

NOT DESIGNATED FOR PUBLICATION

No. 95,690

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of:

KELLY HERROLD,
Appellee,

and

TERRY KIM HUTSON,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; WILLIAM O. ISENHOUR, JR., judge.

Opinion filed April 6, 2007. Affirmed in part, reversed in part, and remanded with directions.

H. Reed Walker, of Law Offices of H. Reed Walker, P.A., of Mission, for appellant.

Lewanna Bell-Lloyd, of Olathe, for appellee.

Before CAPLINGER, P.J., HILL and BUSER, JJ.

Per Curiam: Terry Kim Hutson appeals orders regarding custody, child support, and division of property entered by the district court following his separation from Kelly Herrold. We affirm in part, reverse in part, and remand with directions.

Hutson and Herrold lived together for 17 years. Their only child was born in 1999. They never married, and Herrold moved out in November 2004.

Custody

Hutson argues the trial court abused its discretion by failing to continue the "50/50" custody plan in place before trial.

"When the custody issue lies only between the parents, the paramount consideration of the court is the welfare and best interests of the child. The trial court is in the best position to make the inquiry and determination, and in the absence of abuse of sound judicial discretion, its judgment will not be disturbed on appeal. [Citations omitted.]" *In re Marriage of Rayman*, 273 Kan. 996, 999, 47 P.3d 413 (2002).

Under the 50/50 plan, the parties had shared "custody on a rotating two-day schedule." Based on the evidence at trial, however, the trial court gave Herrold primary residential custody during the school year and allowed Hutson parental access every Thursday and every other weekend. Shared custody continued during the summer months, with Hutson having custody every Wednesday through Friday, plus every other weekend.

The trial court found the 50/50 plan was "working okay" but noted that "circumstances are changing" because K.H. was entering first grade. The trial court found the 50/50 plan "is going to pose a whole lot of problems when it comes time for [K.E.] to go to school and the bouncing around, and not having a particular place that really is home is going to be difficult for her." The trial court also noted certain transportation problems with the 50/50 plan. On the particular facts of this case, Hutson has not shown an abuse of discretion.

Child Support

Hutson argues the trial court abused its discretion when setting the amount of his child support payments. Hutson contends the trial court failed to consider business expenses when determining his monthly income. Hutson also challenges any

consideration of rental income from properties now belonging to Herrold under the court-ordered property division.

"Interpretation of the Kansas Child Support Guidelines is a question of law. However, review of an order setting child support is limited to determining whether there is substantial competent evidence to support the trial court's findings. Substantial evidence is evidence which possesses both relevance and substance so as to form a basis of fact from which the issues can be reasonably resolved." *In re Marriage of Brand*, 273 Kan. 346, Syl. ¶ 1, 44 P.3d 321 (2002).

At the time of trial, Hutson had operated Ace Lawn Care and Lot Maintenance as a sole proprietorship for more than 20 years. He also owned several rental properties. In ruling from the bench, the trial judge found:

"Mr. Hutson did represent his [monthly] income to be something in the neighborhood of \$6,000, as I recall the evidence, in the application he made when he was buying the Kail property, and I'm going to hold him to that figure. That's what he told the lender he was making, and that's what he told everybody his income was from all sources. And so for child support purposes we will use the figure of \$6,000 a month as the income for Mr. Hutson."

The Kaill property loan application was submitted in 1986. It shows Hutson's monthly "Base Empl. Income" was \$1,764, and his "Net Rental Income" was \$500. As Herrold notes on appeal, the trial court apparently misidentified the exhibit while ruling, presumably intending to reference a 2005 loan application also entered into evidence.

The 2005 loan application shows Herrold's monthly "Base Empl. Income" as \$6,300 and his "Net Rental Income" as \$4,900. Hutson states on appeal that the application is not signed, but the record shows he initialed the page containing his income figures.

The basis for establishing and reviewing child support orders is the Kansas Child Support Guidelines. *Brand*, 273 Kan. 346, Syl. ¶ 3. The 2003 Child Support Guidelines, Administrative Order No. 180 (2006 Kan. Ct. R. Annot. 105), begin with a calculation of "Domestic Gross Income." See Guidelines § IV. A-C (2006 Kan. Ct. R. Annot. 112). "Domestic Gross Income for self-employed persons is self-employment gross income less Reasonable Business Expenses." Guidelines § II. E.3 (2006 Kan. Ct. R. Annot. 108).

The district court used the 2005 loan application to determine Hutson's domestic gross income but, as stated previously, this required the subtraction of reasonable business expenses from his self-employment gross income. An itemization of business

expenses is not evident on the face of the 2005 loan application, and in her own testimony Herrold stated the \$6,300 shown on that application was Hutson's "gross income without the rentals." The 2005 loan application was not substantial evidence of Hutson's business expenses.

In her brief, Herrold suggests an alternative way to support the trial court's finding. She asks us to take the \$34,000 net annual business income from Hutson's 2002 tax return and add it to Hutson's own calculation of his annual domestic gross income, which was \$38,416. Hutson based this domestic gross income figure on income from interest, dividends, and the rental properties. Hutson claimed he had no net business income for 2004.

Following Herrold's suggestion would produce a domestic gross income of \$72,416, sufficient to support the \$6000 per month figure the trial court found. The proposed solution would run afoul of Hutson's second point, however, that his domestic gross income should not include rental income belonging to Herrold after the court-ordered property division. The trial court gave Herrold the rental properties at 15217 West 121st Terrace and 7438 Glenwood. This rental income is no longer part of Hutson's self-employment gross income. See Guidelines § II. E.1 (2006 Kan. Ct. R. Annot. 107).

(Self-employment gross income includes "all other income including that which is regularly and periodically received from any source.").

We have also considered the statements of Hutson's net business income on his federal income tax returns for 2001, 2002, and 2003. These figures, which show an approximate annual net business income of \$23,000, \$34,000, and \$18,000 respectively, similarly do not support the trial court's findings. In contrast to the 2005 loan application, the trial court found the tax returns showed "income after depreciation has been claimed and all of the business expenses."

Finally, the evidence regarding 2004, the last full year before the trial, does not support the trial court's findings. Hutson's 2004 federal income tax return showed a business loss of approximately \$27,000. Hutson also testified that the 2004 return was provisional because Herrold took his business records when she moved out in November 2004. Herrold maintains on appeal that Hutson's assertions regarding 2004 were "not credible and shed[] doubt on his entire testimony." This court does not make credibility determinations, however. See *State ex rel. Morrison v. Oshman Sporting Goods Co. Kansas*, 275 Kan. 763, 775, 69 P.3d 1087 (2003). The 2005 loan application was not substantial evidence of Hutson's domestic gross income, and the record does not provide

another basis by which this court could affirm the trial court's calculation. Accordingly, this matter is reversed and remanded for findings consistent with the Guidelines.

Division of Property

For his final issue, Hutson asserts the trial court was without jurisdiction to divide the couple's property. Hutson acknowledges that the trial court's equitable authority extended to the division of property which was jointly accumulated by the parties. See *Eaton v. Johnston*, 235 Kan. 323, Syl. ¶ 2, 681 P.2d 606 (1984). The issue, therefore, is whether the trial court abused its discretion by exercising its equitable authority over property not jointly accumulated by the parties. See 235 Kan. at 329; *Ellis v. Berry*, 19 Kan. App. 2d 105, 106-07, 867 P.2d 1063 (1993).

Hutson recites on appeal the evidence tending to show Herrold did not contribute significantly to the business or the rental properties. Hutson simultaneously recognizes that Herrold's evidence "create[d] the impression [Herrold] worked almost every day, side-by-side with [Hutson] in his . . . business, and worked almost daily with regard to acquiring properties and tenants for properties, and keeping books for the enterprise." The trial court discussed this disputed testimony when ruling:

"What we have here is a matter of the Court having to determine credibility. Ms. Herrold says she was an instrumental factor in the success of the Ace lawn business as well as the investment property that Mr. Hutson accumulated. Mr. Hutson says she didn't do much of anything at all, and, therefore, she is not entitled to anything. . . .

"Now, frankly, I found Ms. Herrold's testimony to be more credible and more precise, more specific, and I mean she demonstrated her familiarity with the documents as we went through the testimony, and Mr. Hutson, frankly, impressed me that he wasn't familiar with the documents and how the business operated and what was going on, which tells me that to say that Ms. Herrold was an insignificant part of the business is to make a serious misstatement of the facts."

The trial court highlighted the testimony of Denise Reed in particular, finding "she appeared . . . less than any other witness to have an axe to grind in this case." Reed had known both Hutson and Herrold for approximately 15 years. She testified that Herrold was active in the business "every day," and that "[t]hey worked side by side. . . . They were a team." With regard to bookkeeping, Reed said Herrold "did everything."

As stated above, this court does not weigh credibility. The trial court found Herrold's evidence was more credible; given this finding, the trial court did not abuse its discretion in equitably dividing the property. The trial court's orders on custody and

property division are affirmed, the trial court's order on child support is reversed, and the matter is remanded for determination of child support under the Guidelines.

Affirmed in part, reversed in part, and remanded with directions.