

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2006-CA-002394-MR

JOSHUA ERIC NICHOLS

APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE DAVID A. TAPP, JUDGE  
ACTION NO. 95-CI-00363

TERESA JO HELTON (N/K/A MOORE)

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON AND NICKELL, JUDGES; GRAVES,<sup>1</sup> SENIOR JUDGE.

CLAYTON, JUDGE: Joshua E. Nichols (Josh) appeals from the Pulaski Circuit Court's Findings of Fact, Conclusions of Law and Order Setting Child Support and Arrearage, Order for Payment of Attorney's Fees, and Final Order Denying Motion to Modify Custody. Because we do not find any abuse of discretion on the part of the trial court, we affirm.

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<sup>1</sup> Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 100(5)(b) of the Kentucky constitution and Kentucky Revised Statutes (KRS) 21.580.

## BACKGROUND

Josh and Teresa Jo Helton (n/k/a Moore)(Teresa) are the parents of Brandon Eric Helton (d.o.b. 9/6/1994)(Brandon). The parties were not married at the time of Brandon's birth. After a paternity action (94-J-00343), Josh was adjudicated to be the father and ordered to pay child support. Shortly thereafter, in May 1995, Josh filed the original petition for custody of Brandon. Ultimately, on August 7, 1995, the trial court adopted the recommendations of the Domestic Relations Commissioner and awarded the parents joint custody with Teresa as the primary residential caretaker. Since that time, Teresa married Richard Moore, a civilian employee of the Department of Defense. Richard and Teresa also have a daughter, Maddy, age 7, who is Brandon's half-sister.

Years of litigation have ensued including at least two appeals and a separate action for grandparent visitation. We, however, begin our analysis from the inception of this action on September 16, 2005. On that date, Teresa filed motions to modify visitation, child support, attorney fees, and for a temporary injunction. The motion for injunctive relief sought the court's approval to relocate Brandon with her to Dahlonga, Georgia. The underlying basis for this action was a promotion and transfer for Teresa's husband.

Josh responded by moving on September 29, 2005, to dissolve the temporary injunction and on October 17, 2005, petitioned to modify custody. After the November 2, 2005, hearing, the court entered an interlocutory custody and visitation order. The order declined to address the merits of a custody change

without the completion of a custodial evaluation but did designate Josh as the primary residential caretaker during the pendency of the litigation and modified the visitation schedule. Contemporaneously, the court appointed Penny Hines as *guardian ad litem* for Brandon and Feinberg & Associates of Lexington, Kentucky, as the custodial evaluators for the family.

Following the court's receipt of the *guardian ad litem* and custodial reports, both of which recommended that Teresa retain her status as primary residential caretaker, another hearing was held on February 3, 2006. After this hearing, the court issued an order on February 13, 2006, adopting the recommendations of the *guardian ad litem* and returning temporary custody to Teresa. Additionally, the court directed the parties, including Brandon, to commence counseling.

Child support had not been modified since September 14, 2004, wherein Josh had been ordered to pay \$313.04 per month based on an annual income of \$23,568. Financial information existed which suggested his income had increased.

## MODIFICATION OF CHILD CUSTODY

Kentucky Revised Statutes (KRS) 403.340 governs modification of a custody decree. KRS 403.340(3) permits custody to be modified if “a change has occurred in the circumstances of the child or his custodian” and “the modification is necessary to serve the best interests of the child.” *See Fowler v. Sowers*, 151 S.W.3d 357 (Ky. App. 2004).

In sum, in order to prevail and have custody modified, Josh had to demonstrate a change in circumstances and that modification of the child custody would be in Brandon’s best interest. In the case *sub judice*, the court found in its May 19, 2006, Findings that a change in circumstances had occurred but that modification was not in Brandon’s best interest. The court opined that a move, two states and 330 miles away, where the child has no extended family, met the first prong of a material change in the child’s circumstances. But determining whether a modification of custody was in the best interest of Brandon is much more difficult and required a full evidentiary hearing to assess the factors of KRS 403.340 and 403.270. Following the hearing on February 3, 2006, and after consideration of the extensive evidentiary record, the court did not find that modification of child custody would serve Brandon’s best interest.

It appeared to the court that Josh’s primary argument supporting modification of custody was that Teresa’s relocations were indicative of a pattern of instability. Yet the *guardian ad litem* proffered that the significance of the moves was overstated. The court agreed and noted that the moves were made

either for mutually agreed (Josh and Teresa) educational decisions or employment changes for Teresa's spouse. No evidence was given that supported the belief that the moves were to disregard or jeopardize Brandon's relationship with his father.

The court discussed at length, citing the custodial evaluator and the *guardian ad litem* reports, about its conclusion that Brandon's best interest would be served by Teresa remaining as the primary custodian. It found that in his mother's home, Brandon would have an environment that enhanced his security and psychological attachment and, importantly, one where he would be able to love and bond with both his parents. Furthermore, the custodial evaluator highlighted the extremely close and loving bond between Brandon and his sister, Maddy.

Modifying the child custody decision of the court is generally within the sound discretion of the trial court. Ultimately, a circuit court's decision regarding custody will not be disturbed absent an abuse of discretion. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). Abuse of discretion implies that the circuit court's decision is unreasonable or unfair. *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994). In reviewing the decision of the circuit court, therefore, the test is not whether the appellate court would have decided it differently, but whether the findings of the circuit judge were clearly erroneous or that he abused his discretion. *Cherry*, 634 S.W.2d at 425.

Here, we observe that the court engaged in a thorough and thoughtful analysis. Furthermore, we find no abuse of discretion and uphold the court's decision to deny Josh's motion to modify the custody order of July 20, 1999.

### **CHILD SUPPORT**

In order to determine the amount of child support that each parent must pay, it is necessary to know the parents' income. Teresa's annual gross income of \$25,380 is uncontroverted. Josh's income is more difficult to ascertain.

The court heard testimony from both parties' witnesses and reviewed voluminous financial records. KRS 403.212(2)(c) provides that where an obligor is self-employed or derives income from rents, royalties, sole proprietorships, joint ventures, partnerships, or closely held corporations, the computation of gross income must account for ordinary and necessary expenses required for self-employment or business operation. Furthermore, the statutory strictures maintain that the determination of whether expenses are "ordinary and necessary" is not the same as a determination of deductible expenses for tax purposes. Moreover, the statutes instruct the court to use a heightened standard of care in scrutinizing income and expenses from self-employment.

In its decision, the trial court gave the following information: Josh is an optometrist who derives income from two businesses – Eye Health Care Professionals located in Somerset, Kentucky, and a recently opened business in Stanford, Kentucky. The opening of the latter business coincides with the closure of the Doctor J business formerly operated at the Wal-Mart in Wayne County,

Kentucky. The court declined to impute income from the second business because in the immediate future no substantial income would be derived. Depending on the success of this new business, however, the court acknowledged that a subsequent adjustment to child support may be necessary.

Second, the court discussed that Josh over the past three years had annually earned \$10,000 for his military service, but in the future he will receive limited compensation. Therefore, the court declined to impute any income from this activity.

Another issue involved significant discrepancies in the manner in which the parties calculated the treatment of Josh's Dodge Durango, payment of health and disability insurance, and the issue of straight line versus accelerated depreciation. The court held that the Dodge Durango should be included as income attributable to Josh, but the payment of health and disability insurance should not. KRS 403.212(2)(c) states that "[e]xpense reimbursement or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business . . . shall be counted as income if they are significant and reduce personal living expenses such as a company or business car, free housing, reimbursed meals or club dues." The court concluded that the Dodge Durango met this parameter as it was "significant" and "reduced" Josh's personal living expenses. Yet the court decided that health and disability insurance did not fall within this statutory constraint. Lastly, on the issue of depreciation, KRS

403.212(2)(c) informs us that straight line depreciation “shall be the only allowable method of calculating depreciation expenses . . . .”

Thereupon, the court found that Josh’s annual gross income was \$114,062. Combining the parties’ incomes (\$114,062 plus \$25,380) results in annual gross income of \$139,442 (\$11,620 per month.) Consequently, using the Child Support Guidelines found in KRS 403.212, the monthly support obligation for one child is \$1,075. Accordingly, the court determined that Josh’s monthly support obligation is \$881.50 while Teresa’s monthly support obligation is \$193.50.

As a matter of public policy, courts cannot allow a party to an action to use KRS 403.212(2)(c) as a shield for avoiding support obligations by funneling the assets of a business to an individual. Josh suggests that his yearly income should be \$93,479, which apparently, was the amount on his 2005 Income Tax Return. If the court had used this amount, it would have completely ignored KRS 403.212(2)(c). As explained above, the court followed its statutory mandate and held that the money used for the Dodge Durango was to be included and used straight line depreciation for assets. We find that the court did a thorough job sifting through the evidence and reviewing the pertinent law to determine Josh’s income for purposes of calculating child support. As an aside, the court did not use Teresa’s figure for Josh’s income of \$139,710, but made a considered decision using statutory mandates to discover Josh’s yearly income and ascertain his monthly child support obligation.

The awarding of child support is addressed to the trial court's sound discretion; absent an abuse of discretion, we may not upset the trial court's determination. *Pegler v. Pegler*, 895 S.W.2d 580,582 (Ky. App. 1995). Accordingly, we uphold the court's determination of child support. Furthermore, Josh's only concern about the child support arrearage being incorrect was based on the child support amount being incorrect. We did not find it to be wrong, and thus, we uphold the amount of the child support arrearage, too. Hence, Josh owes \$7,933.50 in back child support payments.

### **ATTORNEY'S FEES**

The last issue for the Court's consideration is an award of attorney's fees of \$12,500 to Teresa. KRS 403.220 authorizes the trial court's award of attorney's fees in any proceeding under KRS Chapter 403. It provides in pertinent part:

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. . . .

In addition, KRS 403.340(6) allows for attorney's fees and costs to be assessed against a party seeking custody modification if the court finds the modification action is vexatious and constitutes harassment.

Josh does not contest the award of legal fees nor does he contend that he is financially unable to pay these respective costs or that the charges are unreasonable. Instead he believes that his decision to move for modification of custody was completely understandable following Teresa's motion to relocate with Brandon. Because the legal action was justified, he believes that legally he should not have to pay attorney's fees.

In fact, the trial court said on page 4 of its Opinion & Order dated September 19, 2006, that "the Court does not find that the **initiation** of the motion seeking to alter custody filed by Nichols was vexatious or harassing, though the continued non-compliance with the Court's orders regarding discovery unnecessarily prolonged and complicated resolution of these issues." (Emphasis added.) Hence, under either KRS 403.220 or KRS 403.340(6), having the ability **or right** to file an action does not absolve a litigant's responsibility to be timely, transparent, and responsive in the litigation or abrogate the possibility of paying attorney's fees for the other party.

An award of attorney's fees is wholly within the discretion of the trial court and will be disturbed only if the trial court abused its discretion. *Giacalone v. Giacalone*, 876 S.W.2d 616, 620-21 (Ky. App. 1994)(citing *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990); *Wilhoit v. Wilhoit*, 521 S.W.2d 512 (Ky. 1975)). Here, the trial court also reviewed the factors in *Boden v. Boden*, 268 S.W.2d 632 (Ky. 1954), including the: (1) the amount and character of services; (2) labor, time and trouble; (3) nature and importance of the litigation; (4) responsibility imposed;

(5) amount of money or property; (6) skill and experience; (7) professional character and standing of counsel; and (8) results obtained. After a thorough analysis, including the hourly rate and number of hours expended by Teresa's counsel ( $\$150 \times 183.5 \text{ hours} = \$27,525$ ), the court stated that this amount would be excessive, and instead ordered that Josh pay \$12,500 in Teresa's attorney's fees. And the court under Kentucky Rules of Civil Procedure (CR) 54.04 and KRS 403.220, also granted Teresa, *guardian ad litem* fees of \$1,683, deposition cost of \$721.46, and Court of Appeals filing and service fees of \$145.

We are not persuaded by Josh's contention that the trial court erred by awarding \$12,500 in attorney's fees to Teresa. The record shows that Josh earns significantly more than Teresa. Furthermore, the trial court did a careful analysis of the charges. The sheer size of the record illustrates that the parties have expended great sums in bringing the dispute before the court. Under these circumstances and given the trial court's discretion in these matters, it cannot be said that the trial court abused its discretion in awarding \$12,500 in attorney's fees to Teresa.

For the foregoing reasons, the order of the Pulaski Circuit Court is affirmed as to modification of custody and child support, and its award of attorney's fees.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Charles J. McEnroe  
Somerset, Kentucky

BRIEF FOR APPELLEE:

Whitney Dunlap III  
Richmond, Kentucky