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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000467-ME

MARY H. BELL APPELLANT

v. APPEAL FROM MERCER CIRCUIT COURT
HONORABLE D. BRUCE PETRIE, JUDGE
ACTION NO. 09-CI-00124

MICHAEL S. BELL APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, MOORE AND NICKELL, JUDGES.

MOORE, JUDGE: Mary H. Bell appeals the Mercer Family Court's order denying her motion to alter, amend, or vacate the court's previously entered Decree of Dissolution of Marriage regarding the child support calculation. After a careful review of the record, we reverse and remand.

The sole issue before us on appeal is whether the family court erred by allowing the exclusion of unreimbursed expenses associated with the father's employment from his gross income for the purpose of calculating child support. Specifically, the family court[1] excluded approximately $36,000 in unreimbursed business expenses from Michael's gross income when calculating child support for the parties' one minor child.

Mary argued that while KRS[2] 403.212[3] allows for an exclusion of business expenses incurred by self-employed individuals, it does not provide a similar exclusion for individuals classified as employees. As stated by the family court, because Michael was not self-employed, "[Mary] argue[d] that KRS

[1] Initially, these findings were made in the family court's "bench notes," which were filed of record. Although the family court initially failed to incorporate these into the decree, it did so in its order on the parties' motions to alter, amend, or vacate the decree.

[2] Kentucky Revised Statute.

[3] KRS 403.212 provides in pertinent part that:

> "[g]ross income" includes 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. Specifically excluded are benefits received from means-tested public assistance programs, including but not limited to public assistance as defined under Title IV-A of the Federal Social Security Act, and food stamps.
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> For income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, "gross income" means gross receipts minus ordinary and necessary expenses required for self-employment or business operation. . . .

403.212(b) should apply to his gross income and 403.212(c) should not apply to his expenses." In fact, neither party contests that Michael is not self-employed. Nonetheless, the family court concluded that:

> KRS 403.212(c) clearly allows for a deduction of "ordinary and necessary expenses required for self-employment." KRS 403.212(c) goes on to say that "[e]xpense reimbursement received by a parent in the course of **employment, self-employment** [emphasis added] shall be counted as income if they are significant and reduce personal living expenses such as a company car, … or reimbursed meals." The gap here is what happens in this case: *i.e.*, when a person is expected as a part of their employment by another to generate significant business expenses for which they will not be reimbursed, are they entitled to a reduction from their income for purposes of calculating child support? Unfortunately, the statute is silent. Furthermore, neither party has directed the Court to any case law on this point. Accordingly, as the Court in family law is one that sits both at law and in equity, the Court finds that it is only equitable that [Michael] be entitled to a reduction for these expenses. The rationale behind KRS 403.212(c) would support this result. That is, that money that is required to be spent in order to generate income should not be counted as income for child support purposes.

The parties both subsequently filed motions to alter, amend or vacate the judgment. Mary again argued that KRS 403.212 does not allow an employee to exclude unreimbursed business expenses from his gross income. The family court denied Mary's motion, instead decreasing the amount of Michael's child

support obligation based upon arguments contained in his motion."[4][5] This appeal followed.

"Our review of child support awards is governed by the abuse of discretion standard." *Holland v. Holland*, 290 S.W.3d 671, 674 (Ky. App. 2009) (citing *Plattner v. Plattner*, 228 S.W.3d 577, 579 (Ky. App. 2007)). A court abuses its discretion only when its decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id*. (citing *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001)).

Under the facts of this case, we believe that the family court abused its discretion when it disregarded the statutory distinction between employed and self-employed persons with respect to allowable exclusions. The family court found that

the statute was silent as to any exclusions allowable for an employee, but it nevertheless allowed for an exclusion under the guise of its equitable power.

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[4] The subject matter of Michael's motion to alter, amend or vacate is not otherwise relevant to this appeal, and the basis for the reduction has not been raised on appeal.

[5] The family court's order regarding these motions does not clearly delineate its position on the issue on appeal. Its ruling is nevertheless clear. The order decreases the amount of Michael's child support obligation. However, had the family court granted Mary's motion, the obvious result would have been an increase in his support obligation. At the hearing on the motions, the family court stated in unequivocal terms that it maintained its earlier position that Michael should be allowed an exclusion, based upon equity, from his gross income. The family court attached its bench notes from November 19, 2010, to the order and incorporated them into the decree by reference, which reiterated this position. Moreover, both parties' positions involve an identical interpretation of the court's order, and neither party otherwise raises the issue.

As an aside, courts speak *only through their written orders*. *Bax v. Fletcher*, 261 S.W.2d 662, 663 (Ky. 1953). Given the somewhat confusing record before us because of the family court's reliance upon its "bench notes" in lieu of including detailed formal findings of fact and conclusions of law in each of its orders, we discourage this practice in the future for clarity of review.

It is not within the power of this Court, or any court of this Commonwealth, to allow for an exception not otherwise provided for by the statute. *Thompson v. Piasta*, 662 S.W.2d 223, 226 (Ky. App. 1983) (citing *Griffin v. City of Bowling Green*, 458 S.W.2d 456 (Ky. 1970)). Where the legislature has enacted a statute, it must be "accepted as it is written." *Thompson,* 662 S.W.2d at 226. "Where no exception is made to positive statutory terms the presumption is the Legislature intended to make none. It is not the province of the court to introduce exception by construction." *Id*. (citing *Griffin*, 458 S.W.2d 456). Similarly, a court has no authority to make a statute read differently when it is silent on any given issue. *See Coleman v. Reamer's Ex'r*, 237 Ky. 603, 36 S.W.2d 22, 24 (1931). Courts simply "'cannot substitute their judgment for the legislative enactment for to do so would be to usurp the power reserved for the legislative authority.'" *Scheer v. Zeigler*, 21 S.W.3d 807, 813 (Ky. App. 2000) (quoting *Puryear v. City of Greenville*, 432 S.W.2d 437, 442 (Ky. 1968)).

Even a cursory reading of KRS 403.212 reveals that it provides exclusions only for business expenses of individuals who are self-employed, or otherwise engaged in business activities not typically associated with being an employee. KRS 403.212(2)(c). In fact, the trial court acknowledged that the statute provides for no such exclusion for employees. Therefore, it was without authority to allow for an exclusion not otherwise provided for in the statute. *Thompson*, 662 S.W.2d at 226 (citing *Griffin*, 458 S.W.2d 456).

The family court also noted that the policy behind KRS 403.212(2)(c) supports such an additional exclusion. We disagree. It is only permissible for a court to interpolate based upon public policy "where the Constitution and the Statutes are silent on the subject." *International Brotherhood of Boilermakers v. Holt*, 418 S.W.2d 758, 760 (Ky. 1967) (citing *Chreste v. Louisville Ry Co.*, 167 Ky. 75, 180 S.W. 49, 52 (1915)). The fact that a statute does not allow for a particular exclusion does not in and of itself mean that the statute is silent on the issue. Rather, KRS 403.212 clearly delineates several adjustments and exclusions allowable for purposes of calculating a parent's adjusted gross income. The Kentucky Legislature clearly considered instances that would warrant an exclusion, and, in its province, elected not to allow an exclusion for unreimbursed expenses of employees. Accordingly, the fact that the statute does not provide any such exclusion is merely indicative of the fact that the legislature did not intend to allow an exclusion for the unreimbursed business expenses of an employee. Again, a court may not create an exclusion to a statute where the legislature declined to do so. *Thompson*, 662 S.W.2d at 226 (citing *Griffin*, 458 S.W.2d 456).

Finally, the appellant cites to an unpublished case *Leonhardt v. Leonhardt*, 2008 WL 275139 (Ky. App. Feb. 1, 2008). We believe citation to this case was appropriate under CR 76.28(4)(c),[6] and that it is instructive on the issue.

[6] CR 76.28(4)(c) states in relevant part that "[o]pinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court."

In *Leonhardt*, this Court evaluated whether a mother was entitled to a reduction of her gross income, pursuant to KRS 403.212, for purposes of calculating child support. *Leonhardt*, 2008 WL 275139 *4-5. The *Leonhardt* Court held that the mother did not "clear the threshold issue of whether she is truly 'self-employed.'" *Id* at *5. Therefore, the Court did not allow a deduction for unreimbursed business expenses. *Id*. The Court stated that "[KRS 403.212] allows no reduction in a parent's gross income [for unreimbursed business expenses] for [an employee]." *Id*. For this and the reasons stated above, we reverse and remand for proceedings consistent with this opinion.

ALL CONCUR.

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