RENDERED: April 13, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000268-MR

CARWELL GARDNER, JR. APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY PAYNE, JUDGE
ACTION NO. 97-CI-02411

JUDY W. LOWRY APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; BARBER, AND KNOPF, JUDGES.

BARBER, JUDGE: Appellant, Carwell Gardner, Jr. ("Gardner"), appeals from an order of Fayette Circuit Court, modifying his child support obligation. The Appellee is Judy W. Lowry ("Lowry"). At issue is the adequacy of the findings to support the trial court's determination of imputed income. For the reasons set forth below, we reverse and remand.

The parties have never married; they have a son, Carwell Gardner, III, born October 26, 1992 in Lexington, Kentucky. At the time of the child's birth, Gardner was a professional football player. He was employed by the Buffalo Bills from 1990-1995, by the Baltimore Ravens in 1996, and by the

San Diego Charges in 1997. During those years, Gardner's income ranged from $331,000.00 to $818,000.00 in (1993) per season. That came to a halt in October 1997, when he injured his knee, ending his football career.

On or about July 8, 1997, Lowry filed a petition for joint custody, support and visitation, alleging that Gardner had acknowledged paternity, and had been paying child support voluntarily since the child's birth. On August 15, 1997, Lowry filed a motion for temporary custody, temporary child support and temporary visitation seeking $1,581.19 per month as temporary child support. On September 3, 1997, the court entered an order for temporary custody, support and visitation. The order directed Gardner to pay temporary child support in the amount of $1,102.00 per month, effective August 1, 1997 as well as tuition and day care expenses. The order also provided for joint custody and for Gardner to have liberal time sharing with the child.

On November 12, 1997, Gardner filed a motion to terminate temporary child support on the ground that he had been released from the San Diego Chargers and had no income at the present time. By order of December 4, 1997, the court denied the motion to terminate support, and ordered that a hearing be set after the completion of discovery; further, that any adjustment made to Gardner's child support obligation after the matter is heard "shall be retroactive to the date of the filing of [Gardner's November 12, 1997] . . . motion." The court allowed 90 days to complete discovery and submit memoranda of law.

The parties testified at a hearing on November 6, 1998. At that time, Gardner had moved back to Lexington and was looking for a job. After his October 1997 injury, Gardner had stayed in San Diego for a period of time, undergoing daily physical therapy in an attempt to rehabilitate his knee. In September 1998, Gardner realized his injury was permanent and that he would not be able to play football. Since September 1998, Gardner had applied for jobs with the state - as a correctional officer and youth worker - with starting salaries of $1,345-$1,455 per month. He had also applied for a commission sales job with a base of $7.00 per hour, as well as for jobs with Lexmark, Intermedia Cable and Stanley Steamer. Gardner's attempts to find a job using his athletic/sports background were unsuccessful, because he lacked a college degree.

The child's mother, Lowry, had an undergraduate degree in elementary education, an M.A., and is working for a Rank I degree, which she describes as something between an M.A. and Ph.D. She works nine months a year as a teacher at Norton Middle School. In 1997, Lowry earned approximately $40,000.00. She also receives rental income from a duplex, where she resides with the parties' son and her child from a previous marriage. In 1997, she received rental payments in the amount of $9,700.00

At the end of the hearing, Lowry's counsel expressed his opinion that Gardner was untruthful and was hiding income. Lowry's counsel theorized that Gardner's allegedly undisclosed assets would generate interest income of $50,000 - $70,000 per

year. However, there is no evidence of record of any hidden assets.

On November 19, 1998, the court granted Gardner's motion to reduce child support:

> Respondent is no longer able to play for the NFL due to an injury he received. The Court is under the belief that he has assets which have not been disclosed, but the court cannot set child support based on its belief. It is a finding of the Court that the Respondent is capable of earning $50,000 per year. Therefore, the Court will impute income to him and set child support at $492.00 per month, effective December 1, 1998.

On November 25, 1998, Gardner filed a motion to alter or amend pursuant to CR 59.05. Gardner contended that the December 4, 1997 Order, which was signed by counsel for both parties, mandated that any adjustments to child support would be retroactive to his November 12, 1997 motion to reduce. On January 15, 1999, the court entered an order denying Gardner's motion to alter or amend. The court explained:

> It appears to the Court that this Division ruled that any reduction would be retroactive to November 12, 1997. However, the Order setting forth this Court's ruling was inadvertently submitted to Judge Mary Noble or was intentionally signed by Judge Mary Noble pursuant to Rule 2(d).
>
> The court agrees with . . . [Lowry's] position. Due to the discovery process, this matter was pending for over one year. Both parties were involved with discovery prior to the final hearing and ruling of the Court. The Court finds that it would not be equitable to the child to make the reduction retroactive to November 12, 1997; to do so would mean that child support would not have to be paid until the year 2000.

On February 1, 1999, Gardner filed a notice of appeal from the court's November 19, 1998 and January 15, 1999 orders. On appeal, Gardner contends that if the court believed he was voluntarily underemployed or unemployed, it did not explain how it arrived at its determination of potential income. Further, the evidence does not support an imputed income of $50,000, taking into account his occupational qualifications, education, the positions for which he had applied and the job opportunities in the community. Gardner also argues that any reduction in child support should be retroactive to the date of the motion to reduce child support. In his reply brief, Gardner requests that we strike Lowry's brief, on the ground that it fails to comply with CR 76.12. Gardner contends that Lowry makes "absolutely no references" to the record in her Brief; further, that Lowry has included matters which have not been preserved for review or which are not of record. Lowry has not requested leave to file a corrected brief.

Lowry's brief contains no references to the record, as required by CR 76.12(4)(d)(ii) & (iii). Moreover, the brief is replete with personal attacks and other unsubstantiated accusations against Gardner which have no bearing on the issues on appeal. Lowry's brief also improperly refers to matters outside of the record. Under these circumstances, we order Lowry's brief stricken. CR 76.12(8).

KRS 403.212 (2)(d)

> If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income, except that a determination

> of potential income shall not be made for a parent who is physically or mentally incapacitated or is caring for a very young child, age three (3) or younger, for whom the parent owes a joint legal responsibility. Potential income shall be determined based upon employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings level in the community. A court may find a parent intended to avoid or reduce the child support obligation.

Gardner was not working at the time of the hearing. The personal opinion of Lowry's counsel notwithstanding, there was no **evidence** that Gardner had any income at the time. The trial court found that he was capable of earning $50,000 per year. The language of the KRS 403.212(2)(d) is mandatory and outlines the factors that the court must use in imputing income. "Potential income **shall** be determined based upon employment potential and probable earnings level based on the obligor's recent work history, occupational qualifications, and prevailing job opportunities and earnings level in the community." (emphasis added).

A review of the record reflects that Gardner has a high school education, and some college (prior to 1990). His entire work history was as a professional football player. The evidence further established that Gardner could no longer play football, due to the effects of his knee injury. His testimony that he could not find a position using this sports background, due to his lack of a college degree, was uncontroverted. There was no evidence that Gardner had the physical ability and occupational qualifications to perform any jobs other than those essentially

entry-level jobs for which he had applied. They did not pay anything close to the amount that the trial court found Gardner was capable of earning.

There was no **evidence** that Gardner has assets that were capable of producing income.

> '[A]s a general rule the evidence must sustain the judgment, proof being as essential to the support of a judgment as pleading. The evidence must be of a substantial character, sufficient to support the judgment rendered. The judgment must be founded on sufficient facts legally ascertained, and cannot rest on evidence of an incompetent character, or which was never adduced in court, such as matters not put in evidence of which the court took judicial notice. A judgment may not rest on conjecture and speculation or on mere surmise or suspicion, nor may a judgment find support in assumptions or in possibilities or probabilities falling short of actual proof.' [citing 49 C.J.S. Judgments, §44, page 103]
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> [A] . . . judgment . . . based upon alleged transactions that were never proven at trial of this proceeding but . . . founded upon the private opinion and personal knowledge of the trial judge . . . is erroneous.

Stephenson v. Burton, Ky., 246 S.W.2d 999, 1000 (1951).

The trial court's determination that Gardner was capable of earning $50,000 a year is clearly erroneous, because it is not based upon substantial evidence. We vacate the court's order and remand for a determination of Gardner's income, based upon the evidence, in accordance with the factors outlined in KRS 403.212(2)(d). On remand, the court should make specific findings regarding Gardner's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community.

Gardner also contends that the trial court erred in failing to order that the modification in child support be retroactive to November 12, 1997, the date of his motion to reduce child support. The December 4, 1997 order, signed by the parties' counsel, states that any adjustment in child support "**shall be retroactive** to the date of the filing of the Respondent's motion." (emphasis added). KRS 403.213(1) provides that "[t]he provisions of any decree respecting child support may be modified only as to installments accruing subsequent to the filing of the motion for modification and only upon a showing of a material change in circumstances that is substantial and continuing."

Citing Weldon v. Weldon, Ky. App., 957 S.W.2d 283 (1997) and Pretot v. Pretot, Ky., 905 S.W.2d 868 (1995) the trial court in an (unrelated) order and opinion entered September 30, 1998 observed that "Kentucky case law has consistently . . . modified child support payments **to date back to the date of the filing of the motion**". (emphasis added). Nevertheless, the trial court declined to follow this practice, reasoning that it would be inequitable to the child. The trial court stated that to make the reduction retroactive would mean that child support would not have to be paid until the year 2000. Making the reduction retroactive would not relieve Gardner of any child support payments. It would mean that he pays what he owes, based upon his income as determined by the court. Not making the reduction retroactive would mean that Gardner pays more than twice what he owes for over a year.

In light of the unambiguous language in the December 4, 1997 order, we cannot agree that a retroactive modification would be inequitable. Clearly, Lowry knew that Gardner had sustained an injury and that he was not working. Lowry was on notice that Gardner's child support obligation would probably be reduced. Lowry never sought to have the December 4, 1997 order set aside, prior to the hearing on the motion to reduce child support. Nor did she argue that a retroactive reduction in child support would be detrimental to the parties' child, in her response to Gardner's CR 59.05 motion. Disregarding the December 4, 1997 order **after the hearing** is inequitable; to do so effectively deprived the parties of an opportunity to develop proof or present any argument on the issue. Under these facts, we believe that the trial court abused its discretion. We reverse the portion of the trial court's January 15, 1999 order denying the motion to alter or amend. Upon remand, any modification in child support shall be effective November 12, 1997, the date of filing of the motion to reduce child support.

KNOPF, JUDGE, CONCURS.

GUDGEL, CHIEF JUDGE, CONCURS IN RESULT ONLY.

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