

RENDERED: NOVEMBER 8, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000218-ME
AND
NO. 2013-CA-000302-ME

JEFFERY YOUNG

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM ADAIR CIRCUIT COURT
v. HONORABLE O. REED RHORER, SPECIAL JUDGE
ACTION NO. 10-CI-00146

CHARLOTTE YOUNG

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: MOORE, NICKELL AND STUMBO, JUDGES.

STUMBO, JUDGE: Jeffery Young ("Father") appeals and Charlotte Young

("Mother") cross-appeals from an Order of the Adair Circuit Court denying

Father's Motion to Modify Child Support. Father argues that the trial court abused

its discretion when it failed to consider his 2011 income tax returns in determining whether to reduce his current child support obligation. In her cross-appeal, Mother maintains that the trial court erred in denying her motion for attorney fees. We find no error, and accordingly affirm the Order on appeal.

The parties were married on May 15, 1991, and separated on May 1, 2010. The union produced three children born between 1991 and 2000. After the separation, Mother filed a Petition for Dissolution of Marriage in Adair Circuit Court. Upon taking proof, the court rendered a bifurcated decree of dissolution on December 10, 2011.

At the time of dissolution, the two older children were emancipated. The parties were granted joint custody of the minor son, and Mother was designated as his residential custodian. Father was granted scheduled visitation.

The parties raised several post-decree issues, which were resolved by way of an Order rendered on January 7, 2013. This Order forms the basis of the instant appeal. Of relevance herein, the court addressed Father's motion to reduce his child support obligation. In support of the motion, Father argued that their minor child graduated from high school, and he contended that his salary had been substantially reduced. Father argued that his income from a sales position had reduced substantially because the sales market was saturated, and that he earned only \$11,436.00 in 2011 according to his income tax return. He noted that this income was below the minimum wage and conceded that the minimum wage

should be imputed to him for the purpose of calculating child support. He argued that his child support obligation should be reduced about 90% to \$98.00 per month.

Upon considering the motion, the court determined that it had "not been presented sufficient evidence to determine the parties' gross incomes." It calculated Father's child support obligation to be \$678.00 based on the statutory worksheet, Father's Position Statement and the record. It noted also that the amount of his child support obligation can be recalculated in the future using then-current income information pursuant to Kentucky Revised Statutes (KRS) 403.211(5).

The court also addressed Mother's motion for attorney fees, wherein Mother sought fees alleging that Father's motion for a change of custody was improper, his tactics served to waste the court's time, and because there was a substantial income disparity between the parties. In denying the motion, the court found that Judge Bowling, who had previously presided over the dissolution proceeding, opined that this was the most "bitter and toxic" divorce over which he had ever presided. In the matter at bar, Special Judge Rhorer determined that both parties bore responsibility for ongoing litigation, and accordingly directed that each party should pay his or her respective attorney fees. This appeal followed.

Father now argues that the circuit court committed reversible error in failing to sustain his motion to reduce his child support obligation. Father notes that child support may be modified upon a showing of a material change in circumstances that is substantial and continuing, KRS 403.213(1), and contends

that he demonstrated such a material change. Specifically, Father argues that he tendered to the court his 2011 federal income tax return, which "reflected a huge decrease in his income from the preceding year," to wit, that Father had earned below the minimum wage in 2011. He directs our attention to the circuit court's determination that the court "has not been presented sufficient evidence to determine the parties [sic] gross income," and that this finding is unsupported and arbitrary in light of the 2011 income tax return. He maintains that the court's "willful ignorance" of the 2011 income tax return constitutes an abuse of discretion and justifies an Opinion reversing and remanding on this issue.

We find no error on this issue, as the income and child support calculus requires more than a simple examination of Father's 2011 income tax return. In compliance with the court's directive, each party supplemented the record with Position Statements in advance of the September 20, 2012 hearing. That supplemental record reveals that Father's 2011 Federal Form 1040 showed a "gross income" of \$128,518 in 2011, from which he claimed "total expenses" in the amount of \$76,642 and a "net profit" of \$50,064. Various other deductions reduced Father's adjusted gross income in 2011 to \$11,436. Additionally, both parties had various rental properties in that taxable year, and Mother lost her job, though she anticipated future employment. It is noteworthy that while the \$11,436 upon which Father relies is the federally adjusted gross income for income tax purposes, his income for purposes of calculating child support is derived by the court. KRS 403.212(2)(c) provides that,

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.* [Emphasis added].

In the matter at bar, the Adair Circuit Court determined that the parties had not presented sufficient evidence to determine their gross incomes. This conclusion is supported by the record. Income calculation for purposes of modifying child support must be accomplished within the framework of KRS Chapter 403. In attempting to make this determination within that statutory framework, the court found insufficient evidence to deviate from the original child support obligation that was calculated less than one year prior. Additionally, the court also noted that the child support obligation could be recalculated in the future at such time that current income information was made available. KRS 403.211(5). We will reverse a child support decision only upon finding an abuse of discretion. *Downing v. Downing*, 45 S.W.3d 449 (Ky. App. 2001). The test for abuse of discretion is whether the trial court's decision is arbitrary, unreasonable,

unfair or unsupported by sound legal principles. *Id.* We cannot conclude that the Adair Circuit Court abused its discretion herein, and accordingly find no error.

In her cross-appeal, Mother argues that the circuit court erred in denying her motion for attorney fees. She contends that Father is primarily or solely responsible for the ongoing litigation, motions and hearings, and therefore should be held responsible for her attorney fees as well. She describes an "onslaught of motions" wherein she was having to defend Father's almost monthly requests for a change in custody, which she contends were vexatious and constituted harassment. She argues that Father's tactics served to waste the court's time and must be discouraged, and contends that the disparity in the parties' respective incomes supports an award of attorney fees in her favor.

The trial court has discretion to award attorney fees in a dissolution of marriage proceeding. See KRS 403.220, stating that:

[t]he 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 award of such fees is discretionary, and will not be disturbed absent a showing of abuse of discretion. *Age v. Age*, 340 S.W.3d 88 (Ky. App. 2011). The trial court herein was well-versed in the ongoing litigation, and was best situated to determine whether either party was prosecuting frivolous matters for the purpose

of harassing the opposing party or squandering the court's resources. The court was also fully apprised of the most recent income information and disparity between the parties' incomes. In considering all relevant factors and the totality of the record, the court determined that each party bore some responsibility for the current situation and each should pay his or her respective attorney fees. This conclusion is supported by the record, and does not constitute an abuse of discretion. We find no error.

For the foregoing reasons, we affirm the Order of the Adair Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT/
CROSS-APPELLEE:

Elmer J. George
Lebanon, Kentucky

BRIEF FOR APPELLEE/
CROSS-APPELLANT:

Susan Hanrahan McCain
Springfield, Kentucky