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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001409-MR

RICHARD B. STAVERMAN — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE WILLIAM J. WEHR, JUDGE
ACTION NO. 87-CI-00795

TERI ANN STAVERMAN,
NOW KNOWN AS TERRY ANN BUCKLER — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, KNOPF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from an order granting the mother's motion to increase child support. The father argues that the court failed to grant him a hearing on his objections, the court's calculation of his income was in error, and that the court erred in finding that he was voluntarily underemployed. Upon review of appellant's arguments, the record herein and the applicable law, we adjudge that the court held a hearing on appellant's exceptions, the court's calculation of his gross income was not in error, and the court did not err in finding him voluntarily underemployed. Hence, we affirm.

Appellant, Richard Staverman, and appellee, Teri Ann Buckler, were divorced on July 15, 1988. Two children were born of the marriage who were two and three years of age at the time of the divorce. Child support was initially established in the amount of $340 a month, and then increased to $400 per month pursuant to an agreed order entered on November 26, 1991. On August 23, 2000, Buckler filed a motion to increase child support, after which a hearing on the matter was held before the domestic relations commissioner on March 21, 2001.

At the hearing, there was evidence presented that Staverman had worked at Dobbs International ("Dobbs") for 19 years as a liquor and equipment manager. There was also evidence that while employed at Dobbs, Staverman also did work on the side as a general contractor. On May 12, 2000, Staverman quit his job at Dobbs because, according to Staverman, the stress of his job was affecting his relationships with family and friends. He stated that he was stressed at the job because there was no room for advancement, he had inferior help, he often worked overtime, and he was required to travel frequently. He testified that the stress made him unhappy and caused him to snap at people. He maintained that, consequently, his wife and son were always stressed too. Staverman insisted that the only way to save his marriage and his relationship with his children was to quit his job.

Upon leaving Dobbs, Staverman became employed at PDC Construction ("PDC") building homes. As an employee of PDC,

Staverman helped build custom homes and, in between home-building projects, poured concrete footers.

The parties stipulated that Buckler earned $2,374 a month. Staverman earned $14.60 an hour in his employment with Dobbs. The domestic relations commissioner found that between his job at Dobbs and his part-time contracting work, Staverman earned: $42,570 in 1997; $35,885 in 1998; and $35,027 in 1999. In the year 2000, he earned $15,297.40 at Dobbs through May 9. When he began working at PDC, he earned $11.00 an hour. Staverman testified that he has not worked full-time every week since working for PDC because the work is not available.

The domestic relations commissioner found that since Staverman voluntarily quit his job at Dobbs to take a job earning less money and working less hours, he was voluntarily underemployed. She then imputed to him a yearly income of $38,000. Based on that figure, she recommended that Staverman's child support obligation be increased to $622.36 a month pursuant to the child support guidelines.

The report of the domestic relations commissioner was filed on April 10, 2001. On April 18, 2001, Staverman filed objections to the domestic relations commissioner's report, and on June 7, 2001, he filed a memorandum in support of his objections. A motion for a hearing on the objections was filed on June 18, 2001. On June 21, 2001, the circuit court entered its order overruling Staverman's objections and adopting the recommendations of the domestic relations commissioner. This appeal by Staverman followed.

The first argument we shall address is Staverman's claim that the court erroneously deprived him of a hearing on his objections pursuant to CR 53.06(2). See Kelley v. Fedde, Ky., 64 S.W.3d 812 (2002). CR 53.06(2) requires that the court afford the parties an opportunity for oral argument before ruling on the objections. Haley v. Haley, Ky. App., 573 S.W.2d 354 (1978). Although Staverman maintains that the court did not conduct a hearing, the record would indicate otherwise. At the beginning of the court's order overruling the objections, the court states that it "held a hearing on the matter at its regular motion hour on April 20, 2001 . . ." Such is consistent with the notice attached to Staverman's objections, which states: "Notice is hereby given that the foregoing has been scheduled for hearing in Division No. One of the Campbell Circuit Court at the Courthouse, Fourth and York Streets, Newport, Kentucky, on Friday, April 20, 2001 at 9:00 A.M." Staverman makes no mention of the April 20 hearing, instead pointing out that he moved for a hearing on June 18, 2001, which he claims was set for July 7, 2001 (of which there is no record), and that the court ruled on the objections before this hearing was held. As CR 53.06(2) only requires an opportunity for one hearing, which was held in this case, we deem this argument to be without merit.

We next turn to Staverman's argument that the lower court erroneously found that he was voluntarily underemployed. KRS 403.212(2)(d) provides:

> 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 parents owe 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 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.

Staverman contends that he was justified in quitting his job at Dobbs and that there was no evidence that he worked less than full-time hours since ending his employment at Dobbs. Staverman appears to be making a similar argument as the father in Gossett v. Gossett, Ky. App., 32 S.W.3d 109 (2000).

In Gossett, prior to the divorce, the father frequently worked overtime in his full-time job and had another part-time job. After the divorce, the father quit his part-time job and stopped working overtime at his full-time job and thereafter moved for a reduction in child support based on the decrease in his income. The lower court held, as a matter of law, that the father was not obligated to continue working more than one job or overtime hours for purposes of determining child support, and reduced his child support obligation accordingly. On appeal, this Court recognized that it was generally inappropriate to impute income from more than one full-time (40-hour week) job. However, we held that whether a parent is voluntarily underemployed in quitting a second job or in no longer working overtime hours is a question of fact, not one of law. We stated

that in determining whether a parent is voluntarily underemployed under those circumstances, the lower court should consider:

> a history of [the] spouse having had two jobs, . . . the previous history of employment, the occupational qualifications, the extent to which the parent may be under employed in the primary job, the health of the individual, the needs of the family, the rigors of the primary job and the second job, and all other circumstances.

Id. at 112, (quoting Bishop Cochran v. Cochran, 14 Va. App. 827, 419 S.E.2d 419 (1992)). The Court further noted:

> The purpose of the statutes and the guidelines relating to child support is to secure the support needed by the children commensurate with the ability of the parents to meet those needs.
> . . .
> Indeed, even some involuntary changes in circumstances are not sufficient grounds for modification if the change is the result of the obligor's voluntary action.

Gossett, 32 S.W.3d at 112-113 (footnote omitted).

Likewise, in the case of a parent quitting a job to take a job with fewer hours and less money, whether that new employment constitutes voluntary underemployment is a question of fact. It is undisputed that Staverman voluntarily quit his job at Dobbs. While we acknowledge that Staverman quit his job for legitimate reasons and it does not appear that he was intentionally trying to reduce his child support obligation, we cannot say the court erred in, nevertheless, imputing to him income from a like job. Staverman has an associate degree in business and gained experience and skills in his 19-year job at Dobbs, much of which was in a management position, which surely would have enabled him to obtain more than a construction job

earning only $11.00 an hour. Moreover, despite his claims to the contrary, Staverman himself testified that he does not work a 40-hour week every week at PDC because of construction slowdowns in the winter months. Given Staverman's history of overtime hours and working side jobs, this is further evidence of his voluntary underemployment. As noted by the domestic relations commissioner, "Interestingly, since [Staverman] became employed in the construction field, he not only works less than full time but also takes on no additional employment." For these reasons, we cannot say that the lower court's finding of voluntary underemployment was clearly erroneous.

We now come to Staverman's numerous arguments assigning error to the court's calculation of his gross income. Staverman first argues that Buckler did not meet her burden of presenting evidence to support the court's calculation of his gross income at $38,000. KRS 403.212(2)(a) provides, "'Income' means actual gross income of the parent if employed to full capacity or potential income if unemployed or underemployed." Staverman points to the evidence establishing that his most recent work experience yielded $27,997 a year. However, this ignores the fact that Staverman was properly found to be voluntarily underemployed, hence, the issue was what Staverman was potentially capable of earning, not what he actually earned. As we shall discuss further below, we believe there was sufficient evidence to impute potential income to Staverman of $38,000.

The domestic relations commissioner arrived at the $38,000 figure by looking at appellant's income from 1997, 1998,

and 1999 and considering his income potential. The commissioner additionally concluded that because there was evidence that Staverman's income was even greater than what he represented, it further justified imputing to him income of $38,000.

Appellant claims that the commissioner erroneously concluded that his 1998 earnings were $35,885. We cannot be certain how the commissioner arrived at this figure. The 1998 tax return for Staverman and his wife reflects around $35,900 in income, but, as pointed out by appellant, approximately $4,800 of it was income attributable to his current wife. However, even if this figure was arrived at in error, we cannot say it was reversible error, because there was nevertheless sufficient evidence to support the imputed income of $38,000. There is no requirement that the past years' incomes be strictly averaged to arrive at an imputed income. The commissioner was using the past years' income not to determine Staverman's actual gross income, but to estimate "potential" income under KRS 403.212(2)(d). Also, the domestic relations commissioner found that there was evidence regarding Staverman's spending that tended to show that he had under-reported his income.

Staverman next argues that the domestic relations commissioner erroneously failed to deduct self-employment expenses from his 1997, 1998, and 1999 incomes. As stated previously, given the finding that Staverman under-reported income and the fact that this past income was used only to estimate "potential income," we cannot say the commissioner's findings regarding Staverman's past income were reversible error.

The next argument, that the commissioner erred in including extraordinary and non-reoccurring overtime in determining Staverman's gross income for 1997 and 1999, has already been addressed above in the context of his voluntary underemployment. Whether to include overtime in the determination of imputed income is an issue of fact, and we cannot say the court's inclusion of overtime was clearly erroneous given Staverman's long history of working overtime hours. See Gossett, 32 S.W.3d at 112.

Staverman's final argument is that the commissioner erroneously imputed an excessive amount of gross income to him. Given Staverman's education, work experience in a management position, history of working overtime, previous income, and the evidence of under-reporting of income, we cannot say the court erred in imputing gross income of $38,000 a year to him.

For the reasons stated above, the judgment of the Campbell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Frank A. Wichmann
Erlanger, Kentucky

BRIEF FOR APPELLEE:

James A. Daley
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