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 NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000575-ME
and
NO. 2010-CA-001654-ME

GEORGINA LEE MILLER HESTER WICKER APPELLANT

APPEAL FROM MADISON CIRCUIT COURT
v. HONORABLE JEFFREY M. WALSON, JUDGE
ACTION NO. 95-CI-00312

PAUL LOGAN HESTER APPELLEE

OPINION
REVERSING AND REMADING

*** * * * *

BEFORE: TAYLOR, CHIEF JUDGE; CAPERTON AND WINE, JUDGES.

WINE, JUDGE: Georgina Lee Miller Hester Wicker (“Wicker”) appeals from the trial court’s grant of a post-divorce motion by Logan Paul Hester (“Hester”) to reduce child support and from the trial court’s denial of her motion to increase child support. Wicker argues that the trial court erred by denying her access to

Hester's financial records for the purpose of determining his actual income in order to calculate child support. Wicker further argues that the trial court abused its discretion in failing to find Hester voluntarily underemployed and to impute income to him. Upon a review of the record, we reverse the order of the Madison Circuit Court and remand for further proceedings consistent with this opinion.

History

A decree was entered on February 5, 1996, dissolving the marriage of Wicker and Hester. At the time of the divorce, Hester had been employed as a family practice physician for two years and was earning \$120,000 per year. Wicker was not employed at the time of the divorce. The decree incorporated a mediation agreement which had been reached between the parties at mediation the previous January. Pursuant to the mediation agreement, Hester agreed to pay Wicker the sum of \$1,899 per month for child support of their three children. The agreement noted that modification could be sought after a two-year period.

In June of 2009, the parties' oldest child graduated from high school. Hester filed a motion to reduce child support based upon the oldest child's coming into majority and a change in circumstances with respect to his income. Thereafter, Wicker filed a motion to increase child support, as the amount of child support had not been modified since it was first established in 1996, over twelve years prior.

Wicker propounded written discovery to Hester in an attempt to ascertain his available income. These discovery requests sought documentation of

Hester's checking and savings accounts, retirement and investment accounts, the financial statements for his business, Medispa, any accounts belonging to Medispa, and any personal or real property title in his own or Medispa's name.

Discovery revealed that Hester initially continued his position as a primary care physician following the couple's divorce, then later switched to emergency room care. During his tenure as an emergency room doctor, Hester earned between \$144,000 and \$168,000.

In 2004, Hester quit his job as an emergency room physician and opened his own business, Be Medispa ("Medispa"). Hester and his current wife, Chasity, are the sole owners of Medispa. Medispa offers a variety of cosmetic procedures, including Botox. Hester produced tax returns filed for Medispa in 2007, 2008, and 2009, which showed gross receipts of \$559,422, \$682,930, and \$902,002, respectively, and gross income of \$356,070, \$371,434, and \$490,868, respectively. Hester's personal tax returns for those same years, however, showed adjusted gross incomes of only \$20,173, \$20,925, and \$40,794, respectively.¹ Notably, in two of the relevant years, Hester appears to have paid more in child support than he allegedly earned in income. In response to interrogatories propounded by Wicker, Hester stated that he had a business line of credit which he used to pay personal expenses, including child support. As Hester's alleged income appeared at odds with his expenses and lifestyle, Wicker sought Medispa's

¹ There was conflicting evidence concerning Hester's income. While Hester testified his personal tax returns accurately reflected his income (\$1681-\$3399 per month, when divided), he also offered contrary testimony that his monthly income was between \$5000 and \$7000. In addition, Hester submitted a completed child support worksheet stating his income to be \$8000 per month.

financial statements and documentation on any and all loans or accounts in Hester or Medispa's name, or in the name of any other corporate entity established by Hester.

After Hester failed to produce this documentation, Wicker filed a motion to compel the production of the requested documents. The trial court denied Wicker's motion to compel with regard to Hester's loan documentation and his checking, savings, and retirement account statements, but granted Wicker's motion, in part, by ordering Hester to produce copies of any "financial statements disseminated to 3rd parties." Thereafter, Hester filed a motion for a protective order with regard to the financial statements. The court granted the protective order and noted it would review Hester's financial statements "in camera" at the time of the final hearing on the motions for modification of child support.

The final hearing was held on February 25, 2010. In addition to denying Wicker access to the account information, loan information, and financial statements for Hester and Medispa, the trial court also refused to allow Wicker's counsel to persist in certain lines of questioning concerning Hester's disposable income. For example, when Wicker's counsel began to question Hester about his monthly expenses, Hester testified that he paid \$1,800 per month on a home mortgage, \$430 a month in utilities, about \$600 a month in medical insurance, and about \$200 a month in car insurance.² After Hester answered these questions, but

² These expenses total \$3,030 per month. When added to Hester's \$1,899 monthly child support obligation, the total reaches \$4,929 per month. As this line of questioning was cut short when the trial court sustained Hester's counsel's objections, it seems evident that Hester's monthly obligations surely exceeded \$4,929 per month as many other necessary expenses were not testified to, including food and

before Wicker's counsel could continue the line of questioning regarding his monthly expenses, Hester's counsel objected on relevancy grounds. The court sustained the objection.

As such, Wicker's counsel was not able to obtain any further information about Hester's monthly expenses. Moreover, Wicker's questions concerning loans taken out in Hester or Medispa's name were also cut short on relevancy grounds. Wicker's counsel objected to the limitations placed upon discovery and cross-examination by the court. Wicker's counsel argued before the trial court that when a parent is self employed, the courts are to look beyond personal tax returns to determine income under the child support statute. Wicker's counsel further argued that because Hester admitted to using business loans to pay child support, such information was relevant as any such business loans would be used to reduce the income or net worth of the business.

Wicker's counsel also questioned Hester at the hearing about whether he had any source of income other than Medispa. Hester acknowledged that he received a stipend for coaching his son's sports team. He further acknowledged that he was the "on-call" physician for University of Kentucky ("UK") ballgames, and that he was compensated for this with tickets to the games. Hester did not testify to the amount of the stipend he received or the retail value of the tickets.³

gasoline. Regardless of the true number, it remains apparent that the \$4,929 per month testified to by Hester far exceeded his reported taxable income of \$20,173-\$40,794 per year. This testimony was clearly relevant.

³ Notably, neither of these amounts could have been included in Hester's income by the trial court as no testimony was given concerning their value.

At the conclusion of the hearing, the court sustained Hester's motion to reduce child support and entered an order reducing monthly child support to \$1,217. Wicker appealed from the order modifying child support in case number 2010-CA-00575-ME.

Thereafter, in May of 2010, the parties' second child graduated from high school. Hester filed a second motion to reduce child support as there remained only one minor child. A hearing on this motion was held on August 23, 2010, after which the trial court sustained Hester's motion to modify child support, again reducing the amount of support to \$802 per month. This amount was based upon the monthly income previously accepted by the court. Wicker also appealed from this order in case number 2010-CA-001654-ME.

Both appeals were designated to be heard together by this Court. Wicker contends in her appeals that the trial court erred by refusing to allow her access to the financial statements, account statements, and loan documentation of Hester and Medispa. Further, Wicker contends that it was error for the court to find that a physician of fifteen years, who previously made \$168,000 annually, was not voluntarily underemployed where his current reported income was \$20,925 at the time 2010-CA-00575-ME was filed and \$40,794 at the time 2010-CA-001654-ME was filed.

Analysis

A trial court's modification of a child support order is largely prescribed by statute. Kentucky Revised Statute ("KRS") 403.213; *Van Meter v.*

Smith, 14 S.W.3d 569, 572 (Ky. App. 2000). Within the statutory parameters, it is left to the sound discretion of the trial court. *Id.* at 572. We will not disturb the trial court's ruling absent an abuse of that discretion. *Id.* The test for abuse of discretion is whether "the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Although there was a settlement agreement between the parties in this case, the agreement stated that child support was calculated according to the statutory guidelines and that modification could be made after two years. Thus, this case does not involve interpretation of the settlement agreement.

Wicker's first argument on appeal is that the trial court erred by denying her access to Hester and Medispa's financial statements, accounts, and loan documentation for the purposes of determining Hester's income for the modification of child support.

The statute which defines income for the purpose of the child support guidelines, KRS 403.212(2)(c), states that "gross income" for self-employed persons includes:

[G]ross receipts minus ordinary and necessary expenses required for self-employment or business operation. Straight-line depreciation, using Internal Revenue Service (IRS) guidelines, shall be the only allowable method of calculating depreciation expense in determining gross income. **Specifically excluded from ordinary and necessary expenses for purposes of this guideline shall be investment tax credits or any other business expenses inappropriate for determining gross income** for purposes of calculating child support.

(Emphasis added.) KRS 403.212(2)(c) further dictates the income for self-employed individuals should be subjected to closer scrutiny than a mere rote acceptance of the income shown on tax returns. Indeed, KRS 403.212(2)(c) notes that:

Income 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.**

(Emphasis added.) Further, reimbursements of certain expenses associated with the business may be attributable to the parent as income as may any personal use of business property or use of business funds for personal matters. Indeed,

Expense reimbursement or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business or **personal use of business property or payments of expenses by a business, shall be counted as income** if they are significant and reduce personal living expenses such as a company or business car, free housing, reimbursed meals, or club dues.

(Emphasis added.)

As such, a trial court should not limit the determination of income for a self-employed person to a review of the tax returns supplied by the individual and/or business. Instead, the trial court is directed to calculate income as “gross receipts minus ordinary and necessary expenses.” *Id.* Further, significant expense reimbursements or in-kind payments that reduce personal living expenses, such as a company car or reimbursed meals, should be counted in gross income. *Id.* In

addition, any personal use of business property or funds that reduces personal living expenses shall be included in parental income for the purposes of child support. *Id.*

In the present case, the trial court did not calculate the gross receipts of the business and subtract Medispa's ordinary and necessary expenses (less expense reimbursements and the use of business funds or property that reduces personal living expenses). Instead, the trial court accepted Hester's income as volunteered on the proposed child support worksheet, without performing the calculation outlined in KRS 403.212(2)(c).⁴ The trial court abused its discretion by failing to calculate income according to the mandates of KRS 402.212.

Wicker argues that she was unable to accurately calculate Hester's income as the trial court did not allow her access to the account statements and loan documentation for Medispa, but instead granted Hester's motion for a protective order. Wicker argued that this information was necessary for a determination of income because Hester testified that he used business loans in order to pay personal expenses, including child support, and his expenses greatly exceeded his stated income. We agree that Wicker was entitled to such information concerning Medispa as the statute clearly states that income and expenses of a self-employed individual will usually differ from the determination of same for tax purposes. KRS 403.212(2)(c). As such, the restricted discovery, allowing Wicker access only to Hester's tax returns, was patently inadequate.

⁴ Notably, this amount was not the amount shown on the tax returns.

In the present case, the trial court found that Wicker could not access this information based on relevancy grounds and based upon its finding that “loans are not income.” Hester testified that he used business loans to pay personal expenses, including child support, and that he took “draws” from the company to pay personal expenses, including child support. It is clear that any “draws” from the business for personal expenses (including child support), where Hester transferred money from Medispa’s accounts into his own accounts, are attributable to Hester as income. “[P]ersonal use of business property or payments of expenses by a business, shall be counted as income.” KRS 403.212(2)(c).

In addition, to the extent that Hester used business loans or lines of credit to pay for personal expenses (including child support), such amounts are also attributable to Hester as income as they may be considered to be “payments of expenses by a business.” KRS 403.212(2)(c). Indeed, if the loans were attributed to the business, then Medispa, not Hester, would be obligated to repay those amounts. As such, Hester would be receiving monies for personal use which he would not be required to pay back personally. Although loans are ordinarily not income, in a situation such as the present one, where business loans are used to pay personal expenses and are repaid by the business, they shall be counted as income. KRS 403.212(2)(c); *Accord, Keller v. Keller*, 224 S.W.3d 73, 80 (Mo.App. S.D., 2007) (Funds received in the form of loans from a business and put to personal use may be included in the parent’s income for child support).

Accordingly, we reverse and remand to the trial court. On

remand, the trial court shall not prohibit Wicker from discovery of Medispa's account and loan documentation, as same is proper and necessary for a determination of Hester's income for the proper calculation of child support pursuant to KRS 403.212(2)(c). After discovery is completed and a new hearing may be had, the court shall employ the calculation set forth in KRS 403.212(2)(c) in determining Hester's income. The proper calculation of same is "gross receipts less ordinary and necessary expenses." The court may, in its discretion, decide whether the business expenses claimed as "ordinary and necessary" are appropriate or inappropriate. *Id. See also, 16 Graham & Keller, Kentucky Practice-Domestic Relations Law* §24.21; *Snow v. Snow*, 24 S.W.3d 668 (Ky. App. 2000). In addition, the court shall add to the calculation of gross income, any expense reimbursements by Medispa which reduce Hester's personal living expenses, such as use of the business vehicle listed on Medispa's tax returns for each relevant year (for example, an Audi TT in tax year 2009), reimbursed meals and entertainment which are listed on Medispa's tax returns, and any business credit used by Hester to pay for any significant personal living expenses or support obligations.⁵ *Id.*

We need not address Wicker's claim of voluntary underemployment at this time as same is rendered moot because we are reversing and remanding for a new determination as to Hester's income. On remand, after determining Hester's income consistent with this opinion, the trial court shall again consider whether

⁵ Additionally, as previously noted, any coaching stipend received should be included in gross income as should the retail value of any tickets or other items received by Hester in connection with his role as the "on-call" doctor for the UK ball team.

Hester is voluntarily underemployed under KRS 403.212(2)(a) and impute income to him if necessary. *Keplinger v. Keplinger*, 839 S.W.2d 566 (Ky. App. 1992).

ALL CONCUR.

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