IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOSHUA SIMMONS,[1]	§	
	§	No. 677, 2012
Petitioner Below,	§	
Appellant,	§	
	§	Court Below–Family Court
v.	§	of the State of Delaware,
	§	in and for Kent County
DCSE/JESSICA HENRY,	§	
	§	File No. CK08-02314
Respondents Below,	§	Petition No. 12-23708
Appellees.	§	

Submitted: February 22, 2013
Decided: April 9, 2013

Before **BERGER**, **JACOBS** and **RIDGELY**, Justices.

O R D E R

This 9th day of April 2013, upon consideration of the appellant's opening brief and the appellees' motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The petitioner-appellant, Joshua Simmons ("Father"), appeals from the Family Court's November 30, 2012 order affirming the October 17, 2012 order of the Family Court Commissioner,[2] which denied Father's petition for child support modification under Family Court Rule of Civil

[1] The Court *sua sponte* assigned pseudonyms to the parties by Order dated January 2, 2013. SUPR. CT. R. 7(d).

[2] DEL. CODE ANN. tit. 10, § 915(d)(1).

Procedure Rule 508.[3] The respondents-appellees, the Division of Child Support Enforcement ("DCSE") and Jessica Henry ("Mother"), move to affirm the Family Court judgment on the ground that it is manifest on the face of the opening brief that the appeal is without merit.[4] We agree and affirm.

(2) On February 27, 2012, a Family Court Commissioner issued a permanent support order regarding the parties' two minor children. Under that order, Father was required to pay $1,390.00 per month in current child support and $60.00 per month in retroactive support, totalling $1,450.00 per month. On July 5, 2012, Father filed a petition for child support modification, seeking to decrease the amount of his monthly support obligation. Father argued that, after the entry of the February 27, 2012 order, he had moved from Wyoming to Kentucky and was earning significantly less income.

(3) A hearing on Father's petition took place before the Family Court Commissioner on October 17, 2012. At the hearing, Father testified that he had moved from Wyoming to Kentucky because his fiancée lives in Kentucky, and also because he wanted to be closer to his two children, who

[3] The Commissioner also granted the petition of the respondents-appellees for support arrears.

[4] SUPR. CT. R. 25(a).

now live with Mother in Delaware. He testified that, since moving to Kentucky, he has been working at a temporary agency called Work Connection and is assembling trucks. Father testified that he makes significantly less income than he did while working in Wyoming and, as a result, is unable to drive from Kentucky to have visitation with his children. Father also testified that he was not able to have visitation with his children during the summer of 2012 "due to financial reasons." The Commissioner noted that Father's testimony about his earnings was inconsistent with his earlier court filings.

(4) In his October 17, 2012 order, the Commissioner found that Father had failed to demonstrate that his change of circumstances was not caused by Father's voluntary conduct, under Family Court Rule of Civil Procedure 508. The Commissioner found that Father owed child support arrears in the amount of $14,947.46 as of October 8, 2012 and continued to owe monthly payments of $1,450.00. On November 5, 2012, Father filed a request for review of the Commissioner's order. Father claimed that he moved to Kentucky solely to accommodate Mother and to facilitate visitation with his children. He also stated that his driver's license had been suspended as a result of the garnishment of his wages and, therefore, he could not use his car to find a second job. The Family Court accepted the

Commissioner's findings and declined to address Father's argument concerning his suspended license, because it had not been presented to the Commissioner in the first instance. Following the Family Court's affirmance of the Commissioner's order, Father appealed to this Court.

(5) On appeal, Father concedes that his move from Wyoming to Kentucky was voluntary, but argues, for the first time, that in Kentucky, he "earnestly [sought] to achieve maximum income capacity" in accordance with Rule 501(g). He claims that, therefore, his child support obligation should be reduced to reflect his current income.

(6) The Family Court's standard of review of a Commissioner's order is *de novo*, and requires an independent review of the record to determine whether the order should be accepted, rejected, or modified, in whole or in part.[5] On appeal from the Family Court, this Court reviews the factual findings, including the inferences and deductions, of the Family Court.[6] This Court will not overturn the Family Court's factual findings unless they are clearly wrong and justice requires that they be overturned.[7]

[5] DEL. CODE ANN. tit. 10, § 915(d)(1).

[6] *Wife (J.F.V.) v. Husband (O.W.V., Jr.)*, 402 A.2d 1202, 1204 (Del. 1979).

[7] *Solis v. Tea*, 468 A.2d 1276, 1279 (Del. 1983).

If the Family Court has correctly applied the law, our standard of review is abuse of discretion.[8] We review errors of law *de novo*.[9]

(7) Family Court Rule of Civil Procedure Rule 508 governs the modification of a child support order. That Rule provides that a petition for modification filed within 2½ years of the last determination of current support must allege with particularity a "substantial change of circumstances not caused by the petitioner's voluntary or wrongful conduct except as described in Rule 501(g)." Rule 501(g), in turn, provides that parents who suffer a loss of income either voluntarily or due to their own misconduct "may have their support obligation calculated based upon reduced earnings after a reasonable period of time if the parent earnestly seeks to achieve maximum income capacity."

(8) The testimony presented at the hearing on Father's petition for child support modification clearly supports the Commissioner's finding that Father's move to Kentucky, and his resulting loss of income, were voluntary, a point Father now squarely concedes. The transcript of the hearing further reflects that the Commissioner simply did not believe that Father had moved to Kentucky to facilitate visitation with his children and

[8] *Jones v. Lang*, 591 A.2d 185, 186 (Del. 1991).

[9] *In re Heller*, 669 A.2d 25, 29 (Del. 1995) (citation omitted).

that Father was financially unable to have visitation with his children. While the issue of whether Father had "earnestly [sought] to achieve maximum income capacity" was not explicitly raised, it is clear from the transcript that the Commissioner did not believe that Father had sought to do so.

(9) Our review of the record reflects that the Family Court conducted a proper *de novo* review of the Commissioner's order. The Family Court also acted within its discretion in accepting the Commissioner's factual findings, including the Commissioner's negative assessment of Father's credibility. We find no basis for overturning the factual findings of the Family Court or its legal rulings, and conclude that the judgment of the Family Court must be affirmed.

(10) It is manifest on the face of the opening brief that this appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that the appellees' motion to affirm is GRANTED. The judgment of the Family Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice