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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2006-CA-000845-MR

PETER M. GANNOTT — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE PATRICIA WALKER FITZGERALD, JUDGE
CIVIL ACTION NO. 04-CI-501700

SUSAN B. GANNOTT — APPELLEE

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: MOORE AND THOMPSON, JUDGES; GRAVES,[1] SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Peter M. Gannott appeals from a Findings of Fact, Conclusions of Law, and Order of the Jefferson Circuit Court modifying his child support and maintenance obligation to his now ex-wife, Susan B. Gannott. Peter argues that the court abused its discretion by imputing income to him during his period of unemployment. We affirm.

[1] Senior Judge John W. Graves, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Peter and Susan were married on May 26, 1990, and divorced by Final Decree of Dissolution of Marriage entered on July 25, 2005. The parties executed a Marital Settlement Agreement that was incorporated by reference into the Final Decree. With regard to maintenance, the Marital Settlement Agreement provides:

> 10. Maintenance
> [Peter] shall pay maintenance to [Susan] as follows and under the following conditions:
>
> a. beginning August 1, 2005, a monthly payment of $3,500.00 for a period of twelve months, such sum to be modifiable under KRS 403;
> b. beginning August 1, 2006, a monthly payment of $3,000.00 for a period of fifty-four months, such sum to be modifiable under KRS 403;
> c. these payments shall be deductible for tax purposes for [Peter] and shall be income to [Susan];
> d. the time period for payment of maintenance by [Peter] to [Susan] is non-modifiable;
> e. all maintenance payment shall be terminated upon the dates set out above or upon the death of either party or upon the remarriage of [Susan], whichever shall first occur.

The parties have three children, Jennifer, born on February 28 1992, Mark, born on September 7, 1994, and Madeline, born September 27, 1996. The parties share joint custody and have a 50/50, week on/week off, parenting schedule. With regard to child support the parties' agreement states "[Peter] shall pay [Susan] as child support for the parties' three children the sum of $1,000.00 per month, effective August 1, 2005, payable on the first day of each month. This amount is based upon the parties' 50/50 schedule."

At the time of the agreement, Peter was earning $195,707.00 annually as an attorney with Mapother and Mapother, P.S.C. (the firm). On September 3, 2005, Peter's salary was reduced to $130,000.00 annually. On December 14, 2005, Peter signed an agreement with the firm decreasing his salary to $50.00 per hour through February 28, 2006, at which the firm would not offer further employment to him. Peter alleges that he was forced to resign. The agreement provided that the firm would pay Peter $35,000.00 within 60 days of his resignation or within 30 days of receiving payment for a case Peter handled on behalf of the firm. The agreement also allowed Peter to release his interest in the firm in exchange for retirement of his debt to it.

Following his resignation, Peter allegedly made substantial efforts to find suitable employment but was unsuccessful. In light of his decreased income, Peter sought to modify his child support and maintenance obligations. On January 27, 2006, the court heard Peter's October 14, 2005, motion to modify child support and maintenance. On March 20, 2006, the court entered an order granting the motion, reducing Peter's maintenance payment to $1,450.00 per month and the child support payment to $806.00 per month. When Peter's motion to alter, amend, or vacate was denied by the court, this appeal followed.

We begin with a general statement of our standard of review. The trial court's findings of fact will "not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Kentucky Rules of Civil Procedure (CR) 52.01. A finding of fact is clearly

erroneous unless it is supported by substantial evidence. *Black Motor Co. v. Greene*, 385 S.W.2d 954, 956 (Ky. 1964). Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. *Secretary, Labor Cabinet v. Boston Gear, Inc., a Div. of IMO Industries, Inc.*, 25 S.W.3d 130, 134 (Ky. 2000). Legal issues will be reviewed de novo. *Sherfey v. Sherfey*, 74 S.W.3d 777 (Ky.App. 2002).

Peter first argues that the trial court abused its discretion by imputing income to him because he was not "voluntarily" underemployed or unemployed. We disagree.

> Kentucky Revised Statute (KRS) 403.212(2)(d) provides that
>
> > [i]f a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income . . . . 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.

Here, contrary to Peter's contention otherwise, the trial court did not find that Peter was not voluntarily unemployed or underemployed. Rather, the court stated that Peter "characterizes his resignation as forced and an action taken to avoid being terminated," not that the court itself made any such finding. Moreover, it is immaterial that the court further found that Peter had "made substantial efforts to investigate and pursue

appropriate openings" when seeking employment. *See* KRS 403.212(2)(d). Although not explicitly stated, the court logically must have found that Peter was voluntarily unemployed because it stated "[f]or purposes of calculating child support this Court **must** impute potential income to Mr. Gannott based upon his recent work history, occupational qualifications and job opportunities in the community." (Emphasis ours). Indeed, the court's statement nearly mirrors its statutory obligation to impute income to Peter under KRS 403.212(2)(d), regardless of whether Peter intended to avoid or reduce his child support obligation. Thus, the court did not err when it imputed income to Peter in making its modification of the child support obligation.

Peter next argues that the court abused its discretion when it imputed income to him even though no jobs were available. We disagree.

The court was well aware of Peter's contention that he was having difficulty finding suitable employment. Nevertheless, the court also was aware of its obligation to base Peter's potential income on "his recent work history, occupational qualifications and job opportunities in the community." In its order, the court took notice of this statutory obligation and stated "[i]n light of these factors and the evidence before the Court, this Court will impute potential monthly income of $10,833.00 to Mr. Gannott for purposes of calculating child support." The court carefully determined Peter's recent work history, including his much reduced income of $50 per hour. The court was also aware of Peter's occupational qualification as an accomplished attorney in the community. Finally, based upon the evidence before the court, and being well aware of Peter's difficulty finding

suitable employment, it was well within the court's discretion to determine what job opportunities existed in the community. In light of these findings, we cannot conclude that the court abused its discretion.

Peter next argues that the court improperly included his alleged capital loss as income. Peter's argument is without merit.

Peter contends that the $35,000.00 he received from the firm should not have been considered as income because his basis in the firm's stock was "well over $100,000, so the $35,000 payment did not produce a 'capital gain,' but a large loss." In support of his argument, Peter cites KRS 403.212(2)(b) wherein it provides in part that "'[g]ross income' includes income from any source . . . and includes but is not limited to income from . . . capital gains . . . ." Peter argues that because the $35,000 payment did not produce a capital gain it should not have been included as income. Without belaboring this meritless issue, it suffices to say that the clear intention of KRS 403.212(2)(b) is to include "income from any source" including Peter's alleged loss. Thus, the court properly included that figure in making its determination of Peter's income.

Peter next argues that the court abused its discretion in awarding maintenance while his income was substantially reduced and he was unemployed. Again, we disagree.

In support of his argument, Peter contends that the court did not properly assess Susan's financial resources, her earning capacity, as well as his ability to meet his

own needs while paying maintenance. We note at the outset, that the court did not award maintenance to Susan, but rather modified an existing maintenance award. An award, we hasten to add, that Peter himself agreed to in the Marital Settlement Agreement. Nevertheless, Peter was successful in his endeavor to reduce both his child support and maintenance obligations. Peter's motion was styled a Verified Motion to Recalculate Child Support and Modify Maintenance. Peter did not seek to terminate his maintenance obligation, but rather only sought to reduce it. Toward that end, Peter's child support and maintenance obligations were considerably reduced.

Matters relating to maintenance, including modification, are questions delegated to the sound and broad discretion of the trial court. An appellate court will not disturb the trial court's order unless the decision is unsupported by substantial evidence. *Bickel v. Bickel*, 95 S.W.3d 925 (Ky.App. 2002). A modification of a maintenance award is governed by KRS 403.250 which states: "[T]he provisions of any decree respecting maintenance may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable." KRS 403.250(1). Here, Peter made such a showing and the trial court appropriately modified the maintenance award.

The court also properly considered the KRS 403.200(a)(1) factors including that "Mr. Gannott's income is sufficient to meet his needs while contributing a lesser amount to the support of Ms. Gannott, and Ms. Gannott continues to lack sufficient income and resources to meet her needs." Upon a thorough review of the record, we

conclude that the court's decision was based upon substantial evidence and that it did not abuse its discretion when it reduced Peter's maintenance obligation by over $2000.00 per month.

Peter also argues that the court erred because his "maintenance obligation should be lifted retroactive to the date he filed his Motion for Modification, which was October 14, 2005." We disagree.

KRS 403.213(1) provides, in pertinent part, 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 . . . ." Peter does not cite, nor are we aware of, any further requirement upon the trial court to set the effective date of modification the same as the date the motion was filed. The effective date of modification is within the sound discretion of the trial court. *See Ullman v. Ullman*, 302 S.W.2d 849, 850-51 (Ky. 1982); *Giacalone v. Giacalone*, 876 S.W.2d 616, 620 (Ky. 1994). Peter's argument is without merit.

Peter also argues that the court abused its discretion by arbitrarily deviating from the child support guidelines in KRS 403.212. We disagree.

We begin by noting that Peter was successful in having his child support obligation reduced. To the extent that the court deviated from the child support guidelines, it was wholly to Peter's benefit. Under the guidelines, Peter would normally owe $2,102.00 per month in child support. Under the Marital Settlement Agreement, signed by Peter only months before he brought the motion for modification, Peter was

required to pay $1,000.00 per month in child support. The modification of Peter's child support obligation to $806.00 per month amounts to a nearly 20% reduction from his current child support obligation. Moreover, the court did not arbitrarily deviate from the child support guidelines as Peter argues. Rather, the court carefully set out its justification for deviating from the child support guidelines based upon an actual sharing of expenses by the parties and their relatively equal parenting time. The court stated that "[t]his is evidence that a substantial shift of expenses has occurred between the parents which was not anticipated by the child support guidelines, and is therefore a 'factor of an extraordinary nature' under KRS § 403.211(3)(g) making application of the guidelines inappropriate."

Our review of the record confirms that the trial court issued its well-reasoned decision to modify the child support award only after careful consideration of the financial situations of both parties, the 50/50 shared custody arrangement and child educational expenses. In short, we cannot say that the court abused its discretion in modifying and reducing Peter's child support obligation.

Finally, Peter argues that "the court sub judice committed reversible error by relying on a mathematical formula to set the child support amount." We disagree.

In support of his argument, Peter cites *Downing v. Downing*, 45 S.W.3d 449 (Ky.App. 2001). *Downing* concerned a trial court's use of a mathematical projection to determine an award of child support where the combined parental gross income of the parents exceeded the highest level set out in the child support guidelines. In reversing,

this court stated that "a strict reliance on linear extrapolation could result in vast increases in child support unwarranted by the children's actual needs. Beyond a certain point, additional child support serves no purpose but to provide extravagance and an unwarranted transfer of wealth." *Id.* at 455-56 (citing *Ball v. Peterson*, 912 P.2d 1006, 1014 (Utah App. 1996). Such is not the case here. The court substantially reduced Peter's child support payment for his three children to $806.00 per month. That can hardly be thought of as an "unwarranted transfer of wealth" as contemplated by *Downing*. Peter's argument is without merit.

Peter makes various other enumerated arguments which we construe as overlapping and redundant with the foregoing. We will not specifically address those arguments other than to note that the trial court properly considered the substantial evidence before it and did not abuse its discretion in modifying the maintenance or child support obligations.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

THOMPSON, JUDGE CONCURS.

MOORE, JUDGE CONCURS IN PART, DISSENTS IN PART AND FILES SEPARATE OPINION.

MOORE, JUDGE: I concur with the majority's well-reasoned opinion regarding the income imputed to Peter. I respectfully dissent, however, regarding the trial court's imputed income to Susan. In the trial court's findings of fact, it noted that Susan has a Bachelors Degree and some hours toward a Masters Degree in teaching. The trial court further found that Susan has a teaching certificate in three other states but has

not applied for one in Kentucky or made any efforts to determine what it would take to be certified in Kentucky. At the time the trial court made its findings, Susan was a preschool teacher making $12.00 per hour for a 63 hour pay period. The trial court found that she was not underemployed during the school year. It, however, found her to be voluntarily underemployed in the context of not working during the summer months. Accordingly, it imputed to her earnings of $9.00 per hours for twelve weeks during the summer months. Based on the foregoing, the trial court imputed income to Susan of $1,620.00 per month.

Pursuant to KRS 403.212(2)(d), "[p]otential 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." (Emphasis added). The trial court only based Susan's income on her recent work history of being a preschool teacher and did not include her occupational qualifications, prevailing job opportunities and earnings level in the community.

Peter presented evidence that public school teachers in Jefferson County start at a salary of $31,173.00 and that there were more than 100 such jobs available in the public school system. The fact that Susan is not certified to teach in Kentucky is because she has made no effort to become certified. In her brief, she does not contend that she lacks the education or other qualifications to become certified to teach here. Accordingly, I believe the trial court abused its discretion in failing to include in its

otherwise well-reasoned conclusions that Susan is voluntarily underemployed for the school year and that a much higher income should have been imputed to her.

BRIEF FOR APPELLANT:

Peter M. Gannott
Louisville, Kentucky

BRIEF FOR APPELLEE:

Victoria Ann Ogden
Louisville, Kentucky