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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001095-ME

CHRISTOPHER VONFELDT APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DOLLY W. BERRY, JUDGE
ACTION NO. 08-CI-503938

BETH BECKOVICH APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: JONES, D. LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Christopher VonFeldt appeals from an order of the Jefferson Family Court modifying his child support owed for the support of his three children. We conclude that the family court abused its discretion when it imputed income to Christopher of $150,000 per year.

In 2008, Beth Beckovich filed a petition seeking the dissolution of her marriage to Christopher. Pursuant to an agreed order entered on August 5, 2013, Christopher was required to pay Beth $2,600 per month for the support of the parties' four children, 80% of the children's extraordinary medical expenses and 50% of extracurricular fees. The children spent 40% of their time with Christopher, which was factored into the support calculation. It was also agreed that until June 2016, Christopher would pay $888 per month in maintenance. At the time of the order, Christopher was earning approximately $300,000 per year as a medical device salesperson.

On May 6, 2015, Beth filed a motion to hold Christopher in contempt for failure to pay child support and maintenance. On July 1, 2015, Christopher filed a motion to modify child support. Hearings were held on the parties' motions on April 16, 2016, and June 1, 2016.

Regarding the prospective payment of child support, much of the testimony focused on Christopher's current ability to obtain employment at his prior earning level. It was undisputed that on March 3, 2015, Christopher was admitted to the Hazeldon Betty Ford Clinic for substance abuse treatment.[1] As a consequence of his admission for treatment, Christopher took a medical leave of absence from his employment.

After his admission to Betty Ford, Christopher was diagnosed with alcohol abuse disorder, anxiety, and depression. Christopher completed inpatient

[1] At that time, one of the parties' four children was emancipated.

treatment and was released on May 7, 2015. He moved into a halfway house where he attends group meetings three times per week and weekly counseling. He remains in treatment with psychiatrist, Dr. Cedric Skillon.

Christopher testified that he was initially approved for long-term disability benefits through February 2016. He appealed the decision and was later approved to receive benefits through June 1, 2016. He received a lump sum payment of $90,000 for benefits due between June 2015 and December 2015, and a second lump sum payment of $60,000 for benefits due between February 2016 and June 2016.

In October 2015, Dr. Skillon recommended that Christopher be sober for twelve months before returning to work. He testified that Christopher had made little progress and opined that Christopher was unable to return to his employment in medical device sales but had no opinion as to whether Christopher was capable of performing other work. Dr. Skillon testified that he had no reason to believe Christopher was malingering or being untruthful regarding his symptoms or condition.

At the time of the last hearing, Christopher had accepted employment at Costco as a customer service representative where he would earn $13 per hour and work 24 hours per week for an annual income of $16,224. He planned to work full-time in the future but testified that he could not return to medical sales because the high stress level would be detrimental to his sobriety.

The family court found that there was a material change of circumstances that was substantial and continuing as required for a modification of child support under Kentucky Revised Statutes (KRS) 403.213(1). Those circumstances included emancipation of one child, Christopher's reduction in income, and that the children live exclusively with Beth. The family court then addressed the amount of child support owed.

The family court found that there was no evidence that Christopher is incapable of working in a field related to medical sales where he earned $304,000 in 2013 and $237,000 in 2014. The family court found that Christopher was voluntarily underemployed and imputed income to him of $150,000 per year.

Based on that imputed income, the family court calculated child support. Noting that Christopher had a maintenance obligation of $888 per month until June 2016, the family court found that combined with her employment income, Beth had an income of $73,656. The family court found that the parties' combined income exceeded the Kentucky Child Support Guidelines and the application of the guidelines was inappropriate. It proceeded to calculate child support based on a finding that the parties' combined support obligation for the parties' three children was $3,250 per month.

The family court found that based on the income imputed to Christopher, he is responsible for 65% of the combined income and ordered that he pay $2,122.50 per month until July 1, 2016, and then he would pay $2,888.73. Christopher was further ordered to pay 65% of the children's extraordinary

medical expenses between July 1, 2015 and June 30, 2016, and, thereafter, 70%. Christopher was also ordered to pay 50% of the children's extracurricular actives.

The family court also ruled on Beth's contempt motions. It noted that in August 2015, a contempt order was entered and Beth was awarded a common law judgment of $5,658.19 for unpaid child support and maintenance. In April 2016, the family court issued a second contempt order and awarded Beth $4,625.30 for medical expenses, extracurricular actives and childcare costs incurred through July 2015. Since the entry of those orders, Christopher paid Beth $884. The family court found Christopher received $150,000 in two lump sum payments over the last six months yet did not pay child support and found him in contempt for non-payment of child support.

Christopher does not challenge the contempt order. He argues the family court's finding that he was voluntarily underemployed was not based on substantial evidence and the family court improperly awarded a child support amount without making specific findings regarding the children's reasonable needs. We agree with Christopher that there was insufficient evidence to impute income of $150,000 to him and, therefore, reverse and remand for the child support to be reconsidered.

KRS 403.212(2)(d) governs a family court's determination that a spouse is voluntarily underemployed for child support purposes. It provides:

> 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.

The decision to impute income to a spouse is one that falls within the discretion of the trial court and the family court's factual findings cannot be set aside on appeal if supported by substantial evidence. *Gossett v. Gossett,* 32 S.W.3d 109, 111 (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).

Christopher argues that his underemployment is not voluntary because he lost his employment as a medical salesperson due to substance abuse, which he correctly characterizes as a disease. Kentucky has yet to address whether the loss of employment due to substance abuse and reemployment at a lower wage constitutes voluntary underemployment. Other jurisdictions considering the issue have held that although taking drugs or ingesting alcohol is itself voluntary, the addiction and resulting reduction in income after a job loss was not voluntary or

deliberate. *See Pace v. Pace,* 135 Idaho 749, 24 P.3d 66 (Ct.App. 2001); *In re Marriage of Johnson,* 24 Kan.App.2d 631, 950 P.2d 267 (1997).

However, our statute excludes only three situations where income may not be imputed. KRS 403.212(2)(d) instructs that income may not be imputed to a parent who is physically incapacitated, mentally incapacitated or caring for a child, age three or younger, for whom a parent owes a joint legally responsibility.

Although there was evidence that Christopher suffers from anxiety and depression in addition to substance addiction, there was no evidence that he is mentally incapacitated. Therefore, there is no explicit directive in the statute that would preclude the family court from imputing income.

In *Com. ex rel. Marshall v. Marshall*, 15 S.W.3d 396, 401–02 (Ky.App. 2000), we considered whether income could be imputed to an incarcerated parent. This Court held:

> [T]he Legislature is aware that incarcerated parents are no more able to obtain employment than parents of young children or mentally or physically disabled parents. Thus, the Legislature's refusal to include incarcerated parents among those identified as being excepted from imputed income convinces us that incarcerated parents are to be treated no differently than other voluntary unemployed, or underemployed parents owing support.

Likewise, because substance abuse is not specifically identified by the legislature as a condition that precludes imputing income to a parent, this Court may not read such an exception into the statute. Parents who lose employment due to substance addiction are subject to having income imputed considering the

factors listed in KRS 403.212(2)(d). The question is whether the family court properly applied those factors in this case and imputed income of $150,000 per year to Christopher.

"[T]he Kentucky Child Support Guidelines are based on the 'Income Shares Model.' The basic premise of this model is that a child should receive the same proportion of parental income that the child would have received if the parents had not divorced." *Downing* 45 S.W.3d at 455. The imputation of income to a parent who is voluntarily unemployed or underemployed allows a fair and just allocation of the child support responsibility of both parents. However, courts must do so with "due consideration of all the statutory factors." *Grisphover v. Grisphover*, 246 S.W.3d 460, 469 (Ky. 2008). As held in *Keplinger v. Keplinger,* 839 S.W.2d 566, 569 (Ky.App. 1992), the party seeking to have the family court apply a different income level in applying the child support guidelines has the burden of presenting evidence to support the requested finding.

Christopher introduced evidence that due to his substance addiction, he lost his employment as a medical device salesperson. He introduced expert testimony that he cannot return to that type of employment, and his most recent work history was at Costco earning $16,224 per year.

Despite her burden of proof, Beth did not introduce any evidence to support imputing income to Christopher. Such evidence might have included the current availability of employment in the medical sales device field and expert testimony from job counselors regarding the availability of jobs with Christopher's

experience and his history of substance abuse addiction. Instead, she relied exclusively on Christopher's past earnings.

Merely because Christopher previously earned $300,000 per year as a medical salesperson does not warrant imputing income to him. As the Florida court stated in *Woodward v. Woodward*, 634 So.2d 782, 783 (Fla. 5th DCA 1994), "[p]ast average income will not put bread on the table today." The family court was required to consider all factors listed in KRS 403.212(2)(d): (1) Christopher's recent work history; (2) his occupational qualifications; and (3) prevailing job opportunities and earning levels in the community. Those factors must be considered under all the circumstances, including Christopher's substance abuse history and ability to become reemployed in his prior occupation. Beth failed to produce any evidence that Christopher could return to his former employment.

Finally, imputation of income is based on future earnings. Here, the family court erroneously imputed income based on Christopher's receipt of prior yearly income of $150,000 in disability benefits. Those benefits have ended and are not indicative of future income.

The imputation of income to Christopher was not supported by substantial evidence. Of course, should Christopher obtain employment at a higher rate of pay, child support is subject to modification.

Because we conclude the family court erred in imputing income to Christopher, we do not address his argument that the family court did not consider the reasonable needs of the children in setting an amount of child support.

However, we agree that any support exceeding the uppermost amount of the guidelines must be based on the reasonable needs of the children. *Downing*, 45 S.W.3d at 456.

Based on the foregoing, the order of Jefferson Family Court is reversed and the case remanded for reconsideration of the child support award.

JONES, JUDGE, CONCURS.

LAMBERT, D., JUDGE, DISSENTS AND FILES SEPARATE OPINION.

LAMBERT, D., JUDGE, DISSENTING: Respectfully, I dissent. The family court sufficiently considered Christopher's circumstances, in light of both parties' arguments, before modifying the child support obligation. While it is true that Christopher "suffered a serious medical condition that required inpatient treatment for several months" the family court nevertheless found that "he completed the program successfully" and now has a job at a wholesale store making $16,000 a year. As the record plainly indicated, Christopher's current salary is a fraction of what he earned during 2013 and 2014, and just 10.67 percent of what he earned during the past 12 months while on disability. Using this substantial evidence, the family court concluded Christopher was voluntarily underemployed and imputed a yearly income consistent with the $150,000 in disability benefits he received over the previous year. Accordingly, the family court did not abuse its discretion.

BRIEFS FOR APPELLANT:

David B. Mour
Louisville, Kentucky

BRIEF FOR APPELLEE:

Kirk Hoskins
Darren Wolff
Louisville, Kentucky