RENDERED: AUGUST 29, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002098-ME

WILLIAM EMMETT NASH SR. APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE O. REED RHORER, JUDGE
ACTION NO. 06-CI-00803

SUSAN BETH NASH APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND STUMBO, JUDGES; BUCKINGHAM, SENIOR JUDGE.[1]

BUCKINGHAM, SENIOR JUDGE: William Emmett Nash, Sr. (Bill), appeals from a Findings of Fact, Conclusions of Law and Order and a Decree of Dissolution of Marriage entered by the Franklin Family Court on August 2, 2007. He contends that the court erred in ordering him to pay his ex-wife, Susan Beth

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

Nash (Beth), maintenance and erred in imputing income of $5,000 per month to him for purposes of calculating his child support obligation. We affirm.

Bill and Beth were married on December 15, 1995. They separated on June 7, 2006. There were two children born of the marriage: William Emmett Nash, Jr., and Kathryn Coleman Nash. William Jr. was ten years old at the time of the divorce, and Kathryn was six years old. The parties were awarded joint custody of the children, with Beth designated as the primary residential provider.

At the time of the divorce, Beth was 40 years old and had been a teacher employed by the Franklin County Board of Education for 16 years. Her salary was $3,616 per month, or approximately $44,000 annually. Early in the marriage, Bill had been employed as a golf professional. In 1999, the parties purchased a Subway franchise, which they sold in 2005. Bill had served as owner/operator of the business. At the time of the divorce, Bill was 44 years old and held two part-time jobs, working for UPS and for Action Landscape. Bill earned $8.50 per hour working for UPS and $10.00 per hour working for Action Landscape. The court found his gross monthly wage to average $1,909 per month, or approximately $23,000 annually.

The parties owned a residence, and the court ordered that Beth could remain living in the residence until it sold, at which time the proceeds remaining after the payment of indebtedness would be divided equally between the parties. The court ordered that the parties each pay one-half of the $1,400 monthly mortgage payment. Beth was awarded a 2000 Ford Windstar van that had a value

of $7,100 with no debt. Bill was awarded a 2001 Ford Windstar van that had a value of $8,225 with a debt of $7,382 to be paid from the proceeds from the sale of the residence. Until the house sold, Bill was responsible for the payments on his van.

Beth was awarded her state deferred compensation account that had a net value of $6,000. By agreement, she was also awarded her teachers retirement account. Bill was awarded an IRA retirement account in his name valued at $1,558. Each party was awarded his or her nonmarital items, and the parties agreed to each keep their own bank accounts and life insurance policies.

In addition to the mortgage indebtedness, the parties owed the IRS $18,500, the payment of which was secured by a lien on the marital residence. The debt was to be paid from the proceeds of the sale of the residence. In addition, there was a credit card debt of $11,000 that also was to be paid from the proceeds of the sale of the residence. Likewise, the debt owed on Bill's Windstar van was to be paid from those proceeds. Each party was ordered to pay his or her respective attorney fees.

None of the above items are contested by Bill in this appeal. Rather, he challenges the court's award of maintenance and child support. Concerning maintenance, the court found that Beth "lacks sufficient property to provide for her reasonable needs and is not able to support herself through appropriate employment and she is entitled to the payment of maintenance pursuant to KRS 403.200(1)." After considering the factors set forth in KRS 403.200(2), the court

ordered Bill to pay Beth "$500.00 per month until the sale of the property; upon that time it shall decrease to $250.00 [per month] for a total period of five (5) years in maintenance payments." Concerning child support, the court stated that "it is perfectly reasonable that Mr. Nash should be able to earn at least $5,000.00 per month." For purposes of calculating Bill's child support obligation, the court imputed that income to Bill and ordered him to pay child support of $890 per month. This appeal by Bill followed.

Bill first argues on appeal that the court's award of maintenance to Beth "is clearly erroneous and constitutes a misapplication of the law." In support of his argument, he states that, in light of her employment and the assets she was awarded, Beth "did have sufficient property to provide for her reasonable needs." He notes that, in addition to her salary as a teacher, Beth was awarded her teachers retirement account, her deferred compensation account, and a vehicle unencumbered by any debt. Further, he notes that Beth is allowed to live in the marital residence until it is sold and that she had, at one time, earned additional income by working part-time at Kroger. Also, Bill explains that both he and Beth agreed they had lived beyond their means during the marriage.

In addition, Bill contends that the court failed to properly consider, as required by KRS 403.200(2)(f), his ability to meet his own needs while paying the required maintenance. *See Dotson v. Dotson*, 864 S.W.2d 900, 903 (Ky. 1993). He states that his gross income was $1,909 per month and that such income was spent entirely on child support ($890), mortgage payment ($700), and car payment,

leaving him nothing on which to live and nothing from which he could pay any maintenance.

In response, Beth claims monthly expenses of approximately $4,400 per month and states that she cannot "sustain even a modest standard of living" without financial assistance. She claims that she was required to turn to family members for money to make ends meet. *See Leitsch v. Leitsch*, 839 S.W.2d 287, 289 (Ky.App. 1992). She also notes that KRS 403.200(2)(f) does not require the court to consider whether Bill is actually meeting his needs. Rather, the statute requires only that Bill have the ability to meet his needs. *See id*. Further, she notes that her right to occupy the marital residence was only until the property sold. Also, she was required to make one-half of the mortgage payment while she resided there.

"In order to reverse the trial court's determination [on maintenance], a reviewing court must find either that the findings of fact are clearly erroneous or that the trial court has abused its discretion." *Perrine v. Christine*, 833 S.W.2d 825, 826 (Ky. 1992). "Maintenance determinations are within the sound discretion of the trial court." *Platt v. Platt*, 728 S.W.2d 542, 543 (Ky.App. 1987). An appellate court may not disturb the discretion of the trial court in awarding maintenance "unless absolute abuse is shown." *Clark v. Clark*, 782 S.W.2d 56, 60 (Ky.App. 1990). *See also Platt*, *supra*. Appellate courts are required to "maintain confidence" in the determinations of the trial court. *Clark, supra.*

In *Lawson v. Lawson*, 228 S.W.3d 18 (Ky.App. 2007), this court held that "[w]e are therefore foreclosed from vacating a trial court's findings in a divorce proceeding unless they are found to be 'clearly contrary to the weight of the evidence.'" *Id*. at 21. We cannot say that there was not factual support for the finding of the trial court that Beth lacked sufficient property to provide for her reasonable needs and is unable to support herself through appropriate employment according to the standard of living established during the marriage.[2] *See Casper v. Casper*, 510 S.W.2d 253, 255 (Ky. 1974). *See also Weldon v. Weldon*, 957 S.W.2d 283, 285 (Ky.App. 1997). Beth produced evidence of her monthly expenses, and she testified that she had to rely on financial assistance from family members to make ends meet. Also, considering Bill's education, occupational qualifications, and work history, we cannot say that there was not factual support for the finding of the trial court that Bill "should be able to earn at least $5,000 per month."[3] In short, we cannot say that the court abused its discretion in awarding maintenance in the above amount to Beth.

Bill's second argument is that the trial court erred in imputing income of $5,000 per month to him for purposes of calculating his child support obligation. KRS 403.212(2)(d) states in part that "[i]f a parent is voluntarily unemployed or

[2] Citing *Williams v. Williams*, 500 S.W.2d 79 (Ky. 1973), Bill complains that the court failed to consider that Beth's use of the marital residence amounts to maintenance. In *Williams*, the court held that "the award to the wife of the use of the residence was alimony rather than a grant of property." *Id*. at 80. The facts in this case, however, are distinguishable from those in *Williams*. In *Williams*, the wife was given long-term use of the residence. Here, Beth had use of the residence only until the residence sold. Further, she was responsible for one-half of the monthly mortgage payment until that time.

[3] Beth argued that Bill's was underemployed primarily due to his abuse of alcohol. However, the court never made such a finding in this regard.

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." *Id*.

Bill first argues that the court never made any determination that he was underemployed. Rather, the court found that "it is perfectly reasonable that Mr. Nash should be able to earn at least $5,000 per month." In light of Bill's monthly income of $1,909, we conclude that the court's finding that Bill should be able to earn $5,000 per month amounts to a determination that Bill was underemployed. Further, Bill made no motion for the court to make additional findings in that regard. *See* Kentucky Rules of Civil Procedure (CR) 52.04.

"[W]hether a child support obligor is voluntarily underemployed is a factual question for the trial court to resolve." *Gossett v. Gossett*, 32 S.W.3d 109, 111 (Ky.App. 2000). Based on Bill's education, past employments, and earnings history, we cannot say that there was not factual support in the record for the court's finding.

Finally, citing *McKinney v. McKinney*, 813 S.W.2d 828 (Ky.App. 1991), Bill asserts that "a finding of bad faith is required under this statutory provision [KRS 403.212(2)(d)] to find an individual to be voluntarily underemployed even though the statutory language makes no mention of a bad

faith requirement." He claims that his income is not the result of any bad faith on his part in attempting to obtain suitable employment.

KRS 403.212(2)(d) was amended in 1994 (after *McKinney* was rendered) "to eliminate the need of the trial court before imputing income to find that the parent acted in bad faith." *Commonwealth, ex rel. Marshall v. Marshall*, 15 S.W.3d 396, 401 (Ky.App. 2000). Thus, it is not relevant whether Bill's underemployment is due to bad faith or not.

The judgment of the Franklin Family Court is affirmed.

STUMBO, JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS.

CAPERTON, JUDGE, DISSENTING: I dissent and would vacate the judgment and remand to the trial court for findings consistent with the requirements of KRS 403.212(2)(d) and *Gossett v. Gossett,* 32 S.W.3d 109 (Ky. App. 2000).

Appellant complains that the trial court failed to make a finding of voluntary unemployed/underemployment based upon factors found in KRS 403.212(2)(d). Appellant also argued that *Gossett* requires explicit findings. I agree that the factors must be considered and the findings must be explicit.

KRS 403.212(2)(d) requires that, before a court may find voluntary unemployment/underemployment, a court shall consider "employment potential and probable earning levels based upon the obligor's or obligee's recent work his-

tory, occupational qualifications, and prevailing job opportunities and earning levels in the community."

I take the statute to mean just what it says. The trial court is to consider *employment potential* and *probable earnings* based on an *individual's* recent *work history* and occupational *qualifications* in light of the *prevailing* job *opportunities and earnings* in their community. The statute is focused on an individual's abilities (as shown by employment history in light of occupational qualifications) and the prevailing job opportunities and earnings in their community. "Prevail" is defined in Black's Law Dictionary, 1226, 8th ed.,(2004), as "[t]o be commonly accepted or predominant." Thus, the mere fact you may meet the qualifications to file as a candidate for president of the United States does not mean you are voluntarily unemployed/underemployed if you do not pursue the position; this is the prevailing job opportunity and earnings factors. Further, if during the marriage your spouse fails to utilize their full potential in the area of employment and earnings, one should not expect the spouse to achieve full potential or become an overachiever upon divorce; this is the recent work history factor.[4] No one factor may be singled out; all factors must be considered in assessing an individual's employment potential and probable earnings.

Gossett tacitly adopted the reasons in *Cochran v. Cochran,* 14 Va. App. 827, 419 S.E.2d 419 (1992), wherein the Virginia Court of Appeals consid-

[4] I hasten to add that the needs of the family cannot be ignored; divorce often requires more effort by the parties to meet the needs of the family. However, it is sad but often true that a couch potato during marriage is not likely to sprout a garden upon divorce.

ered factors such as the health of the individual, the needs of the family, and the rigors of the job.[5] I see no reason that such factors should not be considered sub judice. The court in *Gossett* found that explicit findings should be made by a court concerning circumstances surrounding a reduction of income. Consideration of all factors underlies and is a necessary basis for the explicit findings necessary to determine whether an individual is voluntarily unemployed/underemployed. I respectfully dissent.

BRIEF FOR APPELLANT:

Jack W. Flynn
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Crystal L. Osborne
Lexington, Kentucky

[5] *Cochran* was a case wherein the court addressed the issue of whether an individual should have income imputed from more than one job. Thus, the "rigors" referenced both a primary and a secondary job. However, such a factor would appear to apply to any job.