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# Commonwealth of Kentucky

# Court of Appeals

NO. 2008-CA-000865-ME
&
NO. 2008-CA-001180-ME

MARY LEVAN SHIVELY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ELEANORE GARBER, JUDGE
ACTION NO. 04-CI-504397

BENJAMIN SHIVELY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, KELLER AND LAMBERT, JUDGES.

CAPERTON, JUDGE: Mary Levan Shively (Paulie) appeals[1] from the Jefferson Family Court's order whereby the court granted Benjamin Shively's (Ben) motion to modify child support, denied Paulie's motion to modify child support, and denied both parties' motions for attorney fees. After a careful review of the

[1] Ben filed a cross-appeal but has only responded to Paulie's arguments. As such, Ben's cross-appeal is not addressed.

parties' arguments, the record, and the applicable law, we hereby affirm the Jefferson Family Court's order.

The parties share joint custody of their two minor children. Ben is the primary residential custodian and as such, Paulie was required to pay Ben $159 per month in child support.[2] Ben is an attorney currently practicing as an independent contractor with the Waters Law Office. Prior to his independent contract work, Ben worked for the law firm of Parker and O'Connell in Louisville. Ben's largest client at Parker and O'Connell was the tobacco company Brown and Williamson, which generated a substantial amount of income for Ben.[3] At the time child support was originally calculated in 2005, the court acknowledged that Ben's income would probably significantly decrease in that he anticipated losing the Brown and Williamson account as the company was moving its headquarters from Louisville.

Paulie is a senior manager in the tax section at Deloitte and Touche, an international accounting firm. She began there in 1991 and worked more than full time hours until the end of 2005, when she switched to fewer hours for less pay. After Paulie switched to fewer hours at work, she moved the court to allow her to provide afterschool care for the parties' children on "Ben's days" if he was

[2] The parties were divorced by decree of the Jefferson Family Court on July 15, 2005, with the parenting schedule set by the court on October 28, 2005. During the school year Paulie has the children from Thursday after school to Friday morning during week 1, and during week 2 she has the children from Thursday after school until Monday morning. Schedule reverses in the summer.

[3] Ben earned $553,221 in 2004.

required to work. On March 21, 2006, the court entered an order that permitted Paulie to provide afterschool care for the children, but the trial court emphatically stated it was not changing the parenting schedule.[4]

On November 30, 2007, the court held a hearing[5] on Ben's motion to increase child support. However, Ben did not provide sufficient verification of his current income at the hearing.[6] Further, Paulie presented an expert witness at the hearing to testify as to Ben's earning capacity. Ben argued that this was an unfair surprise. The trial court kept the record open after the hearing for documentation of Ben's 2007 income and any additional expert witness testimony regarding Ben's potential earning capacity. Each party subsequently filed two post hearing briefs.

After the record closed on February 29, 2008, the court reviewed the evidence presented by the parties. In its order of April 4, 2008, the court addressed the outstanding motions before it: Ben's motion to modify child support, Paulie's motion for common law judgment for child care expenses,[7] Paulie's motion to modify child support, and both parties' request for attorney fees.

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[4] Paulie agreed during this time that the parenting schedule should not be changed. If Ben is not required to work on his days, then Paulie does not have a right to provide childcare afterschool. Thus, Ben is still credited with custody on his days even though Paulie provides afterschool care when he works.

[5] This was in addition to the sixteen prior appearances before the trial court concerning the matter.

[6] While Ben provided documentation that he received $44,642.36 from Parker and O'Connell in 2007 from money due and owed, Ben testified that he is unsure if he will continue to be paid. The trial court properly took the amount of money that Parker and O'Connell paid Ben in 2007 into account when calculating Ben's income for the year. Ben provided his 2007 Form 1099 in February 2008 indicating his income from the Waters Law Office.

[7] This ruling was not appealed from.

In its order the trial court first addressed why it found Dr. Berla's opinion (Paulie's expert) that Ben should be making $220,000 per year not credible. First, Dr. Berla acknowledged that Ben's income had fluctuated greatly over the past five years; therefore, past income was not determinative. Second, the information provided to Dr. Berla was inaccurate as Dr. Berla thought Brown and Williamson was a large law firm and not a tobacco company. Moreover, Dr. Berla thought Ben was a non-equity partner and that his last employer was Brown and Williamson, contrary to the fact that Ben's last employment was with Parker and O'Connell. Third, Dr. Berla utilized the Altman Weil Survey of Law Firm Economics from 2004 as a basis for Ben's earnings. The court noted that this survey was based on self-reported information and Dr. Berla did not know if the information was verified. Further, only sixty-four Kentucky attorneys responded to the survey. Dr. Berla did not look at the survey for smaller law firms since he thought Ben worked for a large law firm. The survey included attorneys who had practiced over 20 years, whereas Ben has been licensed for less than 10 years. Fourth, Dr. Berla could not state that Ben was underemployed. Thus, the trial court concluded that Dr. Berla's opinion contained no relevant information.

The trial court next addressed the parties' parenting schedule which had not changed since October 28, 2005. Even though Paulie provides afterschool care for the children, the court noted that she had failed to explain how this had morphed into additional parenting time when Paulie agreed earlier that this was not a change to the parenting schedule. The court found that during the school year

Ben has the kids 64% of the time and Paulie 36% and that this reverses in the summer.

As to the parties' income, the trial court found that Ben's gross income in 2007 was $131,177 based on the evidence within the record, which was 55% of the combined parties' monthly incomes. The trial court found Paulie's income in 2007 to be $108,391.72 (45% of the combined monthly incomes) based on her average salary and bonuses from 2003-2007 and that Paulie had worked more than full time during the marriage but had recently reduced her hours for less pay. The parties' combined monthly parental income remained above $15,000; therefore the court deviated from the child support guidelines.

The court then set Paulie's child support obligation, as the non-primary custodian, based on the children's reasonable monthly expenses of $2500. The court took the percentage of the combined monthly adjusted income that Paulie earned (45%) and multiplied this by the children's reasonable needs per month. This amount of $1,125 per month was reduced to $609.38 per month as Paulie was paying some of the children's living expenses based on her having the children more often. This amount was again reduced since Paulie provides for the children's health insurance and Ben is responsible for 55% of the cost. Thus, the trial court set Paulie's child support obligation at $492.38 per month.

Last, the court declined to award either party attorney fees as they both contributed to unnecessary legal expenses, Paulie's attorney did not submit a time sheet, Dr. Berla did not add anything of value to the court's determination of

Ben's income, and the disparity in income was not great. It is from this lengthy and well-reasoned order that Paulie appeals.

Paulie sets forth five claimed errors which she argues mandate reversal of the trial court's order modifying child support. First, Ben's motion to modify child support should have been denied because of the incomplete information he presented at the hearing. Second, the court abused its discretion by ordering Paulie to pay an increase in child support, [8] particularly given the near equal parenting schedule. Third, the court erred in its rulings regarding the disclosure of expert witnesses, which resulted in an unfair proceeding to Paulie's claims that the trial court granting Ben additional time to obtain an expert and quashing her discovery was unfair. Fourth, the court erred in quashing Paulie's discovery requests. Fifth, the court should have awarded attorney fees to Paulie under CR 37 and KRS 403.220 due to Ben's tactics before and after the child support hearing.[9]

Ben counter-argues that the trial court did not err and thus we should affirm the order modifying child support. First, Ben's motion to modify child support was properly granted. Second, the court did not abuse its discretion in computing the child support. Third, the court did not err in its ruling regarding Paulie's failure to disclose her expert. Fourth, the court did not err in quashing

[8] In the brief to our Court Paulie objected to the trial court's ordering of child support in the amount of approximately $600.00 per month. However, we note that in the trail court's final judgment Paulie's child support obligation was $492.38 per month.

[9] Paulie presents her claimed errors concerning the trial court's rulings regarding disclosure of expert witnesses and quashing of her discovery request as one argument. We have more properly characterized this as two arguments.

Paulie's discovery requests. Fifth, the court did not abuse its discretion in not awarding Paulie attorney fees.

At the outset we note that our standard of review concerning the issues presented by the parties is whether the trial court abused its discretion in modifying child support, in ruling on evidentiary and discovery matters, or in denying attorney fees to the parties. *See Goldsmith v. Bennett-Goldsmith*, 227 S.W.3d 459, 461(Ky.App. 2007)(modification of child support order is reviewed under abuse of discretion); *Brown v. Brown,* 952 S.W.2d 707, 708 (Ky.App. 1997)(deviation from child support guidelines reviewed under abuse of discretion standard); *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000)(abuse of discretion is the proper standard of review of a trial court's evidentiary rulings); *Naive v. Jones*, 353 S.W.2d 365, 367(Ky. 1961)(appellate court should respect the trial court's exercise of sound judicial discretion in the enforcement of the civil rules pertaining to discovery); *Miller v. McGinty*, 234 S.W.3d 371, 372 (Ky. App. 2007)(decisions regarding attorney fees are within the sound discretion of the trial court).

. Abuse of discretion occurs when a decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *McKinney v. McKinney*, 257 S.W.3d 130, 133 (Ky. App. 2008) (internal citations omitted). Accordingly, we shall review each of the issues presented by the parties in light of the aforementioned abuse of discretion standard.

As to the trial court's factual findings, such as Ben's income, we review said findings pursuant to CR 52.01. This Court will not disturb the trial court's findings of fact unless clearly erroneous. "Findings of fact are not clearly erroneous if supported by substantial evidence." *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 852 (Ky. App. 1999). Substantial evidence is that evidence, when taken alone or in the light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable people. *Id., citing Kentucky State Racing Commission v. Fuller,* 481 S.W.2d 298, 308 (Ky. 1972).

In support of Paulie's first argument, that Ben's motion to modify child support should have been denied because of the incomplete information he presented at the hearing, Paulie argues that the trial court should have denied Ben's motion because Ben did not sustain the burden of proof on his motion to modify. Thus, Paulie argues, the trial court should not have held the record open after the hearing for Ben to supplement his documentation concerning his income.

KRS 403.213 controls the modification of child support obligations. Ben's motion to modify Paulie's child support obligation required a "showing of a material change in circumstances that is substantial and continuing." KRS 403.213(1). A 15% change (or greater) in the amount of support due per month shall be rebuttably presumed to be a material change in circumstances. KRS 403.213(2). While we agree with Paulie that CR 43.01 required Ben to meet his burden of proof on his motion to modify, we do not agree that the trial court abused its discretion in keeping the record open. We find Kentucky Rules of

Evidence (KRE) 103 to be persuasive in this situation. At the hearing the court was faced with motions[10] from both parties to modify child support.

As Ben did not provide sufficient documentation of his income[11] at the hearing, which the court necessarily needed in order to rule on either motion to modify child support, the court understandably held the record open for a limited duration. Appellant has not supplied this Court with any authority that the trial court is required to close the record upon the conclusion of a hearing. Further, the effect of holding open the record for supplementation by Ben did not affect a substantial right of Paulie. Paulie has failed to cite any authority, nor do we know of any, which would prevent the trial court from holding the record open for additional evidence; thus we do not find that the court abused its discretion in holding open the record for supplementation.

Moreover, while the court found that Ben was not forthcoming about his income and did not provide all full documentation until after the hearing, there was adequate documentation for the court to find Ben's 2007 income as $131,177 once the record was supplemented. As such, Ben adequately met his burden of proof with his motion to modify child support and the trial court did not abuse its discretion in modifying the child support obligation.

[10] We note that when the trial court was faced with a motion to modify child support the result could be either no change, an increase, or a decrease in the amount depending on what the evidence substantiates; this is especially true when faced with dueling motions.

[11] Paulie further argues that the deposition of Bob Waters of the Waters Law Group did not add to Ben's verification of income. We have declined to address this as the trial court was provided sufficient documentation of Ben's income independent of the deposition. Paulie's argument that Ben can amend his Form 1099 with the IRS at any time is a red herring as the trial court explicitly addressed this issue in its order by directing that if Ben had under-represented his income then Paulie would be awarded attorney fees if Paulie is required to file a motion.

Paulie next argues that the court abused its discretion by ordering her to pay an increase in child support given the near equal parenting schedule.[12] Ben counter-argues that the court properly determined the amount of Paulie's child support obligation. Upon examination of the record and the applicable law, we agree with Ben that the trial court correctly determined Paulie's child support obligation.

As previously discussed a trial court may only modify an existing child support obligation upon "showing of a material change in circumstances that is substantial and continuing." KRS 403.213(1). A 15% change (or greater) in the

[12] Paulie presents a litany of sub-arguments to support her position which we have briefly addressed as the trial court did not abuse its discretion in modifying Paulie's child support obligation.

First, Paulie argues that Ben has steadfastly refused to pay for the majority of the children's extracurricular expenses and for when the children are with Paulie afterschool. This is an argument best addressed by the trial court; if Ben is shirking his proportionate share of the children's expenses, then the trial court is in the best position to enforce its orders.

Second, the court was required to take into account the amount of time the children are with Paulie. This sub-argument is meritless as the order of the court explicitly addresses this.

Third, Ben should pay Paulie $520 a month based on a $200,000 income and with Ben's greater income and shared parenting time. Ben's income was found to be $131,177 and this finding is not clearly erroneous; thus, Ben as the residential custodian is entitled to child support. *See* CR 52.01 and *Brown, infra.*

Fourth, the court stated that Paulie failed to explain how the after school time morphed into additional parenting time, either the children are with Paulie or they are not. This argument is meritless as the court explicitly did not change the parenting schedule. Paulie's providing afterschool care does not magically dictate a change, especially given that at the time of the court's order allowing Paulie to provide afterschool care she agreed that this was not a change in parenting time.

Fifth, when the parents' income was $668,368, the court set the children's reasonable expenses at $2500; with the sizeable drop in income that amount should have been reduced. Paulie does not cite us to any case law that mandates the court recalculate the children's reasonable expenses when the parents combined monthly income is still well over the Kentucky child support guidelines. Thus, we decline to find abuse of discretion by the trial court.

Sixth, Paulie's expenses are incurred whether the children are with her or not so she should get a bigger credit. The trial court took this into consideration when setting Paulie's child support obligation.

Seventh, Paulie is supporting Ben's opulent lifestyle. This argument is again more properly addressed to the trial court.

amount of support due per month shall be rebuttably presumed to be a material change in circumstances. KRS 403.213(2). The evidence presented to the trial court established that Ben's income was $131,177 and Paulie's was imputed to be $108,391.72.[13] *See* KRS 403.212(2)(d). Compared to the amount of income the parties enjoyed at the time the original child support obligation was set, this was clearly more than a 15% change in the amount of support due per month; as such, the child support obligation was properly modifiable.

The trial court correctly concluded that deviation from the child support guidelines was appropriate as the parties' combined monthly adjusted parental gross income was in excess of the Kentucky child support guidelines. *See* KRS 403.211(3)(e). The trial court then set Paulie's child support obligation in light of all the relevant factors. First, the court determined that the children's reasonable needs were $2500 per month. Next, the court took the percentage of the combined monthly adjusted income that Paulie earned (45%) and multiplied this by the children's reasonable needs per month. This amount of $1,125 per month was reduced to $609.38 per month as Paulie was paying some of the children's living expenses at her home because she has the children more often than a standard custodian/non-custodian visitation schedule, especially in the summer months. This amount was again reduced since Paulie provides for the children's health insurance and Ben is responsible for 55% of the cost. Thus,

[13] The trial court imputed income to Paulie based on her average salary and bonuses from 2003-2007 as Paulie had worked more than full time during the marriage and recently reduced her hours for less pay.

Paulie's child support obligation was modified to $492.38 per month. The trial court took into account all relevant factors; accordingly there was no abuse of discretion.

Paulie cites this Court to *Brown v. Brown*, 952 S.W.2d 707, 708 (Ky.App. 1997) for support that the court should have credited her with an equal amount of parenting time[14] and thus erred in requiring Paulie to pay a greater amount of child support to Ben. In *Brown*, this Court did not find an abuse of discretion by the trial court when it credited the non-residential custodian with the applicable percentage of time the children were with her. However, this Court went on to state:

> As a result of his designation as the primary custodian, Brown has an ongoing obligation to maintain a residence for the children on a permanent basis-regardless of the amount of time they may spend with their mother. Therefore, the continual nature of household maintenance expenses as recognized by *Downey* [ *v. Rogers*, 847 S.W.2d 63, 64 (Ky.App.1993)], was a legitimate consideration by the trial court in refusing to order counterbalancing support by Brown to Hays for the 40% of the time they spent with her.

*Id.*

Contrary to Paulie's argument, this Court in *Brown* did not require a trial court to negate a child support obligation when a parent shares in joint custody

[14] We agree with the trial court that Paulie does *not* share equal parenting time. While the parties' share joint custody of the children, Ben is the primary residential custodian. When Paulie presented her request to provide afterschool care for the children she represented to the trial court that she was not seeking a modification of parenting schedule. The court granted her request and explicitly noted in its order that the parenting schedule was not changed. To argue otherwise is disingenuous as the trial court has consistently declined to modify the parenting schedule, and we decline to find an abuse of discretion.

and has the children more than the traditional custodian/non-custodian visiting schedule. In *Downey, supra,* this Court stated:

> It is apparent that the guidelines contemplate that the children, regardless of whether legal custody is joint or solely reposed in one parent, will primarily reside in one household and not be raised in two separate households. The reason for this is, as this Court has mentioned before, that few can maintain the same standard of living in two households as they did prior to dissolution. *See Stewart v. Madera*, Ky.App., 744 S.W.2d 437, 439 (1988). Further, joint custody, though not defined in KRS 403.270, has come to be considered as an arrangement whereby "both parents share decision-making in major areas concerning their children's upbringing," *Hardin v. Hardin*, Ky.App., 711 S.W.2d 863 (1984), and is not typically one where children are shuffled back and forth between residences. *See also, Burchell v. Burchell*, Ky.App., 684 S.W.2d 296 (1984).

*Downey* at 65.

Thus, Paulie's argument that Ben should be required to pay her child support given the parties' income and the near equal parenting time is not supported by our current jurisprudence. Accordingly, the trial court did not abuse its discretion.

Paulie next presents her third argument that the trial court erred in its rulings regarding the disclosure of expert witnesses, which resulted in an unfair proceeding to Paulie. Paulie argues that the trial court's orders leading up to the hearing did not require disclosure of her expert witness and that Ben never served interrogatories to identity any expert witness that Paulie might call. Ben counter-argues that the court did not err in its ruling regarding Paulie's failure to disclose her expert as Paulie surprised not only Ben but the trial court by presenting an expert witness the day of the hearing.

Paulie relies on CR 26.02(4) which states "[d]iscovery of facts known and opinions held by experts..... may be obtained only as follows: [a] party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial...."

We agree with Paulie that the trial court improperly interpreted CR 26.02 regarding her expert disclosure as Ben should have requested such information through interrogatories; however, the trial court's decision to hold open the record to permit Ben to obtain his own expert and depose Paulie's is not reversible error. The trial court comported with the spirit of our discovery rules as the purpose of pretrial discovery is to simplify and clarify the issues in a case, and to eliminate or significantly reduce the element of surprise. Further, pretrial discovery helps to achieve a balanced search for the truth, which in turn helps to ensure that trials are fair and it encourages the settlement of cases. *LaFleur v. Shoney's, Inc.*, 83 S.W.3d 474, 478 (Ky. 2002). Moreover, the trial court post-hearing reviewed the expert's testimony through deposition and found it to be not credible.[15] This finding was not clear error. CR 52.01. Since the trial court reviewed the expert's opinion and found it to be not credible, Paulie has not suffered a palpable error nor does the error affect a substantial right. At most any alleged error was harmless and, thus, we will not reverse the trial court's order.[16]

[15] The trial court as fact finder was tasked with determining the credibility of the witness. *Cole v. Gilvin,* 59 S.W.3d 468, 473 (Ky.App.2001).

[16] We likewise disagree with Paulie's sub-argument that allowing any additional witnesses to testify post-hearing was a violation of her due process rights. Paulie has not cited any authority for this claim of a violation of her rights; absent citation, we have declined to extend Paulie's

We now turn to Paulie's fourth argument that the court erred in quashing Paulie's discovery requests.[17] Ben counter-argues that the court properly quashed Paulie's discovery requests as they were irrelevant, repetitive, cumulative, unnecessary, and overbroad. Based on the discovery request in the record and the trial court's ruling, we cannot say that there was an abuse of discretion. *See Naïve v. Jones*, 353 S.W.2d 365, 367 (Ky. 1961), stating that "we must respect [the trial judge's] exercise of sound judicial discretion" in the enforcement of the civil rules pertaining to discovery.

Lastly, Paulie presents her fifth argument, that the court should have awarded attorney's fees to Paulie under CR 37 and KRS 403.220 due to Ben's tactics before and after the child support hearing. We disagree.

CR 37.01 permits a party to move the court to compel discovery. Paulie argues that Ben failed to fully comply with the trial court's orders regarding production of records, answering her discovery requests and verification of his income and as such, the trial court should have awarded her attorney fees. Ben argues that Paulie was not entitled to attorney fees as she never filed a CR 37.01 motion; the trial court never found that Ben failed to comply with discovery requirements.

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claimed rights.

[17] Paulie also argues that without a subpoena Ben wrongly filed his motion to quash discovery. We agree with Ben that Paulie's request for discovery were sufficient for his motion to quash discovery.

We agree with Ben that prior to awarding expenses associated with CR 37.01, a motion pursuant to CR 37.01 must be made and subsequently granted. *Cochran v. Cochran,* 746 S.W.2d 568, 570 (Ky. App. 1988). As the Appellant, Paulie has a duty to properly cite to the record to support her arguments. While Paulie provides case law citation, Paulie has failed to cite to the record where such motion, if made, was granted. As such, we presume that the trial court properly denied attorney fees to Paulie. *Horn v. Horn*, 430 S.W.2d 342, 344 (Ky. 1968).

KRS 403.220 provides that a court *may* award attorney fees to a party. However, in deciding whether to award attorney fees pursuant to KRS 403.220, "[t]he trial court need only 'consider' the parties' financial situation." *Hollingsworth v. Hollingsworth*, 798 S.W.2d 145, 148 (Ky.App. 1990). Consideration of the parties' financial situations does not require specific findings by the trial court, but may be evidenced by the trial court being apprised of the parties' financial situations contained within the record. *Id.; Miller* at 374. The record is clear that the trial court was well apprised of the parties' financial situation; accordingly, there was no abuse of discretion in the court's denial of attorney fees.

In light of the foregoing, we affirm the Jefferson Family Court's order modifying Paulie's child support obligation and denial of both parties' motions for attorney fees.

ALL CONCUR.

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