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NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2007-CA-002603-ME

ELDON ISENBERG

APPELLANT

APPEAL FROM WARREN CIRCUIT COURT  
v. HONORABLE MARGARET RYAN HUDDLESTON, JUDGE  
ACTION NO. 00-CI-00144

LAURA LAVICTOIRE (NOW ISENBERG)

APPELLEE

AND

NO. 2008-CA-000009-ME

COMMONWEALTH OF KENTUCKY,  
CABINET FOR HEALTH AND FAMILY  
SERVICES

CROSS-APPELLANT

CROSS-APPEAL FROM WARREN CIRCUIT COURT  
v. HONORABLE MARGARET RYAN HUDDLESTON, JUDGE  
ACTION NO. 00-CI-00144

ELDON ISENBERG

CROSS-APPELLEE

OPINION

AFFIRMING CASE NO. 2007-CA-002603-ME AND  
REVERSING AND REMANDING 2008-CA-000009-ME

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BEFORE: ACREE AND CLAYTON, JUDGES; GUIDUGLI,<sup>1</sup> SENIOR JUDGE.

CLAYTON, JUDGE: This is an appeal from a decision of the Warren Circuit Court regarding child support due Appellee, Laura LaVictoire aka Laura Isenberg from the Appellant, Eldon Isenberg.

### **FACTUAL SUMMARY**

Eldon Isenberg is the father of a child with Laura LaVictoire Isenberg. When Eldon was adjudged the father of Laura's child, he was married to Jani Isenberg. He and Jani entered into a Legal Separation, a condition of which was that Eldon would pay Jani \$2,000.00 per month in maintenance payments for twenty (20) years. This Legal Separation was entered by the same Warren Family Court as the one from which this appeal is taken.

Based upon the finding that Eldon was the father of Laura's child, Judge Margaret Huddleston of the Warren Family Court entered an award of child support to Laura. Eldon contended that the maintenance payments being made to Jani should be deducted from his income pursuant to KRS 403.212(g)(1). That section sets forth that the amount of any pre-existing order for maintenance to prior spouses "to the extent payment is actually made" is not to be included in calculating a payor's income in determining the amount of child support due under Kentucky's child support guidelines.

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<sup>1</sup> Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

On March 14, 2007, an evidentiary hearing was held before the Warren Family Court. Testimony and evidence was presented regarding the maintenance payments. Eldon contended that he had made them, however, opposing counsel set forth evidence in the form of tax returns and the living arrangements between the parties to prove that he did not. The family court found that Eldon had not made the payments and had, in fact, perpetrated a fraud upon the court by hiding income. Eldon has now appealed the issue of whether he perpetrated such a fraud.

The Cabinet for Health and Family Services (the “Cabinet”) has filed a Cross-Appeal contending that the family court did not make a finding regarding Eldon’s underemployment and any imputed income he should have been accountable for.

### **DISCUSSION**

Kentucky Rules of Civil Procedure (CR) 52.01 provides that “[f]indings of fact shall 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.” A judgment is not “clearly erroneous” if it is “supported by substantial evidence.” *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is “evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Id.*, citing *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972).

As set forth above, KRS 403.212(g)(1) provides that “[t]he amount of pre-existing orders for current maintenance for prior spouses to the extent payment is actually made” is not to be included in income of the party responsible for making child support payments. Eldon contends that the \$2,000.00 per month he is obligated to pay Jani pursuant to their Decree of Legal Separation should be deducted from his income. The family court did not agree with his position.

The court below found that “the Respondent committed an act of fraud against the Court by testifying under oath that he continues to make maintenance payments to Jani Isenberg.” Order at pp. 2-3. She based this decision on the fact that they continued to live in the same residence even after their Decree of Legal Separation had been entered. Eldon contends that the family court made the decision based purely upon his income tax returns filed for the years 2003 and 2004. He argues that pursuant to Justice Lambert’s dissent in *Mercer v. Mercer*, 836 S.W.2d 897 (Ky. 1992), a court is not bound by the Internal Revenue Service (IRS) Code definition of income in determining child support awards. This Court disagrees with Eldon’s position.

To begin, Eldon points to the dissenting opinion, rather than the majority’s for his proposition. The principal issue in *Mercer* was “whether the accumulation of interest from nonmarital funds deposited in a financial institution is income and to be treated as marital property or is merely an increase in value of a nonmarital asset which is to be treated as nonmarital property.” *Id.* at 898.

While Justice Lambert commented in his dissent on KRS 403.190, it was dicta and we are not bound by it.

Under Internal Revenue Code (I.R.C.) § 71(b)(1)(C), a payment to a spouse is considered maintenance if the payee and payor are not members of the same household. The purpose of this regulation is to avoid the hiding of assets. The family court found that Eldon was attempting to do just that, hide his assets so that his child support payments to Laura would be smaller. We agree with the family court. Eldon and Jani continued to reside in the same home and, in fact, moved to another home together. This is a clear indication that their Legal Separation was an attempt to hide income from the court when child support payments were being calculated. The family court based its decision on substantial evidence and we will not overturn it.

The Cross-Appeal in this action involves Eldon's potential income. The Cabinet preserved this issue when Eldon filed his Motion to Alter, Amend or Vacate with the trial court. The Cabinet argues that Eldon's potential income is the same as the income he was earning with a previous employer. Eldon's testimony indicated that he left his prior employment with Progressive Insurance in December of 2006 so that he would not have to travel as often. Eldon earned less money with his new employer, Team Construction. The Cabinet argues that Eldon was voluntarily underemployed and we agree with its argument.

KRS 403.212(2)(d) provides that a child support calculation be based upon the parent's potential income if he or she is voluntarily unemployed or

underemployed. A court may find a parent underemployed even if he or she was not intending to avoid or reduce any child support obligation. Eldon's decision to leave a higher paying job for a lower one based only on the possibility of less travel could be sufficient for a court to find he was voluntarily underemployed and impute income accordingly. Thus, we will remand this action to the trial court for a decision as to whether Eldon was voluntarily underemployed and whether income should be imputed.

### CONCLUSION

We affirm the decision of the trial court on the issue of Eldon's maintenance payments to Jani and remand this action to the trial court for a decision on Eldon's possible underemployment.

ACREE, JUDGE, CONCURS.

GUIDUGLI, SENIOR JUDGE, CONCURS IN RESULT ONLY.

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