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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000957-MR

JEFFREY L. ROGERS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOSEPH W. O'REILLY, JUDGE
ACTION NO. 99-FC-005058

WENDY S. MCCUTCHEON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND NICKELL, JUDGES; HENRY,[1] SENIOR JUDGE.

NICKELL, JUDGE: Jeffrey L. Rogers appeals, *pro se,* from a judgment of the Jefferson Circuit Court entered on April 16, 2007. He alleges the trial court erroneously denied his motion to reduce his monthly child support obligation and granted his former wife's motions for a common law judgment in the amount of

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

$1,157.00 for a child support arrearage, and her motion for $1,000.00 in attorneys' fees. After reviewing the record and the law, we affirm.

FACTS

Rogers and Wendy McCutcheon were married in October 1997. Twin girls were born to them in December 1998. The couple separated in March 1999 and McCutcheon petitioned for dissolution of the marriage in April 1999. A divorce was granted in September 2000, and since that time Rogers and McCutcheon have shared joint custody of the twins with McCutcheon serving as the primary residential custodian.

McCutcheon retired from the Jefferson County Corrections Department in August 2002 at an annual salary of about $40,000.00. In 2007, her total monthly retirement income was $2,316.78 which she says she supplemented with about $300.00 a month from cleaning homes.[2] McCutcheon's only other source of income was the child support paid by Rogers for the twins, and a separate child support award from the father of another child. Since retiring, McCutcheon has also worked in a law office and at the YMCA. According to her tax return, her total income for 2006 was $26,076.00. In April 2007, the trial court found McCutcheon to be voluntarily unemployed and imputed to her the ability to earn $1,083.33 per month.

[2] Rogers alleged the part-time cleaning business was more profitable than McCutcheon said it was, but he did not convince the trial court of this fact.

In contrast, Rogers earned $59,082.92 in 2006 as a captain with the Louisville Fire and Rescue Department. He also co-owns five rental properties which he maintains do not currently generate income. In February 2006, the trial court imputed to him $1,000.00 a month in rental income.

In May 2000, Rogers was paying $414.00 bi-weekly in child support for the twins and paying health insurance premiums for them. In June 2005, his obligation was changed to $821.00 per month. In September 2005, McCutcheon sought a common law judgment in the amount of $1,651.65 for past due support. Soon thereafter she sought an increase in monthly child support to $1,194.00 as well as attorneys' fees and costs. On November 11, 2005, McCutcheon moved the court to order Rogers to pay her $1,000.00 in advance for attorneys' fees and costs. About a month later, Rogers submitted an affidavit asking the court to reduce his child support obligation. A few days later, McCutcheon's attorney submitted an itemized statement showing he had generated $3,281.25 in attorneys' fees.

Finding McCutcheon had demonstrated more than a fifteen percent change in circumstances, and thereby satisfied the requirements of KRS 403.213(2) for an increase, the court entered an order on February 27, 2006, raising Rogers' monthly child support obligation to $1,000.00 and making it retroactive to the date of McCutcheon's request for the increase. In this same order, the court awarded McCutcheon a common law judgment in the amount of $1,652.65 for back child support but denied her request for attorneys' fees.

On March 6, 2006, Rogers asked the court to reconsider its February 27, 2006, order because McCutcheon had allegedly under-reported her income from the part-time cleaning business. The motion was denied in April 2006.

In May 2006, Rogers filed an appeal in this Court challenging both the trial court's award of a common law judgment to McCutcheon for back child support and its increase of his child support obligation. McCutcheon filed a cross-appeal challenging the trial court's denial of her request for attorneys' fees. The parties resolved the issues on their own via an agreed order executed in September 2006 and entered by the trial court on October 17, 2006. The agreed order reduced Rogers' monthly child support obligation to $910.00 and made it retroactive to September 12, 2005; reduced Rogers' arrearage from $1,652.65 to $800.00; specified the appeal and cross-appeal were to be dismissed;[3] and directed McCutcheon's attorney to calculate a new arrearage upon receipt of financial information from Rogers.

In November 2006, McCutcheon submitted an affidavit in which she stated Rogers began paying the correct amount of child support ($910.00 per month) on October 13, 2006. However, because the increase was requested in September 2005, $89.00 in child support was due and owing for each of the thirteen months between September 12, 2005, and October 13, 2006. To collect this arrearage, McCutcheon requested a common law judgment in the amount of

[3] On January 16, 2007, this Court entered an order dismissing appeals 2006-CA-000997-MR and 2006-CA-1026-MR on the strength of the agreed order signed by Rogers and McCutcheon.

$1,157.00. She also argued that because Rogers' income was greater than her own, he should be ordered to pay her attorneys' fees and costs. Rogers' response alleged McCutcheon had cut her income in half by voluntarily resigning from the Department of Corrections; she had been working for the attorney who was representing her in the child support litigation; McCutcheon was not reporting income from her house cleaning business on her taxes; McCutcheon was underemployed; and he was not realizing any income from his rental properties.

On February 9, 2007, Senior Judge Kevin L. Garvey (Senior Judge Garvey), sitting in for Judge Joseph W. O'Reilly (Judge O'Reilly), signed two orders. One rescheduled a hearing in the case for April 5, 2007; the other ordered the parties to exchange financial documents and to file a copy with the court by March 30, 2007. Senior Judge Garvey had no other involvement in the case.

On March 1, 2007, two additional orders, signed by Judge O'Reilly, were entered. The first denied McCutcheon's request for Rogers to pay $1,000.00 *in advance* for her attorneys' fees; the second reserved ruling on the question of attorneys' fees until the hearing on April 5, 2007, and directed Rogers to answer interrogatories propounded by McCutcheon and to produce documents requested by her.

Judge O'Reilly heard the matter on April 5, 2007. McCutcheon was present in person and was represented by counsel. Rogers appeared *pro se*, having alleged in a prior pleading that he could no longer afford an attorney.[4]

[4] The record shows Rogers' counsel was permitted to withdraw from the case due to irreconcilable differences.

McCutcheon and Rogers were the only witnesses called to testify. McCutcheon submitted proof of the thirteen-month arrearage and an invoice from her attorney detailing his work on the case. Rogers attempted to show McCutcheon's cleaning business was more successful than she had disclosed by introducing McCutcheon's bank records from 2004 and 2005. The court excluded the exhibits because they had not been introduced prior to entry of an April 2006 order denying Rogers' motion to reconsider the February 2006 ruling raising the monthly child support award to $1,000.00.

At the hearing, Rogers also argued McCutcheon was not entitled to attorneys' fees as she was not paying her attorney. He tried to show McCutcheon's attorney was representing her without charge because she had worked for him. Rogers also alleged that in 1998 McCutcheon had told him she did not have to pay her lawyer. However, McCutcheon contradicted Rogers' allegations, testifying that she had received invoices from her attorney which she had not paid because she was asking the court to award attorneys' fees to her so she could pay him. The court stated payment was not the real issue; the relevant question was whether McCutcheon had been *billed* for legal services. The record contains multiple affidavits from McCutcheon's attorney supported by itemized invoices for legal services.

In an order entered on April 16, 2007, the trial court found McCutcheon was voluntarily underemployed. As a result, the court imputed to her

a twenty-five hour work week at a rate of $10.00 an hour for a total of $1,083.33 per month. The court did not figure McCutcheon's part-time cleaning business into the equation because it would have duplicated the salary being imputed to her. When combined with her retirement income of $2,316.78, McCutcheon's monthly income was calculated to be $3,400.11. Upon finding Rogers' monthly income as a firefighter was $4,923.58, the court denied Rogers' request for a reduction in child support because he had satisfied neither of the statutory requirements for a modification. First, he had not demonstrated the substantial and continuing change in circumstances required by KRS 403.213(1). Second, he had not shown a change of fifteen percent or more in the amount of support due each month as required by KRS 403.213(2). Thereafter, the trial court granted McCutcheon a common law judgment in the amount of $1,157.00[5] to cover the child support arrearage.

Finally, the trial court granted McCutcheon's request for $1,000.00 in attorneys' fees. This appeal followed. We now affirm.

ANALYSIS

We begin by noting Rogers acted as his own lawyer for much of the proceedings in the trial court and does so again on appeal to this Court. By choosing to represent himself, Rogers assumed the risks and accepted the hazards that accompany self-representation. *Graham-Humphreys v. Memphis Brooks*

[5] Rogers calculated the proper amount of the arrearage as being $552.18 because he had paid McCutcheon a lump sum of $604.82 prior to the hearing on April 5, 2007.

Museum of Art, Inc., 209 F.3d 552, 561 (6th Cir. 2000) (citing *McNeil v. United States*, 508 U.S. 106, 113, 113 S.Ct. 1980, 1984, 124 L.Ed.2d 21 (1993)).

One of the risks of self-representation is the failure to adhere to the rules of appellate practice. Rogers' brief does not strictly comply with the requirements of CR[6] 76.12. First, it does not contain a statement of points and authorities, as required by CR 76.12(4)(c)(iii), stating "succinctly and in the order in which they are discussed in the body of the argument, [the] contentions with respect to each issue of law relied upon for a reversal, listing under each the authorities cited on that point and the respective pages of the brief on which the argument appears and on which the authorities are cited." Rogers has not delineated specific claims within his general discussion of the case. As a result, it is difficult for us to decipher the alleged errors he is asking us to review. Second, the argument portion of his brief does not begin with a "reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." This is a critical requirement of CR 76.12(4)(c)(v) because issues which are not preserved at the trial level are not subject to review on appeal. *Steel Technologies, Inc. v. Congleton,* 234 S.W.3d 920, 926 (Ky. 2007). While we could strike Rogers' brief for these deficiencies, McCutcheon has not requested such relief and we have chosen not to exercise our authority to impose such a harsh sanction in this appeal. *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. 1990).

[6] Kentucky Rules of Civil Procedure.

Rogers appears to raise three questions on appeal. First, how much money should he pay each month to support his twin daughters? Second, why did the common law judgment granted to McCutcheon not reflect a payment of $604.82 McCutcheon admitted Rogers had made to her? Third, was McCutcheon entitled to an award of attorneys' fees when she had allegedly told Rogers in 1998 that she did not have to pay her attorney for representing her?

Rogers' first claim is that the trial court erroneously excluded McCutcheon's 2004 and 2005 bank records from the April 2007 hearing and as a result did not consider all of his ex-wife's income when calculating child support. In particular, Rogers claims the court had to admit these records because Senior Judge Garvey, in Judge O'Reilly's absence, had signed an order directing the parties to exchange financial documents and to file a copy of those documents with the court. Rogers maintains these records would have shown McCutcheon was earning about the same amount of money in retirement as she did when she was working full-time and therefore his child support obligation should be reduced.

After McCutcheon's attorney objected to Rogers questioning his client about the bank records, the trial court excluded them because they were not introduced prior to its issuance of an order in 2006 determining McCutcheon's income from her housecleaning business. Rogers mistakenly equates the filing of a courtesy copy of exchanged documents in the trial court record with a pre-hearing ruling that McCutcheon's bank records from 2004 and 2005 were automatically admissible. The filing of the courtesy copy with the trial court did not relieve

Rogers of his responsibility to offer relevant evidence in conformity with KRE[7] 401, 402 and 403. The filing also did not relieve the trial court of its responsibility to apply those same evidentiary rules in admitting or excluding evidence.

Our review of the record reveals no motion to compel production of McCutcheon's 2004 and 2005 bank records prior to March 2006. Had such a motion been filed, Rogers could have presented his argument in a timely fashion. Rogers has cited no case law, statute or rule requiring the trial court to admit McCutcheon's bank records solely because a courtesy copy was filed in the court record at the court's direction and we are not persuaded to so rule today.

According to the principle of *res judicata,* "once the rights of the parties have been finally determined, litigation should end." *Whittaker v. Cecil*, 69 S.W.3d 69, 72 (Ky. 2002) (citing *Keefe v. O.K. Precision Tool & Die Co.,* 566 S.W.2d 804, 805 (Ky. App. 1978). Moreover, when the parties are the same and the causes of action are the same, further litigation of issues previously decided on the merits is prohibited. *Newman v. Newman,* 451 S.W.2d 417, 419 (1970).

> As a result, a final judgment precludes subsequent litigation not only of those issues upon which the court was required to form an opinion and pronounce judgment but also of matters included within those issues and matters that, with the exercise of reasonable diligence, might have been raised at the time.

Whittaker (citing *Newman*; *Hays v. Sturgill,* 302 Ky. 31, 193 S.W.2d 648, 650 (1946)). McCutcheon's 2004 and 2005 bank records may have been relevant *prior*

[7] Kentucky Rules of Evidence.

to the court's ruling in 2006, but Rogers did not submit them until *after* the trial court had already ruled on McCutcheon's income. Thus, we have no grounds upon which to conclude the trial court erred in excluding the bank records from consideration.

As for Rogers' claim that his child support obligation should have been reduced, we disagree. We defer to the trial court's findings of fact in dissolution cases unless they are clearly erroneous, which means they are unsupported by credible evidence. CR 52.01. We give due deference to the trial court's opportunity to judge the credibility of the witnesses. When there is a conflict in the evidence, the trial court, not this Court, chooses which evidence to believe. *See Adkins v. Meade*, 246 S.W.2d 980 (Ky. 1952); *Ghali v. Ghali*, 596 S.W.2d 31, 32 (Ky. App. 1980).

No two dissolution actions are alike. Therefore, trial courts have broad discretion in fashioning a fair and appropriate remedy, in accord with the statutory scheme, that is specific to the particular action. *Cochran v. Cochran*, 746 S.W.2d 568, 570 (Ky. App. 1988); *see also Herron v. Herron*, 573 S.W.2d 342, 344 (Ky. 1978). We may reverse a trial court only if it has abused its considerable discretion. *Herron*, 573 S.W.2d at 344. Discretion is abused when a trial court acts arbitrarily, unreasonably or unfairly or when its decision is unsupported by sound legal principles. *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004). Our role as an appellate court is not to provide parties with a trial *de novo* but rather to correct errors of law made by lower courts.

The circuit court record before us is replete with income tax returns, pay stubs and child support worksheets. In calculating Rogers' child support obligation, the court relied upon each party's income for 2006. The trial court also imputed rental income to Rogers and a salary to McCutcheon upon finding she was voluntarily underemployed.

Modification of child support is governed by KRS 403.213. To justify a reduction in his monthly obligation, Rogers had to establish either a substantial and continuing material change in circumstances under KRS 403.213(1) or at least a fifteen percent change in the amount of child support due each month under KRS 403.213(2). The trial court found Rogers satisfied neither statutory requirement so modification was not permitted. Having reviewed the calculations and the circumstances in the record before us, we conclude the trial court considered the relevant evidence and did not abuse its discretion. Therefore, we affirm the trial court's denial of Rogers' request for a reduction in his monthly child support obligation.

Rogers' second argument in this appeal is that the trial court erroneously granted McCutcheon a common law judgment in the amount of $1,157.00. He believes the judgment should have been for only $552.18 since he had previously sent McCutcheon a check for $604.82. The purpose of the judgment was to enable McCutcheon to recoup a thirteen-month child support arrearage resulting from Rogers' obligation being increased from $821.00 a month $910.00 a month. The parties agree Rogers began paying the increased amount on

October 13, 2006. However, the increase was made retroactive to September 12, 2005, the date of McCutcheon's request for the increase. As a result, the trial court gave McCutcheon a common law judgment representing thirteen payments of $89.00. During the April 2007 hearing, McCutcheon acknowledged Rogers had sent her a check for $604.82. The trial court did not mention this payment in its order entered on April 16, 2007.

Had Rogers asked the trial court to make additional findings or explain the absence of any mention of the payment, we would be inclined to grant relief. However, since Rogers took neither of these actions, *Cherry v. Cherry,* 634 S.W.2d 423, 425 (Ky. 1982), is dispositive of the issue and the desired relief will not be forthcoming. Under CR 52.04, "[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." By failing to call the inadequate findings of fact to the trial court's attention as required by CR 52.02 Rogers waived the alleged error and we will say nothing further on the subject.

Rogers' third and final contention is that the trial court erroneously ordered him to pay McCutcheon $1,000.00 in attorneys' fees. Rogers maintains McCutcheon was not entitled to attorneys' fees because she could not prove she had paid any fees to her attorney for whom she had previously worked. He also

contends the court failed to consider the full income of both parties in making the award.

In *Wilhoit v. Wilhoit*, 521 S.W.2d 512, 514 (Ky. 1975), the Supreme Court of Kentucky held the question of whether to award attorneys' fees in a divorce action was entirely within the trial court's discretion. The only statutory requirement for an award is a disparity in the financial resources of the parties. KRS 403.220. In the case *sub judice,* the trial court's order recites numerous facts and figures about the income of the parties and the sources of that income. Rogers earned $59,082.92 as a firefighter in 2006. The court imputed to him an additional $12,000.00 in rental income from the five properties he co-owns. McCutcheon received $26,076.00 in retirement income in 2006. She supplemented this amount by earning about $300.00 a month cleaning houses. However, the court found her to be voluntarily underemployed and imputed to her the ability to earn $1,083.33 each month. Based upon these figures, Rogers earns nearly twice as much as McCutcheon. As a result, there is a substantial financial disparity between the two and we have no basis upon which to hold the trial court abused its discretion in awarding $1,000.00 in attorneys' fees to McCutcheon.

For the foregoing reasons, we affirm the trial court's order *in toto.*

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeffrey L. Rogers, *pro se*
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BRIEF FOR APPELLEE:

Harold L. Storment
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