

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000765-MR

DONALD J. EMERSON

APPELLANT

v. APPEAL FROM KENTON FAMILY COURT
HONORABLE CHRISTOPHER J. MEHLING, JUDGE
ACTION NO. 06-CI-02211

ERIN L. EMERSON

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: MOORE AND THOMPSON, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Donald Emerson appeals the trial court's determination that he was voluntarily under- or unemployed for purposes of

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

calculating child support payments. After our review of the record, we discover no abuse of trial court discretion and affirm.

Erin and Donald Emerson were married on August 22, 1998. It was the first marriage for both. Three children were born of the marriage, their birthdates being June of 2000 for their older child, and twins who were born in October of 2002. The couple separated in August 2006 and a decree of dissolution was granted by the Kenton Circuit Court. On July 7, 2008, Donald filed a motion with the Kenton Family Court seeking to suspend his court-ordered child support payments since he had recently become unemployed. After a hearing, the family court found that as of October 1, 2008, Donald's earning capacity was \$80,000 and reduced his child support obligation to \$2,467.40 per month. On March 27, 2009, the family court modified its findings of fact pursuant to Kentucky Revised Statutes (KRS) 403.212, finding that Donald was voluntarily underemployed.²

Donald secured new employment at a salary significantly reduced from that which he previously enjoyed. On February 18, 2009, he filed a motion seeking to modify his child support obligation based upon the substantial change in circumstances. After a hearing, the family court found Donald was not "forthright about his sources of income and it appears that he is working two jobs." The family court reaffirmed its decision that his earning capacity was \$80,000 per year

²KRS 403.212(d) reads in part: "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 levels in the community. A court may find a parent to be voluntarily unemployed or underemployed without finding that the parent intended to avoid or reduce the child support obligation."

and refused to modify the previously ordered child support amounts. Donald now seeks our review of the question of whether the trial court abused its discretion when it found him voluntarily underemployed and attributed an income of \$80,000 to him for child support calculation purposes.

“The trial court heard the evidence and saw the witnesses. It is in a better position than the appellate court to evaluate the situation.” *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967). Donald testified that he remained a member of the Fort Mitchell Country Club but that his monthly spending there was reduced by 15 to 20 percent. He testified he prefers to dine there rather than “Applebee’s or any other place[.]” He further testified he continued to live at the Drawbridge Hotel and Convention Center where he paid \$1,100 per month in rent. He provided testimony that he was employed by Academy Rentals at a salary of \$50,000 per year and his biweekly net pay was approximately \$1,431.10, which was direct-deposited into his checking account. On cross-examination, however, he was unable to explain why his checking account did not show any deposits near the amount of his alleged pay but instead showed deposits of \$2,000 and \$2,131.10.

Erin was also able to introduce evidence that Donald was employed as an account executive with Best Exposition Services. Donald ultimately acknowledged he spent at least 80 percent of his working time at Best. He additionally had applied for unemployment benefits in Ohio prior to accepting employment with Best and Academy. He was qualified to receive \$328 per week

instead of \$435 he would have been eligible to receive had he listed his children on his application. He never collected any payment. When questioned by the court how he provided for himself, he responded “with credit cards and help from his father.”

“The court below made findings of fact which may be set aside only if clearly erroneous.” *Id.* We discover nothing in the record that convinces us the family court’s findings were anything but completely accurate.

The judgment of the Kenton Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John R. Elfers
Covington, Kentucky

BRIEF FOR APPELLEE:

J. Eric Rottinghaus
Covington, Kentucky