

RENDERED: OCTOBER 8, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-002329-ME

JON<sup>1</sup> THOMAS YOST

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT  
HONORABLE WILLIAM B. MAINS, JUDGE  
ACTION NO. 07-CI-00207

SAMANTHA BALLARD YOST  
AND MONTGOMERY COUNTY ATTORNEY,  
CHILD SUPPORT DIVISION

APPELLEES

OPINION  
AFFIRMING IN PART, REVERSING IN PART  
AND REMANDING

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BEFORE: CLAYTON AND KELLER, JUDGES; LAMBERT,<sup>2</sup> SENIOR  
JUDGE.

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<sup>1</sup> Notice of Appeal incorrectly spelled Jon as John.

<sup>2</sup> Senior Judge Joseph E. Lambert 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.

CLAYTON, JUDGE: Jon Thomas Yost appeals from the Montgomery Circuit Court's Order entered November 3, 2009, which adopted the Domestic Relations Commissioner's (DRC's) recommendations and entered an order overruling Jon's exceptions. After review of the parties' arguments, the record, and applicable law, we affirm in part, reverse in part, and remand for additional proceedings consistent with this opinion.

#### FACTUAL AND PROCEDURAL BACKGROUND

Jon and Samantha were married on October 22, 1999, in Montgomery County, Kentucky. They separated in September 2007. During the marriage, the parties had three children – Katlyn (d.o.b. 5/8/00), Jon Carter (d.o.b. 9/17/03), and Clay, (d.o.b. 3/14/05). A decree of dissolution was entered by Montgomery Circuit Court on August 5, 2008.

Samantha filed a motion on January 8, 2008, requesting temporary custody and temporary child support. At that time, she was a full-time nursing student at Lexington Community College. Jon was employed by Equitable Resources as an Engineering Independent Contractor where he earned \$250.00 per day plus reimbursement for expenses. Jon also had side jobs for which he earned additional income. The children were living with Samantha.

During the pendency of the action, Jon agreed to pay child support of \$1,000.00 every two weeks. In spring 2008, however, Jon fell behind in his child support payments. Thereafter, on June 22, 2008, he filed a motion to reduce child

support alleging that his income had been reduced. This matter was referred to the DRC for a hearing on July 15, 2008.

At this initial DRC hearing, certain issues relevant to this appeal were decided. In determining Jon's income for purposes of the child support calculation, the DRC used Jon's reported income on the 2007 tax return, which was \$75,760.00. Using this amount, the DRC recommended that he pay \$1,807.50 per month in child support. In addition, the DRC proposed that the parties amend the 2007 income tax return and file a joint tax return. Apparently, Samantha had already filed a 2007 tax return as an individual. It was the Commissioner's understanding that a joint filing would financially benefit both parties. Jon was to be financially responsible for all income taxes.

Thereafter, Jon filed exceptions to the DRC's report. The trial court sustained Jon's exceptions to the extent that the parties would only have to file a joint 2007 tax return if it financially benefitted them. Otherwise, the trial court adopted the DRC's recommendations including the suggested child support. Jon then filed an appeal with our Court, which was eventually dismissed for failing to file his brief.

On September 30, 2008, Jon filed a motion to reduce child support, but neither Samantha nor her attorney received notice of the motion.

Subsequently, in January 2009, Jon's counsel filed a properly noticed motion to reduce Jon's child support obligation. On May 1, 2009, the DRC held another hearing on the motion. After the hearing, the Commissioner recommended, and

trial court adopted, an imputation of \$9.00 per hour in income to Samantha once the youngest child was three years old and an imputation of income to Jon of \$50,000.00 per year.

Next, the DRC held another hearing on September 21, 2009. At this time, Samantha had relocated and obtained a job earning \$9.25 per hour for a 40-hour work week. Child care expenses for the children are \$150 per week or \$650 per month. Furthermore, Jon had also obtained new employment for which he was paid \$16.00 per hour for a 35-hour week. By the time of the hearing, Jon had significant child support arrearages. As of August 30, 2009, the arrearages totaled \$15,356.29.

In her October 1, 2009 report, following the hearing, the DRC recommended that Jon pay \$1,478.16 per month in child support. This amount reflects Samantha's actual annual income of \$19,240 per year, imputes income to Jon of \$50,000 per year, and adds the child care costs. Based on his percentage of the income, Jon is responsible for 73 percent of the child care expense. Further, the DRC also recommended that Jon pay Samantha \$3,615.00, the amount intercepted from her tax refund by the Internal Revenue Service (I.R.S.), plus \$257.00, the amount levied on her checking account by the Kentucky State Treasurer. And Jon is to pay the remaining 2007 federal and state taxes.

On October 12, 2009, Jon filed exceptions to the DRC's report. First, Jon contested the imputation of \$50,000 per year in income. Jon maintains that he has provided uncontroverted evidence that, because of the slowdown in the

economy since 2007, he now earns significantly less. Jon also contended that the DRC's order for him to pay Samantha the money intercepted by the I.R.S. and expert witness fees was unsupported by the evidence. The trial court held a hearing on November 6, 2009, and thereafter entered an order on November 23, 2009, overruling Jon's exceptions to the DRC's report and adopting it. Jon appeals from this order.

## ISSUES

First, Jon maintains that the trial court erred in imputing \$50,000 annual income to him. He argues that, based on statutory precepts, the determination of income for child support purposes must be based on a person's recent income history. In addition, Jon claims the trial court set his child support payment based on an imputation of income for which there is no evidentiary support and which is in excess of Jon's total current income. Samantha claims that the trial court has broad discretion in determining whether to modify a child support order. She further maintains that sufficient evidence exists to allow for such an imputation.

Next, Jon asserts that the trial court erred in directing him to reimburse Samantha for the tax intercept of her 2008 tax refund and the levy on her bank account. Moreover, Jon claims that Samantha's testimony did not support a finding that he owes her money for taxes. Samantha counters that the DRC, the fact-finder, had ample opportunity to observe the witnesses and make decisions

regarding credibility. Therefore, she contends that the trial court did not abuse its discretion in making this decision.

### STANDARD OF REVIEW

Clearly, the findings of a trial court will not be disturbed by this Court if they are supported by substantial evidence. *Gossett v. Gossett*, 32 S.W.3d 109, 111 (Ky. App. 2000); Kentucky Rules of Civil Procedure (CR) 52.01. Moreover, as with most areas of domestic relations law, the establishment, modification, and enforcement of child support is generally prescribed by statute and largely left, within the statutory parameters, to the sound discretion of the trial court. *Van Meter v. Smith*, 14 S.W.3d 569, 572 (Ky. App. 2000). In *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001), a panel of this Court discussed the standard of review for appellate courts in child support matters:

Kentucky trial courts have been given broad discretion in considering a parent's assets and setting correspondingly appropriate child support. . . . However, a trial court's discretion is not unlimited. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

### ANALYSIS

#### 1. Imputation of income

Turning to Jon's argument that the trial court abused its discretion in imputing \$50,000 annual income to him, we will first review the pertinent portion of the child support statutes. The relevant language to the imputation of income for child support purposes is found in KRS 403.212(2)(d):

(d) If 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.

Thus, courts must now determine whether a parent is voluntarily unemployed or underemployed. *McKinney v. McKinney*, 257 S.W.3d 130 (Ky. App. 2008). The statute directs that a determination of potential income shall be made by ascertaining employment potential and probable earnings levels based on the obligor's recent work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community. “[I]f the court finds that earnings are reduced as a matter of choice and not for reasonable cause, the court may attribute income to a parent up to his or her earning capacity[.]” *Snow v. Snow*, 24 S.W.3d 668, 673 (Ky. App. 2000). But, in doing so, “the court must consider the totality of the circumstances [to decide] whether to impute income to a parent.” *Polley v. Allen*, 132 S.W.3d 223, 227 (Ky. App. 2004).

Jon testified that, in 2007, the year in which the parties separated, he was self-employed as an independent contractor and worked almost exclusively for Equitable Gas in the engineering field. Jon further stated that because of the economic downturn, industry-wide layoffs had occurred in his area of employment. Subsequently, his hours were significantly reduced and he was eventually terminated from Equitable Gas at the end of 2008. Jon said that he

attempted to find other contracts so that he could continue his independent contractor business but, because of the economic climate, was unsuccessful. Later, at the September 21, 2009 hearing before the DRC, Jon provided information that he had obtained employment with an engineering firm and was earning \$16.00 per hour and working a 35-hour week. Yet, the DRC deemed Jon voluntarily underemployed and imputed income to him of \$50,000.00 per year, which is nearly twice the \$29,120.00 salary he receives at his new job. In making this finding, the DRC merely noted Jon's earnings in 2007 and perfunctorily found that Jon is capable of earning \$50,000.00 per year, the amount previously imputed to him at a prior hearing.

We find that the record does not support the imputation of income to Jon and that the trial court erred in adopting the DRC's recommendation to impute \$50,000.00 per year as Jon's income for the child support calculation.

Additionally, the trial court made no separate findings of fact in its order beyond the findings contained in the DRC's report. We agree with Jon that the DRC's imputation of income did not adequately take into account prevailing job opportunities in an economic downturn, Jon's recent work history, or his educational background and qualifications. By not reviewing the totality of the circumstances, the court abused its discretion by imputing to Jon an income level well in excess of his current job position, his level of training, and the state of the current economy. On remand, therefore, the trial court must redetermine both parties' actual income, recalculate the child support amount, including child care

and arrearages. The recalculation shall commence from Jon's January 2009 motion to reduce child support.

## 2. Tax Intercept

The second issue before us involves the parties' 2007 income tax filing. The history for this issue is somewhat convoluted. After the July 2008 DRC hearing, the DRC recommended in her report that the parties jointly file an amended 2007 tax return. Although Samantha had already filed individually, the Commissioner believed it would financially benefit both parties to file an amended return and file jointly. In that report, the DRC also proposed that Jon be responsible for all income taxes resulting from the amended tax return. As noted above, Jon filed an exception to the DRC's recommendation about filing a joint tax return. The trial court sustained part of Jon's exception when it held in its August 21, 2008 order that the parties shall prepare a joint tax return but need not file it if no benefit inured to them.

Many facts surrounding the tax return are contested. For example, at one point, Samantha says that Jon forged her signature on the amended 2007 joint income tax return and at another point that he filed the return without her signature. Regardless, the amended tax return was filed in February 2009 with taxes of \$6,733.00 owed to the I.R.S. To date, Jon has not paid these taxes.

At the September 21, 2009 hearing, William Redman, a former I.R.S. agent who is currently self-employed to assist parties with tax problems, testified on behalf of Samantha. According to Redman, at the time of the September 2009

hearing, taxes were owed to the state in the amount of \$7,086.00 plus interest and penalties, and taxes were owed to the I.R.S. in the amount of \$3,566.00 plus accumulating interest and penalties. The previous amount owed to the I.R.S. had been reduced when Samantha's 2008 tax refund was intercepted by the I.R.S. and her bank account garnished. The amount of her diverted refund check was \$3,615.00 and her first paycheck was levied for another \$257.00. Jon testified that additional business deductions are to be included in the 2007 amended tax return, which will substantially reduce the taxes owed.

In the October 1, 2009 DRC's report, it was recommended that Jon pay all the federal and state taxes within thirty (30) days or make arrangements for them so that the I.R.S. will take no further action against Samantha. Then, after Jon has paid all taxes, the parties are to arrange for Samantha to sign the amended return. When the trial court overruled all Jon's exceptions to the DRC's report and recommendations, it did not specifically mention any issues regarding the tax return. Therefore, it must be inferred that the trial court concurred with this portion of the DRC's report.

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 S.W.3d 843, 852 (Ky. App. 1999). Substantial evidence is that evidence, "when taken alone, or in the light of all the evidence, it 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). Substantial evidence was presented to allow for the DRC to ascertain that Jon should reimburse Samantha for the tax intercept and the bank levy besides following through on a previous order and paying the income taxes. Thus, we believe that, with regards to the trial court's handling of the tax matter, there was no error. We affirm the trial court's orders that Jon is responsible for all owed taxes and that he shall reimburse Samantha for her intercepted tax refund and garnished wages. In doing so, we observe that, if Jon is correct regarding a reduction in the amount of taxes owed for 2007, he will be the recipient of this benefit.

#### CONCLUSION

Accordingly, the judgment of the Montgomery Circuit Court is affirmed in part, reversed in part, and remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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