RENDERED: MAY 19, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000996-MR

EDWARD L. CREECH — APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS, III, JUDGE
CIVIL ACTION NO. 03-CI-00596

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES;
MARTHA C. RUMMAGE;
JARRIETT L. RUMMAGE;
AND BRITTANY ANN MARKS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, KNOPF, AND MINTON, JUDGES.

MINTON, JUDGE: Edward Creech appeals, *pro se*, from an order of the Nelson Circuit Court determining his child support obligation. We affirm.

In October 2003, Martha and Jarriett Rummage petitioned the Nelson Circuit Court for joint custody of their minor grandchild, Lillie Creech. The Rummages are the parents of Brittany Ann Marks, Lillie's mother. Edward is Lillie's

father. Edward and Brittany agreed that the Rummages should be awarded joint custody of Lillie, and an agreed order to that effect was entered in October 2003. That agreed order provided that child support was held in abeyance pending further orders of the court.

About a year later, the Commonwealth of Kentucky, Cabinet for Health and Family Services, was permitted to intervene in the action by virtue of the fact that Martha Rummage was receiving public assistance. The Cabinet sought an order requiring Edward, who became incarcerated sometime following the agreed custody order, to pay child support. According to the Cabinet's intervening complaint, Brittany had been ordered to pay child support in a separate action in the Nelson Circuit Court. Edward filed a *pro se* answer, as well as a request for a guardian ad litem under Kentucky Rules of Civil Procedure (CR) 17.04.[1] The trial court did not issue a formal order appointing a guardian ad litem for Edward. But on January 12, 2005, a week before the scheduled hearing on the Commonwealth's motion for child support, the trial court signed a document, titled "NOTICE OF FILING," which stated that "Tom Hall has been appointed for Creech." For reasons not contained

[1] That rule provides, in relevant part, that "[i]f for any reason the prisoner fails or is unable to defend an action, the court shall appoint a practicing attorney as guardian ad litem, and no judgment shall be rendered against the prisoner until the guardian ad litem shall have made defense or filed a report stating that after careful examination of the case he or she is unable to make defense."

in the record, Hall was not listed on the distribution list for that document. But Hall did attend the January 19, 2005, hearing.

At the hearing, Hall stated that he had not been appointed in the case, to which the trial court responded that the "NOTICE OF FILING" was an order appointing him as Edward's counsel. The trial court then conducted a very brief hearing on the matter, at which Edward and Martha testified. Several days later, the trial court issued an order requiring Edward to pay $249.82 per month in child support. That order contained no findings setting forth how the trial court arrived at its conclusions. In response to Edward's motion to vacate and for more specific findings, the trial court issued an order stating that it found Creech to be voluntarily underemployed because he testified that he quit a job paying $8.50 per hour for a lower paying, part-time job delivering pizza because he anticipated his imminent incarceration. So the trial court imputed earnings of $1,473.33 per month to Edward ($8.50 per hour X 40 hours per week = $340 per week X 52 weeks per year = $17,680 per year / 12 months per year = $1,473.33 per month). The trial court also rejected Edward's argument that it should have continued the hearing because of Hall's lack of notice and preparation and because Hall failed to request a continuance. Dissatisfied, Edward filed this appeal.

As we construe Edward's brief, he does not challenge the trial court's finding that he was voluntarily unemployed and the court's imputing income to him. Rather, Edward contends that the trial court erred by: not granting a continuance on its own motion because of Hall's lack of time to prepare for the hearing; not requiring Brittany's income to be proven with authenticated documents; not taking the Rummages' income into account when assessing his child support obligation; and reducing Brittany's child support obligation. All of Edward's arguments are unavailing.

The decision of whether to grant a continuance is within the trial court's discretion, and we may disturb the trial court's decision only if the decision represents an abuse of discretion.[2] In the case at hand, neither Hall nor Edward asked for a continuance; and Hall did participate in questioning the witnesses at the hearing. In addition, Edward has not demonstrated any prejudice he actually suffered from a failure to postpone the hearing. It is significant that Edward has not suggested what additional steps Hall could have taken if he had been given more time to prepare. And we believe the proceedings below met the mandate of CR 17.04 because Hall was present and took an active role in representing Edward's interests at the hearing. So we reject Edward's argument that this case must be

[2] Lewis v. Liming, 573 S.W.2d 365, 368 (Ky.App. 1978).

reversed and remanded because of the trial court's failure to grant a continuance on its own motion.

We also reject Edward's argument that the trial court erred by not requiring specific documentary evidence of Brittany's income for child support computation purposes. No objection was made to Martha's testimony regarding Brittany's income, which is not surprising given that Brittany's child support obligation had already been established in a separate case. Furthermore, Edward did not present any evidence at the hearing, nor has he suggested that any evidence exists that shows that the trial court erred when it computed Brittany's income. Finally, we note that better practice would be for a parent's income to be established by documentation but that such documentation is not required in all cases.[3] Thus, in the absence of objection or anything definitively showing that either Martha's testimony as to Brittany's income was erroneous or that the trial court erred in its computations of Brittany's income, we will not disturb the trial court's findings. Of course, if Edward obtains concrete evidence that Brittany's income has materially risen, he may file a motion to reduce his child support obligation under KRS 403.213.

[3] Schoenbachler v. Minyard, 110 S.W.3d 776, 784 (Ky. 2003) ("[w]e thus conclude that, while child support, as a general rule, shall be based on the parties' documented income, a trial court may consider income not susceptible to documentation if such income is properly established by the evidence.").

Next, we find that Edward's argument that the trial court erred by not factoring the Rummages' income when computing Edward's child support obligation is without merit. The statutes governing child support rely upon the income of the child's parents to determine the proper amount of child support.[4] Edward has not cited any authority, nor are we aware of any, which requires the income of a custodial grandparent to be taken into account when assessing the child support obligation of a non-custodial parent.

Finally, we reject Edward's claim that the trial court erred when it allegedly reduced Brittany's child support obligation. This reduction allegedly occurred in a wholly separate circuit court proceeding, meaning that the propriety of that reduction is not properly before us. In fact, the only documentation of that reduction is an appendix to Edward's brief, which purports to contain an unauthenticated copy of the order reducing Brittany's child support. Since that document is not a part of the circuit court record in this case, we may not consider it.[5] In addition, Edward would appear to lack standing to contest the reduction in Brittany's child support obligation because he has not demonstrated how that reduction affected him

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[4] *See, e.g.*, KRS 403.212.

[5] *See, e.g.*, Callahan v. Fluhr, 267 Ky. 637, 103 S.W.2d 109, 110 (1937) (refusing to consider matters presented by counsel on appeal which were not in the record).

(such as showing that his obligation increased when Brittany's obligation allegedly decreased). So Edward is not entitled to relief on this issue.

For the foregoing reasons, the order of the Nelson Circuit Court assessing Edward Creech's child support obligation is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEES:
Edward L. Creech, *Pro se* LaGrange, Kentucky	John Pottinger Bardstown, Kentucky