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 NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001318-MR

JOSEPH F. BALTIMORE

APPELLANT

APPEAL FROM WHITLEY CIRCUIT COURT
v. HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 01-CI-00304

MELISSA F. BALTIMORE

APPELLEE

OPINION
AFFIRMING

*** * * * *

BEFORE: ACREE AND VANMETER, JUDGES; HENRY,¹ SENIOR JUDGE.

HENRY, SENIOR JUDGE: Joseph F. Baltimore appeals from two orders of the Whitley Circuit Court, which denied his motion to modify custody and child support. We affirm.

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

A decree dissolving the marriage of Joseph F. Baltimore and Melissa F. Baltimore was entered by the Whitley Circuit Court on October 16, 2002. The decree incorporated by reference a property settlement agreement which provided that the parties would share joint custody of their son, born on July 27, 1993, and their daughter, born on February 4, 2001. Joseph was designated the primary residential custodian of the son and Melissa was designated the primary residential custodian of the daughter. The parties also agreed to a visitation schedule that would allow the children to spend time together on weekends. The settlement also provided that Joseph was to pay \$200.00 per month to Melissa in child support.

About four years after the entry of the decree, on January 22, 2007, Joseph filed a motion to modify custody and child support. The basis of the motion was that there had been a change in circumstances warranting such a modification pursuant to Kentucky Revised Statutes (KRS) 403.340(b). Joseph, who has remarried, claimed that his daughter had been allowed to spend extended periods of time at his home, and had consequently become integrated into his family with Melissa's tacit consent. As further support for the motion, Joseph claimed that Melissa had failed to provide a stable environment for their daughter because she had moved repeatedly since the entry of the decree. Joseph also requested a modification of his child support obligation commensurate with any change in custody.

Melissa filed a response and a series of motions including a motion seeking to be designated the son's primary residential custodian; a motion for an

order adopting the Rules of Visitation and designating an impartial place for exchange of the children; a motion to modify Joseph's support obligation; a motion for contempt against Joseph for failing to pay his child support; and a motion for psychological counseling for the children.

A hearing was held on the motions on March 28, 2007. Testimony was heard from Joseph, his mother, his current wife, and two neighbors. Melissa and the daughter's school teacher testified on Melissa's behalf. Following the hearing, the trial court entered findings of fact and conclusions of law which denied both parents' motions to modify the existing custody arrangement. The parties were ordered to abide fully by their previous agreement regarding visitation. The trial court also found Joseph to be in contempt of court for failure to pay child support and allowed him to purge himself of contempt by paying Melissa the arrears of \$2,500.00 within six months. The court also found a change in circumstances sufficient to modify child support and ordered Joseph to pay Melissa \$683.40 per month, based upon their incomes and in accordance with the child support guidelines. Joseph filed a motion to alter, amend, or vacate the order. On June 15, 2007, the trial court entered an order denying Joseph's motion except as to the amount of child support which was recalculated and reduced to \$561.10 per month. This appeal followed.

The requirements for custody modification are set forth in KRS 403.340, which states that

[T]he court shall not modify a prior custody decree unless after hearing it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interests of the child. When determining if a change has occurred and whether a modification of custody is in the best interests of the child, the court shall consider the following:

- (a) Whether the custodian agrees to the modification;
- (b) Whether the child has been integrated into the family of the petitioner with consent of the custodian;
- (c) The factors set forth in KRS 403.270(2) to determine the best interests of the child;
- (d) Whether the child's present environment endangers seriously his physical, mental, moral, or emotional health;
- (e) Whether the harm likely to be caused by a change of environment is outweighed by its advantages to him; and
- (f) Whether the custodian has placed the child with a de facto custodian.

The standard of review in cases involving an award of child custody requires that we make

... a determination of whether the factual findings of the family court are clearly erroneous. A finding of fact is clearly erroneous if it is not supported by substantial evidence, which is evidence sufficient to induce conviction in the mind of a reasonable person. Since the family court is in the best position to evaluate the testimony and to weigh the evidence, an appellate court should not substitute its own opinion for that of the family court. If the findings of fact are supported by

substantial evidence and if the correct law is applied, a family court's ultimate decision regarding custody will not be disturbed, absent an abuse of discretion. Abuse of discretion implies that the family court's decision is unreasonable or unfair. Thus, in reviewing the decision of the family court, the test is not whether the appellate court would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion.

B.C. v. B.T., 182 S.W.3d 213, 219-20 (Ky. App. 2005)(citations omitted).

Joseph contends that the trial court erred in finding that, although Melissa had allowed the daughter to spend more time with Joseph than was required under the terms of the decree, she had not voluntarily allowed the child to be integrated into his home. He argues that his testimony and that of the witnesses on his behalf showed that there had been a dramatic change in circumstances and that his daughter had been completely integrated into his family. Joseph's neighbors and his mother all testified that the daughter spent a great deal of time at his house. One neighbor testified that she had assumed Joseph had primary custody of the daughter "because she was always there." Another neighbor testified that she could "count on one hand" the number of days she did not see the daughter at Joseph's house. As further proof of the change in circumstances, Joseph cites the fact that from Christmas 2005 through February 2006, the daughter had stayed with him for ninety days during one ninety-six day period.

Joseph also contends that the record is lacking significant, substantive testimony from Melissa as to her plans and wishes regarding their daughter,

whereas it is replete with testimony regarding his daughter's interaction and relationships with him and his family. He argues that he presented a "wealth of testimony" about the "practical, familial, and loving relationships" in his household, whereas Melissa did not present substantive evidence in this regard. He argues that there was insufficient evidence presented regarding the daughter's adjustment to Melissa's frequent changes of residence. Joseph also argues that the court paid insufficient attention to the emotional harm suffered by his daughter when she was removed by her mother from kindergarten in his school district in Harlan County to a school in Melissa's school district in Corbin. He also points out that the child was not interviewed and that no expert testimony was presented.

We note that "a party seeking modification of a custody decree pursuant to KRS 403.340 must also bear the burden of proof." *Wilcher v. Wilcher*, 566 S.W.2d 173, 175 (Ky. App. 1978). Melissa did not bear the burden of disproving Joseph's claims. Furthermore, Joseph did not make a motion for additional findings of fact on any of the issues where he claims the trial court's order was deficient.

The thread which runs through [Kentucky Rules of Civil Procedure] CR 52 is that a trial court must render findings of fact based on the evidence, but no claim will be heard on appeal unless the trial court has made or been requested to make unambiguous findings on all essential issues.

Vinson v. Sorrell, 136 S.W.3d 465, 471 (Ky. 2004).

Moreover, Melissa did present substantial evidence which refuted Joseph's claims and supported the decision of the trial court. She testified that she never left the daughter in Joseph's care for more than two periods of two weeks each. She agreed that she had allowed the daughter to spend more time with her father than the schedule set forth in the decree, but she had done this in an effort to get along with Joseph and to improve her relationship with her son. She also admitted that she had moved frequently since the dissolution, from Pineville to Corbin to Harlan and then back to Corbin, in part to stay close to her family in Corbin, and then to be close to her son in Harlan. Melissa also testified that she had removed the daughter from kindergarten in Harlan to a school in Corbin because she was notified that the school in Harlan was "failing" under the No Child Left Behind Act (NCLBA). This testimony was supported by a letter in the record from Hall Elementary in Harlan stating that the school had been identified as requiring improvement under NCLBA and providing the option for parents to transfer their children to another school. The daughter's kindergarten teacher in Corbin testified that the child was progressing at school and was well-adjusted.

When we apply our standard of review to these facts, we find no abuse of discretion on the part of the trial court. Substantial evidence supported its conclusion that there had not been a change in circumstances sufficient to justify a modification of the original custody arrangement.

Joseph's next argument concerns the trial court's calculation of his child support obligation based on an imputation of a minimum wage income to

Melissa. Joseph testified that he earned between \$45,000.00 and \$46,000.00 in 2006 from his employment as a manager at Worldwide Equipment. Melissa operates a photography studio. She testified that her personal income was approximately \$8,000.00. Her tax return for 2005 listed her individual gross income as \$6,813.00, and the gross income from her business as \$48,485.00. The court imputed a minimum wage income to Melissa, and on that basis ordered Joseph to pay her the sum of \$683.40 in child support per month. Joseph filed a motion to alter, amend or vacate the order. The trial court modified the amount to reflect an offset for the amount of child support Melissa should pay to Joseph for the support of their son, \$122.30. With the offset, Joseph's child support is now set at \$561.10 per month.

Joseph argues that the trial court's imputation of income on the basis of Melissa's testimony and her individual tax return, and its failure to consider her business income and expenses, contravened KRS 403.212(2)(c) which states that

[i]ncome and expenses from self-employment or operation of a business shall be carefully reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support obligation. In most cases, this amount will differ from a determination of business income for tax purposes.

There is nothing in the statute or our case law, however, to suggest that a court is prohibited from using taxable income as the basis for determining gross income for child support purposes.

This statute [KRS 403.212(2)(c)] confronts trial courts with the unenviable task of distinguishing between a self-

employed child-support obligor's taxable income and what may be called his or her disposable income. Taxable income commonly serves as the starting point for determining "gross income" for child support purposes, and **because taxable income frequently provides a good measure of the income left to a business after the deduction of ordinary and necessary expenses, deviation from it should not be undertaken lightly.** Nevertheless, as the statute recognizes, taxation and child support serve different purposes. Trial courts establishing child support thus have the discretion and the duty to scrutinize taxable income and to deviate from it whenever it seems to have been manipulated for the sake of avoiding or minimizing a child support obligation or when deviating from it is clearly in the best interest of the child.

Snow v. Snow, 24 S.W.3d 668, 672-73 (Ky. App. 2000)(citations omitted) (emphasis supplied).

There was no evidence presented that Melissa's income had been manipulated for the purposes of avoiding or minimizing a child support obligation. The 2005 tax return provided by Melissa included a Schedule C form showing profit or loss from the business. The expenses listed included advertising, car and truck expenses, depreciation, insurance, office expenses, rent or lease of vehicles, and other business property, supplies, taxes and licenses, deductible meals and entertainment and utilities. The largest single amount was \$13,783.00 for lab fees. Joseph's attorney did not question Melissa about any of these specific expenses at trial, nor did he call her tax preparer as a witness. On appeal, Joseph has not specified which of these expenses should have been disallowed in computing her gross income for purposes of calculating child support. Although the trial court

admittedly made comments which suggest that it would rely solely on Melissa's gross income, and not delve into business deductions in arriving at an income for child support purposes, the court was not provided with any evidence that Melissa had manipulated her business income in order to avoid or minimize her child support obligation. Its reliance on her taxable income, and imputation of a minimum wage income on that basis for child support purposes, was justified under these circumstances.

For the foregoing reasons, the orders of the Whitley Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Scott M. Webster
London, Kentucky

BRIEF FOR APPELLEE:

Jane R. Butcher
Williamsburg, Kentucky