App. 1992); *Rainwater v. Williams*, 930 S.W.2d 405, 407 (Ky. App. 1996). In reviewing the trial court's decision, we must determine whether it abused its discretion. Abuse of discretion requires us to consider whether the "decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000); *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

## DISCUSSION

First, Anthony argues that his lump-sum workers' compensation benefits award should not be included as "income" pursuant to KRS 403.212(2)(b) which provides, in relevant part, that "[g]ross income" includes income from any source, except as excluded in this subsection, and includes but is not limited to income from . . . workers' compensation benefits[.]" He contends that the use of the word "benefits" is a clear indication that the legislature did not intend "gross income" to include "settlements." We cannot agree with Anthony's position.

KRS 342.730(1)(a) and (b) provides that "income benefits" for workers' compensation purposes can be either Temporary Total Disability ("TTD") benefits or Permanent Partial Disability ("PPD") benefits. A "lump sum" settlement is based on the amount of weekly benefits and the number of weeks the benefits are or would have been paid. Anthony's lump sum settlement was for 265 weeks of future PPD benefits commuted to their present value of \$61,075.72. Under KRS 403.212(2)(b), such benefits must be counted in deciding what an individual's "gross income" is.

Anthony next contends that the entire lump sum he received should not be counted as income for one (1) year. As set forth above, the PPD benefits were for 265 weeks. He argues that if it is all included in 2007's income, he will have to move for a modification in 2008. In *Clary v. Clary*, 54 S.W.3d 568, 573 (Ky. App. 2001), the Court held that "when determining child support, the emphasis should be on including, not excluding, income especially where

including the income more accurately reflects a parent's economic condition and financial circumstances for that year.”

In the present action, Anthony's lump sum settlement is reflective of his income for the year 2007. Thus, the family court's inclusion of the settlement in that year's income for the purposes of child support obligation was proper. As set forth in *Clary*, there may be a motion for modification filed the following year if the income is non-recurring.

Next, Anthony contends that the family court erred in granting Lisa's motion for attorneys' fees. Lisa contends that this issue was not properly preserved for appeal. She argues that Anthony made no request for findings of fact on the record with regard to the granting of fees and that his failure in doing so precludes review.

Under Kentucky Rules of Civil Procedure (CR) 52.01, “[r]equests for findings are not necessary for purposes of review . . .” in actions tried without a jury. Thus, Anthony's failure to make a request for specific findings is not fatal to his appeal of the issue.

KRS 403.220 provides that:

[A]fter considering the financial resources of both parties [a court] 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[.]

Given the income disparity set forth in the calculation under the Child Support Guidelines, it is clear that the family court did not err in finding that

Anthony should be responsible for Lisa's defense of his motion to modify. Thus, we will uphold the family court's decision regarding the granting of attorneys' fees as well.

Finally, Lisa moves this Court to award her attorneys' fees in defending Anthony's appeal. CR 73.02(4) provides that:

If an appellate court determines that an appeal or motion is frivolous, it may award just damages and single or double costs to the appellee or respondent. An appeal or motion is frivolous if the court finds that it is so totally lacking in merit that it appears to have been taken in bad faith.

We do not find Anthony's position on the inclusion of his workers' compensation benefits in his income for purposes of the calculation of child support obligations to be either frivolous or in bad faith. Consequently, we will deny Lisa's motion for attorneys' fees.

For the reasons set forth above, we will affirm the decision of the Fayette Family Court and deny Lisa's motion for attorneys' fees.

ALL CONCUR.

ENTERED: \_\_\_\_\_

\_\_\_\_\_  
JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANT:

Michael Davidson  
Lexington, Kentucky

BRIEFS FOR APPELLEE:

Lois T. Prewitt  
Catherine C. DeLoach  
Stephanie L. Calvert  
Lexington, Kentucky