RENDERED: AUGUST 15, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001039-MR

PETER NATHAN CURRAN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DONNA DELAHANTY, JUDGE
ACTION NO. 11-CI-500897

LISA NAOMI CURRAN — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE, CAPERTON AND VANMETER, JUDGES.

CAPERTON, JUDGE: Peter Nathan Curran appeals from the family court's findings of fact, conclusions of law, judgment and decree, in which the court set child support and maintenance, and divided the parties' personal property. After a thorough review of the parties' arguments, the record, and the applicable law, we agree with Peter that the court erred in imputing income to him without the

appropriate findings. As such, we reverse and remand this matter for further proceedings.

The parties were married for approximately twenty years and had three children. On March 11, 2011, Lisa Naomi Curran filed a petition for dissolution of marriage. As the parties were unable to reach any agreements during the course of litigation, the court held a trial on the matter over two days. The court also held two EPO hearings and heard numerous motions prior to entering its findings of fact, conclusions of law, judgment and decree on April 3, 2012.

In its final order of April 3, 2012, the court found that Lisa is self-employed as a piano teacher. She provides private lessons to approximately twenty students at the rate of $20.00 per hour. Lisa did not provide tax documents establishing her income; instead she provided the court with her tithing records. Lisa did not maintain employment outside of the home for the majority of the parties' marriage; instead, by agreement, Peter was the sole financial provider while Lisa cared for the family and home. Prior to beginning his landscape business, Peter worked for Humana and earned $85,000 annually. Peter provided the court with his 2010 business tax returns, where it was reported that the business received gross receipts of $89,712.00 that year. Peter did not anticipate higher earnings for 2011. Lisa claimed that the total deductions in the amount of $82,927.00 should not be considered by the court for purposes of establishing child support. Moreover, she claimed that the business was not in good standing. The

court concluded that it was unclear as to how much income Peter made through his landscape business. There was testimony that the family's bills and expenses were paid or otherwise reduced through the business operations.[1] The court found that Peter had ample opportunity to provide more accurate information regarding his financial resources but failed to do so.

Based upon Peter's education, historical earnings, and current income, the court found that it was proper to impute income to Peter for purposes of determining maintenance and child support, in the amount of $85,000. However, the court did not specifically find Peter to be voluntarily underemployed, but it did find that it was proper to impute income of his prior job of $85,000 to him based on his prior income level and the gross receipts of the business. From this imputation of income, the court set child support and maintenance.[2] It is from this order that Peter now appeals.

On appeal, Peter argues: (1) Family courts are courts of equity and, as such, are obligated to treat the parties before it justly, reasonably, and fairly; (2) KRS 403.200(2)(f) Spousal Maintenance must be established on an equitable basis, including the ability of the payer to meet the payment obligation; (3) Child support obligations must be decided using actual income amounts, when underemployment is not a factor; and (4) Marital personal property is to be divided in just proportions between the parties. In response, Lisa argues: (1) this appeal was not timely filed

[1] *See* Kentucky Revised Statutes (KRS) 403.212(c)

[2] The court found that maintenance was necessary to permit Lisa to obtain education or employment experience in order to support herself.

and should be dismissed;[3] (2) the court properly determined the parties' incomes to establish maintenance and child support; and (3) the court properly divided the parties' personal property.[4] With these arguments in mind we turn to our applicable standard of review.

At the outset, we address the various standards of review for the issues before us. We note that in dividing marital property a trial court has wide latitude, and absent an abuse of discretion we shall not disturb the trial court's ruling. *See Smith v. Smith*, 235 S.W.3d 1, 6 (Ky. App. 2006), and *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001). Similarly, in maintenance awards, the trial court is afforded a wide range of discretion, which is reviewed under an abuse of discretion standard. *See Platt v. Platt*, 728 S.W.2d 542, 543 (Ky. App. 1987). In regard to child support, "[a]s are most other aspects of domestic relations law, the establishment, modification, and enforcement of child support are prescribed in their general contours by statute and are 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). "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." *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001).

[3] We decline to dismiss this appeal as the court below, in ruling on the motion filed by Peter after the entry of the final judgment, denied the motion on any Kentucky Rules of Civil Procedure 59.05 grounds in addition to modifying the child support obligation based on a change in circumstances per KRS 403.213.

[4] On remand, the court may consider the distribution of the family photography.

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, 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). Abuse of discretion is that which is arbitrary or capricious, or at least an unreasonable and unfair decision. *See Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004). However, the trial court's conclusions of law are reviewed *de novo*. *Stipp v. St. Charles*, 291 S.W.3d 720, 723 (Ky. App. 2009).

At issue, KRS 403.212(d)[5] permits the trial court to impute potential income to a parent found to be voluntarily unemployed or underemployed. Whether a child support obligor is voluntarily unemployed or underemployed under KRS 403.212(2)(d) is a factual determination for the trial court. This Court shall not disturb the findings of the trial court, provided that they are supported by substantial evidence. *Gossett v. Gosset*t, 32 S.W.3d 109, 111 (Ky. App. 2000). The trial court is vested with broad discretion in the establishment, enforcement,

[5] KRS 403.212(2)(d): If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income, except that a determination of potential income shall not be made for a parent who is physically or mentally incapacitated or is caring for a very young child, age three (3) or younger, for whom the parents owe a joint legal responsibility. 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.

and modification of child support. Accordingly, this Court reviews child support matters under an abuse of discretion standard, *i.e.*, whether the decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *McKinney v. McKinney*, 257 S.W.3d 130, 133 (Ky. App. 2008).

KRS 403.212(2)(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." The court's order *sub judice* does not reflect these statutory considerations except for the past earnings of Peter's work history.[6] Thus, it is unclear that the trial court made the explicit findings as required by statute. More troubling is the imputation of income to Peter without a finding that he was voluntarily unemployed or underemployed.[7] Without the court's full assessment of the required statutory considerations *and* a finding of Peter being voluntarily underemployed, we must conclude that the court erred in imputing income to Peter without finding him voluntarily underemployed.

[6] On remand, the court will have to consider whether work history from five years ago in a completely different profession qualifies as recent work history.

[7] While the court below relied upon *McGregor v. McGregor*, 334 S.W.3d 113, 117 (Ky. App. 2011)("it is implicit in this statutory language that a court may impute income to a voluntarily unemployed or underemployed spouse to determine both the spouse's entitlement to maintenance and the amount and duration of maintenance."), to impute income to Peter for the purposes of determining maintenance, we note that in *McGregor,* the trial court properly complied with the statutory considerations under KRS 403.212 and specifically found the mother voluntarily underemployed for both the purposes of child support and in determining maintenance.

As stated in *Gripshover v. Gripshover*, 246 S.W.3d 460, 469 (Ky. 2008), "Income should not be imputed to Darlene without due consideration of all of the statutory factors." This court has held that the party who wants the family court to use a different income level in applying the child support guidelines bears the burden of presenting evidence which would support the requested finding. *Keplinger v. Keplinger,* 839 S.W.2d 566, 569 (Ky. App. 1992).

Consequently, on remand, the family court is to consider employment potential and probable earnings based on Peter's recent work history and occupational qualifications, and also in light of the prevailing job opportunities and earnings in the community for persons similarly qualified. KRS 403.212(2)(d). Furthermore, *Gossett, supra*, requires explicit findings concerning the circumstances surrounding any reduction in Peter's income, which is the necessary basis for determining whether he is voluntarily underemployed. *See also, McKinney* at 135(A contrary rule "necessarily deprives litigants of an understanding of the order or judgment, as well as inhibits any type of meaningful appellate review.") Most importantly, prior to imputing income to Peter for the purposes of establishing child support and maintenance, the court is required to find Peter to be voluntarily unemployed or underemployed.

In light of the aforementioned, we reverse and remand this matter for further proceedings.

ACREE, CHIEF JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS AND WILL NOT FILE A SEPARATE OPINION.

BRIEF FOR APPELLANT:

Michael R. Slaughter
Louisville, Kentucky

BRIEF FOR APPELLEE:

Hugh W. Barrow
Louisville, Kentucky