

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2012-SC-000026-D
(2011-CA-000467)

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CLERK
SUPREME COURT

MICHAEL S. BELL

APPELLANT

vs.

APPEAL FROM MERCER FAMILY COURT
CIVIL ACTION NO. 09-CI-00124
THE HONORABLE D. BRUCE PETRIE, JUDGE

MARY H. BELL

APPELLEE

BRIEF OF APPELLEE
MARY H. BELL

Respectfully submitted,


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this Brief was served upon the parties of interest by mailing same to the following on this the 28th day of November, 2012:

The Honorable D. Bruce Petrie
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Mercer County Courthouse
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Honorable William R. Erwin
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Clerk of the Court of Appeals
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STATEMENT CONCERNING ORAL ARGUMENT

Appellee does not desire an oral argument because she does not believe it would be helpful to the Court in deciding the issue presented herein.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

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COUNTERSTATEMENT OF THE CASE

This is a Dissolution of Marriage case. The parties were married on October 10, 1998. One (1) child, namely, Myles Thomas Bell, age ten (10) years, was born of the parties' marriage. The parties separated on February 19, 2009 and a Petition for Dissolution of Marriage was filed in March, 2009.

On November 19, 2010, the trial court took jurisdictional proof sufficient for the entry of a Decree of Dissolution of marriage and conducted a final hearing to resolve the contested issues of child support, maintenance and attorney's fees. All other matters were either agreed upon by the parties or reserved for future resolution by the court, including the parties' agreement to exercise joint custody of their minor child with Appellee, Mary H. Bell, designated his primary residential parent.

Following the hearing, the trial court made specific findings of fact and conclusions of law and submitted written "Bench Notes" to be made a part of the final decree. (Transcript of Record, hereinafter TR, at pages 206-215, Bench Notes hereinafter BN, at pages 1-10). In regards to child support, the court found that Ms. Bell was capable of earning \$1,257.00 in gross monthly income. (TR at pages 208-210, BN at pages 3-5). The court found that Appellant, Michael S. Bell, was expected to earn \$125,086.00 in gross annual income. (TR at page 210, BN at page 5). However, the court estimated that Mr. Bell would incur \$36,000 of unreimbursed employee business expenses in 2010 and, as a result, adjusted and reduced his gross annual income to \$89,086.00 (\$125,086.00 - \$36,000.00). (TR at pages 210-212, BN at pages 5-7).

Thereafter, both parties timely filed Motions to Alter, Amend or Vacate the trial court's decision. Specifically, Ms. Bell argued that the court erred by reducing her husband's unreimbursed employee business expenses from his gross income for purposes of calculating his monthly child support obligation. She did not contest the

court's findings as they related to each party's gross income or the amount of Mr. Bell's unreimbursed expenses. Rather, Ms. Bell argued that, because Mr. Bell was not self-employed, he was not entitled to adjust his gross income. As such, Ms. Bell contended that Mr. Bell's child support obligation should be calculated based on a gross annual income of \$125,086.00 (\$10,420.00/month) instead of \$89,086.00 (\$7,420.00/month).

Following a brief hearing on January 4, 2011 wherein the court denied Ms. Bell's Motion to Alter, Amend or Vacate, the court entered a final Order on February 10, 2011 resolving all outstanding issues. This Order, along with the Bench Notes appended thereto, was incorporated by reference into the Decree of Dissolution entered on November 19, 2010. Thereafter, Ms. Bell timely appealed the trial court's decision to the Court of Appeals. The Court of Appeals reversed the trial court's ruling with respect to child support calculation and remanded for proceedings consistent with its opinion. Mr. Bell then requested, and the Supreme Court granted, discretionary review.

ARGUMENT

THE COURT OF APPEALS PROPERLY REVERSED THE TRIAL COURT'S DECISION TO REDUCE MR. BELL'S GROSS INCOME BY HIS UNREIMBURSED EMPLOYEE BUSINESS EXPENSES FOR PURPOSES OF CALCULATING CHILD SUPPORT

Child support awards are governed by the abuse of discretion standard of review. *Holland v. Holland*, 290 S.W.3d 671, 674 (Ky. App. 2009). Discretion is abused only when a trial court's decision is arbitrary, unreasonable, unfair or unsupported by sound legal principles. *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001). A trial court's findings of fact, however, will not be disturbed unless they are clearly erroneous. *Wilhoit v. Wilhoit*, 521 S.W.2d 512, 513 (Ky. 1975).

Child support is calculated in the Commonwealth of Kentucky by using the guidelines set forth in KRS 403.212. KRS 403.212(2) provides the following:

- (a) "Income" means actual or gross income of the parent employed to full capacity or potential income if unemployed or underemployed;
- (b) "Gross income" includes income from any source, except as excluded in this subsection...;
- (c) For income from **self-employment...**"gross income" means gross receipts minus ordinary and necessary expenses required **for self-employment or business operation**...Expense reimbursement or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business or personal use of business property or payments of expenses by a business, **shall be counted as income** if they are significant and reduce personal living expenses such as company or business car, free housing, reimbursed meals, or club dues. Emphasis added.

In the present case, the trial court found that Mr. Bell was an employee of Henry Schein, Inc. (TR at page 210, BN at page 5). However, as a matter of equity, the trial court concluded that it was only fair that Mr. Bell receive the same benefit under KRS 403.212(2)(c) afforded to those individuals who are self-employed—that is, a reduction in his gross income for unreimbursed business expenses. (TR at page 212, BN at page 7). The trial court supported its decision by citing to KRS 403.212(2)(c) which provides that "expense 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." (TR at page 211, BN at page 6). The trial court maintained that the rationale behind KRS 403.212(2)(c) is "that money that is required to be spent in order to generate income should not be counted as income for child support purposes," whether or not the individual in question is self-employed. (TR at page 212, BN at page 7). The trial court's reasoning in this regard is, respectfully, flawed.

The plain language of KRS 403.212 makes it abundantly clear that, unless a person is self-employed, his/her gross income for purposes of calculating child support should be determined under KRS 403.212(2)(b). KRS 403.212(2)(c) is only applicable when a person proves that he/she is self-employed. Because it is undisputed that Mr.

Bell is an employee of Henry Schein, Inc., the clear language of KRS 403.212 requires that his gross income be calculated pursuant to KRS 403.212(2)(b) without consideration of his business expenses.

Moreover, KRS 403.212(2)(c) does not contemplate a reduction in gross income for employees who incur out-of-pocket expenses. Rather, this section merely states that, regardless of the employment status of the parent, expense reimbursement or in-kind payments received by the parent in the course of his/her employment shall be counted as *income* if they are significant and reduce personal living expenses. While there may be significant tax benefits for a parent who incurs unreimbursed employee business expenses as reported on the Form 2106 of his/her tax return, those expenses have absolutely no impact on that same parent's gross income for purposes of calculating child support unless he/she is self-employed.

Surprisingly, Ms. Bell could not find any published case law that adequately addresses the issue before this Court. However, she did locate an unpublished opinion, *Leonhardt v. Leonhardt*, 2008 WL 275139 (Ky. App.), in support of her position on appeal and instructive on the issue. As such, and pursuant to CR 76.28(4)(c), Ms. Bell cited to this opinion for consideration by the Court of Appeals.

In *Leonhardt*, the Appellant argued that the trial court erred in determining her gross income for purposes of calculating child support. *Id.* at *4. The Appellant was an employee of CTX who incurred out-of-pocket unreimbursed business expenses from advertising, meals and business meetings. *Id.* In accordance with her 2005 federal income tax return, the Appellant's gross income from her employment with CTX was \$41,791.00. *Id.* However, she also attached a Form 2106 to her tax return reflecting unreimbursed employee business expenses in the amount of \$10,581.00. *Id.* Moreover, the Appellant argued that she was an independent contractor and, therefore,

self-employed because she only received commissions and not W-2 type wages. *Id.* As a result, she argued that her gross income for purposes of child support should be \$31,210.00 (\$41,791.00 (gross income) - \$10,581.00 (unreimbursed employee business expenses)). *Id.* at *5.

The Court of Appeals found that the Appellant “failed to clear the threshold issue of whether she is truly ‘self-employed’ or simply an employee who incurred unreimbursed business expenses.” *Id.* It further held that the Appellant had the burden of proving she was self-employed, citing *Sexton vs. Sexton*, 125 S.W.3d 258,266 (Ky. 2004). *Id.* If she did not satisfy that burden, then the family court did not err in applying KRS 403.212(2)(b) rather than KRS 403.212(2)(c) in determining her gross income because “the statute allows no reduction in a parent’s gross income for [a person who is simply an employee who incurred unreimbursed business expenses].” *Id.*

This is exactly the same issue we are confronted with in the present case. Using the reasoning in *Leonhardt*, Mr. Bell has the burden of proving that he is truly self-employed before the trial court can consider application of KRS 403.212(2)(c) in determining his gross income. If he does not satisfy this burden, KRS 403.212(2)(b) should be used to determine his gross income instead of KRS 403.212(2)(c). Because Mr. Bell never contested his employment status with Henry Schein, Inc., he, just like the Appellant in *Leonhardt*, is simply an employee who incurs unreimbursed employee business expenses. As a result, and consistent with the Court of Appeal’s reasoning in *Leonhardt*, he is not entitled to a reduction in his gross income and the trial court abused its discretion by applying KRS 403.212(2)(c) for purposes of calculating his child support obligation. Instead, the trial court should have determined his gross income pursuant to KRS 403.212(2)(b) without regard to his unreimbursed business expenses.

CONCLUSION

The Court of Appeals properly considered, addressed and resolved the issue presented on appeal. Accordingly, the Supreme Court of Kentucky should uphold and affirm the Court of Appeal's decision to reverse the trial court's findings and remand for further proceedings to recalculate child support.

Respectfully submitted,



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APPENDIX

Leonhardt vs. Leonhardt, 2008 WL 275139 (Ky. App.)