

RENDERED: SEPTEMBER 30, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-001450-MR
AND
NO. 2004-CA-002298-MR

DAVID L. LANE

APPELLANT

v. APPEAL FROM McCRACKEN FAMILY COURT
HONORABLE CYNTHIA E. SANDERSON, JUDGE
ACTION NO. 00-CI-00189
AND
APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 00-CI-00189

PAULA O. LANE

APPELLEE

OPINION
AFFIRMING IN PART, VACATING
IN PART, AND REMANDING

** ** *

BEFORE: DYCHE AND SCHRODER, JUDGES; ROSENBLUM, SENIOR JUDGE.¹

ROSENBLUM, SENIOR JUDGE: Davie Lane appeals from orders of the McCracken Family Court and McCracken Circuit Court² increasing

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

² The McCracken Family Court entered the orders resulting in appeal 2004-CA-001450-MR. Following the entry of those orders, Family Court Judge Cynthia E. Sanderson recused herself from the case. McCracken Circuit Court Judge

his child support obligation to Paula Lane; denying his motion to hold Paula in contempt for failing to keep him informed regarding the children; denying his motion to supersede the increased child support obligation pending the outcome of his appeal of the increase; and denying his motion for credits. For the reasons stated below, we affirm in part and vacate and remand in part.

BACKGROUND

David and Paula were married on November 24, 1990. Two children were born during the marriage, David L. Lane, II (born September 16, 1992) and Grant A. Lane (born March 29, 1995). The marriage was dissolved by a decree entered on April 24, 2000. In the original divorce proceedings, among other things, David was ordered to pay Paula \$12,000.00 per month in maintenance for a period of 36 months and \$3,000.00 per month in child support.

This case was previously before this Court on appeal and cross-appeal from the original divorce proceedings. On January 30, 2004, this Court rendered an unpublished opinion which, among other things, upheld an antenuptial agreement under which Paula waived her right to maintenance (see Case Nos. 2002-CA-000647-MR and 2002-CA-000754-MR). The effect of this Court's

Craig Z. Clymer entered the orders leading to appeal 2004-CA-002298-MR in orders captioned "McCracken Circuit Court." For convenience we refer to both McCracken Family Court and McCracken Circuit Court as the "trial court."

decision was to nullify the maintenance award to Paula of \$12,000.00 per month for 36 months.³ The decision is currently pending before the Supreme Court upon Paula's motion for discretionary review (See Case No. 2004-SC-000151).

The current phase of litigation began on January 7, 2004, when Paula filed a motion to modify child support. In support of her motion to modify child support, Paula stated that there had been a change in conditions in that, among other things, her 36-month maintenance award had elapsed, thereby lowering her monthly income by \$12,000.00. On February 25, 2004, David filed a motion to hold Paula in contempt for failing to keep him properly informed regarding various matters concerning the children.

On March 15, 2004, a hearing was held on Paula's motion to modify child support and David's motion to hold Paula in contempt. On March 22, 2004, the trial court entered an order increasing David's child support obligation from \$3,000.00 per month to \$5,000.00 per month; the order also denied David's motion to hold Paula in contempt. On March 31, 2004, David filed a motion for additional findings pursuant to CR⁴ 52 and/or to alter, amend or vacate pursuant to CR 59. On July 8, 2004,

³ In the original divorce proceedings, the family court had held that the antenuptial agreement under which Paula had waived her right to maintenance was unconscionable.

⁴ Kentucky Rules of Civil Procedure.

the trial court entered an order denying David's CR 59 motion, but granting his CR 52 motion and entering additional findings of fact. On July 16, 2004, David filed his notice of appeal from the foregoing rulings (Case No. 2004-CA-001450-MR).

David subsequently attempted to supersede the increased child support obligation by filing a supersedeas bond for the estimated child support obligation which would accrue during the appeals process. On July 21, 2004, David filed a motion for various credits against any amounts owed, or to be owed, to Paula, including credits for maintenance paid to Paula.

On October 7, 2004, the trial court entered an order denying David's motion for credits. On October 13, 2004, the trial court entered an order permitting David to supersede that portion of his child support obligation relating to the period from the time Paula filed her motion until the circuit court's order granting the modification. The order denied David's motion with respect to amounts due following entry of the modification order. On November 3, 2004, David filed his notice of appeal from the foregoing orders (Case No. 2004-CA-002298-MR).

APPEAL NO. 2004-CA-001450-MR

CHILD SUPPORT

David contends that the circuit court erred by increasing his child support obligation from \$3,000.00 per month to \$5,000.00 per month.

KRS⁵ 403.213 provides, in relevant part, as follows:

- (1) The provisions of any decree respecting child support may be modified only as to installments accruing subsequent to the filing of the motion for modification and only upon a showing of a material change in circumstances that is substantial and continuing.
- (2) 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. . . .

In its order of March 22, 2004, the trial court addressed Paula's motion to modify child support as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DIRECTED
AS FOLLOWS:

⁵ Kentucky Revised Statutes.

. . . .

2. The Court finds there has been a substantial change of circumstances justifying a modification of child support. Specifically, the Court notes that at the time the original child support award was entered, Paula was living in Paducah without a house payment, as David was making the house payment on the marital residence where Paula was living. In addition, Paula was to receive \$12,000.00 a month in maintenance. Since the order in 2001, the maintenance award has expired, Paula has moved to Florida, and she has purchased a new home for herself and the children. The Court finds that if Paula could receive a job making \$20,000 a year, that would be an excellent job for her, considering her lack of education and lack of work experience. Indeed, Paula will probably struggle to receive a job making near that much. David, on the other hand, makes a substantial income. He reports that for 2003 his monthly gross income was \$86,625.

Reviewing the child support chart, the top child support would be \$1,844 per month for a man making \$15,000 a month. That would be approximately 12.3% of that person's income. If the Court were to award similar child support based on David's income, the award would be \$10,600 per month. The Court does not believe such an award would be appropriate, and indeed finds it would be an abuse of discretion to award that much child support.

The Court finds that an appropriate amount of child support is **\$5,000 per month**. The Court finds this amount to be sufficient child support to support the children, and is based upon the manner in which the children were previously supported by both parties, both prior to the divorce and subsequent to the divorce. With this amount

of money, Paula will not be able to duplicate the exact same lifestyle for the children. She probably will not be able to remain in her current house or live in a gated community. The Court notes that Paula made a decision not to finish her education after testifying at the original hearing that she was going to get a degree in interior design. The Court also finds that Paula has, according to her own testimony, spent all the property award she received. The Court finds the order it is entering is going to require David to pay approximately 5% of his gross income toward child support. The Court finds the children have substantial expenses, although the Court was not persuaded that the expenses listed on Paula's Financial Declaration were accurate or realistic.

In its July 8, 2004, order which, in part, granted David's motion for additional findings, the trial court made, in relevant part, the following additional findings of fact relating to Paula's motion to modify child support:

1. The Court finds that on March 13, 2001, the Court entered Supplemental Findings and Decree, which the Court found David Lane to have gross income from his employment of \$95,728.33 per month. The Court had ordered David Lane to pay Paula Lane the amount of \$12,000 per month in maintenance. Therefore, David's adjusted gross income was \$83,481.33 per month. Paula was unemployed at that time, but had the maintenance award, so her income was calculated at \$12,000 per month. The Court awarded \$3,000 per month in child support based upon those respective incomes. The case is back before the Court for a modification of child support based upon a change of circumstances. . . . The Court finds specifically there has been a material change of circumstances that is substantial and continuing. That material

change of circumstances which is substantial and continuing is David Lane has not, since January of this year, been under any obligation to pay \$12,000 per month maintenance to Paula Lane. Therefore, David Lane's actual income has been increased by \$12,000 per month, and Paula Lane's actual income has decreased by \$12,000 per month.

2. The Court finds at the hearing of this matter, David Lane reported his monthly gross income to now be \$86,625. After the hearing, in his motion to alter, amend or vacate, David asked for an opportunity to present additional proof that he had misstated his income, and his accountant, Richard Walker would testify that David's actual gross monthly income is \$80,474.16. . . . Richard Walker has now confirmed that David Lane's gross monthly income was \$80,474.16, or \$965,689.92 per year. That income figure is based upon David's earnings for the year 2003. The Court finds that consistently for the past several years, David's income has been around \$1,000,000 per year. In some years, he has earned slightly more, and in some years he has earned slightly less.

3. At the hearing, Paula Lane testified regarding the needs of the children. In the Court's previous finding, the Court noted it did not accept all of Paula's monthly expenses. Paula allocated \$9,257.75 as expenses for the children. On oral argument, David's attorney argued, as an example, that Paula has claimed a much too high expense for food, being \$900 per month. Yet, as the Court pointed out to David's attorney, the financial declaration which David filed, showed the three people in his household, including him, his wife and his step-daughter, spend \$1,867 per month in food. Accordingly, the Court cannot find that Paula and the parties' two children spending \$900 per month on food is unreasonable.

4. The Court specifically finds it is legitimate for Paula to assess a portion of her household expenses for the children. But for her children, she would not need as large a house, she would not incur as much in utilities, and her living costs would be much less. The Court specifically finds that the children were residing in a house valued in excess of \$1,000,000 at the time of dissolution. It would not be reasonable to expect that because Paula makes little money, the children should now reside in rent subsidized housing. The Court notes also in comparing Financial Declarations that David, his wife and step-daughter spend \$726 per month at a country club. Paula has requested as entertainment for the children \$360.83 for travel, and \$126 for pool service, which in and of itself is less than David's country club bill. In fact, David and Paula have a similar expense for travel with the children. Paula claims \$360.83, and David claims \$380 per month.

5. The two expenses which the Court does not accept as legitimate expenses for Paula assessing to the children are the \$666 for landscaping and home repairs, and the Court does not find credible that clothing and athletic expenses for the parties' children should run Paula \$2,215.11 per month, although the court has previously found that some of the children's clothes have been destroyed when they have had prior visits with their father. Reducing the children's clothing and athletic expenses to \$500 per month, deducting the landscaping and home repairs of \$666 per month, leaves Paula's expenses for the children at \$6,876.64. The Court believes it could have legitimately assessed child support as high as \$6,500 a month, considering David's income in comparison with imputed income for Paula. At the time of the hearing, Paula was not working, and she testified she had not been able to complete her education. If Paula

could make \$10 an hour, which the evidence does not support she will necessarily earn, she would have approximately 2% of the total parental income ($\$10 \times 40 \text{ hours} \times 52 \text{ weeks} \div 12 = \$1,733$ per month). Contrast \$1,733 per month in income Paula has to help support her children with David's income of \$80,474 per month.

6. The Court finds that when it made the original child support award in this case, it was cognizant it was awarding \$12,000 in maintenance. The Court took into consideration at that time that income tax consequences made higher maintenance more preferable to David than higher child support. David is no longer paying maintenance. David certainly has the ability to pay \$5,000 per month in child support, and the Court specifically finds that the children's needs are in excess of \$6,000 per month. Therefore, child support of \$5,000 per month is reasonable. As the Court noted in its earlier ruling, the Court has awarded the equivalent of \$86 per day, per child for Paula to feed, clothe, house, transport, entertain, provide gifts for the children, and otherwise support the children.

Findings of fact shall not be set aside unless they are clearly erroneous, and due regard shall be given to the opportunity of the court to judge the credibility of witnesses. CR 52.01. David does not specifically challenge any of the trial court's factual findings, and its findings are supported by substantial evidence in the record. We find no basis in the record to disturb the trial court's findings of fact and, accordingly, our review of child support issues in this case will presuppose that the findings made by the trial court in its

orders of March 22, 2004, and July 8, 2004, are our proper guide.

The child support guidelines set out in KRS 403.212 serve as a rebuttable presumption for the establishment or modification of the amount of child support. Courts may deviate from the guidelines only upon making a specific finding that application of the guidelines would be unjust or inappropriate. KRS 403.211(2). However, KRS 403.211(3)(e) specifically designates that "combined monthly adjusted parental gross income in excess of the Kentucky child support guidelines" is a valid basis for deviating from the child support table. Furthermore, the trial court may use its judicial discretion to determine child support in circumstances where combined adjusted parental gross income exceeds the uppermost level of the guidelines table. KRS 403.212(5). The child support table ends at the \$15,000.00 per month level, so deviation from the guidelines is clearly appropriate in this case. See Downing v. Downing, 45 S.W.3d 449 (Ky.App. 2001)

Kentucky trial courts have been given broad discretion in considering the relevant circumstances and setting correspondingly appropriate child support. Redmon v. Redmon, 823 S.W.2d 463 (Ky.App 1992). A reviewing court should defer to the lower court's discretion in child support matters whenever possible. See Pegler v. Pegler, 895 S.W.2d 580 (Ky.App. 1995).

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. Commonwealth v. Marshall, 15 S.W.3d 396, 400-01 (Ky.App. 2000). However, a trial court's discretion is not unlimited. The test for abuse of discretion is whether the trial judge'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); Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

At a minimum, any decision to set child support above the guidelines must be based primarily on the child's needs, as set out in specific supporting findings. Stringer v. Brandt, 128 Or.App. 502, 506-07, 877 P.2d 100, 102 (1994).

In determining the reasonable needs of the children, the trial court should also take into consideration the standard of living which the children enjoyed during and after the marriage. Consequently, the concept of "reasonable needs" is flexible and may vary depending upon the standard of living to which they have become accustomed. Harris v. Harris, 168 Vt. 13, 714 A.2d 626, 633 (1998); White v. Marciano, 190 Cal.App.3d 1026, 1032, 235 Cal.Rptr. 779, 782 (Cal.App. 2 Distr., 1987).

Any assessment of the child's reasonable needs should also be based upon the parents' financial ability to meet those

needs. Factors which should be considered when setting child support include the financial circumstances of the parties, their station in life, their age and physical condition, and expenses in educating the children. Voishan v. Palma, 327 Md. 318, 329, 609 A.2d 319, 324-325 (1992). The focus of this inquiry does not concern the lifestyle which the parents could afford to provide the child, but rather it is the standard of living which satisfies the child's reasonable and realistic needs under the circumstances. Thus, while a trial court may take a parent's additional resources into account, a large income does not require a noncustodial parent to support a lifestyle for his children of which he does not approve. Downing v. Downing, supra.

In the present case, the combined adjusted parental gross income exceeds the uppermost levels of the guideline tables, and, accordingly, it was within the trial court's discretion to determine an appropriate level of child support. KRS 403.211(3)(e); KRS 403.212(5). The trial court made findings concerning the reasonable needs of the children, David's financial ability to meet those needs, the children's station in life, and set David's support obligation at a corresponding level. After payment of his \$5,000.00 child support obligation David will still have gross income in excess of \$75,000.00 per month. A \$5,000.00 child support obligation,

or \$2,500.00 per child, is not excessive for David's income level. The children will not enjoy an extravagant lifestyle at that level of support. In summary, the trial court did not abuse its discretion in modifying David's child support obligation from \$3,000.00 per month to \$5,000.00 per month.

In opposition to the trial court's decision to modify child support, David raises five arguments. First, David argues that the trial court failed to make adequate findings of fact in support of its modification order and failed to base the modification on the reasonable and realistic needs under the circumstances. We disagree. As noted in our general discussion above, deviation from the guidelines is authorized when the combined income of the parents exceed the uppermost level of the support tables; the trial court's modification order is based upon findings of fact which considered the relevant factors in setting child support when income exceeds the guidelines; the trial court considered the children's reasonable needs and David's ability to meet those needs in setting child support; and the trial court did not abuse its discretion in establishing David's child support obligation at \$5,000.00 per month.

David also argues that the trial court erred in its modification order on the basis that the increase in child support accrues primarily for the benefit of Paula. Under present circumstances, however, Paula's sole source of income is

child support. While the trial court did impute income of \$1,733.00 per month to Paula, absent the increase, the actual household income of the home where the children would reside would be only \$36,000 per year ($\$3,000.00 \times 12$), whereas David earns an income approaching \$1,000,000.00 per year. In light of David's income of \$80,474.16 per month, the children's reasonable needs, and David's financial wherewithal, the modification of David's child support obligation to \$60,000.00 per year ($\$5,000.00 \times 12$) was not an abuse of the trial court's discretion.

David also argues that the trial court failed to consider that the children spend 30% of their time with David. However, under a typical visitation schedule the noncustodial parent will normally receive visitation days (counting weekend, summer, and holiday visitation) of approximately 25% to 30% annually. If David's visitation is slightly above average, in light of the other factors discussed herein, nevertheless, the trial court did not abuse its discretion by establishing child support at \$5,000.00 per month.

Next, David contends that the trial court erred in setting child support because it increased child support by 66.67% when the income of both David and Paula decreased and Paula's projected living expenses decreased. In support of this argument David notes that his income decreased from \$95,728.33

per month at the time of the original award to \$80,474.16 per month at the time of the modification, a 16% decrease. However, upon the expiration of her maintenance award, Paula's income decreased from \$15,000.00 per month to \$3,000.00, an 80% decrease. In light of this, David's argument is unpersuasive.

Next, David contends that the trial court failed to impute income to Paula pursuant to KRS 403.212(2)(d). However, we construe paragraph 5 of the trial court's order of July 8, 2004, as an imputation of income to Paula which was considered by the trial court in setting David's child support obligation.

We agree with David, however, that the trial court erred by failing to consider Paula's imputed income in its allocation of uninsured medical expenses. The trial court ordered David to pay 100% of uninsured medical expenses on the basis that, considering the animosity between the parties and Paula's relatively small share of the expense, it would not be worth the bookkeeping to allocate a portion to Paula. However, KRS 403.211(8) provides that "[t]he cost of extraordinary medical expenses shall be allocated between the parties in proportion to their combined monthly adjusted parental gross incomes." (Emphasis added). The term "shall" is mandatory. Bowen v. Commonwealth, ex rel. Stidham, 887 S.W.2d 350, 352 (Ky. 1994). While we sympathize with the trial court's motive for deviating from the statute, nevertheless, as the allocation

provisions of KRS 403.211(8) are mandatory, we vacate the trial court's March 22, 2004, order insofar as it requires David to bear 100% of the uninsured medical expenses, and remand for entry of an order requiring Paula to bear her proportionate share of such expenses based upon her imputed income.

MOTION FOR CONTEMPT

Next, David contends that the circuit court erred by failing to hold Paula in contempt for violating its orders concerning Paula's obligation to keep David informed regarding the children.

In its March 23, 2004, order, the trial court made the following findings concerning David's motion to hold Paula in contempt for failing to keep him informed regarding the children:

The next issue before the Court was David's motion to hold Paula in contempt of court for his perception that she has failed to comply with the Court's Orders in keeping David informed of the children and their activities, doctor's appointments, sports schedules, teachers, etc. The Court finds that Paula is in substantial compliance with the Court's previous orders. The Court finds that David's expectations are too high. David has a right to know what is going on in his children's life as a joint custodian, but the Court finds that Paula is doing a reasonably good job of keeping him informed. The Court finds that Paula's behavior does not rise to a level of contempt. On a relative scale, David seems to know a lot more about his children and what is going on with his children than most

non-residential custodial parents. In some areas, David's complaints about Paula almost arise to the level of harassment. The Court perceives that David may be trying to set Paula up so she would fail, and then he can find fault with her failure. Finding Paula in contempt on this issue would be giving David too much control of a situation in which these parties have never been cooperative with each other. Accordingly, the Court does not find Paula Lane to be in contempt of court for any failures to abide by the Court's prior Orders on this issue.

Power to punish for contempt is inherent in every court. Arnett v. Meade, 462 S.W.2d 940, 947 (KY. 1971); Underhill v. Murphy, 117 Ky. 640, 78 S.W. 482, 484 (1904). Any court or judge may punish any person guilty of contempt for disobeying a judicial order entered under the authority of the Court. KRS 432.280. In Commonwealth v. Bailey, 970 S.W.2d 818 (Ky.App. 1998), the Supreme Court defined contempt as "the willful disobedience of -- or open disrespect for -- the rules or orders of a court." Id. (citing Commonwealth v. Burge, 947 S.W.2d 805 (Ky. 1996)).

A trial court's decisions concerning whether to hold a party in contempt is reviewed under an abuse of discretion standard. See Smith v. City of Loyall 702 S.W.2d 838, 839 (Ky.App. 1986). The courts' discretionary power necessarily includes the power to refrain from imposing sanctions and fines in the face of compliance. Id. The trial court's findings concerning contempt issues are supported by substantial evidence

and are not clearly erroneous. In light of those findings, the trial court did not abuse its discretion by determining that Paula should not be held in contempt.

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MOTION FOR SUPERSEDEAS BOND

David contends that the trial court erred by denying his motion to supersede his increased child support obligation pending the conclusion of the appeals process. The trial court permitted David to supersede that portion of his child support obligation related to the time between when Paula filed her motion to modify child support and the time of the modification order; however, the trial court denied the superseding of child support during the pendency of the appeals process.

Generally, judgments respecting the custody and maintenance of infants may not be superseded. Franklin v. Franklin, 299 Ky. 426, 185 S.W.2d 696, 697 (1945); Clay v. Clay, 707 S.W.2d 352 (Ky.App. 1986). However, an exception exists for a judgment for lump-sum child support where the judgment consists of arrearages accumulated by the retroactivity of the Circuit Court's ruling based upon that court's increase of child support. Getty v. Getty, 792 S.W.2d 136 (Ky.App. 1990). Hence, the trial court properly permitted David to supersede that portion of his child support obligation relating to the period

from when Paula filed her motion to modify and the trial court entered its modification order. The ongoing increase, however, may not be superseded and the trial court did not err in denying David's motion to supersede that portion of his obligation. Franklin, supra; Clay, supra.

MOTION FOR CREDITS

Next, David contends that the trial court erred in denying his motion for various credits against his payment obligations to Paula. Specifically, David contends that he is entitled to a \$62,000.00 credit related to attorney fees he paid on behalf of Paula. David also contends that he is entitled to credits for maintenance paid to Paula as a result of this Court's decision in the previous appeal that the antenuptial agreement waiving Paula's right to maintenance is enforceable, thereby nullifying David's maintenance obligation and entitling him to reimbursement of any maintenance paid to Paula.

David does not explain why he is entitled to a credit relating to attorney fees paid on behalf of Paula, and we accordingly are unable to undertake a meaningful review of the issue.

Further, as previously noted, this Court's decision upholding the antenuptial agreement is currently pending before the Supreme Court upon discretionary review, and any review of

credits concerning maintenance would be premature. We accordingly will not review David's request for credits relating to maintenance payments on the merits.

For the foregoing reason we affirm in part, vacate and remand in part, and remand for additional proceedings consistent with this opinion.

SCHRODER, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN PART, DISSENTS IN PART AND FILES SEPARATE OPINION.

DYCHE, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I would affirm *in toto*.

BRIEF FOR APPELLANT:

James B. Brien, Jr.
Mayfield, Kentucky

BRIEF FOR APPELLEE:

John T. Reed
Paducah, Kentucky