

RENDERED: DECEMBER 16, 2011; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2011-CA-000193-ME

BRIAN MITCHELL

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE PAMELA ADDINGTON, JUDGE  
ACTION NO. 01-CI-01055

LANA MITCHELL

APPELLEE

AND

NO. 2011-CA-000475-ME

BRIAN E. MITCHELL

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE PAMELA ADDINGTON, JUDGE  
ACTION NO. 01-CI-01055

LANA R. MITCHELL

APPELLEE

OPINION  
AFFIRMING IN PART,  
REVERSING IN PART AND REMANDING

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BEFORE: MOORE, STUMBO AND WINE, JUDGES.

STUMBO, JUDGE: Brian Mitchell appeals from two orders of the Hardin Family Court wherein Mr. Mitchell was held in contempt and ordered to pay medical expenses, child support arrearages, and attorney fees. Mr. Mitchell's child support obligation was also increased. Mr. Mitchell argues on appeal that the trial court's calculation of child support was erroneous; that he should have been given a credit for amounts he overpaid in child support; that Lana Mitchell failed to give him notice of the medical expenses; that Ms. Mitchell failed to prove actual payment of the medical expenses; that he should not have been held in contempt; and that he should not have been ordered to pay attorney fees. We find that the trial court's calculation of child support was erroneous and that Mr. Mitchell was ordered to pay too much in medical expenses. We reverse and remand on these two issues only, the other issues are affirmed.

By an agreed order entered January 29, 2003, Mr. Mitchell was ordered to pay child support in the amount of \$975.89 per month for his three children. He was also ordered to pay 88% of the children's extraordinary non-covered medical costs. Appellant voluntarily began paying \$1,166 in January of 2003. In June of 2009, when the oldest child graduated from high school, Mr.

Mitchell sent an e-mail to Ms. Mitchell requesting that the child support be reduced by 1/3, to \$778 per month. He then began paying the lower amount.

Around ten months later, Ms. Mitchell filed a motion for contempt due to Mr. Mitchell not paying the full \$975.89 per month. On December 29, 2010, an order was entered awarding Ms. Mitchell \$1,970.90 in child support arrearages and \$5,089.84 for past medical expenses. Mr. Mitchell's child support obligation was also reduced to \$667.64 per month and he was found in contempt for failing to pay the children's extraordinary medical expenses. Ms. Mitchell was also awarded \$500 in attorney fees. Ms. Mitchell then filed a motion to amend or vacate the order reducing child support claiming that Mr. Mitchell made more money than the trial court imputed to him. This motion was sustained on February 17, 2011, and the child support was increased to \$1,119.90 per month. This appeal followed.

Mr. Mitchell's first argument is that the trial court erred in calculating his child support obligation. In the February 17, 2011 order, the trial court found that Mr. Mitchell received \$1,500 per month in rental income from a home in Atlanta, Georgia. The court also found that while Mr. Mitchell testified that he paid a mortgage on the property and had other expenses related to the home's upkeep, he did not provide any evidence supporting the testimony. Because of this, the trial court imputed the whole \$1,500 to Mr. Mitchell and did not take into account any expenditures.

Kentucky Revised Statutes (KRS) 403.212(2) states:

(2) For the purposes of the child support guidelines:

(a) “Income” means actual gross income of the parent if employed to full capacity or potential income if unemployed or underemployed.

(b) “Gross income” includes income from any source, except as excluded in this subsection, and includes but is not limited to income from salaries, wages, retirement and pension funds, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, Social Security benefits, workers’ compensation benefits, unemployment insurance benefits, disability insurance benefits, Supplemental Security Income (SSI), gifts, prizes, and alimony or maintenance received. Specifically excluded are benefits received from means-tested public assistance programs, including but not limited to public assistance as defined under Title IV-A of the Federal Social Security Act, and food stamps.

(c) For income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, “*gross income*” means *gross 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. 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. 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).

In the February 17, 2011 order, the trial court found Mr. Mitchell's gross income to be \$8,923.00; \$1,500.00 of which was from rental income. Mr. Mitchell argues that he did provide evidence of his mortgage payments and other expenses utilized in the maintenance of the rental property. Kentucky Rules of Civil Procedure (CR) 52.01 directs that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." A judgment "supported by substantial evidence" is not "clearly erroneous." *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is defined as "evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men." *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972).

We find that the court's order was clearly erroneous when it found Mr. Mitchell had not provided evidence of his mortgage payments on the rental property. A copy of a monthly mortgage statement is contained in the record, specifically on page 280 of the certified record on appeal. As to other costs

involved in the maintenance and upkeep of the property, we cannot find any evidence relating to that in the record. As required by KRS 403.212(2)(c), the trial court should have taken the mortgage payments into consideration when including the \$1,500 in rental income into Mr. Mitchell's child support obligation. We therefore reverse and remand on this issue.

Mr. Mitchell's next argument is that his overpayment of child support should be credited against the money he now owes to Ms. Mitchell. He also claims the e-mail where he asks to reduce his child support was a binding agreement and he should not owe any arrearages. We disagree on both parts.

If a party wishes to contribute to the support of his children in some manner other than that in which a court has directed, the court is always open to a timely application for modification. If he does it without such permission it is not incumbent on the court to give him any credit for it.

*Tucker v. Tucker*, 398 S.W.2d 238, 239 (Ky. 1965). Mr. Mitchell's overpayment was voluntary and he is not entitled to any reimbursement or credit. Also, there is no proof in the record that Ms. Mitchell agreed to the reduction. She did not respond to the e-mail. Also, Ms. Mitchell met with an attorney shortly after receiving the e-mail.

A court will enforce a private agreement between parents if it meets certain requirements. If the agreement is oral it must be proven with reasonable certainty and the court must find "that the agreement is fair and equitable under the circumstances." Moreover, the agreement, once proven, will only be enforced if the "modification might

reasonably have been granted, had a proper motion to modify been brought.”

*Price v. Price*, 912 S.W.2d 44, 46 (Ky. 1995) (citations omitted). Here, the trial court made no findings concerning the alleged agreement, stating only that the reduction was a unilateral agreement. We therefore affirm on this issue.

Mr. Mitchell next argues that Ms. Mitchell failed to give him notice of the medical expenses and that some medical expenses should not have been included. We agree in part. Mr. Mitchell was required by court order to pay extraordinary medical expenses. He did not do so. Mr. Mitchell provided medical insurance for his children. He also received statements from his insurance provider detailing the expenses paid by insurance and those not paid. This put him on notice that medical expenses were being incurred. Ms. Mitchell is entitled to reimbursement of the money she paid toward these medical expenses that was actually owed by Mr. Mitchell.

However, the trial court erroneously included medical expenses for the years 2001 and 2002. These years were prior to the court order requiring him to pay his share of the medical expenses. We reverse and remand on this issue. On remand, the trial court should calculate the extraordinary medical expenses incurred after January 29, 2003.

Mr. Mitchell also claims that Ms. Mitchell failed to show that she actually paid the extraordinary medical expenses. This argument is without merit. The

record in this case contains a lengthy exhibit with a detailed listing of the extraordinary medical expenses paid with receipts and medical records to corroborate.

Mr. Mitchell's next argument is that he should not have been held in contempt for failing to pay his share of the medical expenses. "Civil contempt consists of the failure of one to do something under order of court, generally for the benefit of a party litigant." *Commonwealth v. Burge*, 947 S.W.2d 805, 808 (Ky. 1996). Mr. Mitchell failed to pay his share of medical expenses as ordered by the court, therefore, contempt was warranted. We will note that it appears Mr. Mitchell did not have to spend any time in jail. He was ordered to serve 60 days in the Hardin County Detention Center, but it was probated on the condition that he pays the expenses.

Mr. Mitchell also claims that he should not have had to pay \$500 in attorney fees. We disagree.

The court from time to time after considering the financial resources of both parties 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, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.



KRS 403.220. Mr. Mitchell's income is twice that of Ms. Mitchell. The payment of attorney fees was within the discretion of the trial court and we cannot find that it was an unreasonable abuse of discretion.

Based on the foregoing reasons we reverse and remand this case for the trial court to recalculate Mr. Mitchell's child support obligation and the amount he owes in extraordinary medical expenses. On all other issues we affirm.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Douglas E. Miller  
Radcliff, Kentucky

BRIEF FOR APPELLEE:

Lana Mitchell, *Pro se*  
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