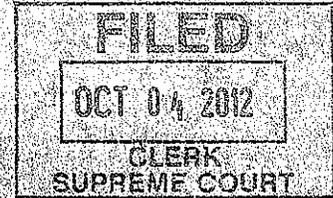


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2012-SC-000026-D
(2011-CA-000467)



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 FOR APPELLANT
MICHAEL S. BELL

Submitted by:


William R. Erwin
Helton, Erwin & Associates
Attorney for Appellant
432 W. Main Street
Danville, Kentucky 40422

CERTIFICATE REQUIRED BY CR 76.12(6)

I do hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, United States mail, to: Mercer Circuit Clerk, 207 W. Lexington Street Harrodsburg, Kentucky 40330; John W. Oakley, 109 Court Row, Nicholasville, KY 40356; Hon. D. Bruce Petrie, Mercer Family Court Judge, 207 W. Lexington Street, Harrodsburg, KY 40330; and the Clerk of the Kentucky Supreme Court, all on this the 3 day of October, 2012.



WILLIAM R. ERWIN

I. INTRODUCTION

This is a divorce case in which the Court took into account un-reimbursed expenses of the Appellant when calculating his income for child support purposes.

II. STATEMENT CONCERNING ORAL ARGUMENT

The Appellant desires oral argument and believes that oral argument would be helpful to the Court in deciding the issues presented.

IV. STATEMENT OF THE CASE

This is a Dissolution of Marriage case. The parties were married on October 10, 1998. They have one child. The parties separated on February 19, 2009. A Petition for Dissolution of Marriage was filed in March of 2009.

On November 19, 2010, the Trial Court took jurisdictional proof sufficient for entry of a Decree of Dissolution and conducted a final hearing with regards to all issues. Following the hearing, the Court made specific Findings of Fact and Conclusions of Law and submitted written bench notes to the parties consistent with the decision on all contested issues. (Transcript of record pgs. 206-215 designated as bench notes). With regards to child support, the Court found that Mary H. Bell was capable of earning \$1257.00 in gross monthly income. The Court found that Michael S. Bell was expected to earn \$125,086.00 per year. In addition, the Court found that Michael S. Bell would incur \$36,000.00 of un-reimbursed employee business expenses in 2010 and , as a result, adjusted and reduced Mr. Bells' gross annual income for purposes of calculating child support to \$89,086.00.

The Court's decision to allow these expenses was based on the testimony of Mr. Bell's Regional Manager, Joseph Gersky. Mr. Gersky testified that a crucial part of Mr. Bell's job required him to undertake significant entertainment expenses for clients to generate his income along with regular weekly overnight trips. Mr. Bell is a sales representative for a dental products supplier. The Regional Manager explained that the sales representative was expected to maintain and increase the market value of his clients. This involved taking the clients out of the workplace environment to initiate sales. Mr. Gersky verified that Mr. Bell is paid strictly on commission on the sales that he confirms. (Hearing November 19, 2010 at 9:28:00). Mr. Gersky

testified that Mr. Bell's expenses were necessary and reasonable. (Hearing November 19, 2010 at 9:34:00).

This testimony was undisputed. Mrs. Bell agreed that these expenses were incurred on an annual basis. In fact, she also signed the tax returns documenting the expenses that we deducted from income on an annual basis. As the Court found, "as a joint filer on those returns, Mary received the benefit of the deductions as well."

Mrs. Bell appealed the decision to the Court of Appeals. The Court of Appeals reversed and remand the action. The Supreme Court then granted discretionary review.

V. ARGUMENT

KRS 403.212 is silent on the issue of how to deal with employee expenses incurred in order to generate income. As the Court made clear, the parties both agree that Mr. Bell had to incur expenses on an annual basis in order to generate income. He had no choice. His Regional Manager testified that he was required to do this and expected to do this. If Mr. Bell did not incur the expenses, his income would be dramatically less. This is a case in which Mr. Bell had projected income for 2010 of \$128,086.00. He incurred the sum of approximately \$36,000.00 in order to generate this income. Therefore, Mr. Bell's actual income was \$89,086.00. This is basically undisputed.

As stated above, KRS 403.212 is silent on whether a Trial Court can consider unreimbursed expenses of an employee. However, there are other parts of the statutory scheme, as well as case law, that offers some guidance.

First, it is clear in this case that the Court, after careful consideration, deviated from the guidelines in setting child support. KRS 403.211(2) grants the Court this authority. The Statute provides that, "Courts may deviate from the guidelines where their application would be unjust or inappropriate. Any deviation shall be accompanied by a written finding or specific finding on the record by the Court specifying the reason for the deviation." KRS 403.211(2). Furthermore, the General Assembly went to great lengths to give the Court broad discretion in deviating from the guidelines. In KRS 403.211(3) the statute provides, "A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption and allow for an appropriate adjustment of the guideline award if based upon one or more of the following criteria.:

(g) any similar factor of an extraordinary nature specifically identified by the Court which would make application of the guidelines inappropriate. Furthermore, in (4) of this same statute, the statute defines the term “extraordinary” as used in this section shall be determined by the Court in its discretion.” This broad and discretionary statutory language makes it clear that the General Assembly wanted to give Trial Courts flexibility to set child support in just amounts based on the facts and circumstances of each case.

The Court of Appeals has previously held that the Courts have flexibility to fashion appropriate child support orders for situations not addressed by the statutory scheme. *Brown v. Brown*, 952 SW2d 707 (Ky. App. 1997). The Court of Appeals has also acknowledged that Trial Courts in Kentucky are given broad discretion in calculating income for child support purposes. See *McKinney v. McKinney*, 257 SW3rd 130 (Ky. App. 2008). As set forth in the *McKinney* decision, the Trial Court is required to make specific findings as to why it arrived at its decision. In this case, the Court went into great detail as to how Mr. Bell’s income was to be calculated. It arrived at its decision based on uncontroverted evidence entered into the record.

This Court has previously ruled that the Trial Court **should** consider income not susceptible to documentation if such income was properly established by the evidence. See *Schoenbachler v. Minyard*, Ky. 110 SW3d 776 (2003). In the same manner, this Court should grant the trial Court the flexibility to consider the un-reimbursed expenses that are required to be expended in order to generate income.

VI. CONCLUSION

Trial Courts in Kentucky are given broad discretion in calculating income for child support purposes. In this instance, the Court went to great length to review the evidence presented. The evidence presented was uncontested. Appellant had actual un-reimbursed expenses. Appellee agrees that these expenses have been and continue to be incurred on an annual basis. The Trial Court's decision and its rationale behind the decision should be upheld. The Court of Appeals decision should be reversed and the Trial Courts findings and Judgment affirmed.

Respectfully Submitted:



William R. Erwin
Helton, Erwin & Associates
432 W. Main Street
Danville, Kentucky 40422

APPENDIX

FINDINGS OF FACT, CONCLUSIONS OF LAW AND
JUDGMENT OF THE TRIAL COURT

OPINION OF THE COURT OF APPEALS