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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001415-ME
AND
NO. 2013-CA-001490-ME

MATTHEW L. STROUT — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM LIVINGSTON CIRCUIT COURT
HONORABLE C.A. WOODALL, III, JUDGE
ACTION NO. 10-CI-00211

STEPHANIE D. BARNES — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MAZE, AND TAYLOR, JUDGES.

MAZE, JUDGE: Matthew Strout appeals from an Order of the Livingston Circuit Court denying his motion to modify his child support obligation and, in doing so, finding him to be voluntarily underemployed pursuant to Kentucky Revised Statutes (KRS) 403.212. In addition, Stephanie Barnes appeals the trial court's

order because it included only a portion of the actual cost of child care she incurred on a monthly basis. However, finding no error in the trial court's various findings, we affirm.

Background

Strout and Barnes have one child, born in February 2010. Pursuant to a Mediation Agreement, they enjoy joint custody and Barnes is the Primary Residential Parent. Pursuant to another Mediation Agreement, dated December 17, 2010, Strout was required to pay Barnes nearly $800 per month in child support. Strout holds two bachelor's degrees and a Master of Business Administration. In 2011, Strout was employed with a company in East Chicago, Indiana, earning $97,000 per year. However, in March 2012, he began collecting short-term disability, earning his full salary on disability until August 2012.

While Strout was on disability, his wife obtained employment which required the couple to relocate to Florida. As a result of this relocation, Strout did not follow up with his doctors and did not receive medical clearance to return to work. Accordingly, his employer terminated his employment on February 1, 2013.

Shortly thereafter, Strout moved the trial court to reduce his child support obligation due to his unemployment. In response, the Livingston County Attorney, on behalf of Barnes, sought modification in the form of an increase due to a rise in child care costs. The trial court held a hearing on the matter on June 5, 2013. At that time, Strout's sole income was $1,690 per month in unemployment benefits. He testified that upon relocating to Florida, he unsuccessfully sought

work in both his previous field and the field of commodities and futures trading. Strout testified that following his move to Florida, he was effectively a "househusband." A worker with the Livingston County Child Support office also testified at the hearing. She stated that, based on Strout's imputed income of $97,000 per year, as well as Barnes's income and child care costs of $444.23 per month, the statutory guidelines required Strout to pay Barnes $1,161.13 per month.

Following the hearing, the trial court entered its Findings of Fact, Conclusions of Law, and Order. The trial court found, *inter alia*, that "though there was no specific testimony about the job market in [Strout's] vicinity, … with his education, training, and work experience, he is voluntarily underemployed at the present time pursuant to KRS 403.212(2)(d)." The trial court therefore imputed Strout's income to $97,000 per year for purposes of its child support calculation. Regarding child care, the trial court found that "despite the actual cost [of $444.23], … $300.00 per month is a reasonable amount to be included for child support computation."

Using these figures, the trial court found that the guidelines called for an increase in Strout's child support obligation of more than $200 per month to a total of $1,031.00. However, the court stated that while this would typically justify modification of Strout's child support obligation under statute, "because of [his] underemployment and because of the substantial arrearage he has accumulated, the Court deviates from the guidelines based upon those extraordinary factors and simply denies [Strout's] Motion to Modify his child support." The trial court's

Order left Strout's monthly child support obligation at $800. In addition, the court ordered Strout to pay an additional $200 per month toward the aforementioned arrearage. Strout and Barnes both appeal from various portions of this Order.

Standard of Review

The issues in this case concern issues related solely to the trial court's determination of Strout's child support obligation. The establishment, enforcement, and modification of child support is generally prescribed by statute and largely left, within the statutory parameters, to the sound discretion of the trial court. *McKinney v. McKinney*, 257 S.W.3d 130, 133 (Ky. App. 2008) (*citing Van Meter v. Smith*, 14 S.W.3d 569, 572 (Ky. App. 2000)). Therefore, "[a]s long as the trial court's discretion comports with the guidelines, or any deviation is adequately justified in writing, this Court will not disturb the trial court's ruling in this regard. However, a trial court's discretion is not unlimited." *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001). We may overturn the contested rulings if they were arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Id.* (*citing Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) and *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

Additionally, whether a party is voluntarily underemployed for the purposes of calculating a child support obligation is a factual question. *Gossett v. Gossett*, 32 S.W.3d 109, 111 (Ky. App. 2000). Therefore, we will disturb the trial court's findings only in the presence of clear error; that is, only if they are

unsupported by substantial evidence. *Id*.; *see also* Kentucky Rules of Civil Procedure (CR) 52.01.

Analysis

Strout raises two issues on appeal: Whether the trial court properly considered all elements of KRS 403.212 in finding him to be voluntarily underemployed and imputing his income to $97,000; and whether the trial court improperly refused to reduce his child support obligation pursuant to KRS 403.213. In addition, Barnes asserts that the trial court improperly deviated from the statutory guidelines in disallowing a portion of her claimed child care expenses. We address these issues in-turn.

I. Voluntary Underemployment and Imputation of Income

KRS 403.212 states, in part,

> (d) If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income …. Potential income shall be determined based upon employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community. A court may find a parent to be voluntarily unemployed or underemployed without finding that the parent intended to avoid or reduce the child support obligation.

In addition to these factors, a court may consider the totality of the circumstances in determining whether a parent is voluntarily unemployed or underemployed. *Maclean v. Middleton*, 419 S.W.3d 755, 775 (Ky. App. 2014) (*citing Polley v. Allen*, 132 S.W.3d 223, 226-27 (Ky. App. 2004)).

On appeal, Strout alleges that the trial court did not consider all of the requisite statutory factors associated with a finding of voluntary underemployment. He emphasizes that the trial court made its decision in the absence of any evidence concerning the "prevailing job opportunities and earning levels" in the community in which he now lives. KRS 403.212(d). However, we hold that the trial court did not err in so deciding.

The record contains several facts the sum of which constitutes substantial evidence supporting the trial court's conclusion that Strout was voluntarily underemployed as defined by statute. The most compelling of these facts are that Strout holds two bachelor's degrees, including one in engineering, and an MBA in finance; and that he was employed, as recently as August 2012, in the engineering field at his full salary of $97,000 per year. Strout does not contest these facts. The controversy in this case surrounds the trial court's finding of voluntary underemployment when, according to Strout, the court heard no specific evidence pertaining to job market conditions in Florida.

In arguing that the trial court improperly failed to consider the third statutory element of KRS 403.212(d), Strout asserts that it was Barnes's burden to present evidence about "prevailing job opportunities and earning levels in the community" and that she failed to do so. Strout relies on this Court's decision in *Keplinger v. Keplinger*, 839 S.W.2d 566 (Ky. App. 1992) for this assertion. However, he misunderstands our holding in that case. In *Keplinger*, we held that

> KRS 403.212(d) must be read as creating a presumption that future income will be on a par with the worker's most recent experience. The party who wants the trial court to use a different income level in applying the child support guidelines bears the burden of presenting evidence which would support the requested finding.

Keplinger, 839 S.W.2d at 569 (internal citations omitted). Applying *Keplinger* correctly, and starting from the presumption that Strout's previous earning capacity of $97,000 was the appropriate indicator of his future income, it was Strout's burden to rebut that presumption. It was not the Commonwealth's or Barnes's burden to preserve it.

Furthermore, while it is true that little evidence existed on the record concerning prevailing job opportunities in Strout's new community in Florida, the totality of the circumstances presented in this case, supported by other substantial evidence of record, brings the trial court's decision within reason. We first point out that Strout himself provided the scarce testimony that does exist in the record regarding prevailing job opportunities in Florida. He testified that he had searched unsuccessfully for employment in the engineering field, and that he had applied for his commodities and futures trading license but was turned down. More generally, Strout did not dispute that he chose to leave his medical treatment in Indiana – a key precursor to maintaining his employment there – in favor of relocating to Florida due to his wife's career pursuits.

These facts, in conjunction with Strout's qualifications and very recent earning capacity of $97,000, lead us to conclude that the trial court's finding

of voluntary underemployment was not erroneous. Likewise, the imputation of Strout at the salary he made as recently as 2012 was not an abuse of discretion.

II. Strout's Request for a Reduction in Support

We briefly discuss Strout's argument that the trial court wrongfully denied his Motion to Modify, or reduce, his child support obligation. In light of our analysis above, as well as the following, we hold that the trial court did not abuse its discretion in denying Strout's request.

KRS 403.213(1) permits modification of a party's child support obligation when there is "a material change in circumstances that is substantial and continuing." It further states that where a change exists of fifteen percent or greater in the amount required under the guidelines, a material change in circumstances is presumed. Such a change did not exist in this case.

The record demonstrates that Strout's income at the time of the original obligation under the 2010 Mediation Agreement was very similar, if not the same, as that which the trial court imputed to him. Having already held that the trial court did not err in finding Strout to be voluntarily underemployed and imputing him to his previous salary of $97,000 per year, there was little, if any, change in Strout's income for purposes of calculating his child support obligation under the statutory guidelines. Therefore, we detect no error in the trial court's conclusion that Strout had not suffered a "material change in circumstances" justifying a reduction under KRS 403.213.

III. Allotment of Child Care Expenses

KRS 403.211(6) states that, in calculating a party's child support obligation, "[t]he court shall allocate between the parents, in proportion to their combined monthly adjusted parental gross income, reasonable and necessary child care costs incurred due to employment, job search, or education leading to employment, in addition to the amount ordered under the child support guidelines." Barnes appeals the trial court's decision to allow only $300 of the more than $444 she claimed for child care expenses for purposes of her motion to increase Strout's child support obligation. She seemingly argues that the allotment of these actual expenses was mandatory, not discretionary. We disagree.

Contrary to Barnes's assertion, the trial court did not state that it was "deviating from the guidelines" in disallowing part of her claimed child care costs. The trial court's announced and reasoned deviation only pertained to its calculation of Strout's child support obligation. As Barnes points out, child care is not calculated as support under the statutory guidelines; it is ordered "in addition to the amount ordered under the child support guidelines." KRS 403.211(6). The trial court did exactly that. Thus, the trial court's decision regarding child care was not a "deviation" from the guidelines requiring sufficient justification.

Barnes is also incorrect in asserting that KRS 403.211(6) categorically required the trial court to allot the entirety of her claimed child care expenses. While the language of the statute, "[t]he court shall allocate…[,]" indeed requires the trial court to allocate child care expenses among the parties, it limits the

amount allotted to that which the court deems "reasonable and necessary," leaving that determination to the discretion of the trial court. KRS 403.211(6).

Furthermore, the record provides evidence sufficient to conclude that the trial court did not abuse its discretion in limiting its allotment. Though it is true that Strout expressed his belief that school would benefit the child, Barnes admitted that she enrolled their son in the pre-school of her choice without discussing it with Strout or giving him the opportunity to research other schools. Barnes also testified that she lives with her grandparents who, though elderly, have proven capable of providing supervision for her son. From these facts, we perceive no error in the trial court's finding that the $444.23 Barnes pays in child care monthly is "expensive;" or in the language of the statute, unreasonable and possibly unnecessary.

Conclusion

For the foregoing reasons, we affirm, in its entirety, the Order of the Livingston Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeffery P. Alford
Paducah, Kentucky

BRIEF FOR APPELLEE:

Billy N. Riley
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Smithland, Kentucky