

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001012-ME

CHRISTOPHER MUELLER

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT (FAMILY) COURT
v. HONORABLE JERRY J. BOWLES, JUDGE
ACTION NO. 07-CI-501425

AMY J. MUELLER (now BARBOUR)

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON AND VANMETER, JUDGES; LAMBERT,¹ SENIOR
JUDGE.

LAMBERT, SENIOR JUDGE: Christopher Mueller appeals from a post-decree
order of the Jefferson Family Court denying his motion to modify child support.

On appeal, Chris argues that the trial court erred by refusing to consider an equal

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

parenting arrangement, by refusing to impute full-time income to the mother, Amy Mueller, and by refusing to make a specific finding concerning the applicability of an agreement between the parties during the marriage that Amy would seek full-time work once the children were school-aged.

The parties were married from May 30, 1997, to October 8, 2008.

Two children were born of the marriage, E.L.M., born December 2000, and L.A.M, born June 2005. A petition for dissolution was filed on April 13, 2007, and a mediated property settlement agreement was filed of record on August 24, 2007.

In August 2010, Chris filed a motion to modify child support. Chris moved the court to eliminate his child support obligation because under the current time-sharing plan, he has the children four more hours than Amy does over a fourteen day period. In addition, Chris alleged therein that there was an implicit or explicit agreement between the parties that Amy would seek full-time employment after their youngest child reached preschool age. However, no evidence was produced before the trial court of any such agreement. Chris moved the trial court to impute income to Amy for full-time employment.

The Jefferson Family Court denied Chris's motion to modify child support and declined to impute income to Amy. The court found there had been no substantial and continuing change in the parties' circumstances which would warrant modification. Further, the court noted that Amy was employed in the same

position at the time of Chris's motion as she had been when the child support order was originally entered. Although the court noted that a shared parenting agreement may make application of the guidelines "unjust or inappropriate" in certain circumstances under KRS 403.211(3)(g), the court found the use of the guidelines to be just and appropriate in this particular case. The court noted that, regardless of the parenting schedule, the record in the case and the history of the parties clearly shows that Amy is the primary caregiver for the children.

Chris moved the court to alter, amend, or vacate, which motion was denied. He now appeals to this Court.

As with most other areas of domestic relations law, the establishment, modification, and enforcement of child support is largely left, within the statutory parameters, to the sound discretion of the trial court. KRS 403.211-KRS 403.213; *Van Meter v. Smith*, 14 S.W.3d 569, 572 (Ky. App. 2000). We will not disturb an order granting or denying modification of child support, absent an abuse of that discretion. *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001). Abuse of discretion is found when a trial judge's decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Herein, the court noted that, despite any time-sharing agreement, Amy was clearly the primary caregiver for the children. The court further noted that although Amy only worked part-time in her position as a radiation therapist at the James Brown Cancer Center, there were currently no full-time positions for a

radiation therapist and Amy did not wish to leave her job with a reputable employer after working there for fifteen years. The court found Amy's work history never demonstrated earnings approaching \$64,140.00 per year, the amount Chris argued should be imputed to her. While the trial court noted it could deviate from the guidelines based upon the time-sharing agreement, it declined to do so.

It is clear that the trial court specifically relied on the Kentucky Child Support Guidelines (KRS 403.212) and considered the financial considerations of both parties, including Amy's employability and the time-sharing agreement between the parties. Accordingly, the findings are supported by substantial evidence and we are unable to conclude that the family court abused its discretion in refusing to modify child support. A trial court is not required to deviate from the guidelines simply because one parent has the children four hours more than another over a fourteen day period under the time-sharing agreement. *Downey v. Rogers*, 847 S.W.2d 63-64 (Ky. App. 1993). Further, the trial court was not required to impute income to Amy simply because she worked part-time. *Polley v. Allen*, 132 S.W.3d 223, 227 (Ky. App. 2004) (Imputation of income is based on totality of circumstances).

In addition, the trial court did not err by refusing to make specific findings regarding the applicability of an elusive agreement, the terms of which are unknown, where no evidence existed to support the existence thereof other than Chris's bare assertions. The court made numerous findings of fact otherwise, on

all relevant factors underlying its decision. CR 52.04 (Judgment shall not be reversed unless court failed to make essential finding).

Accordingly, we affirm the Jefferson Family Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Bonita K. Baker
Louisville, Kentucky

BRIEF FOR APPELLEE:

Marcia L. Sparks
Louisville, Kentucky