RENDERED: DECEMBER 13, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001418-MR

CHRISTOPHER WAYNE HOLBROOK — APPELLANT

v.

APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE TAMRA GORMLEY, JUDGE
ACTION NO. 10-CI-00092

VICKY JANEEN HOLBROOK — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DIXON AND VANMETER, JUDGES.

DIXON, JUDGE: Christopher Wayne Holbrook appeals from the June 5, 2012, findings of fact, conclusions of law, and final order of the Bourbon Circuit Court. That judgment addressed property division, child custody and support, and maintenance in Christopher and Vicky Janeen Holbrook's dissolution action. Christopher also appeals from the August 9, 2012, order of the Bourbon Circuit

Court which denied, in part, and granted, in part, his motion to alter, amend, or vacate the June 5, 2012, judgment. We affirm.

The parties were married in 1994. Two children were born into the marriage in 1999 and 2001. Vicky, who was previously employed with Toyota, quit her job when the couple's first child was born, and became a homemaker for the duration of the marriage. In 2010, Vicky filed a petition for dissolution of marriage. The parties entered into a settlement agreement, wherein they divided their tangible property, bank accounts, investments, and retirement accounts; agreed upon joint custody of the children; and reserved the issues of child support and maintenance for final decision by the trial court.

Following a final hearing, the trial court's finding of fact, conclusions of law, and final order was entered on June 5, 2012. Relevant to this appeal are the trial court's orders that Christopher pay child support and maintenance in the amounts of $1,148.29 per month and $460.00 per month, respectively. The maintenance award was ordered for a duration of 24 months. Christopher filed a motion to alter, amend, or vacate the trial court's June 5, 2012, judgment. On August 9, 2012, that motion was denied in part and sustained in part. In particular, Christopher's requests to be relieved of his maintenance and child support obligations were denied, but his child support obligation was reduced to $1,061.00 per month. In addition, the trial court amended a portion of the decree which related to the parties' ability to file a dependency tax exemption. This appeal followed. Additional facts will be provided as necessary.

We first address Christopher's assertion that this Court should conduct a *de novo* review of the parties' incomes. "For the purposes of the child support guidelines: "Income" means *actual gross income* of the parent if employed to full capacity or potential income if unemployed or underemployed." Kentucky Revised Statutes (KRS) 403.212(2) (emphasis added). A trial court's calculation of income, because it is based upon the evidence presented, is a factual determination which we will not disturb if supported by substantial evidence. *Gossett v. Gossett*, 32 S.W.3d 109, 111 (Ky. App. 2000); Kentucky Rules of Civil Procedure (CR) 52.01.

When computing Vicky's income, the trial court included the imputed minimum wage of $15,600.00 per year; an annual gift from Vicky's father, given since she was twelve years old, of $12,000.00; and annual stock dividends of $8,200.00, for a total income of $35,800.00 per year. Christopher argues that an amount higher than minimum wage should have been imputed to Vicky because she was receiving a salary of $30,000.00 when she left the workforce in 1999. The trial court based the amount of imputed income upon Vicky's GED level of education; the fact that she has been absent from the workforce for more than ten years; and the recent downturn in the economy. Christopher has failed to show that this finding is clearly erroneous. *McGregor v. McGregor*, 334 S.W.3d 113 (Ky. App. 2011). Christopher further argues that the trial court's computation of Vicky's income erroneously omitted additional potential future gifts from Vicky's father, based on the history of gifting from Vicky's father to Vicky. The trial court

found that such future gifts were speculative income, as opposed to actual income, upon which the trial court would not "make a leap of faith." This finding was based upon testimony from Vicky and her father that future gifting was no longer possible due to the economical downturn. The trial court further concluded that Christopher improperly attempted to present new evidence regarding gifts to Vicky from her father in his motion to alter, amend, or vacate. Given the broad discretion granted to the trial court in considering the totality of the circumstances and judging the weight of the evidence, we find that the trial court's finding that Vicky's income is $35,800.00 is supported by substantial evidence. *Marcum v. Marcum*, 779 S.W.2d 209, 212 (Ky. 1989) (Trial court has discretion to consider totality of parties' economic circumstances and judge credibility of witnesses.).

Christopher next argues that he should not have been ordered to pay child support because the parties have equal parenting time and equal incomes. We disagree. "The child support guidelines in KRS 403.212 shall serve as a rebuttable presumption for the establishment or modification of the amount of child support." KRS 403.211(2). "Within statutory parameters, the establishment, modification, and enforcement of child support obligations are left to the sound discretion of the trial court." *Jones v. Hammond*, 329 S.W.3d 331, 334 (Ky. App. 2010). Such discretion, however, is not without limit and "must be fair, reasonable, and supported by sound legal principles." *Id.* We note, once again, that this Court will not substitute its judgment for that of the trial court where the

trial court's factual findings are supported by substantial evidence. *Id.*; *Gossett*, 32 S.W.3d 109.

Deviation from the guidelines is permitted "where their application would be unjust or inappropriate." KRS 403.211(2). A number of reasons justifying deviation is identified by KRS 403.211(3)(g), of which equal parenting time is not included. Nonetheless, this Court has held that equal parenting time, when combined with additional extraneous circumstances is a sufficient reason for deviating from the guidelines. *Dudgeon v. Dudgeon*, 318 S.W.3d 106, 107 (Ky. App. 2010). The Court in *Dudgeon* held that application of the child support guidelines was inappropriate based on three combined factors: the parties' combined monthly gross income exceeded that envisioned by the guidelines; the parties had almost equal incomes; and the parties shared nearly equal timesharing. *Dudgeon*, 318 S.W.3d at 112. The facts of *Dudgeon*, however, are plainly dissimilar to those presently before us. The parties in *Dudgeon* had a combined monthly income of almost $20,000, which far exceeded the uppermost level of the child support guidelines of $15,000. *Id.* at 110. In addition, the parties' total income in *Dudgeon* was nearly equal with a 51.9% and 48.1% divide. *Id.* at 111. Here, Christopher and Vicky's combined monthly income of $10,900 is clearly envisioned by the guidelines. *See* KRS 403.212. In addition, the discrepancy between their incomes, $35,800 and $95,000, is significant. Thus, we reject Christopher's argument that the parties have similar incomes. We further dismiss Christopher's claim that he shares in the children's expenses in a manner which

would exclude him from having to pay child support. He has offered no examples of extraneous child-related expenses, and we can glean none from his pleadings. Thus, we are left with Christopher's argument that he should be relieved from paying child support because the parties enjoy equal parenting time. This Court has previously held that a trial court's decision to utilize the guidelines, when parents enjoy equal timesharing, is not an abuse of discretion. *Downey v. Rogers*, 847 S.W.2d 63 (Ky. App. 1993). Because Christopher has failed to show that application of the guidelines would be unjust or inappropriate, his argument is without merit. We note, however, that our holding in no way affects Christopher's ability to later seek modification of his child support obligation if circumstances warrant under KRS 403.213.

Christopher's final argument pertaining to child support is that the trial court erred when it failed to consider the children's independent financial resources. Independent financial resources of the children may be considered by the trial court and may serve as appropriate criteria to rebut the presumption of KRS 403.212 and thus deviate from the guidelines. KRS 403.211(3)(g). This Court has found that a trial court's failure to account for such resources, when applying the guidelines, was an abuse of discretion. *Rainwater v. Williams*, 930 S.W.2d 405 (Ky. App. 1996). We note, however, that *Rainwater* involved a child's substantial independent resource consisting of a $13,381,000 settlement. *Id.* Clearly, no such resource exists in the case before us. In addition, this Court has held that a trial court did not abuse it discretion when it deviated from the child

support guidelines based on sibling children's interest income of $7,447. *Jones v. Hammond*, 329 S.W.3d 331 (Ky. App. 2010). In the case before us, the trial court found that the children received less than $1,000 annually in dividends from their stock. Christopher does not challenge this finding. Given the minimal amount of dividend income at issue in this case, we do not agree that the trial court abused its discretion when it failed to utilize this resource to support a deviation from the guidelines.

Christopher's next argument is that the trial court improperly awarded maintenance to Vicky. Maintenance awards are within the sound discretion of the trial court and we will not disturb such an award absent an abuse of that discretion. *Powell v. Powell*, 107 S.W.3d 222 (Ky. 2003). A court may grant maintenance if it finds that the spouse requesting maintenance lacks sufficient property to provide for his or her reasonable needs and is unable to support him or herself through appropriate employment. KRS 403.200(1). Any order of maintenance shall be for the amount and duration that the trial court deems just after they have considered "all relevant factors," including:

> (a)The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
> (b)The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment
> (c)The standard of living established during the marriage;
> (d) The duration of the marriage;

> (e) The age, and the physical and emotional condition of the spouse seeking maintenance; and
> (f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

KRS 403.200(2).

Christopher argues that the maintenance award was inappropriate because Vicky received sufficient property to take care of her needs and had substantial income of her own. The trial court, however, found differently. In support of its maintenance order, the trial court found that Vicky had insufficient income to meet her needs and could not "support herself through reasonable employment in accord with the same standard of living which she enjoyed during the marriage." These findings are supported by substantial evidence. The trial court further indicated that the purpose of the maintenance was to assist Vicky in meeting her needs while she rehabilitated her job skills. Given the amount and duration of the maintenance order, $460 per month for 2 years, we do not find that the trial court abused its discretion. Christopher further argues that the trial court failed to consider his ability to pay maintenance. However, in the trial court's June 5, 2012, judgment, an entire paragraph was devoted to the trial court's consideration of whether Christopher was able to provide maintenance and meet his own needs. Christopher's argument is therefore without merit and the order of maintenance is therefore affirmed.

Christopher's final argument on appeal is that the trial court improperly changed the terms of the parties' separation agreement *sua sponte*. In

particular, Christopher argues that the trial court altered the date by which the parties would have to execute the terms of the separation agreement. Unfortunately, Christopher fails to cite with specificity the dates that were altered. The June 5, 2012, judgment stated "[b]oth parties are ordered to cooperate in the execution of these orders within a reasonable time, but no more than 90 days from the date of this Decree." Given the trial court's clear adoption of the parties' separation agreement and the language cited above, we fail to perceive a change in expected execution dates. Presumably "within a reasonable time" would encompass and adopt any dates previously stated in the separation agreement, whereas "no more than 90 days" would apply to all other elements not previously assigned a date. Accordingly, Christopher has failed to show how the trial court's order conflicts with the parties' agreement.

For the foregoing reasons, the June 5, 2012, findings of fact, conclusions of law, and final order of the Bourbon Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Traci H. Boyd
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BRIEF FOR APPELLEE:

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