

RENDERED: FEBRUARY 8, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-002041-ME

TIMOTHY RUSSELL

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE CHRISTOPHER J. MEHLING, JUDGE
ACTION NO. 16-CI-00229

APRIL RUSSELL

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, CHIEF JUDGE; KRAMER AND NICKELL, JUDGES.

CLAYTON, CHIEF JUDGE: Timothy Russell appeals pro se from a Kenton Circuit Court order denying his motion to modify child support.

Timothy and April Russell were married on July 29, 2014, and separated on January 23, 2015. Timothy was incarcerated in February 2015. April filed a petition for dissolution of marriage on February 16, 2016. Following a

hearing on December 2, 2016, the family court entered findings of fact, conclusions of law, and the final decree on December 20, 2016.

The pertinent portions of the family court's findings state that the parties had no marital debts and agreed to hold one another harmless for their individual debts. They have one child together, who was four years of age at the time of the dissolution. April, who has two children from a previous marriage, was granted sole custody. Timothy was not granted parenting time or visitation. A previously entered domestic violence order against him requiring no contact with April and the children remained in effect.

Regarding child support, the family court found that April earns \$19,500 per year (\$1,625 per month). Before his incarceration, Timothy earned \$22 per hour. The family court imputed his earning capacity at the minimum wage of \$15,084 per year (\$1,257 per month) and ordered Timothy to pay April reasonable child support in the sum of \$195.40 per month commencing on December 2, 2016. Timothy was also made responsible for 44 percent of all the child's unreimbursed medical, daycare, school, extracurricular or related expenses.

On January 19, 2017, Timothy filed a motion to modify child support and hold in abeyance during his incarceration pursuant to Kentucky Revised Statutes (KRS) 403.213. April argued that the motion should be denied because there had not been a material change in Timothy's circumstances since the

December 2, 2016, hearing. On February 2, 2017, the family court entered an order denying Timothy's motion on the grounds that he failed to meet the criteria for modification. Timothy filed an appeal which was dismissed on April's motion for failure to file a brief.

Timothy then filed another motion to modify the family court's findings of fact regarding child support. The family court scheduled a hearing at which Timothy did not appear. The family court noted that Timothy did not request a transport order or contact the court to arrange for a telephonic hearing. Following the hearing, at which April's counsel was present, the trial court entered an order denying the motion. This appeal by Timothy followed.

The Kentucky Supreme Court has recognized "a trial court's general authority and discretion to determine child-support questions." *C.D.G. v. N.J.S.*, 469 S.W.3d 413, 421 (Ky. 2015). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

Timothy argues that the trial court abused its discretion in denying his motion to modify child support because there was insufficient evidence to impute an annual salary of \$15,084 per year because he is incarcerated, has no income and no assets. He challenges the equation of incarceration with voluntary

unemployment; argues that he met the statutory standard for modification; and, finally, claims that his guardian ad litem was ineffective in advising and advocating for him.

As noted by the family court in its order, Timothy's challenge to the amount of child support ordered by the court in its original findings of fact and conclusions of law is procedurally barred. Although Timothy brought a timely appeal from that judgment, it was dismissed for failure to file a brief.

Consequently, the only way in which the amount of child support may be modified at this point is "upon a showing of a material change in circumstances that is substantial and continuing." KRS 403.213(1). Timothy has failed to make such a showing. By his own admission, he was incarcerated in February 2015, well before the hearing on December 2, 2016, and the entry of the family court's findings of fact and conclusions of law on December 20, 2016. According to Timothy, he will continue to be incarcerated until 2020 at the earliest. The family court did not err in denying his motion because there has been no change in Timothy's circumstances to warrant a modification.

We are cognizant that "[p]ro se pleadings are not required to meet the standard of those applied to legal counsel[.]" *Beecham v. Commonwealth*, 657 S.W.2d 234, 236 (Ky. 1983), and will therefore briefly address Timothy's argument regarding child support. He acknowledges that "the Legislature did not

intend to exempt incarcerated parents from those for whom income should be imputed for purposes of child support.” *Commonwealth ex rel. Marshall v. Marshall*, 15 S.W.3d 396, 401-02 (Ky. App. 2000). “[I]ncarcerated parents are to be treated no differently than other voluntary unemployed, or underemployed parents owing support.” *Id.* at 402.

Timothy argues that his situation is distinguishable because he is not asking for a total suspension of child support, but a reduction to a “reasonable” amount of \$60 per month. He contends that when he is released he will owe almost \$6,000 in arrears, which he claims will significantly handicap him and become a “very significant” source of tension between the parties.

Timothy misunderstands the purpose of child support, which derives “from the obligation of the parent to the child, not from one parent to another.” *Clay v. Clay*, 707 S.W.2d 352, 354 (Ky. App. 1986). Throughout the period Timothy is incarcerated, the child will continue to have financial needs which April will endeavor to meet without Timothy’s assistance. Timothy cannot evade this obligation to his child simply because he is incarcerated, even if it may impose a hardship on him upon his release.

Finally, Timothy argues that he was denied competent counsel because his guardian ad litem did not advocate for a reasonable child support order and failed to advise him of the consequences of the child support order. Timothy

gives no citation to the record to indicate that this argument was ever presented to the family court. “The Court of Appeals is without authority to review issues not raised in or decided by the trial court.” *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989). “It is an unvarying rule that a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this court.” *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011) (internal quotation marks and citation omitted), *abrogated on other grounds by Nami Res. Co. v. Asher Land & Mineral, Ltd.*, 554 S.W.3d 323 (Ky. 2018).

For the foregoing reasons, the order of the Kenton Family Court denying the motion to modify its findings of fact regarding child support is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FILED FOR APPELLEE

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