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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001791-ME

R.R. APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DAWN M. GENTRY, JUDGE
ACTION NO. 13-J-1929-004

R.R. AND T.R. APPELLEES

AND
NO. 2018-CA-001792-ME

R.R. APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DAWN M. GENTRY, JUDGE
ACTION NO. 13-J-1926-001

R.R. AND T.R. APPELLEES

AND
NO. 2018-CA-001793-ME

R.R. APPELLANT

APPEAL FROM KENTON CIRCUIT COURT
v. HONORABLE DAWN M. GENTRY, JUDGE
ACTION NO. 13-J-1928-003

R.R. AND T.R. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; GOODWINE AND L. THOMPSON, JUDGES.

CLAYTON, CHIEF JUDGE: Appellant, R.R., appeals the Kenton Circuit Court, Family Division's order denying his motion for relief from an order modifying his child support payment. For the following reasons, we affirm.

BACKGROUND

Appellant, R.R., has three children. In 2013, dependency and neglect petitions were filed on each child and the children were placed with the Cabinet for Health and Family Services. Custody was subsequently given to Appellant's brother and sister-in-law, R.R. and T.R. In 2014, Appellant was ordered to pay child support of $324 per month.

On March 2, 2018, the county attorney filed a motion to modify that child support payment, along with an affidavit from Appellant's brother/custodian of Appellant's three children. The affidavit attested that a "material change in circumstances" occurred, Appellant's child support is not in compliance with the Kentucky Child Support Guidelines, and application of these guidelines will result in a 15% change in Appellant's current obligation. That same day, the county attorney filed a notice that a pretrial conference would be held on May 11, 2018 at the Child Support Office and all parties and their counsel were asked to appear with documents responsive to the county attorney's requests for production of documents.[1]

On May 11, 2018, the pretrial conference with the Child Support Office was held. Appellant claimed he tried to attend that conference but was late and they told him the matter would go to court.

On June 27, 2018, the trial court heard the county attorney's motion, which asked for an increase in Appellant's child support payment from $324 per month to $1,227.40 per month. The county attorney relied upon a wage history report and noted Appellant earned $13,703.71 in the first quarter of 2018 at his job with Eagle Manufacturing. Appellant was present at the hearing and gave sworn

[1] The county attorney filed a similar notice with requests for production of documents to W.R., Appellant's former wife and mother of the three children at issue. W.R.'s child support obligation is not part of this appeal.

testimony. Appellant was presented with the Child Support Worksheet and asked if he agreed with it. Appellant responded: "I think it's kinda too much." When asked again if he agreed with it, Appellant stated he had no income because he quit that job in April. When asked by the trial judge if he had anything else to add, Appellant replied "not really." On July 10, 2018, the trial court entered a Uniform Child Support Order ordering Appellant to pay $1,227.40 per month in child support as determined by the Kentucky Child Support Guidelines.

On July 31, 2018, Appellant's attorney filed a notice of representation of Appellant, and on August 10, 2018, filed a Kentucky Rule of Civil Procedure (CR) 60.02 motion for relief from the July 10, 2018 order increasing Appellant's child support payment. As a basis for his motion, Appellant argued a mistake, pursuant to CR 60.02(a), was made as to his income. He also argued that he did not fully understand the proceedings or how to explain the significance of his overtime, so he should be entitled to relief under CR 60.02(f) for "any other reason of an extraordinary nature justifying relief." Attached to Appellant's motion were three earning statements from his job at Eagle Manufacturing showing earnings of $30,114.31 in 2016, $51,773.87 in 2017, and $15,796.19 in 2018.[2]

[2] The earning statements were for the pay periods ending on December 18, 2016, December 17, 2017, and May 6, 2018, respectively.

On October 26, 2018, the trial court heard Appellant's CR 60.02 motion for relief. At that hearing, Appellant was present with counsel. Upon questioning, Appellant admitted he worked at Eagle Manufacturing from 2015 until April 2018. At that job, he earned $14.79 per hour, with time and a half on Saturdays and double time on Sundays. He had mandatory overtime and worked 64 hours per week. Appellant testified that he quit because the job was getting too hard, he was not able to see his kids a lot, he wanted out of there, the company was going downhill, and he was not happy anymore. He also testified that he only had an 11th grade education because school got too hard. On cross-examination, Appellant testified he quit one month after the motion to modify his child support payment was filed. The county attorney argued that his office had been approaching Appellant since March 2018 for documentation of his income with no response. Only when Appellant learned of the county attorney's motion to increase child support did he respond. The county attorney further argued that Appellant's children should not suffer due to Appellant's underemployment and no extenuating circumstance should relieve him from paying the child support calculated based upon the money he earned.

On November 2, 2018, the trial court denied Appellant's motion finding no evidence was presented which would qualify as grounds for relief under CR 60.02. The trial court held: "(Appellant) worked 3 years at 64 hours per week

and left employment after child support began. The Court finds this timing suspect." This appeal followed.

ANALYSIS

Appellant's CR 60.02 motion for relief fell under subsection (a) for "mistake, inadvertence, surprise or excusable neglect" and subsection (f) for "any other reason of an extraordinary nature justifying relief." As stated, he claimed a mistake was made as to his income. Additionally, he claimed not to have understood the proceedings or how to explain his overtime pay. For this appeal, however, Appellant attempts to argue additional grounds for relief claiming it is "unfair and unreasonable" to increase his child support without testimony or documentation and it is "unfair and unreasonable" to require him to work 64 hours per week to comply with his child support obligation. He also claims the trial court should have considered that he quit his job at Eagle Manufacturing as "newly discovered evidence."

We review the trial court's denial of Appellant's CR 60.02 motion under an abuse of discretion standard. *Kerr v. Osborne*, 305 S.W.3d 455, 459 (Ky. App. 2010); *see also Snodgrass v. Snodgrass*, 297 S.W.3d 878, 884 (Ky. App. 2009) (holding a family court's decision on all CR 60.02 motions are reviewed under an abuse of discretion standard). The test for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by

sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). Absent some "flagrant miscarriage of justice[,]" we will respect the trial court's exercise of discretion and affirm its decision. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

The Kentucky Supreme Court has noted that the purpose of CR 60.02 is to bring before a court "errors in matter of fact which (1) had not been put into issue or passed on, [and] (2) were unknown and could not have been known to the party by the exercise of reasonable diligence and in time to have been otherwise presented to the court." *Gross*, 648 S.W.2d at 856. Appellant's CR 60.02 motion did not bring these types of error before the trial court. Appellant did not dispute his earnings at Eagle Manufacturing, and he did not testify that a "mistake" was made regarding his income. Instead, Appellant used the CR 60.02 motion and hearing to offer reasons why he quit his job at Eagle Manufacturing and to describe his mandatory overtime. These were not facts which were unknown at the time of the June 2018 hearing. Becoming voluntarily unemployed after the county attorney filed a motion to increase Appellant's child support obligation is not a "mistake" envisioned by CR 60.02(a), nor "newly discovered evidence" under CR 60.02(b), nor any other reason of an extraordinary nature justifying relief under CR 60.02(f).

Moreover, if Appellant had an issue with the trial court's order imputing income to him based on his mandatory overtime, he should have filed a motion for amendment pursuant to CR 52.02 or even a motion pursuant to CR 59.05 to alter, amend, or vacate. A judgment should not be set aside unless an issue essential to that judgment has been brought to the attention of the trial court by a written motion pursuant to CR 52.02. CR 52.04. Without such a motion, the Court presumes the evidence presented at the hearing supports the trial court's conclusions. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982).

Here, the evidence demonstrated that Appellant's income increased since his child support obligation was first set in 2014. And, when the county attorney filed the motion to modify, Appellant's child support obligation had increased by more than 15%.

Under Kentucky law, to modify child support, "a material change in circumstances that is substantial and continuing" must be demonstrated. KRS 403.213(1). "Under KRS 403.213(2), a change in circumstances is rebuttably presumed to be substantial if application of the child-support guidelines (KRS 403.212) to the new circumstances would result in a change in the amount of child support of 15% or more." *Snow v. Snow*, 24 S.W.3d 668, 672 (Ky. App. 2000). "Thus, a party who is able to show a 15% discrepancy between the amount of support being paid *at the time the motion is filed* and the amount due pursuant to

the guidelines is entitled to a rebuttable presumption that a material change in circumstances has occurred." *Tilley v. Tilley*, 947 S.W.2d 63, 65 (Ky. App. 1997) (emphasis added). Appellant did not rebut the presumption of a substantial change in circumstances by quitting his job one month after the motion was filed.

As to Appellant's complaint that the trial court increased his child support obligation without any testimony or documentation, we disagree. At the June 2018 hearing, the county attorney read from the Child Support Worksheet calculated from the wage reports of Appellant's 2018 first quarter earnings. Documentation was shown to Appellant and he was then questioned, under oath, by the county attorney and the trial judge. While the actual documents were not introduced into evidence, Appellant had an opportunity to dispute this evidence. If Appellant disagreed with the county attorney's evidence, he should have responded to the requests for production of documents or timely appeared at the pretrial conference at the Child Support Office or brought refuting documentation with him to the June 2018 hearing. He did none of these. In fact, the only evidence presented by Appellant were the pay stubs attached to his CR 60.02 motion, which appear to support the modification to his child support obligation.

Appellant also complains he was not asked why he quit his job at Eagle Manufacturing at the June 2018 hearing. However, Appellant was given an opportunity to testify and respond. More importantly, the reason why Appellant

quit his job has no bearing on the motion to modify. The county attorney filed the motion to modify based on Appellant's income *at that time*. KRS 403.212(2)(a) defines "income" when modifying child support payments as "actual gross income of the parent if employed to full capacity or potential income if unemployed or underemployed." The trial court ruled on that motion based on the evidence presented at that time, and the evidence established an increase in child support was warranted. Again, under KRS 403.213(2), the county attorney was able to show a greater than 15% discrepancy in the amount of child support owed at the time he filed the motion to modify. *Tilley*, 947 S.W.2d at 65. Appellant cannot quit his job while the motion to modify is pending to keep his child support obligation the same.

Appellant further complains that he was not asked if he had an attorney or wanted to consult one during the June 2018 hearing. Appellant was not entitled to legal representation in this matter. Moreover, Appellant was on notice that his child support obligation may be modified. The pretrial conference notice specifically informed him to appear with counsel and to bring documentation of his earnings. He chose not to timely appear at the May 11, 2018 pretrial conference at the Child Support Office. Appellant then chose to appear at the June 27, 2018 hearing of the motion to modify without counsel.

Finally, Appellant argues that the trial court only found his timing "suspect" and did not specifically find he quit his job to avoid child support. However, the trial court is not required to find bad faith or an intent to avoid a child support obligation. *See Howard v. Howard*, 336 S.W.3d 433, 439 (Ky. 2011). Pursuant to KRS 403.212(2)(d), "child support shall be calculated based on a determination of potential income[.]" The statute further provides that potential income "shall be determined based upon employment potential and probable earnings level based on the obligor's or obligee's recent work history" and "[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." KRS 403.212(2)(d) (emphasis added). The trial court's decision to modify the Appellant's child support obligation was supported by the evidence. And, as stated, if Appellant thought the trial court should have made additional findings, he should have filed a CR 52 motion, not a CR 60.02 motion for relief.

Relief provided by a CR 60.02 motion is "extreme, limited, and reserved for those times when justice itself requires an avenue for the plight endured by the aggrieved party." *Meece v. Commonwealth*, 529 S.W.3d 281, 285 (Ky. 2017). In denying Appellant's motion, the trial court found no evidence was presented to qualify as ground for relief under CR 60.02. We agree and conclude the trial court did not abuse its discretion in denying Appellant's CR 60.02 motion.

CONCLUSION

For the foregoing reasons, we affirm.

ALL CONCUR.

BRIEFS FOR APPELLANT:

R. Kim Vocke
Covington, Kentucky

BRIEF FOR APPELLEE:

Patrick Grote
Assistant Kenton County Attorney
Covington, Kentucky