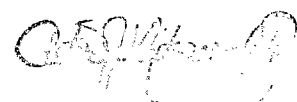


FILED FEB 26 2002

NOT DESIGNATED FOR PUBLICATION



**STATE OF LOUISIANA
O/B/O JACQUELINE GORIS

VERSUS

DALE GORIS**

**COURT OF APPEAL

FIFTH CIRCUIT

STATE OF LOUISIANA

01-CA-1162**

APPEAL FROM
THE FORTIETH JUDICIAL DISTRICT COURT,
PARISH OF ST. JOHN THE BAPTIST, STATE OF LOUISIANA,
NUMBER J-2126, DIVISION "A,"
HONORABLE MADELINE JASMINE, PRESIDING.

February 26, 2002

**WALTER J. ROTHSCHILD
JUDGE**

Panel composed of Judges Edward A. Dufresne, Jr.
Sol Gothard and Walter J. Rothschild.

JOHN M. CRUM, JR..

District Attorney
40th Judicial District
Parish of St. John the Baptist
State of Louisiana

RODNEY A. BRIGNAC

Assistant District Attorney
P.O. Box 399
LaPlace, Louisiana 70069
Counsel for State of Louisiana, Plaintiff-Appellee.

BRENDA BRAUD BIRNER

Birner & Birner
2925 Highway 51, Suite D
LaPlace, Louisiana 70068
Counsel for Dale Goris, Defendant-Appellant.

AFFIRMED.

WJR
EAWK
AS

On February 19, 1999, the State of Louisiana, through the Department of Social Services, on behalf of Jacqueline Goris, filed a Rule to Show Cause against Dale Goris for child support for the Goris' two minor children. On March 11, 1999, after a hearing on this issue, the trial court ordered Mr. Goris to pay \$1,073.00 per month in child support to the Department of Social Services, retroactive to the date of the filing of the rule. This award was based on Mr. Goris' salary that he had been earning as a heavy equipment mechanic, which was approximately \$5,987.00 per month.

On September 16, 1999, the trial court held a hearing on a Rule for Contempt that was filed by the State. At this hearing, Mr. Goris was found to be in arrears in the amount of \$5,500.00, and the arrears were made executory. On September 21, 1999, Mr. Goris filed a Rule to Decrease Child Support on the grounds that he had been unemployed for six months.

On December 16, 1999, a hearing was held on Mr. Goris' Rule to Decrease Child Support. Mr. Goris asserted that he had been laid off from his employment as a heavy equipment mechanic on March 6, 1999, which was just before his child support was set at \$1,073.00 per month. The trial judge had apparently based the child support on his

earnings as a heavy equipment mechanic on the basis that Mr. Goris was voluntarily unemployed/underemployed. Mr. Goris testified that since he had been laid off, he had looked for work as a heavy equipment mechanic, but was unable to find any. He further stated that he had not looked for any work other than heavy equipment employment because that was his trade.

Mr. Goris indicated that for the three months prior to this hearing, he had been working part-time for his brother's auto repair shop, Johnny's Auto Repair, as a mechanic where he was receiving 46% commission on the work that he did and that he earned a total of approximately \$1,000 to \$1,200 in these three months. He testified that he did not work every day but that there was no reason why he could not. He stated that he spends every day at Johnny's Auto Repair so that he is available in the event that a job comes up.

Mr. Goris testified that he had been receiving unemployment in the amount of \$215.00 per week since he was laid off and that half of this amount had been garnished for Ms. Goris. However, he stated that his unemployment had terminated approximately September 21, 1999. Mr. Goris asked the court to consider a large community debt to the IRS when determining child support.

At the conclusion of the hearing, the trial judge stated that she did not believe that Mr. Goris had made any sincere efforts to find employment, and she noted that he spent five days per week at a job site waiting for jobs and earning very little money. She further indicated that she believed that he was capable of finding full-time employment. Thereafter, the trial judge ordered the parties to return for a hearing in January 2000, and she encouraged Mr. Goris to make payments to the Department of Social Services on behalf of Ms. Goris before returning to court.

In February 17, 2000, the trial court conducted an additional hearing on the Rule to Decrease and the State's Rule for Contempt. At the hearing, Mr. Goris testified that he began working full-time at Johnny's Auto Repair on January 17, 2000. He indicated that he had paid one-half of his paychecks since that time to Ms. Goris for child support.

However, he also stated that he did not receive an hourly rate as a full-time employee at Johnny's Auto Repair. Rather, he continued to earn a 46% commission for the work that he performed.

At the conclusion of this hearing, the trial court ordered the defendant to return to court on March 16, 2000. On March 16, 2000, the trial court imposed a 90-day jail sentence for Mr. Goris' contempt for failing to pay his child support. On May 29, 2001, the trial judge signed a judgment wherein she ruled that the Rule to Decrease Child Support which was filed on September 21, 1999 was denied.

On July 14, 2000, Mr. Goris filed a Rule to Terminate Support because he had temporary physical custody of the children. A hearing was held on August 17, 2000, and the trial judge ruled that Mr. Goris' child support obligation would be suspended for the six weeks that he had temporary custody of the children, which was from July 1, 2000 through August 19, 2000. On April 7, 2001, Mr. Goris filed another Rule to Terminate Child Support because he had been awarded temporary physical custody of the children, and the trial court ordered his child support obligation terminated as of April 6, 2001.

Mr. Goris appeals the trial court's denial of his Rule to Decrease Child Support which was filed on September 21, 1999. Although Mr. Goris is no longer ordered to pay child support, the child support obligation from September 21, 1999 through July 1, 2000 and August 19, 2000 through April 6, 2001, which was based on the amount of child support ordered in March 1999, is at issue in this appeal of the trial court's denial of Mr. Goris' Rule to Decrease Child Support.

DISCUSSION

An award of child support may be modified if the circumstances of the child or either parent materially changes between the time of the previous award and the time of the motion for modification of the award. LSA-C.C. art. 142; LSA-R.S. 9:311. LSA-R.S. 9:315.11 provides that child support shall be based on income earning potential when a party is voluntarily unemployed or underemployed.

Mr. Goris asserts that he was laid off from his employment as a heavy equipment mechanic on March 6, 1999. Therefore, when Mr. Goris' child support was set at \$1,073.00 per month, he was already unemployed. Although the record does not provide a copy of the transcript from the March 11, 1999 child support hearing, the trial judge apparently based his income on his salary as a heavy equipment mechanic and found that he was voluntarily unemployed. At the time that he filed his Rule to Decrease Child Support, Mr. Goris was working part-time at Johnny's Auto Repair. Therefore, he did not show a change in circumstances such that his income had decreased from the time of the March 11, 1999 child support order until the filing of the Rule to Decrease on September 21, 1999. However, considering Mr. Goris' change in income just prior to the setting of child support, we will address whether he was entitled to a decrease.

It is clear that the trial judge denied the Rule to Decrease Child Support based on a finding that Mr. Goris was voluntarily underemployed at Johnny's Auto Repair. A trial judge has great discretion in deciding whether a modification of child support is justified, and the trial judge's decision will not be disturbed on appeal absent a clear abuse of that discretion. Musacchia v. Musacchia, 00-1670 (La. App. 5 Cir. 1/30/01), 778 So. 2d 1158, 1161. Proof of a change in circumstances does not warrant a reduction in child support where an obligor's inability to pay is caused by his own voluntary actions that render performance difficult or impossible. Koch v. Koch, 97-1600 (La. App. 4 Cir. 4/22/98), 714 So. 2d 63, 66. The question of voluntary underemployment is a question of the good faith of the obligor. Pellerin v. Pellerin, 97-2085 (La. App. 4 Cir. 6/17/98), 715 So. 2d 617, 621. Whether an obligor spouse's actions are in good faith is a factual determination which will not be disturbed absent an abuse of discretion. Id.

Based on the record before us, we cannot say that the trial judge abused her discretion when she found Mr. Goris to be voluntarily underemployed and denied his Rule to Decrease Child Support. Although Mr. Goris testified at the December 16, 1999 hearing that he had attempted to find a job and provided a list of companies that he

presumably called to inquire about employment, he indicated that he had only looked for a job as a heavy equipment mechanic. He testified that he spent everyday at Johnny's Auto Repair waiting for individual jobs to come in where he made very little money, rather than looking for some other type of employment in order to pay his child support. At the February 17, 2000 hearing, Mr. Goris had a full-time job as a mechanic at Johnny's Auto Repair. However, even as a full-time employee, he did not earn an hourly rate, just commission. The commission that he earned as a full-time employee, as of the date of the February 17, 2000 hearing, was substantially lower than his prior salary as a heavy equipment mechanic.

Considering the testimony and evidence in this matter, we find that it was reasonable for the trial judge to conclude that Mr. Goris did not make a sincere effort to find employment with a salary comparable to his prior salary as a heavy equipment mechanic. Therefore, we find that the trial court did not abuse her discretion when she denied Mr. Goris's Rule to Decrease Child Support. Accordingly, the judgment of the trial court is affirmed.

AFFIRMED.



EDWARD A. DUFRESNE, JR.
CHIEF JUDGE

SOL GOTHARD
JAMES L. CANNELLA
THOMAS F. DALEY
MARION F. EDWARDS
SUSAN M. CHEHARDY
CLARENCE E. MCMANUS
WALTER J. ROTHSCHILD
JUDGES

Court of Appeal

FIFTH CIRCUIT
STATE OF LOUISIANA
101 DERBIGNY STREET (70053)
POST OFFICE BOX 489
GRETN, LOUISIANA 70054

PETER J. FITZGERALD, JR.
CLERK OF COURT

GENEVIEVE L. VERRETTE
CHIEF DEPUTY CLERK

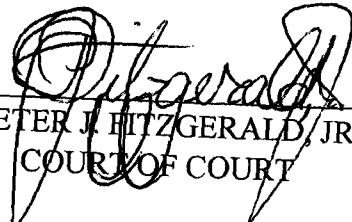
GLYN RAE WAGUESPACK
FIRST DEPUTY CLERK

JERROLD B. PETERSON
DIRECTOR OF CENTRAL STAFF

(504) 376-1400
(504) 376-1498 FAX

CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER
HAS BEEN MAILED OR DELIVERED THIS DAY FEBRUARY 26, 2002
TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY
COUNSEL, AS LISTED BELOW:


PETER J. FITZGERALD, JR.
CLERK OF COURT

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

OFFICIAL 01-CA-1162

Postage \$

Hon. John M. Crum, Jr.
District Attorney
St. John The Baptist Parish
P.O. Box 6
Edgard, Louisiana 70049

Sent To Rodney BRIGNAC, ADA
Street, Apt. No., or PO Box No. P.O. Box 399
City, State, ZIP+4 LAPLACE, LA 70069

PS Form 3800, May 2000

See Reverse for Instructions

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

OFFICIAL 01-CA-1162

Postage \$

Ms. Brenda B. Birner
Attorney at Law
2925 Hwy. 51 Suite D
LaPlace, LA 70068

Sent To
Street, Apt. No., or PO Box No.
City, State, ZIP+4

PS Form 3800, May 2000

See Reverse for Instructions