IN THE COURT OF APPEALS OF TENNESSEE

AT KNOXVILLE

FILED

December 31, 1998
Cecil Crowson, Jr.
Appellate Court
Clerk

JOSEPH JOHN NARUS, JR.,	)	C/A NO. 03A01-9804-CV-00126
	)	
Plaintiff-Appellee,	)	
	)	
	)	
	)	
v.	)	APPEAL AS OF RIGHT FROM THE
	)	BRADLEY COUNTY CIRCUIT COURT
	)	
	)	
	)	
	)	
CELIA S. BROOKSHIRE NARUS,	)	
	)	HONORABLE JOHN B. HAGLER, JR.,
Defendant-Appellant.	)	JUDGE

For Appellant

SELMA CASH PATY
Paty, Rymer & Ulin, P.C.
Chattanooga, Tennessee

For Appellee

JAMES R. McKOON
McKoon, Billings & Gold, P.C.
Chattanooga, Tennessee

AFFIRMED AND REMANDED Susano, J.

This is a post-divorce proceeding. The original plaintiff, Joseph John Narus, Jr. ("Father"), filed a petition to reduce his child support obligation. Following a hearing, the trial court reduced the amount of his obligation, and the original defendant, Celia S. Brookshire Narus ("Mother"), appealed. She raises issues that essentially present the following questions:

> 1. Did the trial court correctly set the amount of Father's new child support obligation?
>
> 2. Did the trial court err when it refused Mother's request to discover (a) Father's non-income-producing assets; and (b) his canceled checks on his checking account?
>
> 3. Did the trial court err in denying Mother's request that she be substituted in place of Father as trustee of the educational trust fund previously established by that court for the benefit of the parties' only child, Alejandria D. Narus?
>
> 4. Did the trial court err in refusing to award Mother her attorney's fees?

I.

The parties were married on May 13, 1977. Their child was born on February 15, 1980. Their marriage was dissolved by judgment entered December 13, 1985.

On December 31, 1996, Father filed a petition in which he alleged that he planned to retire effective January 1, 1997.

He sought a reduction in his child support obligation, which had been set at $2,500 per month in a post-divorce order entered on June 30, 1995.

Following a hearing on November 24, 1997, the trial court found that Father's gross monthly income for calendar year 1997 was $8,360.39. It also determined that his gross monthly income beginning January 1, 1998, would be $6,277.06.[1] Assuming these income figures are correct -- and Mother strenuously argues that they are not -- it is undisputed that the trial court correctly calculated the amount of support in accordance with the Child Support Guidelines ("Guidelines").

II.

By her first issue, Mother basically contends that the trial court failed to properly apply the Guidelines to the facts of this case. She argues (1) that Father is voluntarily unemployed, and that this fact mandates that his income, for child support purposes, be based upon his "potential income," as mandated by Tenn.Comp.R. & Regs., ch. 1240-4-.03(d)[2]; (2) in the

[1]Under the trial court's order, Husband's obligation to pay child support continued until May 23, 1998, the date of the child's graduation from high school.

[2]This regulation provides as follows:

> If an obligor is willfully and voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income, as evidenced by educational level and/or previous work experience.

alternative, that his child support obligation should be based on a gross monthly income of $9,922, an amount he could have elected to receive under a different retirement option; (3) that the trial court should have included dividend and interest income on Father's retirement accounts in calculating his income even though he is not presently drawing down this income; (4) that the trial court erred when, so the argument goes, it allowed Father to reduce his gross rental income by the full amount of his mortgage payments in arriving at his net income from these rentals; (5) that the trial court erred in failing to consider interest income from investments as reflected on Father's 1996 income tax return; and (6) that the trial court should have included in Father's income the rental income received by his present wife.

Following high school and a stint as a United States Navy pilot, Father went to work for Delta Airlines in 1963. After flying for Delta for some 34 years, Father retired on January 1, 1997. He was then approximately 10 months shy of his 60th birthday. Federal regulations prohibit a commercial airline company from allowing a person who has reached his 60th birthday "to serve as a pilot." *See* 14 C.F.R. § 121.383(c) (1997).[3]

[3]14 C.F.R. § 121.383(c) provides as follows:

> No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday.

Because of health problems, Father had been contemplating retirement since 1993. Meanwhile, his union negotiated with Delta an early retirement program entitled the Special Early Retirement Program for Pilots ("the program"), by the terms of which pilots eligible for retirement would receive significant retirement "perks" by retiring in advance of the federally-mandated retirement age of 60. For example, under the program, Father was able to secure extended and better quality health insurance coverage for his daughter and him. Father testified that this benefit and other benefits prompted him to take "early" retirement.

Mother contends that Father is voluntarily unemployed. She correctly points out that an individual who is prohibited by federal law from serving as a commercial pilot, *i.e.*, as a captain or first officer, can apply for employment as a second officer with seniority based upon all years of service with Delta. This was acknowledged by Father; but he pointed out that such employment was subject to an available vacancy.

In this case, we do not find that the availability of a second officer position is critical to our determination. Father chose to retire from the work that he had pursued all of his post-military adult life. He made this choice after 34 years of steady employment. It was a decision that he made at a reasonable retirement age -- 10 months shy of his 60th birthday. He chose to leave shortly before the federally-mandated

retirement age of 60. He made this choice because of fringe benefits that would accrue to him and his daughter because of the union-negotiated program. Even at that, his decision only impacted the last 17 months of the period of time for which his daughter was entitled to child support. The evidence does not preponderate against the trial court's finding that Father is not voluntarily unemployed. On the contrary, the evidence shows that he has chosen retirement at a reasonable age, based upon legitimate reasons, and at an income level that enabled him to significantly contribute to his daughter's support during the short remainder of her minority, as defined in T.C.A. § 34-11-102(b). We find no basis in this case for invoking the provisions of Tenn.Comp.R. & Regs., ch. 1240-4-.03(d).[4]

Mother relies on a number of cases from this court finding an obligor "willfully and voluntarily unemployed or underemployed." *See* ***Ford v. Ford***, C/A No. 02A01-9507-CH-00153, 1996 WL 560258 (Court of Appeals at Jackson, October 3, 1996); ***Herrera v. Herrera***, 944 S.W.2d 379 (Tenn.App. 1996); ***Garfinkel v. Garfinkel***, 945 S.W.2d 744 (Tenn.App. 1996). However, none of these cases involve a situation where an obligor chooses to retire at a reasonable age, for legitimate reasons, and otherwise under reasonable circumstances. The factual pattern in the cited cases render them inapposite to the facts now before us. They have no precedential value in our inquiry.

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[4]For text, see footnote 2 to this opinion.

At the time of his retirement, Father was eligible under Delta's retirement plan to accept one of several retirement options. As Mother points out, he could have chosen an option that would have paid him $9,922 per month; but this option provided no benefit at his death for his designated beneficiary. It also would have adversely impacted his ability to roll-over dollars from his 401(k) account to an IRA. Consequently, father chose an option that pays him a gross monthly pension of $6,085.39, with a survivor's pension for his designated beneficiary -- his present wife. We find and hold that Father made a legitimate and reasonable election from several options, and that there is no basis under the Guidelines for "assuming" a larger monthly pension for the purpose of setting his child support obligation. The Guidelines cannot be interpreted so as to force an individual to select a retirement option clearly at odds with the long-term best interests of himself and his wife in order to increase his daughter's child support entitlement for 17 months.

As a third concept under her first issue, Mother argues that the trial court should have included in Father's projected income, dividends and interest on his IRA. We disagree. Father testified that he was not presently withdrawing funds from his IRA. Under the circumstances of this case, it is immaterial that Father was age-eligible to make such withdrawals without penalty; the fact is that he was not making such withdrawals, and, hence, this IRA income was not a part of his spendable income. In our

judgment, the definition of income[5] -- and specifically the references to “dividends” and “interest” in that definition -- is not intended to include income on an IRA that has not been taxed because it has not yet been withdrawn.

We also disagree with the remaining assertions in Mother’s first issue. The evidence does not preponderate against the trial court’s determination that Father’s annual rental income was $300. He so testified, and his testimony was accredited by the trial court. Such a determination is entitled to great weight on appeal. ***Tennessee Valley Kaolin Corp. v. Perry***, 526 S.W.2d 488, 490 (Tenn.App. 1974). As to Father’s supposed interest income, there was no evidence that Father anticipated such income in the future. The fact that his joint income tax return, without further explanation, reflected such income for *1996* does not establish that he anticipated receiving such income in 1997 or subsequent years. Finally, we know of no authority authorizing us to consider the income of Father’s wife

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[5]Tenn.Comp.R. & Regs., ch. 1240-2-4-.03(3)(a) defines income as follows:

> Gross income shall include all income from any source (before taxes and other deductions), whether earned or unearned, and includes but is not limited to, the following: wages, salaries, commissions, bonuses, overtime payments, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, benefits received from the Social Security Administration, i.e., Title II Social Security benefits, workers compensation benefits whether temporary or permanent, judgments recovered for personal injuries, unemployment insurance benefits, gifts, prizes, lottery winnings, alimony or maintenance, and income from self-employment. Income from self-employment includes income from business operations and rental properties, etc., less reasonable expenses necessary to produce such income.

in calculating Father's income for child support purposes. After all, the obligation to provide child support is that of Father, and not that of his present wife.

We find that the trial court correctly set Father's new child support obligation pursuant to the Guidelines. Mother's first issue is found to be without merit.

III.

Mother contends that the trial court erred when it limited her request for a listing of all of Father's assets to those which are income-producing. She also complains that the trial court erred when it refused to order Father to produce his canceled checks.

A trial court has wide discretion in discovery matters and an appellate court will not interfere with that discretion absent a showing of abuse. ***Price v. Mercury Supply Co., Inc.***, 682 S.W.2d 924, 935 (Tenn.App. 1984).

The trial court did not abuse its discretion. Simply put, non-income-producing assets and canceled checks were not relevant to the issues before the trial court. The real question to be determined below was related to Father's *income*, and not to the non-income-producing assets he had accumulated, or to the manner in which he had spent his money.

IV.

The trial court refused Mother's request that she be designated as the sole trustee of the educational trust established for the benefit of the parties' daughter. The trial court instead opted to leave Father as the sole trustee. We find no abuse of the trial court's discretion in this decision. *See* ***Jahn v. Jahn***, 932 S.W.2d 939, 943-44 (Tenn.App. 1996). Mother's third issue is found to be without merit.

V.

Finally, Mother seeks attorney's fees for services performed by her counsel at the trial court level and on this appeal. We find no abuse of discretion in the trial court's decision not to award Mother attorney's fees. *See* ***Sherrod v. Wix***, 849 S.W.2d 780, 785 (Tenn.App. 1992). Furthermore, we do not find an award of fees on appeal to be appropriate in this case.

VI.

The judgment of the trial court is affirmed with costs on appeal being taxed to the appellant. This case is remanded to the trial court for enforcement of the lower court's judgment and collection of costs assessed there, all pursuant to applicable law.

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Charles D. Susano, Jr., J.

CONCUR:

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Herschel P. Franks, J.

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William H. Inman, Sr.J.