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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001709-ME

JASON LAMBERT — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE GINA KAY CALVERT, JUDGE
ACTION NO. 11-CI-501134

JULIE LAMBERT — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, DIXON AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Jason Lambert appeals from the Jefferson Family Court's order denying his motion to modify his child support obligation. We reverse and remand because Jason sufficiently met his burden to establish he had a continuing change in circumstance that required recalculation of his child support obligations and could not obtain equivalent employment to what he had prior to a layoff. Julie

failed to present any evidence to establish that Jason could be expected to earn the same income now and, therefore, there was an insufficient basis for the family court to impute such income so as to deny Jason's motion.

Jason and Julie Lambert were married in 2005, and Jason's petition for dissolution was granted in 2011. They have three children and, as part of an agreed order incorporated into the decree of dissolution, they were to share joint custody with Jason having parenting time.[1] In October 2011, the family court ordered Jason to pay monthly child support of $1,201.20 per month per the guidelines after finding that Jason's gross monthly income as a technician for Cricket Communications was $6,419.80 and Julie's gross monthly income was $2,754. Jason was also ordered to provide the children's health insurance.

In 2016, Cricket was bought by AT&T. In November 2016, Jason received notice that he would be laid off as a surplus employee. After his layoff, Jason received unemployment benefits of $1,798 per month.

On November 21, 2016, Jason filed a *pro se* motion for modification of child support. Jason requested a decrease in his child support payments because

[1] In November 2012, Jason was ordered to have no contact with the children. In October 2013, after a hearing, the family court found Jason in contempt of the no contact order because he visited the children at school. Jason still does not have contact with the children.

he was unemployed, and he believed Julie's income had increased. The parties were ordered to mediate, but mediation was unsuccessful.

On May 17, 2017, Julie filed interrogatories and requests for production. These included a request for Jason to identify all applications for employment from November 1, 2016 through the present and provide specific information about such applications along with documentation of them.

Jason hired counsel and filed a new motion to modify child support on July 3, 2017. Jason's attached affidavit indicated that since he had lost his job, he was unable to find employment and his unemployment benefits had now lapsed. When he was receiving monthly unemployment benefits of $1,798, $828 was withheld from these checks for child support.

On August 24, 2017, a hearing was held on Jason's motion. Jason testified he was laid off when Cricket was acquired by AT&T and AT&T laid off most Cricket employees. He testified he had not been able to gain new employment despite applying to about eighteen places. Later, he corrected himself and stated he applied for many more jobs, including several internal hire jobs at AT&T, but he did not have any proof to submit.

Jason testified he believed he was not getting hired because in 2013, he entered into a plea agreement and pled guilty to violating a domestic violence

order (DVO) protecting Julie.[2] He testified he did not purposefully violate the DVO, although he admitted approaching too close to Julie's workplace when he was doing an install for Cricket. He testified he believed he had permission from a previous judge to work on that specific installation and believed he was not within 500 feet of Julie's workplace because her workstation was on a high floor in a tall building.[3]

Jason testified that while in response to Julie's interrogatories he reported he had been applying for jobs weekly, which was then correct, he was no longer applying as frequently because he was discouraged by repeatedly advancing to the interview phase but never being hired. He testified he believed he was repeatedly turned down at this stage because when potential employers ran a background check they would learn he had a misdemeanor conviction for violating the DVO. He reported he interviewed with Coca Cola on the previous day but was still waiting to hear on that job pending his background check report.

Jason testified his monthly bills before being laid off were $1,500, which included rent of $700 a month, but he had reduced his monthly bills by at

[2] The DVO is not contained in the record. Any subsequent discussion of this matter is based on the testimony of the parties and the representations made by them in their briefs.

[3] The court commented that if the previous judge had granted Jason permission to do so through a court order, there would have been no reason for him to plead guilty to this charge, thus making an oral finding that this testimony was not credible.

least $500 by canceling some bills, lowering his thermostat and junking a vehicle. He testified he currently has no source of income, his fiancée buys their groceries and he gets by on selling equipment and tools but could not report what he had sold and for how much. Later, he testified he also borrowed money from his mother and fiancée.

Julie testified she believed Jason deliberately violated the DVO based on his previous conduct of posting harassing signs near her workplace.

Julie testified she and the children live with her mother and she contributes to the household expenses by buying groceries, giving her mother money when she needs it, and paying her own bills. Julie testified her current income is $40,000 a year and she now provides health benefits for the children, paying an additional $16 a month for their medical coverage.

Based on Julie's testimony, her gross monthly income has increased from the $2,754 used on the child support worksheet in 2011, to $3,333.33.

On September 13, 2017, the family court denied Jason's motion to modify his child support obligation. In doing so, the family court made two important findings. First, it found Jason was terminated through no fault of his own when AT&T acquired Cricket. Second, it found Jason was now voluntarily unemployed, and it was appropriate to impute income to him. The family court explained it did not believe Jason was actively seeking employment and imputed

his income level at his last reported wages of $6,419 per month. Citing a lack of change in the parties' incomes, the family court denied Jason's motion for modification and found him $4,227.60 in arrears.

Jason filed a motion to alter, amend or vacate arguing he made a good faith effort at regaining employment but was stifled by his criminal record stemming from his unwitting violation of the DVO. The family court summarily denied his motion.

Jason argues on appeal that he has been unable to obtain a new job because of his violation of the DVO. He argues the family court erred by not granting his motion for modification based on the substantial change in his income resulting from his termination because the family court failed to find that he set out to be unemployed and acted in bad faith. He also argues it was Julie's burden to produce evidence to show he could return to his former type of employment before it would be proper for the family court to find there was no ongoing substantial change to his income.

We review the family court's factual findings on modification and imputation of income for abuse of discretion. *Goldsmith v. Bennett-Goldsmith*, 227 S.W.3d 459, 461 (Ky.App. 2007); *Gossett v. Gossett*, 32 S.W.3d 109, 111 (Ky.App. 2000).

"The purpose of the statutes and the guidelines relating to child support is to secure the support needed by the children commensurate with the ability of the parents to meet those needs." *Id.* at 112. In calculating the parents' support obligations, under the child support guidelines table the amount of child support due is calculated from the parents' combined monthly adjusted gross income. KRS 403.212(7). "Income" is defined as "actual gross income of the parent if employed to full capacity or potential income if unemployed or underemployed" while "[g]ross income" generally means "income from any source." KRS 403.212(2)(a), (b).

When a parent seeks a modification in child support and a new application of the child support guidelines, a fifteen percent or greater change in the amount of child support due each month pursuant to the child support worksheet calculations "shall be rebuttably presumed to be a material change in circumstances." KRS 403.213(2).

An obligor having lower actual earnings post-decree, standing alone, does not entitle the obligor to a modification in the obligor's child support obligations. *Howard v. Howard*, 336 S.W.3d 433, 443 (Ky. 2011). "The provisions of any decree respecting child support may be modified . . . only upon a showing of a material change in circumstances that is substantial and continuing." KRS 403.213(1). In *Snow v. Snow*, 24 S.W.3d 668, 673 (Ky.App. 2000), the Court

explained that "a substantial and *continuing* change" is from a "lasting circumstance[.]"

"To prevail, [in obtaining a modification to reduce the obligor's child support obligation, the obligor] need[s] to show that a material, substantial, and continuing change of circumstances existing post-decree made him less capable of attaining his former income level than existed at the time of the decree." *Howard*, 336 S.W.3d at 440-41.

Jason established a substantial and continuing change in his circumstances when he was terminated due to AT&T's acquisition of Cricket. This would qualify Jason for a modification because going from his high level of income, to the level of income he received from unemployment benefits, to having no income was a direct result of being terminated due to the buyout. Jason's circumstances are very different from that of an obligor who voluntarily reduces his income and then seeks a modification.

Having concluded that Jason qualified for a modification based upon having lost his job, we must now consider whether the family court erred in imputing income to Jason equivalent to what he earned while employed with Cricket. Income may be imputed to a parent who is not working if that parent is found to be voluntarily unemployed or underemployed pursuant to 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 . . . . 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.

"[I]ncome should not be imputed to [the obligor] without due consideration of all of the statutory factors." *Gripshover v. Gripshover*, 246 S.W.3d 460, 469 (Ky. 2008). The totality of the circumstances should be considered in imputing income. *Polley v. Allen*, 132 S.W.3d 223, 227 (Ky.App. 2004).

The presumption is that an obligor's future income will be equivalent to that obtained during the obligor's most recent work experience. *Keplinger v. Keplinger*, 839 S.W.2d 566, 569 (Ky.App. 1992). Therefore, "[t]he party who wants the trial 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." *Id.* "[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.' . . . Certainly, evidence of prior years' earnings is relevant to determining 'earning capacity.'" *Snow*, 24 S.W.3d at 673 (quoting *Pearson v. Pearson*, 190 Ariz. 231, 236, 946 P.2d 1291, 1296 (Ariz. App. 1997)).

Jason is incorrect that the family court would have to find he intended to be unemployed before it could find that he was voluntarily unemployed. The family court's finding that Jason lost his prior job through no fault of his own did not preclude it from also finding that he was voluntarily unemployed at the time of the modification hearing by failing to take adequate measures to obtain a new job in the meantime.

Jason is also incorrect that the family court had to find he acted in bad faith in not obtaining new employment. As explained in *Howard*, 336 S.W.3d at 439, the current version of KRS 403.212(2)(d) contains no bad faith requirement.

In deciding to impute income to Jason, the family court essentially not only found that Jason was not diligently applying for jobs but also found that if he diligently applied for jobs Jason would currently be employed and earning equivalent wages to that used to previously calculate his child support obligation. The second proposition does not naturally follow from the first where Jason testified that he has applied for jobs and repeatedly made it to the interview stage but has been unable to obtain employment.[4] We note that Jason testified he was laid off as part of a buyout of Cricket by AT&T in which many Cricket employees were laid off. Based upon this testimony, there was likely a glut of former Cricket

[4] While Jason testified he believed he was unable to find new employment due to his conviction, Jason does not in fact know why he has not yet been hired. This may be a factor, but it is not necessarily the only one or the predominant one.

employees with similar technical backgrounds to Jason all simultaneously looking for new employment and competing for the same jobs that Jason was seeking.

KRS 403.212(2)(d) in mandating that the family court determine potential income "based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community[,]" requires the family court to consider that the prevailing job opportunities of which Jason can now avail himself, after being laid off through no fault of his own, could be limited by his personal circumstances and the current job opportunities in his field where consolidation has taken place.

Unlike the obligor in *Keplinger*, 839 S.W.2d at 569, who failed to "present any evidence to show that his future earnings were likely to vary significantly from [his most recent earnings,]" and thus should have had his child support set "at a level commensurate with [the parents'] most recent earnings[,]" Jason met his "burden of presenting evidence which would support his requested finding" that his earning capacity was now lower and, accordingly, presented evidence to show that he cannot earn the same wages as he could before and, therefore, his future earnings were likely to vary significantly from his most recent earnings.

While Jason's work history and qualifications should not preclude him from obtaining all employment,[5] his own testimony was sufficient to provide some evidence that he could not be expected to obtain equivalent employment for the same wages as before. While it would have been helpful for Jason to introduce expert evidence as to what his current earning capacity was given his recent work history, occupational qualifications, and prevailing job opportunities for someone with his background and this type of criminal conviction and, accordingly, what type of earnings he could expect in his community, we do not believe expert testimony is required to make such a showing.

Once Jason testified as to his efforts to find a job and inability to obtain equivalent employment after being laid off, we agree with him that Julie was required to introduce evidence that Jason could have obtained equivalent employment and the same wages as before. Without any evidence from Julie to counter Jason's testimony, the family court had no basis for determining that Jason could continue to earn at the same level as he previously obtained. *See Hempel v. Hempel*, 380 S.W.3d 549, 553 (Ky.App. 2012) (remanding for further

[5] Jason's conviction does not preclude him from obtaining any gainful employment considering his skill set. It appears his continuing unemployment either results from him not actively searching for jobs or his failure to apply for lower level positions with lower pay scales. While it is understandable that Jason would prefer an equivalent job to what he had before, it is inexcusable not to find any job when he has children that are due child support from him. There is no reason that Jason could not continue to apply for better paying jobs while working a less than ideal job.

consideration on imputed income because the appellate court was unable to conduct a meaningful review where the family court failed to make adequate factual findings as to how much income an obligor could be expected to make where "there was no evidence introduced to show the strength or nature of prevailing job opportunities in the community or the expected earnings levels.")

While the family court could properly find that Jason was voluntarily unemployed by failing to obtain any new job since being laid off, it abused its discretion in failing to then consider what income Jason could be expected to make upon obtaining new employment before imputing income to him equivalent to that which supported his current child support obligation. Jason's previous job for Cricket no longer exists. It is not appropriate for the family court to impute a monthly salary to Jason of more than $6,000 and continue to require him to pay $1,201.20 in child support each month if he no longer can earn that income or pay that amount of child support.

When a family court abuses its discretion by imputing an income level to an obligor which does not properly comport with what the obligor could currently achieve, on remand the family court "must redetermine both parties' incomes and recalculate child support accordingly" after "due consideration of all of the statutory factors." *Gripshover*, 246 S.W.3d at 469. Given the paucity of the record for the family court to determine the correct amount of income to impute to

Jason, which is somewhere between full time minimum wages and the income he had while working for Cricket, it is appropriate for the family court to conduct a new hearing on modification. Giving the parties the opportunity to offer evidence as to what Jason's imputed income would properly be will enable the family court to make an appropriate finding as to how much income should be imputed to Jason and then calculate the child support due from him before ruling on whether modification is warranted. We note that even a relatively moderate decrease in Jason's imputed income, when combined with Julie's increase in income, could yield a fifteen percent or greater change in the amount of child support due from Jason each month.

Accordingly, we reverse and remand the Jefferson Family Court's order denying Jason's motion to modify his child support obligation.

ACREE, JUDGE, CONCURS.

DIXON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Michael R. Slaughter Louisville, Kentucky	Christina M. Tobin Louisville, Kentucky