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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000584-ME

CARLA D. MILLER (BOWLING) APPELLANT

v. APPEAL FROM BATH CIRCUIT COURT
HONORABLE WILLIAM E. LANE, JUDGE
ACTION NO. 02-CI-00244

BRYAN K. MILLER APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, KRAMER,[1] AND STUMBO, JUDGES.

KRAMER, JUDGE: Carla Miller (now Bowling) appeals the March 13, 2014 findings of fact, conclusions of law, and judgment of the Bath Circuit Court modifying Bryan Miller's child support obligation. After careful review of the record, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

[1] Judge Joy A. Kramer, formerly Judge Joy A. Moore.

Bryan and Carla were married in December 1997 and had two children. Carla filed for divorce in October 2002. The parties appeared several times in front of the Bath Circuit Court through 2004 sorting out the financial obligations of their divorce. Following a hearing on August 11, 2004, a post-decree order was entered on September 1, 2004. In that order, the court imputed an annual income of $89,098 to Bryan for child support purposes, and consequently imposed a monthly child support obligation of $1,624.26. The court observed Bryan's bachelor degree in accounting and his success in the insurance and automotive industries through 2002. The court also took notice of suspicious dramatic increases in expenses on Bryan's tax return for 2003 as compared with prior years. This was testified to by a Certified Public Accountant who reviewed Bryan's financial records for the years 2000 through 2003[2] in order to attribute an appropriate amount of income to Bryan for calculating his child support. Bryan did not produce evidence refuting the testimony. Bryan claimed he was forced to take a low paying job earning $325 per week in order to care for his children.[3] Bryan appealed the order; however, the Court of Appeals affirmed the trial court in a December 9, 2005 opinion.

[2] On his 2000 joint tax return, Bryan reported a net profit of $42,147 from his automotive lot. The following year, Bryan reported a net profit of $92,707 on the parties' joint tax return. In 2002, Bryan filed a separate tax return from Carla and reported a net profit of $125,034 from his lot. In 2003, Bryan reported a net income of $26,563 from his lot, and he testified that he had closed the lot and was working at an automotive garage.

[3] This includes Bryan and Carla's two children and Bryan's child from a prior marriage.

There were several adjustments made to the child support amount throughout 2006 and 2007. Carla filed a show cause motion on July 2, 2009, requesting that Bryan be ordered to show cause as to why he had not been paying his monthly child support obligation.[4] A hearing was held on July 10, 2009. At the hearing, Bryan stated that the automotive lot where he worked had closed due to dire economic circumstances, and he had been drawing unemployment. He stated that he had been paying nearly half of his unemployment toward child support each month. Bryan also stated at the hearing that the automotive lot was getting ready to try to start selling cars again. The court suggested that Bryan's child support payments be modified based on his unemployment to help him get reestablished, and the case would be reviewed four months later in November. The parties were in agreement. Bryan and Carla were asked by the court to get their figures to the child support office for the amount to be readjusted so an order could be entered. However, an order pertaining to this modification apparently was never prepared and does not appear in the record.

On August 10, 2009, Carla filed a motion for a rule of contempt claiming that Bryan had made misrepresentations to the court about his financial situation at the July 10th hearing. An order was entered the next day ordering Bryan to appear before the court on September 11, 2009, and show cause as to why he should not be held in contempt for his failure to comply with orders of the court. Prior to this hearing, Carla filed a criminal complaint against Bryan on August 19,

[4] At this time, Bryan's child support was set at $1,532.28 per month.

2009, alleging Flagrant Non-Support.[5] Bryan was indicted on the charge in 2010. The indictment was dismissed on December 19, 2013,[6] due to lack of a prior civil contempt process having been conducted and because Bryan had paid his child support on a regular basis, if not always the full amount, according to the Bath County Child Support Office records.

Bryan then made a request to review his child support obligation and a hearing was held on December 17, 2009. At this time, Bryan was an employee of an automotive dealer, Miller Motors, owned by his cousin. Bryan was living in a home owned by his mother, and he did not pay any rent or utilities. He did not own a vehicle as he would drive whatever was available from the lot, and he did not have to pay insurance because the vehicles were insured through the business. Bryan testified that he gave up his insurance agency to go into the automotive business, but had been struggling since the most recent economic downturn. He testified that he had tried to find other work in the automotive industry without success. Bryan stated that he had made $45,000 in 2008. The court acknowledged the prior determination that Bryan was previously found to be underemployed and reviewed the case at this time based on changed circumstances. The court found that Bryan's rent, utilities, and vehicle costs should be imputed to him, and he should be making more than $45,000 annually based on all of the evidence

[5] Kentucky Revised Statutes (KRS) 530.050(6). Flagrant nonsupport is a Class D felony.

[6] An order dismissing the indictment was entered on April 23, 2014.

previously heard. The court imputed an annual income of $79,900 to Bryan and imposed a child support obligation of $1,215.22 per month.

On July 14, 2011, Bryan filed another motion to modify his child support. The Court ordered the exchange of financial information and held the motion for a hearing in abeyance pending mediation. The mediation failed, and nothing further occurred in the matter while the non-support charge was being prosecuted.

The court then entered an order on October 2, 2013, retroactive to July 14, 2011, modifying Bryan's child support to $352.93 per month. An amended order modifying Bryan's child support to $276.05 per month was entered on October 10, 2013. Carla filed a motion to alter, amend or vacate both orders and sought an evidentiary hearing. The matter came to a hearing on February 12, 2014. Bryan testified, as did his manager, that he resides in Florida as well as he works for Florida Auto and Truck Exchange. At the time of the hearing, Bryan had worked for Florida Auto and Truck Exchange for approximately a year and one-half as an independent contractor. The company is a wholesale buyer of automobiles that are subsequently sold overseas. Bryan is paid commission based on the net profit of each of the vehicles he brokers. His 1099 tax form showed that he made $39,016 gross annual income for 2013. He has no other sources of income and receives advances from his employer. Bryan testified that he has tried to obtain other employment. However, due to the pending felony charge over the

past several years, he was unable to obtain those higher paying jobs that require background investigations.

The Bath Circuit Court determined that Bryan's child support obligation should be based on his actual income from the most recent tax year given "his lack of recent verifiable employment history, testimony of his witnesses and the 4 year pendency of a felony charge that would clearly have impacted his employment in the sales, business and insurance fields." In a March 13, 2014 order, Bryan's child support was modified to $427.26 per month effective August 1, 2011. Carla now appeals.

STANDARD OF REVIEW

"[T]he establishment, modification, and enforcement 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)). The test for abuse of discretion is whether the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001). Additionally, the trial court's findings of fact shall not be set aside unless they are clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Kentucky Rule of Civil Procedure (CR) 52.01. A factual finding is clearly erroneous if it is not supported by substantial evidence;

that is, evidence sufficient to induce conviction in the mind of a reasonable person. *B.C. v. B.T.*, 182 S.W.3d 213, 219 (Ky. App. 2005).

ANALYSIS

Carla's sole argument on appeal is that the trial court abused its discretion in modifying Bryan's child support obligation because the doctrine of *res judicata* precluded the trial court from considering whether income should be imputed to Bryan. Carla argues that because income was imputed to Bryan initially in 2004 and again in 2010 in calculating child support, the only matter the trial court should have reviewed was *how much* income should be imputed to Bryan based upon his earning capacity. We disagree.

The Kentucky Supreme Court explained the doctrine of *res judicata* as follows:

> The rule of res judicata is an affirmative defense which operates to bar repetitious suits involving the same cause of action. The doctrine of res judicata is formed by two subparts: 1) claim preclusion and 2) issue preclusion. Claim preclusion bars a party from re-litigating a previously adjudicated cause of action and entirely bars a new lawsuit on the same cause of action. Issue preclusion bars the parties from relitigating any issue actually litigated and finally decided in an earlier action. The issues in the former and latter actions must be identical.

Yeoman v. Commonwealth, Health Policy Bd., 983 S.W.2d 459, 464–65 (Ky. 1998) (footnote and internal citations omitted). However, in relation to judgments subject to subsequent modification, Comment c to Section 13 of the *Restatement (Second) of Judgments* provides:

> A judgment concluding an action is not deprived of finality for purposes of res judicata by reason of the fact that it grants or denies continuing relief, that is, requires the defendant, or holds that the defendant may not be required, to perform acts over a period of time. Judgments of these types are rendered typically in actions for injunctions, specific performance, alimony, separate maintenance, and child support and custody.
>
> The res judicata consequences of such judgments follow normal lines while circumstances remain constant, but those consequences may be affected when a material change of the circumstances occurs after the judgment. Thus if the judgment denied on the merits the continuing relief sought, but there has been a later material change of conditions, a new claim may arise upon the later facts (to be considered sometimes in combination with the old), and that claim will be held not barred by the previous judgment.

Wheeler v. Wheeler, 154 S.W.3d 291, 294 (Ky. App. 2004). Thus, the issue before the trial court was whether Bryan had presented evidence of a material, substantial and continuing change to his circumstances since the most recent judgment that would justify modifying to his child support obligation and discontinuing the imputation of income.

Carla claims that Bryan continues to cite the same excuses for his inability to pay child support: the lack of opportunities due to the state of the economy, he no longer sells insurance, and he is only able to earn what his paycheck shows. She maintains that Bryan is underemployed because he has an accounting degree and past experience and success in insurance and vehicle sales, but now purposely and continually fails to capitalize on his skills.

The statutory standard for modification of child support is "a showing of a material change in circumstances that is substantial and continuing." KRS 403.213(1). Additionally, KRS 403.212(2)(d) provides that "[i]f 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 or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community."

As Bryan was the party who brought the motion to modify his child support obligation, it was his burden to provide the court with evidence of a substantial and continuing material change in circumstances. Bryan established this through his testimony and that of his manager, verification of his current employment, recent employment history, and the circumstances created from the pendency of the felony charge sufficient to demonstrate that he is no longer voluntarily underemployed. He is not required to return to the income level he previously enjoyed to no longer be considered underemployed. Bryan is currently employed in the industry in which he has substantial experience, although in a new area different from a typical retail automotive business. He testified to numerous positions for which he had applied, but explained that employers declined to offer him positions after a background investigation revealed the felony non-support charge. While we will not condone the felony as a basis for his inability to obtain a higher paying position, it is the trial court's responsibility as it is in the best

position to weigh the evidence and judge the credibility of witnesses. The court was familiar with the parties and the history of the case as it considered Bryan's circumstances since the most recent judgment on his child support obligation. The determination to modify Bryan's child support obligation based upon his actual income is supported by evidence in the record, and therefore, the trial court did not abuse its discretion. For these reasons, the Bath Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Brandie L. Hall
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BRIEF FOR APPELLEE:

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