

RENDERED: FEBRUARY 25, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002622-MR

BRADLEY DAVID HEIDORF

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE KATHLEEN VOOR MONTANO, JUDGE
ACTION NO. 00-FC-00553

ROBERTA KAY HEIDORF; AND
MELANIE STRAW-BOONE, ATTORNEY

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, JOHNSON, AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Bradley David Heidorf has appealed from the July 29, 2003, order of the Jefferson Family Court, which denied his motion to reduce his child support and awarded attorney's fees to Roberta Kay Heidorf's attorney. Having concluded that the trial court made adequate factual findings which were supported by substantial evidence, that it correctly applied the law, and that it did not abuse its discretion, we affirm.

Bradley and Roberta were married on April 29, 1989.

Two minor children were born of the marriage, namely Paige Elizabeth Heidorf (DOB 10/25/94) and Hudson Bradley Heidorf (DOB 7/10/97). At the time of the parties' separation, Bradley was 38-years old and employed as a pilot for United Parcel Service with a gross income of approximately \$14,782.00 per month.

Roberta was 36-years of age and unemployed.

Bradley filed a petition for dissolution of marriage on January 24, 2000. Both parties requested the family court to award them joint custody of the minor children and to set child support in accordance with the Kentucky Child Support Guidelines. Roberta requested that she be awarded temporary and permanent maintenance. The family court entered orders¹ on February 1, 2000, requiring that mediation and a case management conference be held.²

On June 2, 2000, following two mediation sessions, the parties signed a handwritten agreement establishing custody, visitation, and child support for the minor children; maintenance for Roberta; and the property rights of both

¹ Honorable Patricia Walker Fitzgerald, Jefferson Circuit Judge, presided in this case and signed various orders until February 20, 2003, when this case was transferred to Division 10 of the Jefferson Family Court with Honorable Kathleen Voor Montano presiding.

² On March 28, 2000, the family court held a case management conference and determined that since the parties could not resolve their differences, a trial was necessary and scheduled it for June 20, 2000, and June 23, 2000.

parties. The informal, terse agreement stated, in relevant part, as follows:

Maint. 3 yrs non-modif. \$2250/m
Child Supp. 3 yrs non[-]modif. \$2250/m

. . .

Joint Cust. No primary resid. Parties[']
time with children shall be as close to
50/50.

. . .

Pet. will pay Resp. \$2,500.00 towards her
atty's fee.

The family court entered a decree of dissolution of marriage on June 12, 2000, dissolving the parties' marriage and incorporating the handwritten mediation agreement into the decree.

Approximately three years later, on May 9, 2003, Bradley filed a motion and affidavit requesting a modification of his child-support obligation, stating, in relevant part, as follows:

4. The Affiant further states that by the terms of that mediated agreement, the Affiant . . . was required to pay to [Roberta] the sum of \$2,250 per month as child support that was non-modifiable and in addition thereto, the sum of \$2,250 per month, non-modifiable, as maintenance. The parties specifically agreed that those two (2) figures would not be modified for a period of three (3) years and both parties fully acknowledge that the child support as conveyed was greater

than what any Court would have awarded based upon the parties['] respective incomes at that time.³

5. Further, the Affiant states that the agreement did not take into consideration for child support purposes [Roberta's] income, including the amounts agreed to in the form of maintenance. . . . The Affiant states that as of the signing of this Affidavit thirty-six (36) months have passed and the Affiant moves to terminate the maintenance per the agreement and to modify child support predicated upon the parties' respective incomes [emphasis added].

Bradley also filed a motion requesting an award for the attorney's fees he "incurred in establishing child support for the parties' two (2) minor children." Roberta filed a motion requesting "an award of attorney's fees incurred in defending Mr. Heidorf's motion to reduce his child support."

After a hearing was held on June 27, 2003, the family court entered an order on July 29, 2003, which included the following findings of fact:

In [the handwritten Property Settlement Agreement], child support was set at \$2250.00 per month. The amount was agreed to be non-modifiable for three (3) years.

³ The family court's order makes no reference to this allegation. Bradley relies upon this contention in making his argument that child support should have been established "anew" following the expiration of the three-year period. Bradley contends the family court erred in applying the law pertaining to modification of child support because the temporary amount of child support he had agreed to pay exceeded the amount he would have been required to pay under the law. The flaw in this argument is that when the family court computed Bradley's child-support obligation in 2003, the amount that it determined he owed was not 15% lower than the amount he had been paying. See Kentucky Revised Statutes (KRS) 403.213(2).

Now that the three (3) year period has passed, Petitioner wanted to have his child support obligation lowered. However, there have been no substantial changes to support the lowering of child support. In fact the only changes that have occurred are that Petitioner earns a higher income and the children have more expenses. Both of these changes would only support an increase in child support.

Based on these facts and others, the family court denied Bradley's motion for a reduction in child support and his motion for attorney's fees, but granted Roberta's motion for attorney's fees. Thus, Bradley's child support payment remained at \$2,250.00 per month and he was ordered to pay Roberta's attorney a fee of \$1,747.50.

On August 8, 2003, Bradley filed a CR⁴ 59.05 motion, requesting the family court to alter, amend, or vacate its July 29, 2003, order. Bradley stated that his three-year, child-support obligation had been based upon an agreement between the parties; and that when the three-year period expired, the child support was to be modified.⁵ He claimed that the reason for the three-year period was to give Roberta "an opportunity get on her feet[;]" that for "tax reasons" the amount of child support was

⁴ Kentucky Rules of Civil Procedure.

⁵ In this motion, Bradley referred to his initial motion as a "motion to modify child support."

"based upon the maintenance amount[;]"⁶ and that "the parties agreed to deviate from the guidelines but they agreed to deviate only for the three years[.]" He further stated that the award of attorney's fees resulted in him being "punished for filing his appropriate motion." The family court denied Bradley's motion in an order entered on November 6, 2003. This appeal followed.

Bradley alleges the family court erred by refusing to grant him a reduction in his child support and by making an award of attorney's fees to Roberta's attorney. He makes three arguments concerning the child support, but his second argument has two aspects. First, Bradley contends the family court erred by applying the wrong statute in setting his child support.⁷ Second, Bradley claims the family court (1) failed to consider and to make adequate findings as to the reasonable expenses of the children, their standard of living, and the amount of time they spent with each parent; and (2) made factual findings to support its child-support award that were not supported by

⁶ This argument seems illogical since normally the payor would benefit from having a greater tax deduction for his maintenance payments if the maintenance portion of his total payments for maintenance and child support were inflated. Bradley seems to be saying that his child-support payments were inflated for "tax reasons."

⁷ We use the more general term "setting" because Bradley claims he was asking the trial court to establish child support after the expiration of the three-year period, but Roberta contends the child support was established in the decree of dissolution and that Bradley was attempting to obtain a reduction in child support through a modification. Regardless, the trial court would have to "set" an amount for child support.

substantial evidence. Third, he claims the family court abused its discretion in setting his child support. Lastly, Bradley contends that the family court erred by ordering him to pay Roberta's attorney's fees.

A trial court's determination of child support involves three steps that entail three separate standards of review.⁸ Initially, the trial court must determine the law that is applicable to the movant's claims. "Since the interpretation of a statute is a legal question, the trial court's interpretation is subject to de novo review by an appellate court" [citations omitted].⁹ In light of the law that is applicable to the matter being litigated, the trial court must make the appropriate findings of fact. The factual findings are reviewed under the clearly erroneous standard, as this Court stated in Sherfey:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." A factual finding is not clearly erroneous if it is supported by substantial evidence. "Substantial evidence" is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people [footnotes omitted].¹⁰

⁸ Sherfey v. Sherfey, 74 S.W.3d 777, 782 (Ky.App. 2002).

⁹ Clary v. Clary, 54 S.W.3d 568, 571 (Ky.App. 2001).

¹⁰ Sherfey, 74 S.W.3d at 782.

Finally, "[a]fter a trial court makes the required findings of fact, it must then apply the law to those facts[,]"¹¹ and in doing so it must make a judgment based on the factual findings and the applicable law as to the proper amount of child support to be awarded. This "determinat[ion] by the trial court will not be disturbed unless it constitutes an abuse of discretion" [footnote omitted]. "'Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.'" . . . 'The exercise of discretion must be legally sound'" [footnote omitted].¹²

We will initially address Bradley's contention that the trial court erred in applying KRS 403.213¹³ to deny modification of his child support because he was first entitled

¹¹ Sherfey, 74 S.W.3d at 782.

¹² Sherfey, 74 S.W.3d at 782-83.

¹³ KRS 403.213(1) provides in part that "[t]he provisions of any decree respecting child support may be modified only as to installments accruing subsequently to the filing of the motion for modification and only upon a showing of a material change in circumstances that is substantial and continuing." KRS 403.213(2) provides in part as follows:

Application of the Kentucky child support guidelines to the circumstances of the parties at the time of the filing of a motion or petition for modification of the child support order which results in equal to or greater than a fifteen percent (15%) change in the amount of support due per month shall be rebuttably presumed to be a material change in circumstances. Application which results in less than a fifteen percent (15%) change in the amount of support due per month shall be rebuttably presumed not to be a material change in circumstances.

to have his child support established under KRS 403.211.¹⁴ Since the interpretation of the parties' settlement agreement and the applicable statutes present questions of law, we review them de novo.¹⁵

In their agreement, the parties merely stated that Bradley would pay Roberta child support of \$2,250.00 per month for three years and that the amount was not subject to modification during the three-year period. If the parties had wanted to agree that child support would be set "anew" after three years, the agreement could have so stated.¹⁶ Instead, we agree with the family court's interpretation of the agreement: that the child support had been initially set in 2000 and that it was not modifiable for three years; but that after three years, it was subject to modification under the applicable law. Thus, we conclude that Bradley's motion was a motion to modify his child support under KRS 403.213(1) since his child support had

¹⁴ KRS 403.211(1) provides in part that "[a]n action to establish or enforce child support may be initiated by the parent, custodian, or agency substantially contributing to the support of the child."

¹⁵ First Commonwealth Bank of Prestonsburg v. West, 55 S.W.3d 829, 835 (Ky.App. 2000) (stating that "[t]he construction and interpretation of a contract, including questions regarding ambiguity, are questions of law to be decided by the court"); Clary, 54 S.W.3d 571.

¹⁶ Employers Insurance of Wausau v. Martinez, 54 S.W.3d 142, 145 (Ky. 2001) (stating that the Court saw "no reason to rewrite the parties contract"). See also Morganfield National Bank v. Damien Elder & Sons, 836 S.W.2d 893, 895 (Ky. 1992); and O'Nan v. O'Nan, 345 S.W.2d 377, 379 (Ky. 1961).

already been established under KRS 403.211(1) by the decree of dissolution, which adopted the parties' agreement.¹⁷

We now turn our review to whether the family court's factual findings were adequate, whether those findings were clearly erroneous, and whether the family court abused its discretion in setting child support. Kentucky trial courts have been given broad discretion in considering the various factors in setting child support.¹⁸ "As 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."¹⁹ The family court has the discretion to set a reasonable amount of child support in excess of the Guidelines and among the factors it may consider is an extrapolation of the Guidelines. This Court stated in Downing v. Downing,²⁰ as follows:

When child support is set outside of the Guidelines, the Court is required to exercise discretion in arriving at a fair and equitable amount of support. In exercising such discretion, the finder of fact may consider the needs of the children. . . . Also the finder of fact may consider

¹⁷ It appears that Bradley may have also viewed his motion as a motion to modify since in his affidavit in support he stated that he moved "to modify child support predicated upon the parties' respective incomes."

¹⁸ Redmon v. Redmon, 823 S.W.2d 463, 466 (Ky.App. 1992).

¹⁹ Commonwealth ex rel. Marshall v. Marshall, 15 S.W.3d 396, 400-01 (Ky.App. 2000) (citing Bradley v. Bradley, 473 S.W.2d 117, 118 (Ky. 1971)).

²⁰ 45 S.W.3d 449, 452, 456 (Ky.App. 2001).

the lifestyle the children would have enjoyed had the parties continued to be together and married. The finder of fact may also consider a "projection" of the Guidelines.

. . .

The trial court may not substitute a mechanical calculation for the exercise of its discretion. While such a calculation may be a useful tool in determining an appropriate amount of child support, the amount reached through such a calculation is not entitled to presumptive weight.

Further, the family court is required to find the facts "specifically and state separately its conclusion of law thereon and render an appropriate judgment[.]"²¹ Courts "'will give more careful consideration to the problem if they are required to state not only the end result of their inquiry, but the process by which they reached it.'"²²

In this case, the family court specifically determined the parties' combined amount of monthly income and that total was in excess of the highest amount provided in the Guidelines. The family court stated:

The parties' actual combined [monthly] income is \$17,717.00, with Petitioner earning eighty-seven percent (87%) of that amount. A mathematical projection or extrapolation of the guidelines would result in a child support obligation of approximately \$2,254.00.

²¹ CR 52.01.

²² Stafford v. Stafford, 618 S.W.2d 578, 580 (Ky.App. 1981) (quoting United States v. Merz, 376 U.S. 192, 84 S.Ct. 639, 11 L.Ed.2d 629 (1964)).

However, this court does not rely on a straight projection or extrapolation of the guidelines.²³

Since the parties' combined income was in excess of the Guidelines, the family court had the discretion to deviate from the Guidelines and to set the appropriate amount of child support if the evidence supported a deviation.

Bradley argues that "[o]nce the lower court exercised its discretion to deviate from the guidelines based on Appellant's high income, it was bound to follow this Court's decisions that require it to consider the reasonable expenses of the children, their standard of living and the amount of time the children actually spent with each parent." However, our review of the limited record on appeal indicates that the family court did consider these factors since it made specific findings relating to these issues and the children.²⁴

As stated previously, if the family court's factual findings are supported by substantial evidence, then they must be affirmed. Roberta introduced a chart detailing the children's monthly expenses and a record of Bradley's flight schedule, showing that the children stayed with Roberta an average of 66% of the time. The family court made the following findings:

²³ KRS 403.212(5) provides that "[t]he court may use its judicial discretion in determining child support in circumstances where combined adjusted parental gross income exceeds the uppermost levels of the guideline table."

²⁴ We have not been provided with a tape or transcript of the evidentiary hearing.

Respondent presented credible evidence that the children's monthly expenses total \$2,780.36. While Petitioner took exception to the method of calculating the children's expenses, this Court finds that the method was reasonable and results in a fair assessment of the needs of the children. It is clear that the children enjoy a higher standard of living while staying in the home of Petitioner. Respondent was just able to meet the expenses of the children prior to the expiration of the agreed upon child support. This Court finds no reason why child support should be lowered when the children's expenses have increased, Respondent's income is virtually unchanged, and Petitioner has an increase in income.

In Downing, the court stated that "The basic premise of [the child support guidelines] is that a child should receive the same proportion of parental income that the child would have received if the parents had not divorced." . . . The court also went on to say that "a child is not expected to live at a minimal level of comfort while the noncustodial parent is living a life of luxury." . . . This Court finds that the reasonable needs of the children would not be met if the child support were lowered.

There is some discrepancy over whether Petitioner has the children half of the time. Respondent presented an exhibit [Bradley's flight schedule indicating the nights he was at home] alleging that she has the children over half of the time each month, as measured by the nights that the children spend in her home. While Petitioner originally alleged that the children were in his home half of the time, he did not dispute any of the information in [the flight schedule presented by Respondent]. As such, it appears that the children are in the home of Respondent more than half of the time. Regardless of which, Petitioner would not be entitled to a reduction of child support under the

totality of the circumstances in this case, due to the large disparity in the parties' incomes and given the financial needs of the children and the standard of living to which they have become accustomed. Under KRS 403.211(2), "Courts may deviate from the guidelines where their application would be unjust or inappropriate." Regardless of the amount of time that the children spend in the home of Petitioner, child support in the amount of \$2,250.00 is in no way unjust or inappropriate. In fact, it would be unjust to set child support at a lower amount based upon the facts of this case where Petitioner alone earns in excess of the upper-most levels of the Guideline tables and at least eighty-seven percent (87%) of the combined monthly gross income of the parties. Respondent's income barely replaces the monthly maintenance she previously received. Respondent cannot meet her own needs and the needs of the children if the child support is reduced.

Based on the evidence of record, we hold that in setting the child support the family court adequately weighed the children's needs and reasonable expenses as well as the amount of time they spent with each parent and its factual findings were supported by substantial evidence.

Further, based on the applicable law and the family court's factual findings, we cannot conclude that it abused its discretion in setting child support. The family court made sufficient findings as to the parties' income, the reasonableness of the children's needs and expenses, and the amount of time they spent with each parent; and the amount of child support it awarded was reasonable under the circumstances.

Thus, since the family court applied the correct law, made adequate findings of fact that were supported by substantial evidence, and did not abuse its discretion, we affirm the child support award.

Bradley also claims the trial court erred by granting Roberta's attorney's fees. KRS 402.220 provides as follows:

The 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 court may order that the amount be paid directly to the attorney, who may enforce the order in his name.

In determining that Bradley should pay Roberta's attorney's fees, the family court stated as follows:

Both parties' attorneys submitted affidavits of attorneys' fees. It is unclear why Petitioner made motion for an award of attorney's fees, as it was Petitioner's motions that brought this case before the court. On the other hand, Respondent was forced to incur attorney fees in defending against Petitioner's motion to reduce child support. Additionally, there is a great disparity between the income of the parties.

The family court found a great disparity in the parties' financial resources; and under KRS 403.220, nothing more is required. The family court's award of attorney's fees was

supported by the law and the facts and it was not an abuse of discretion.²⁵

For the foregoing reasons, the order of the Jefferson Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Sammy Deeb
A. Holland Houston
Louisville, Kentucky

BRIEF FOR APPELLEE:

Melanie Straw-Boone
Louisville, Kentucky

²⁵ Gentry v. Gentry, 798 S.W.2d 928, 938 (Ky. 1990).