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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001051-ME

AMANDA JAYNE MARCUM (NOW NANTZ)

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE STEPHEN M. JONES, JUDGE
ACTION NO. 09-CI-00379

OWEN LEROY MARCUM

APPELLEE

OPINION
REVERSING AND
REMANDING

** ** * * * * *

BEFORE: CLAYTON, DIXON, AND THOMPSON, JUDGES.

DIXON, JUDGE: Amanda Jayne Marcum Nantz appeals from an order of the Laurel Circuit Court modifying the child support obligation of her former husband, Owen Leroy Marcum. After careful review, we conclude the court abused its discretion in the calculation of the parties' gross incomes; consequently, we reverse and remand this matter for further proceedings.

Amanda and Owen divorced in 2010, and Owen was ordered to pay child support to Amanda for their four children. In March 2015, the court held an evidentiary hearing to address modification of child support due to changes in child care expenses and health insurance premiums. Income tax documents were introduced indicating Owen's gross income for 2014 was \$60,658, while Amanda's gross income was \$25,855. Additionally, Owen's pay stubs from the first seven weeks of 2015 were admitted into evidence, which showed he worked between twenty and thirty overtime hours each week.¹ In his testimony, Owen asserted he had been working overtime for the past three years.

The trial court issued an order modifying Owen's child support obligation to reflect the changes in child care expenses and health insurance. The court calculated each party's gross income based on their respective hourly wages for a forty-hour work week. The court determined Owen's gross income was \$36,379 and Amanda's was \$23,088.² The court did not include overtime and holiday pay in its calculation, concluding those wages were "uncertain and unstable." Amanda filed a motion to alter, amend, or vacate, contending the court erred in its calculation of the parties' gross incomes. The court denied Amanda's motion, and this appeal followed.

¹ Owen worked in a commercial baked goods manufacturing plant. His regular hourly rate of pay for a forty-hour week was \$17.49. His hourly overtime rate of pay was \$26.23.

² Owen: \$17.49 per hour x 40 hours = \$699.60 per week x 52 weeks = \$36,379.20 per year or \$3031.60 per month.

Amanda: \$11.10 per hour x 40 hours = \$444.00 per week x 52 weeks = \$23,088 per year or \$1924 per month.

As an initial matter, we note Owen did not file a brief with this Court. Pursuant to CR 76.12(8)(c)(i), we accept Amanda's statement of the facts and issues as correct.

The trial court has broad discretion in modifying child support; accordingly, we will not disturb that decision unless the court abused its discretion. *Snow v. Snow*, 24 S.W.3d 668, 672 (Ky. App. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

KRS 403.212(2)(a) defines "income" as "actual gross income of the parent if employed to full capacity" In *Keplinger v. Keplinger*, 839 S.W.2d 566 (Ky. App. 1992), this Court stated:

KRS 403.212(2)(a) must be read as creating a presumption that future income will be on a par with the worker's most recent experience. The party who wants the trial court to use a different income level in applying the child support guidelines bears the burden of presenting evidence which would support the requested finding.

Id. at 569 (internal footnote omitted).

In the case at bar, Owen testified he had been working overtime for at least three years. The undisputed evidence established Owen's actual gross income for 2014 was \$60,658, and his paystubs indicated he continued earning similar wages at the beginning of 2015. Despite the evidence of Owen's most recent income, the

trial court determined his income was uncertain and relied on Owen's hourly wage to calculate gross income of \$36,379.³

We reiterate, "KRS 403.212(2)(a) must be read as creating a presumption that future income will be on a par with the worker's most recent experience." *Id.* Consequently, we conclude the court's determination of gross income constituted an abuse of discretion; accordingly, we reverse the Laurel Circuit Court's order modifying child support and remand this matter for further proceedings consistent with this opinion.

CLAYTON, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. I disagree that the circuit court abused its discretion. There is substantial evidence to support the Laurel Circuit Court's finding that Owen Marcum's gross income should only include wages he received for working his regular full-time shift and should not include his overtime and holiday pay because those wages were "uncertain and unstable."

I reiterate the required standard of review because I believe it is ignored in the majority's analysis. "For the purposes of the standard of review, in reviewing family court cases, . . . a family court judge has extremely broad discretion in ascertaining the reliability of the evidence presented. Moreover, a reviewing Court is not permitted to substitute its judgment for that of the family court unless its

³ Likewise, the evidence established Amanda's actual gross income for 2014 was \$25,855, yet the court calculated her gross income as \$23,088.

findings are clearly erroneous.” *Jones v. Hammond*, 329 S.W.3d 331, 334–35 (Ky.App. 2010). A trial court’s determination of a child support obligor’s earning capacity involves a finding of fact which will not be disturbed unless clearly erroneous. *Maclean v. Middleton*, 419 S.W.3d 755, 775 (Ky.App. 2014).

KRS 403.212(2)(a) states that “‘Income’ means actual gross income of the parent if employed to full capacity or potential income if unemployed or underemployed.” KRS 403.212(2)(b) explains that “‘Gross income’ includes income from any source . . . and includes . . . income from salaries, wages [and] bonuses[.]”

As summarized in Christopher Vaeth, J.D., Annotation, *Consideration of Obligated Spouse's Earnings from Overtime or "Second Job" Held in Addition to Regular Full-Time Employment in Fixing Alimony or Child Support Awards*, 17 A.L.R.5th 143, § 2[a] (2011), the majority of states agree it is appropriate to consider income from overtime work in setting child support “where the overtime was a regular part of the parent’s employment[.]” However, overtime should not be considered when “the overtime work was speculative or uncertain to continue[.]”

While Kentucky lacks published caselaw on the subject, it considered a similar issue, whether modification of child support would be proper where the father’s income decreased after father who had formerly worked both a full-time job and a second part-time job quit his part time employment in *Gossett v. Gossett*, 32 S.W.3d 109 (Ky.App. 2000). In resolving that matter, the Court determined

whether father was still employed to full capacity or was voluntarily underemployed was a factual issue which should be resolved by the trial court after considering the relevant circumstances in each case. *Id.* at 112.

This is consistent with our unpublished caselaw, which distinguishes between certain and uncertain future overtime-pay and emphasizes that whether overtime-pay is to be included in gross income for purposes of KRS 403.212(2)(b) is a factual determination within the family court's discretion. In *Cox v. Cox*, No. 2011-CA-000756-MR, 2012 WL 3136918, 3 (Ky.App. 2012) (unpublished), the Court determined the trial court did not err when it did not include overtime-pay in the total gross income of the father for purposes of setting child support. Deferring to the lower court's discretion to determine factual matters, the Court held there was sufficient evidence presented that the father's total gross income was the result of seasonal overtime-pay during the holidays and not typical of the father's regular income. In *Mills v. Mills*, No. 2005-CA-002598-MR, 2007 WL 3409368, 2–3 (Ky.App. 2007) (unpublished), the Court again deferred to the trial court's discretion. It refused to reverse the trial court's finding that the father failed to prove his earning capacity had declined where the father did not definitively show a recent decrease in overtime was likely to continue and his income was determined from the monthly average for the previous year.

The majority opinion finds a basis for disturbing the family court's exercise of discretion in the words written by this Court in *Keplinger v. Keplinger*, 839 S.W.2d 566, 569 (Ky.App. 1992). In that case, it was stated that “KRS

403.212(2)(a) must be read as creating a presumption that future income will be on par with the worker's most recent experience." *Keplinger*, 839 S.W.2d at 569 (footnote omitted). However, that presumption does not divest the family court of its discretion to determine whether overtime-pay should be included in gross income.

In *Keplinger*, the Court was reviewing an order which deviated from the guidelines in ordering child support of \$40 per week, per child, on the basis that while the father made \$30,000 in 1990, he did not have a permanent job and made less than \$5,000 in 1986. *Id.* at 567-58. The Court concluded the trial court erred by failing to make a finding as to each party's income and setting an appropriate child support amount without supporting any deviation from the guidelines with reference to the relevant statutory factors in its order. *Id.* at 569. The Court noted that the father admitted he earned \$30,000 per year in 1989, 1990, was earning at that level in 1991, yet, he did not present any evidence to show that his future earnings were likely to decrease. The Court explained that "[t]he party who wants the trial court to use a different income level in applying the child support guidelines bears the burden of presenting evidence which would support the requested finding." *Id.* In contrast, Owen presented substantial evidence that his future overtime earnings were uncertain.

Owen testified that he has been employed at Flower's Bakery for fourteen years and currently earns \$17.49 per hour. When he works over forty hours, he

earns time and a half. During his employment for Flower's Bakery, he typically worked at least forty hours per week.

Owen testified he was not guaranteed to work at least forty hours per week; sometimes he worked less and sometimes he worked more. He testified he had not paid off the arrearage in his child support from when the divorce decree was entered because his income was too low during certain weeks for the full amount of child support, which included the arrearage payment, to be deducted from his paycheck.

Owen's testimony was supported by records admitted into evidence from the Cabinet for Health and Family Services recording when payments were made and the amount of those payments. These records showed Owen's typical child support payment amount was \$263.91 weekly, but lesser amounts were taken from his weekly paycheck several times, apparently due to him having a smaller paycheck during those weeks. This occurred during two weeks in 2011, five weeks in 2012 and seven weeks in 2013.

Owen testified his overtime hours increased over the last three years after the Hostess plant closed. For the first seven weeks of 2015, he typically worked forty hours plus more than twenty hours of overtime each week. In some of these weeks, he also had holiday or vacation pay.

Owen testified he did not expect to continue to work the amount of overtime in the future as he had in the past. Flower's Bakery was in the process of adding new production lines, which would result in more people being added and him

getting less work. Owen's testimony was substantial evidence that his future overtime pay would be reduced.

While Amanda testified over the course of their marriage it was typical for Owen to work twenty or more hours of overtime a week, the trial court had the discretion to decide whether Amanda's or Owen's testimony was more credible. Factors against considering Amanda's testimony more credible included her attorney's representations and the former and current child support worksheet figures. Amanda's attorney represented that Owen had a 26-28% increase in his salary since the divorce decree entered on May 19, 2010. Logically, that increase was the result of increased overtime when the child support worksheet from the decree and from the modification are compared. The child support worksheet from the decree indicated that Owen had a monthly gross income of \$2,930.03 and the family court's child support worksheet which accompanied the child support order that is being appealed, indicated that without overtime, Owen was making \$3,031.60 per month. This slight increase in gross income indicates that Owen's overtime hours significantly increased after the decree was entered, rather than showing that he typically had an equivalent amount of overtime over the course of his marriage to Amanda, as she testified.

Given this evidence, the family court properly acted within its discretion in crediting Owen's testimony as reliable. Its finding that the amount of overtime wages and holiday pay Owen would receive was uncertain and unstable is not clearly erroneous and should not be disturbed on appeal.

Accordingly, I dissent.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

Jennifer Caudill Bundy
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