

RENDERED: FEBRUARY 27, 2009; 2:00 P.M.
NOT TO BE PUBLISHED

OPINION OF DECEMBER 31, 2008, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001977-ME

CALVIN E. LEE

APPELLANT

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE TAMRA GORMLEY, JUDGE
ACTION NO. 96-CI-00107

RUTH FERGUSON, (FORMERLY LEE)

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * **

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

CAPERTON, JUDGE: Calvin Lee appeals the judgment and order of the Scott Circuit Court which denied his motion to modify child support. Lee moved the court to reduce his child support obligation as both parties had retired. The trial

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 the Kentucky Revised Statutes (KRS) 21.580.

court, pursuant to Ruth Ferguson's response to Lee's motion, increased the child support obligation and found that Lee was voluntarily underemployed. Lee argues that the trial court's finding that he was voluntarily underemployed requires specific findings of facts, which in this case are unsupported by substantial evidence. After a review of the record before us, we agree with Lee. Accordingly, we vacate and remand to the trial court.

Lee presents three arguments to this Court. First, that the trial court erred in resolving disputed factual issues without taking testimony, leaving its decision unsupported by the evidence. Second, that Lee is entitled to have child support recalculated based upon both parties' current, post-retirement, reduced incomes. Third, that neither Lee nor Ferguson are voluntarily underemployed as both are in the identical and appropriate circumstances of age and retirement.

Ferguson argues that the trial court did not err in resolving the matter and that oral testimony was not necessary; that Lee is not entitled to have his child support reduced as he is voluntarily underemployed; and that the circumstances of the parties are not identical and the trial court properly found that only Lee was voluntarily underemployed.

On July 13, 2007, Lee filed a motion to reduce his child support. In support of that motion, Lee stated that both parties had retired since the last time child support was established and that the child support obligation should be set commensurate with the parties' current income. Attached to the motion was the notice for a hearing. No exhibits were attached to the motion.

Ferguson filed a combination response and a motion to increase child support. In the response and motion she alleged that Lee had failed to comply with Kentucky Revised Statutes (KRS) 403.212 by not verifying his income to the court with proper documentation. Ferguson further alleged that Lee was voluntarily underemployed. Exhibits attached to Ferguson's response and motion included Ferguson's retirement income, child support worksheets, and a W-2 for Lee covering half of a year. Ferguson also attached a child support worksheet for Lee's imputed income.²

At the motion hour on September 5, 2007, Lee's motion for a reduction in child support was denied. Lee claims that the motion was denied without an opportunity to present testimony or any factual evidence in support of his position.³ The trial court, based on its own notes, read an order from the bench. This order was written on the docket, noted as a final and appealable order, and signed by the judge. The September 5, 2007, order stated:

Court reviewed pleadings submitted by both parties and makes the following ruling: Mr. Lee was aware of his child support obligation at the time he voluntarily elected to buy out the remaining years of his employment and retire early. He was also aware of the drastic reduction in income that would result. Mr. Lee voluntarily created his situation. The Court will impute to him as if [he] had

² Note that the W-2 offered as an exhibit is allegedly for only a half-year of employment. Ferguson then took the amount listed, multiplied by two for a full year, and then divided by 12 to get a per-month amount for the worksheet.

³ While a video record of the motion hour was designated on appeal, the clerk indicated that no video existed.

continued in his preretirement employment. Motion to modify overruled, support obligation is \$568.80.⁴

Thereafter, Lee filed a motion to vacate the September 5, 2007, order.

Lee stated that the court made findings of fact without taking testimony as to factual issues in dispute and failed to make findings on important relevant issues. The motion also stated that the finding of voluntary underemployment was not supported by any evidence, let alone substantial evidence. Attached to the motion to vacate was an affidavit from Lee. The affidavit averred that Lee had developed a stress related disorder that led him to being asked to retire.⁵ In addition, the affidavit stated that Lee had lost his license as a class IV water treatment plant operator and, thus, could not work at any water treatment plant in Kentucky. Lee had been a water treatment plant operator for twenty-two (22) years.

The motion to vacate was overruled at motion hour on September 19, 2007. The written order on the docket was signed by the judge and simply stated that the motions of the defendant were overruled.

While a trial court retains broad discretion in ruling on motions to modify child support, this discretion is not unfettered. *See Wilhoit v. Wilhoit*, 521 S.W.2d 512, 513 (Ky. 1975). This Court will not disturb the trial court's findings of fact unless clearly erroneous. "Findings of fact are not clearly erroneous if supported by substantial evidence." *Janakakis-Kostun v. Janakakis*, 6

⁴ We shall treat the increase in the child support obligation as a denial of Lee's motion to decrease child support and a simultaneous grant of Ferguson's motion to increase child support.

⁵ The affidavit further avers that if he had failed to retire, he would have been fired.

S.W.3d 843, 852 (Ky.App. 1999). Substantial evidence is that evidence, when taken alone or in the light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable people. *Id.*, citing *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972).

In the case *sub judice*, the trial court found that Lee was voluntarily underemployed. KRS 403.212 requires that the finding of voluntary underemployment must be based on a finding of fact. *See also Gossett v. Gossett*, 32 S.W.3d 109 (Ky.App. 2000). KRS 403.212(d) requires that, before a court may find voluntary unemployment or underemployment, a court shall consider “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.”

Therefore, 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. *Gossett* requires explicit findings by the court concerning the circumstances surrounding a reduction in income, which is the necessary basis for determining whether an individual is voluntarily unemployed or underemployed.

Based on the record before this Court, we do not find substantial evidence to support the trial court's finding that Lee is voluntarily underemployed; nor do we find in the record the explicit findings required by *Gossett*. As such, we

agree with Lee that the trial court's finding of his voluntary underemployment is not supported by substantial evidence within the record.

In addition to its finding of voluntary underemployment, the trial court also determined that modification of child support was appropriate in this instance. However, child-support awards may be modified only upon a showing of a material change in circumstances that is substantial and continuing. *See* KRS 403.213 and *Goldsmith v. Bennett-Goldsmith*, 227 S.W.3d 459 (Ky.App. 2007). Under *Goldsmith*, the decision to modify a child-support obligation will be reviewed under an abuse of discretion standard. In light of the record, the trial court could not determine that there was a material change in circumstances that is substantial and continuing. Therefore, the trial court exceeded its discretion in this respect.

As the record does not support the findings of the trial court concerning voluntary underemployment nor a modification of child support, we need not address the remaining arguments presented by Lee until appropriate findings of facts are entered. Therefore, we vacate and remand to the trial court to make appropriate findings of fact based on a sufficient record which may require a rehearing.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Neil E. Duncliffe
Georgetown, Kentucky

BRIEF FOR APPELLEE:

Jennifer McVay Martin
Lexington, Kentucky