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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001031-ME

STEVE ALLEN WHITWORTH — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JERRY J. BOWLES, JUDGE
ACTION NO. 07-CI-502064

DENEEN NICOLE DELUCE
(FORMERLY WHITWORTH) — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CAPERTON AND TAYLOR, JUDGES.

ACREE, CHIEF JUDGE: Steve Whitworth appeals the March 2, 2011 order of the Jefferson Family Court modifying the allocation of child support allocated between Whitworth and Appellee, Deneen Deluce (formerly Whitworth). Finding no error, we affirm.

I. Facts and Procedure

Whitworth and Deluce have previously been before this Court. *Whitworth v. Deluce (Formerly Whitworth)*, 2009-CA-000453-MR, 2010 WL 3604108, at *1 (Ky. App. Sept. 17, 2010). In the interest of brevity, we rely, initially, on the statement of facts and procedure set forth in our prior opinion:

> Steve and Deneen Nicole Deluce (formerly Whitworth) were married June 21, 1998. Two children were born of the marriage. The parties were divorced by Decree of Dissolution of Marriage entered in the family court on March 4, 2008. Prior to entry of the decree, the parties entered into a property settlement agreement which was incorporated into the decree. Pursuant thereto, the parties shared joint custody of the children and exercised equal parenting time. Also, Deluce paid child support to Whitworth.
>
> Shortly after the decree was entered, Deluce filed two motions seeking to modify the parenting schedule and to hold Whitworth in contempt for failure to abide by the property settlement agreement. Thereafter, Whitworth filed several *pro se* motions seeking various relief including modification of child support. Following a hearing, the family court entered an order on October 13, 2008, modifying the award of child support and awarding Deluce a portion of her attorney's fees. Thereafter, the order was amended on December 3, 2008. The circuit court eventually ordered Deluce to pay Whitworth $220 per month in child support payments.

Id. at *1.

Whitworth appealed the family court's October 13, 2008 and December 3, 2008 orders. On December 2, 2009, while the prior appeal was pending, Deluce filed a motion to modify child support. However, because, on appeal, Whitworth took issue with the initial child support award, the family court held Deluce's

motion in abeyance pending the outcome of the appeal. On September 17, 2010, this Court affirmed the family court's October 13 and December 3, 2008 orders, including the award of child support. *Id.*

Thereafter, Deluce renewed her motion to modify child support. As grounds for her motion, Deluce claimed a substantial and continuing decrease in her income since the enactment of the original child support order. On February 14, 2011, the family court held a hearing on Deluce's motion. At the hearing, evidence and testimony revealed that when the family court entered the initial child support award Whitworth's gross monthly income was $1,548.82 and Deluce's gross monthly income was $3,360.50 per month. Subsequent thereto, Whitworth's gross monthly income increased to $1,750.32 and Deluce's gross monthly income decreased to $2,233.00. Deluce testified she works at two places of employment and that both of her employers reduced her work hours. Combined, she works only 22.5 hours per week earning $558.28 per week at her two jobs. Deluce also testified that since the initial child support award, she has incurred $262.00 per month in work-related child care costs for her children.

On March 2, 2011, the family court entered an order sustaining Deluce's motion and directing Whitworth to pay Deluce $486.00 per month in child support.[1] Whitworth filed a timely motion seeking to alter, amend, or vacate the

[1] In reaching this amount, the family court concluded the parties' combined gross monthly income was $3,983.00 per month, with Deluce's income representing 56.06% and Whitworth's income representing 43.94%. In accordance with Kentucky Revised Statutes (KRS) 403.212(7), the family court found the parties' base monthly support obligation to be $844.00. The family court then added child-care costs to the base support amount, finding the parties' total child support obligation equaled $1,106.00 per month. As Whitworth's income constitutes 43.94% of

March 2, 2011 order pursuant to Kentucky Rules of Civil Procedure (CR) 59.05, and requesting a new trial under CR 59.01. The family court denied Whitworth's motion. This appeal followed.

II. Standard of Review

The family court "is vested with broad discretion in the establishment, enforcement, and modification of child support." *Artrip v. Noe*, 311 S.W.3d 229, 232 (Ky. 2010); *Downing v. Downing*, 45 S.W.3d 339, 454 (Ky. App. 2001). Accordingly, our review is limited to whether the family court abused its discretion. *Artrip*, 311 S.W.3d at 232. An abuse of discretion occurs when the family court's decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.*

III. Discussion

As in the prior appeal, Whitworth's "arguments are at times incoherent and difficult to discern." *Whitworth*, 2010 WL 3604108, at *2. We have attempted to dissect and address Whitworth's copious claims of error.

Whitworth first contends the family court erred in calculating Deluce's gross monthly income. This argument has two facets.

First, Whitworth asserts Deluce is voluntarily underemployed. Whitworth contends Deluce works 22 hours a work and, because she has a four-year degree and "extensive work history in the medical field," Deluce could, but purposely chose not to, obtain additional work. (Appellant's Brief at 22). Accordingly,

the parties combined monthly adjusted parental gross income, the family court concluded his monthly child support obligation is $486.00.

because Deluce is able to either obtain a full-time job or obtain an additional 18 hours of work per week, Whitworth argues, the family court erred in refusing to impute income to her based on a forty-hour work week.

It is well-settled that in establishing or modifying child support, the family court "may impute income to a party it finds to be voluntarily unemployed or underemployed." *McKinney v. McKinney*, 257 S.W.3d 130, 134 (Ky. App. 2008). KRS 403.212(2)(d) explains:

> (d) If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income . . . . Potential income shall be determined based upon employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community.

"[I]f the court finds that earnings are reduced as a matter of choice and not for reasonable cause," KRS 403.212(2)(d) authorizes the family court to "attribute income to a parent up to his or her earning capacity." *Snow v. Snow*, 24 S.W.3d 668, 673 (Ky. App. 2000). In so doing, however, the family court "must consider the totality of the circumstances in deciding whether to impute income to a parent." *Polley v. Allen*, 132 S.W.3d 223, 227 (Ky. App. 2004).

"[W]hether a child support obligor is voluntarily underemployed is a factual question for the family court to resolve." *Gossett v. Gossett,* 32 S.W.3d 109, 111 (Ky. App. 2000). Accordingly, this Court must defer to the family court's findings of fact unless they are clearly erroneous; that is, not supported by substantial

evidence. CR 52.01. Here, Deluce testified she works two part-time jobs as a dental hygienist. Notwithstanding her considerable experience in this field, Deluce explained she has been unable to secure additional hours of work. Additionally, Deluce testified that the divorce proceedings have negatively affected the children, necessitating the need for substantial psychological therapy; Deluce is solely responsible for ensuring the children receive, as well as transporting the children to, all therapy and medical appointments. Deluce's testimony constitutes substantial evidence in support of the family court's finding that, under the totality of the circumstances, Deluce is not voluntarily underemployed. Accordingly, we find no error here.

Second, Whitworth urges us to conclude that Deluce is hiding and/or refusing to disclose additional income. Particularly, Whitworth argues Deluce failed to report "thousands and thousands of dollars from her parents and other sources from April-May 2007 through the February 14, 2011 hearing to pay for her huge monthly personal expenses" and attorney's fees. (Appellant's Brief at 10).

We have already addressed whether Deluce failed to disclose additional income prior to December 2008 in our prior opinion.

> Whitworth believes that Deluce received "thousands of dollars . . . from her parents and other sources" that were not included as monthly income for child support calculations. The family court considered [this] argument[] by Whitworth and rejected [it]. Indeed, the family court noted Deluce "borrowed" money from her parents for which she was responsible for repayment. . . . Hence, we think this argument is meritless.

Whitworth, 2010 WL 3604108, at *4. Having then effectively concluded that substantial evidence supported the family court's finding that the money was borrowed, it became the law of the case. "Whether [a tribunal's decision] is supported by substantial evidence is a question of law." *Board of Ed. of Ashland School Dist. v. Chattin*, 376 S.W.2d 693, 607 (Ky. 1964) (*overruled on other grounds*). Therefore, pursuant to the law of the case doctrine, we decline to re-address this argument as to moneys received prior to December 2008. *See Union Light, Heat & Power Co. v. Blackwell's Adm'r*, 291 S.W.2d 539, 542 (Ky. 1956) (explaining the law of the case doctrine holds "an opinion or decision of an appellate court in the same cause is the law of the case for a subsequent trial or appeal however erroneous the opinion or decision may have been"); *Martin v. Frasure*, 352 S.W.2d 817, 818 (Ky. 1961) ("A final decision of this Court, whether right or wrong, is the law of the case and is conclusive of the questions therein resolved.").

Likewise, we find Whitworth's claim that Deluce received and failed to disclose additional income in 2009, 2010, and 2011 similarly meritless. At the February 2011 hearing, Deluce testified several times she only received income from her two part-time jobs; she did not receive income from any other sources. When asked specifically by Whitworth if Deluce received money each month from her parents to meet her basic living needs, Deluce responded no. Deluce then clarified that her parents loaned her money to pay attorney's fees. Based on Deluce's testimony, the family court concluded such money was not income to

Deluce but, instead, constituted a loan Deluce was obligated to re-pay. The family court's reasoning is sound and is supported by substantial evidence. Whitworth's claim that Deluce failed to disclose other income lacks merit.

This leads to Whitworth's third argument: that the family court committed reversible error when it prohibited him from effectively and thoroughly cross-examining Deluce regarding all relevant sources of income. We disagree.

Trial courts enjoy broad discretion to control and, as needed, limit cross-examination. *See Moore v. Commonwealth*, 771 S.W.2d 34 (Ky. 1988) ("The presentation of evidence as well as the scope and duration of cross-examination rests in the sound discretion of the trial judge."). "So long as a reasonably complete picture of the witness' veracity, bias and motivation is developed, the judge enjoys power and discretion to set appropriate boundaries." *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997) (quoting *U.S. v. Boylan*, 898 F.2d 230, 254 (1st Cir.1990)).[2]

Here, Whitworth asserts that this Court

> will plainly see, upon reviewing the entire hearing, [the family] judge treated [Whitworth] with indignity, disrespect, was rude, curt, nasty, snotty, and would not allow extremely relevant questions to be asked of [Deluce] and/or answered by her concerning all her income in 2009, 2010, and 2011 from all sources, sometimes even cutting [Whitworth] off before he completed the question and/or allowing [Deluce's] attorney to interrupt [Whitworth's] questions before these

[2] While *Maddox* and *Boylan* discuss a criminal defendant's constitutional right to cross-examination, we find the underlying reasoning set forth in those opinions equally applicable in the civil context. *See Moore*, 771 S.W.2d at 38 (explaining the trial court's discretion to control and, when appropriate, limit, cross-examination "applies to both criminal and civil cases").

> questions were finished with objections and would not allow [Deluce] to answer these extremely relevant questions about her entire gross income in those three years from all sources.

(Appellant's Brief at 7). When we reviewed the February 14, 2011 hearing, we did not perceive it as Whitworth expected we would. Rather, it is our opinion that the family court properly prohibited Whitworth from asking irrelevant and, at times harassing, questions, and exercised its rightful control of the courtroom and decorum of the parties. *See Fugate v. Commonwealth,* 62 S.W.3d 15, 21 (Ky. 2001) ("A judge has a right and obligation to maintain control over his own courtroom[.]"). Moreover, despite Whitworth's contention to the contrary, the family court allowed Whitworth to cross-examine Deluce within the bounds of the Kentucky Rules of Evidence and Kentucky Rules of Civil Procedure. We perceive no abuse of discretion. Whitworth's argument is meritless.

Whitworth next argues that Deluce failed to submit any evidence except her own self-serving testimony that supports a finding of a decrease in her income constituting a material and continuing change in circumstances sufficient to justify modifying child support. Specifically, in Whitworth's estimate, "the credibility and believability given to [Deluce] by the [family court] when she testified at the February 14, 2011 hearing should have been absolutely zero . . . especially since she provided NO documentation or corroboration of her testimony to the Court." (Appellant's Brief at 9).

"[J]udging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). As we previously alluded, "[r]egardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding . . . appellate courts should not disturb trial court findings that are supported by substantial evidence." *Id.*; CR 52.01.

Here, the family court found Deluce's testimony and supporting documentation credible. Whitworth has failed to point to any evidence that causes us to question Deluce's veracity and, in turn, the family court's reliance on Deluce's testimony regarding her current income. Further, despite Whitworth's contention to the contrary, the family court did not rely solely on Deluce's testimony. Instead, in support of her income, per court order, Deluce submitted three pay stubs from both of her employers and two prior tax returns.[3] *See* KRS 403.212(2)(f) ("Income statements of the parents shall be verified by documentation of both current and past income. Suitable documentation shall include . . . income tax returns, [and] paystubs[.]"). Whitworth's claim here is also meritless.

Ignoring his previous argument that Deluce presented nothing to support her income but self-serving testimony, Whitworth claims the family court erred in

[3] Indeed, on October 4, 2010, the family court ordered both parties to exchange and file, within 10 days of the entry of that order: (i) copies of their three most recent paystubs; (ii) copies of their 2008 and 2009 federal and state tax returns; (iii) written documentation of the costs of medical insurance for the children only; and (iv) written documentation of the cost of work- and school-related daycare.

relying on Deluce's pay stubs from August and September 2010 to calculate Deluce's monthly gross income for the entire modification time period. We find no merit in Whitworth's argument as Deluce specifically testified the paystubs accurately reflect her current income.

Whitworth next argues the family court erred when it factored child care expenses into the child support equation. Specifically, Whitworth complains the family court erroneously relied upon Deluce's self-serving testimony and uncorroborated testimony in concluding Deluce paid approximately $262.00 per month in child care costs. We perceive no error.

KRS 403.211(6) requires the family court to "allocate between the parents, in proportion to their combined monthly adjusted gross income, reasonable and necessary child care costs incurred due to employment, job search, or education leading to employment, in the amount ordered under the child support guidelines." Additionally, as explained previously, the applicable standard of review requires us to afford a great deal of deference to the family court's factual findings. *See Frances v. Frances*, 266 S.W.3d 754, 758 (Ky. 2008). To that end, it is not our prerogative to second-guess the family court's credibility determinations. *Id.*

Here, Deluce testified she enrolled the children in the YMCA Child Enrichment Program at their elementary school, which provides both before- and after-school child care. Deluce explained the cost of the program varies depending on how often child care is needed, which in turn varies based on Deluce's work schedule and each child's medical and therapy appointments. On average, Deluce

testified, she pays $60.00 per week for both children. In support, Deluce presented a letter from the YMCA program confirming her testimony.[4] We discern no abuse of discretion in the family court's finding that child care costs were necessary and properly included in the child support calculation.

Finally, Whitworth contends, *albeit* vaguely, the family judge engaged in judicial misconduct, claiming the record reveals "numerous . . . instances of corruption, favoritism, illegal behavior, and other judicial misconduct by this Judge in favor of [Deluce][.]" (Appellant's Brief at 2). However, Whitworth cites no authority to support his argument, and we reject it. Indeed, a thorough review of the record reveals a complete absence of proof to support Whitworth's claim of judicial misconduct. We caution Whitworth to avoid similar sweeping statements without an adequate basis in fact.

IV. Conclusion

The Jefferson Family Court's March 2, 2011 order modifying child support is affirmed.

ALL CONCUR.

[4] Whitworth contends the YMCA letter should not have been admitted into evidence as it constitutes un-authenticated hearsay. However, because Whitworth failed to object to the admission of the YMCA letter, this argument is not properly preserved for our review. *See Price v. Commonwealth*, 474 S.W.2d 348, 349 (Ky. 1971) (the failure to object to the admission of evidence constitutes a waiver).

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