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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001401-ME

BRADLEY CARL RENFROW

APPELLANT

v.

APPEAL FROM BUTLER CIRCUIT COURT
HONORABLE MIKE McKOWN, JUDGE
ACTION NO. 02-CI-00086

LAURA ANN RENFROW (NOW PHELPS);
COMMONWEALTH OF KENTUCKY, EX.
REL. LAURA ANN RENFROW (NOW PHELPS)

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON AND DIXON, JUDGES; GRAVES, SENIOR JUDGE.¹

GRAVES, SENIOR JUDGE: Bradley Carl Renfrow appeals from orders of the Butler Circuit Court (1) denying his motion to change the primary residential custodian of the parties' two minor children; (2) increasing his child support obligation to the custodial

¹ Senior Judge J. William Graves, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

parent, Laura Ann Renfrow (now Phelps); and (3) awarding attorney fees to Laura. For the reasons stated below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The parties were married on May 17, 1997. They have two children, Caleb Austin Renfrow, born October 10, 1996, and Bailey Nicole Renfrow, born January 30, 1999. On May 31, 2002, Laura filed a motion for dissolution of marriage.

On August 13, 2002, the final decree dissolving the marriage was entered. The decree incorporated a separation agreement between the parties under which, among other things, Laura would be the primary residential custodian of the children and Bradley would pay child support of \$300.00 per month.

On March 1, 2007, the Commonwealth, on behalf of Laura, filed a motion with the trial court seeking to increase Bradley's child support obligation based upon a material change in circumstances that is substantial and continuing. Shortly thereafter, on April 2, 2007, Bradley filed a motion seeking to change custody so as to designate him as the primary residential custodian.

A hearing was held on the pending motions on June 2, 2007. On June 14, 2007, the trial court entered an order denying Bradley's motion to change the primary residential custody of the children. On June 19, 2007, the trial court entered an order granting Laura's motion to increase Bradley's child support obligation and setting his obligation at \$801.00 per month. This appeal followed.

Before us Bradley contends that the trial court erred by (1) denying his motion to change the primary residential custodian of the children; (2) increasing his child support obligation; and (3) awarding attorney fees to Laura.

CHILD CUSTODY

Bradley argues that the trial court erred by denying his motion to change the primary residential custody of the children. However, in his brief Bradley does not address the merits of the court's decision but, rather, focuses only upon its failure to make adequate findings pursuant to CR² 52.01.

We agree with Bradley that the trial court failed to make adequate findings under CR 52.01. Bradley, however, did not file a motion requesting more specific findings of fact or file a motion pursuant to CR 52.02 upon the issue of inadequate findings. CR 52.04 provides that “[a] final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02.” As such, we will not reverse the trial court's decision because of its failure to make adequate findings in support of its custody determination.

As previously noted, Bradley's brief addresses only the procedural deficiencies of the trial court's order, and does not address the custody determination on

² Kentucky Rules of Civil Procedure.

the merits. Nor do Laura and the Commonwealth, in their briefs, address the custody decision on the merits. As such, there is no discussion and argument of the custody decision, nor citation to the evidence, presented to this Court for review.

Upon the merits, however, the trial court did make the finding that “[Bradley] has not met his burden and there was not a significant change in circumstances under KRS³ 403.340 to warrant a change in custody.” KRS 403.340(3) provides, in relevant part, that “the court shall not modify a prior custody decree unless after hearing it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian”

In custody matters tried by a court without a jury, the court's “[f]indings 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.” CR 52.01; *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky.App. 2002). Upon the record as a whole, and in light of Bradley's failure to cite us to evidence demonstrating otherwise, we cannot conclude that the trial court's finding that there had not been a change in circumstances so as to support a change in custody is clearly erroneous.

CHILD SUPPORT

As previously noted, the trial court granted the motion to modify child support and increased Bradley's child support obligation from \$300.00 per month to

³ Kentucky Revised Statutes.

\$801.00 per month. Bradley argues that the trial court's child support calculation was in error because it was “not based upon fact and evidence but, rather, speculation and conjecture.” More specifically, Bradley objects to the trial court's setting of his income for child support calculation purposes at \$3,000.00 per month.

In its June 19, 2007, order the trial court addressed the issue of Bradley's income as follows:

[Bradley] submitted his income tax returns for the years 2004 and 2005. During those years he was self employed and reported a loss as taxable income. There was much testimony from [Bradley] as to his work, his income and his expenses, both business and living expenses. The Court found [Bradley's] testimony to be unbelievable particularly when compared to his tax returns.

[Bradley] has remarried and has another child.

[Bradley] testified that he is self-employed. He further testified that he buys and sells car parts, largely through a business called TransTech. A wife of one of the owners of TransTech testified that [Bradley] is paid in cash for some of these transactions.

Furthermore, the Court heard testimony that [Bradley] has owned numerous cars since he has received his driver's license. The Court finds that [Bradley] has been buying and selling cars for profit. The Court can only assume since his profit is not reported on his income tax return, that [Bradley] is profiting in this business on a cash basis.

[Bradley] testified that he recently added three rooms to his home, purchased a new truck, landscaped his home and purchased a \$6,500.00 lawnmower. He takes his family on vacations three or four times per year. He and his current wife own at least six motor vehicles, including a new truck which he purchased for approximately \$33,000.00. He owns

his home and a house adjoining, both on 1.75 acres. He owns another lot of 3.471 acres. He and his mother jointly own the house in which she lives.

The Court reviewed three of [Bradley's] loan applications and found that he listed his income on these three forms as \$600 per week in 2003, \$7,000 per month in 2006 and \$3,000 per month in 2007.

[Bradley] testified that he received rent on the house next to his home in the amount of \$1,000 in 2006.

[Bradley] testified that he borrowed for the addition to his home. He makes payments on two home mortgage loans in the amount of \$221 per month. He currently pays child support to [Laura] in the amount of \$300 per month. His mother testified that she makes the payments on the house in which she lives.

He owes \$12,000 on a promissory note secured by a tract of land, \$6,500 for a newly purchased mower, and his home is mortgaged by an amount in excess of \$100,000.

While [Bradley]'s current wife is employed, her income (reported as gross income of \$14,912 on 2005 tax return) plus his loss from self employment per their tax return is ridiculously insufficient to provide this lifestyle. However, he is assisted in supporting his lifestyle by his total lack of payment of income and Social Security tax.

Since the Court finds [Bradley's] testimony as to his income to be unbelievable, it is forced to estimate it. Using the amounts from [Bradley's] 2005 income tax returns, his testimony in Court, and this Court's common sense, the Court has calculated his monthly income to be \$3,000.

We note that our standard of review is governed by CR 52.01, which provides that findings of fact by the circuit court shall not be set aside unless clearly erroneous, with due regard being given to the opportunity of the court to judge the

credibility of the witnesses. In divorce actions, this Court will not disturb the findings of a trial court unless those findings are clearly erroneous. *Cochran v. Cochran*, 746 S.W.2d 568 (Ky.App. 1988). Findings of fact are not clearly erroneous if supported by substantial evidence. *Ky. State Racing Comm'n v. Fuller*, 481 S.W.2d 298 (Ky. 1972). “‘Substantial evidence’ is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.” *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky.App. 2002).

The trial court determined that the income information supplied by Bradley in his income tax forms and testimony was not credible in light of his lifestyle, evidence that he received cash payments for some of his work, and based upon other evidence of his income. As the ascertaining of credibility is the province of the trial court, not this Court, we will not disturb this finding.

Moreover, the trial court's finding that, in the absence of credible tax returns and credible testimony by Bradley, a reasonable imputation of monthly income of \$3,000.00 is supported by substantial evidence. On January 13, 2007, less than two months prior to the filing of the motion to increase child support in this case, Bradley executed a consumer loan application as the sole applicant in which he listed his monthly income as \$3,000.00 per month. Record on appeal, pg. 228. Shortly prior to that, on September 29, 2006, Bradley, as the sole applicant, executed a home loan application in which he listed his monthly income as \$7,000.00 per month. Record on appeal, pg. 231. We believe these bank loan applications to be substantial evidence supporting the trial

court's finding of an imputed income of \$3,000.00 per month for child support calculation purposes.

ATTORNEY FEES

Finally, Bradley contends that the trial court erred by ordering him to pay attorney fees in the amount of \$1,125.00. He argues that the child support issues were prosecuted by the Commonwealth, and thus Laura's retained counsel is receiving a windfall by being awarded attorney fees.

It is well-settled in this Commonwealth that an award of attorneys' fees is entirely within the sound discretion of the trial court. The only provision as to that discretion is that the court is required to consider the financial resources of the parties. *Poe v. Poe*, 711 S.W.2d 849 (Ky.App.1986). The breadth of the trial judge's discretion was recently reiterated and reinforced by the Supreme Court of Kentucky when it cited favorably to its previous holding in *Wilhoit v. Wilhoit*, 521 S.W.2d 512, 514 (Ky. 1975):

If there had ever been any doubt regarding the discretionary authority of the trial court to allocate court costs and award an attorney's fee, KRS 403.220 laid that doubt to rest once and for all. As matters now stand, an allocation of court costs and an award of an attorney's fee are **entirely** within the discretion of the court. (Emphasis added.)

Neidlinger v. Neidlinger, 52 S.W.3d 513, 519 (Ky. 2001).

The language is sweeping in scope, and the rationale behind the principle is clear. A trial judge is in the best position to assess conduct and tactics which may

unnecessarily increase the amount of attorneys' fees. *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990).

We note that in addition to the child support issue, this case also involved child custody litigation, which was not litigated by the Commonwealth but, rather, by Laura's private attorney. Based upon the trial court's extremely broad discretion in this area, we will not disturb its wholly proper exercise of that discretion by awarding Laura attorney fees in this case.

CONCLUSION

For the foregoing reasons the judgment of the Butler Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE

COMMONWEALTH OF KENTUCKY, EX
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