RENDERED: June 17, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001051-MR

ANDREW I. WEINER — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 91-CI-02531

VALERIE M. WEINER (now Gore) — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TACKETT AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.[1]

VANMETER, JUDGE: This is an appeal from an order entered by the Fayette Circuit Court, Family Division, increasing the child support obligation of appellant Andrew I. Weiner. For the reasons stated hereafter, we affirm.

The parties married in 1987 and divorced in 1993. Their only child was born in January 1989. By agreement, the

[1] Senior Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

parties were awarded joint custody of the child and appellee Valerie Weiner (now Gore) was named as the child's primary residential custodian. It was agreed that Andrew would pay Valerie $468.12 per month child support.

In August 2003 Andrew filed a motion which, in part, requested the trial court to "affirm" the "alternating-week time-sharing practice which has been in place by agreement between the parties for the past year," and to terminate his child support obligation in light of the "equal time-sharing arrangement and the equal income-earning capacity of the parties." Valerie responded by filing a motion seeking an increase in Andrew's child support obligation.

The trial court found that both parties acknowledged that it was in the child's best interest to continue the voluntary timesharing plan, which the court directed "shall continue henceforth pending further orders of the Court." As to child support, the court noted that it was undisputed that income should be imputed to Valerie as she is voluntarily unemployed. However, although Valerie asserted that she could earn $65,000 to $70,000 through employment, Andrew alleged that based on the testimony of his expert witness, income of $114,171 should be imputed to Valerie. Further, although Valerie asserted that Andrew's income amounted to $167,000 to $204,000 per year because of outside consulting work, Andrew claimed that

his gross income amounted to $104,370 per year as shown through his previous year's tax returns.

After a hearing the court imputed income to Valerie of $70,000 per year, and it found that Andrew had a gross income of $104,370 per year. The court then considered the parties' respective obligations under the child support guidelines, noting that "[b]ecause of the equal timesharing arrangement" it was

> not appropriate to follow the guidelines and the obligations of each parent should be offset with the difference of $236.00 to be a component of the child support obligation to be paid by the Respondent to the Petitioner. Offsetting the obligations of the parents in this fashion only works if the parties are truly sharing all expenses of the child. The Court finds based upon the testimony and exhibits of the parties that in this case, all of Lauren's expenses are not equally shared by the parties. Specifically, the Court finds that the child's clothing, shoes, purses, personal hygiene items, hair care, and cosmetics are predominantly paid by the Petitioner and cost a total of $6,600.00 per year. Respondent's sixty-percent (60%) share of this expense increases his monthly base child support obligation by $330.00, to $566.00 per month.

The court also directed the parties to divide certain other school-related, athletic and extracurricular expenses, as well as extraordinary medical expenses, in proportion to their respective incomes. The court subsequently clarified certain

findings but otherwise denied Andrew's motion to alter the order modifying child support. This appeal followed.

First, Andrew contends that the trial court erred by failing to permit discovery and consider evidence regarding the income of Valerie's current husband. According to Andrew, Valerie's income at the time of the parties' dissolution was $5,688 per month ($68,256 per year), which exceeded his by $1,352 per month. Several years later, Valerie married a pediatrician and voluntarily ceased working. Andrew asserts that although Valerie's current husband has no direct child support obligation for the parties' child, evidence of his income is relevant to this proceeding as he necessarily helps to support the child since Valerie is unemployed. We disagree.

Andrew relies on *Ewing v. May,*[2] in which the Kentucky Supreme Court held in 1986 that a "custodial parent seeking an increase in child support may obtain limited and reasonable discovery of the other parent's spouse for the purpose of determining the financial needs and resources of the noncustodial parent pursuant to KRS 403.210(5)." However, some four years later, in 1990, the Kentucky General Assembly repealed KRS 403.210 and reenacted it with other legislation implementing federally-mandated child support guidelines. As part of that legislation, KRS 403.212 provides that "[t]he child

[2] 705 S.W.2d 910 (Ky. 1986).

support obligation set forth in the child support guidelines table shall be divided between the parents in proportion to their adjusted gross income,"[3] which is defined as "the combined gross incomes of both parents" less payments made in satisfaction of certain other specified obligations.[4] (Emphasis added.) "Gross income" in turn is defined as including

> income from any source, except as excluded in this subsection, and includes but is not limited to income from salaries, wages, retirement and pension funds, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, Social Security benefits, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, Supplemental Security Income (SSI), gifts, prizes, and alimony or maintenance received.[5]

Finally, "income" is defined as meaning "actual gross income of the parent if employed to full capacity or potential income if unemployed or underemployed."[6] (Emphasis added.)

Thus, none of these definitions permit nonparent spousal income to be included as a component of parental income for purposes of calculating child support obligations. Even assuming that Valerie's current husband provides funds which help to support the parties' child, the availability of such

[3] KRS 403.212(3).

[4] KRS 403.212(g).

[5] KRS 403.212(2)(b).

[6] KRS 403.212(2)(a).

funds was addressed by imputing income to Valerie of $70,000 per year. Under these circumstances, we cannot say that the current spouse's income was relevant to the calculation of child support under KRS 403.212, or that the trial court erred by failing to permit discovery of such evidence.

Next, Andrew contends that the trial court erred by relying on incompetent evidence regarding Valerie's imputed income. We disagree.

Valerie asserted her belief that she could earn some $65,000 to $70,000 per year. Andrew and his expert witness, Dr. Ralph Crystal, asserted that Valerie should be found to have an imputed income of $114,171 per year, calculated by adding benefits and bonuses to a base salary of nearly $60,000. The court rejected Andrew's position, finding that

> Dr. Crystal did not consider factors which would have had an impact on the assumption that Petitioner could have maintained the same job she had, progressed in that job, and maintained the benefits of that job. The Court specifically finds that Dr. Crystal did not factor into his conclusion the age of the Petitioner, the changes to the economy over the past several years which have had a dramatic impact on incomes and benefits, and the typical career changes for pharmaceutical sales representatives in this area as they progress in age and tenure with a company. Dr. Crystal readily acknowledged that Petitioner may not be able to get back into the pharmaceutical sales business at the present time if she desired to re-enter the field. Further, the Court is suspect of Dr. Crystal's testimony in

> this case as being his own, unbiased testimony. Dr. Crystal testified that he has known the Respondent for twenty years. Both work for the University of Kentucky. Respondent met with Dr. Crystal on January 16, 2004, to deliver Petitioner's income information. The Court notes that Respondent's handwriting appears at the top of several pages of what was purported to be Dr. Crystal's work product . . . . The Court believes that, in addition to providing Petitioner's income information, Respondent also may have (1) advised Dr. Crystal of the opinions to which he should testify at trial, and (2) provided Dr. Crystal with information he acquired online so Dr. Crystal could include it in his report. Therefore, the Court determines the appropriate level of income to impute to Petitioner is $70,000 per year.

The court also rejected Valerie's claims regarding the amount of Andrew's income, instead finding in accordance with Andrew's evidence that he had a gross income of $104,370 per year.

We are not persuaded by Andrew's contention that the trial court erred by admitting Valerie's testimony regarding the salary she believed she would earn if she currently was employed in pharmaceutical sales work. Even though Valerie admitted that she had conferred with her former employer, she certainly had adequate experience in the field of pharmaceutical sales to have some personal knowledge to support her lay opinion testimony[7] as

[7] *See* KRE 701. *Cf. Roberts v. Roberts,* 587 S.W.2d 281 (Ky.App. 1979) (lay witnesses who were owners of a business were permitted to testify as to its value).

to what salary she was likely to earn if currently employed in the field.

Further, given our conclusion that such evidence was not improperly admitted, we cannot say that the trial court erred when making its findings of fact. A trial court's findings of fact may be set aside only if clearly erroneous, with the dispositive question being "whether or not those findings are supported by substantial evidence."[8] Substantial evidence is defined as

> "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence.[9]

[8] *Moore v. Asente,* 110 S.W.3d 336, 354 (Ky. 2003) (footnote omitted).

[9] *Id.* at 354 (footnotes omitted) (quoting *Black's Law Dictionary* 580 (7th ed. 1999), *Blankenship v. Lloyd Blankenship Coal Co.,* 463 S.W.2d 62, 64 (Ky. 1970), CR 52.01, and 7 Kurt A. Phillips, Jr., *Kentucky Practice,* CR 52.01, note 55, comment 8 (5th ed. 1995)).

As stated in *Cross v. Clark*,[10] "[t]he determination of the weight of conflicting evidence and of the credibility of witnesses rests exclusively within the province of" the trier of fact, who "may believe any of the witnesses in whole or in part, and may accept the testimony of one set of witnesses to the exclusion of that of another or the testimony of one witness as against the testimony of a number of witnesses."

Here, as described above, the trial court clearly considered the conflicting evidence regarding the issue of Valerie's imputed income. Although Andrew asserted that Valerie should be imputed an income of $99,000 to $110,000, that figure included 10% government benefits, 35% employer benefits, and 37% yearly bonuses, although no benefits were included in either party's estimates of Andrew's income. Having considered the evidence, we cannot say that the trial court erred by imputing to Valerie a yearly income of $70,000 rather than the higher amount proposed by Andrew. It follows that there is no merit to Andrew's subsequent argument that the parties' actual or imputed incomes were approximately equal, and that the trial court therefore should have found that neither party owed the other child support.

Next, Andrew contends that the trial court erred by rejecting his request that in lieu of formal child support

[10] 308 Ky. 18, 213 S.W.2d 443, 446 (1948).

payments, the parties should be directed to equally divide all expenses for the child based on sales receipts for purchases. While the parties certainly could agree to such a sharing of expenses, there is no legal authority supporting or compelling such a method of allocating responsibility for child support expenses. Given Valerie's clear opposition to such a method of calculating expenses, it cannot be said that the trial court erred by refusing to order the parties to engage in such a sharing of expenses in lieu of regular monthly child support payments.

Finally, Andrew contends that the trial court erred when applying the child support guidelines. Although Andrew disagrees with the imputed income figures which the trial court allocated to Valerie, there is no dispute that based on the income figures used by the court, the parties' base monthly child support obligation is $1,202, 40.14% of which should be apportioned to Valerie based on the parties' combined adjusted parental gross income, with the result that Valerie is responsible for $483 per month and Andrew is responsible for $719 per month in child support. However, Andrew asserts that even if the figures on the worksheet were correctly calculated, the trial court erred when applying the child support guidelines to the parties' situation. We disagree.

KRS 403.211(2) provides that although the KRS 403.212 child support guidelines "shall serve as a rebuttable presumption" for establishing or modifying the amount of child support, "[c]ourts may deviate from the guidelines where their application would be unjust or inappropriate. Any deviation shall be accompanied by a written finding or specific finding on the record by the court, specifying the reason for the deviation." Although in a more typical visitation situation Andrew's child support obligation would not be adjusted according to the amount of time the child spent in his household, Andrew argues that here the support obligation should be equally divided between the parties just as the child's time is equally divided. However, not only would such a division of the support obligation fail to be in proportion to the parties' respective incomes, but it would fail to take into account whether one parent purchases most of the child's clothing, shoes or other expensive items.

Here, the record shows that the court awarded child support after considering two separate contributing factors. First, the equal division of financial responsibility between the parties, in proportion to their respective incomes, resulted in a finding that Andrew was obligated to pay Valerie $719 per month and that Valerie was obligated to pay Andrew $483 per month. To achieve the same result, the court ordered Andrew to

pay Valerie the difference between the two amounts, or $236 per month.

Second, the court reviewed the evidence and found that in addition to the duplicate items purchased by both households for the benefit of the child, Valerie spends an additional $6,600 per year as the predominant purchaser of "the child's clothing, shoes, purses, personal hygiene items, hair care, and cosmetics." Proportionately dividing financial responsibility, the court found that Andrew is responsible for 60% of those expenditures, or $330 per month. Adding $330 to the previous finding of $236 resulted in the court's determination that Andrew has a monthly base child support obligation of $566 per month. That amount, which is less than the $719 obligation calculated on the child support worksheet, clearly takes into account the costs of equal timesharing while addressing the realities of which parent makes a majority of the purchases for the child. Having reviewed the evidence, we cannot say that the trial court erred when deviating from the child support guidelines or when modifying Andrew's child support obligation.

The court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Catesby Woodford
J. Scott Benton
Lexington, Kentucky

BRIEF FOR APPELLEE:

Fred E. Fugazzi, Jr.
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