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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000797-ME

CHRISTOPHER LUKE TURNER — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE LAUREN ADAMS OGDEN, JUDGE
ACTION NO. 15-CI-500888

RAYANNE TURNER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, NICKELL AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Christopher Luke Turner appeals from the Jefferson Family Court's order denying his motion to reduce his child support obligation based upon a change in circumstances in his employment. Because we agree the family court properly imputed income to Christopher, we affirm.

Christopher and Rayanne Turner were married in 2005. Their son, A.J.T. (child), was born in April 2014.

In 2015, Christopher filed for dissolution and a decree of dissolution was entered on August 5, 2015. The decree incorporated a mediated property settlement which provided for joint custody, but child was to live primarily with Rayanne with Christopher having parenting time every Tuesday at 9 a.m. until Thursday at 3:30 p.m. and every other Friday to from 9 a.m. until 3:30 p.m. Christopher also agreed to pay $495 in child support per month.

In June 2016, the family court entered an income withholding order so that child support would be paid timely. In December 2016, a new income withholding order was entered after Christopher's employment changed.

On May 3, 2017, Christopher filed a motion to reduce child support because he was "forced to accept a lower paying job with new employment." Subsequently, on June 15, 2017, an agreed order was entered changing Christopher's child support obligation to $395 per month beginning June 2017 based on revised child support worksheets.

On August 7, 2017, a new agreed order was entered after Christopher began a higher paying job. This changed Christopher's child support obligation to $661 beginning August 2017, based on revised child support worksheets.

On December 20, 2017, Christopher filed another motion to reduce his child support obligation on the basis that he was laid off and drawing unemployment. Christopher attached an unemployment statement from October 29, 2017.

Before the matter came up for a hearing on April 11, 2018, Christopher obtained new employment, was subsequently terminated from that new employment on February 8, 2018, and began working part-time.

In the April 26, 2018 order regarding Christopher's motion to reduce his child support obligations, the family court made several findings about Christopher's employment:

> [Christopher] typically works as a bartender and/or bar manager. He has worked at various restaurants over the past three years, earning between $35,000 and $43,000 per year. He was terminated for cause from his most recent position as General Manager of Barrel House restaurant in Jeffersonville, Indiana on February 8, 2018. At the time of the hearing, he was bartending two nights per week, earning $150-$300 per weekend. He had two interviews scheduled the following day for full-time restaurant positions.

The family court then determined:

> In this case, there is no "substantial and continuing" change in the parties' financial circumstances. [Christopher] has a history of moving between jobs in the restaurant industry but when he chooses to work full-time, his salary remains relatively consistent. He was terminated for cause from his last position, and currently he works only two days per week.

> There is nothing to indicate that [Christopher] is physically or mentally incapable of maintaining full-time employment. To the extent that he is earning less than he was at the time child support was last calculated, the Court finds him to be voluntarily underemployed and imputes income to him consistent with his prior earnings. For this reason, [Christopher's] motion to modify child support is denied.

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). In doing so, we defer to the family court's discretion whenever possible but recognize that its discretion is not unlimited. *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky.App. 2001).

Christopher argues the family court erred in finding that there was no substantial and continuing change in his financial conditions, he was voluntarily underemployed and in imputing him with his prior earnings. He argues there were errors in the family court's findings, because there was no testimony to support its findings that he worked full-time when he chose to do so and that he was terminated for cause. Christopher argues he testified at the hearing that there were ups and downs in the restaurant industry and he was diligently seeking full-time employment. He argues he testified that his termination resulted from the fact that he and his manager "did not see eye to eye on the daily operation of the business." Christopher argues that "going from a nearly $40,000 per year income to roughly

$16,000 per year income through no fault of his own is absolutely a material change in circumstances."

Before we begin our review, we note that we are unable to evaluate Christopher's claims as to what he testified to at the hearing as the video of the hearing is not part of the record on appeal. As explained in *Gambrel v. Gambrel*, 501 S.W.3d 900, 902 (Ky.App. 2016), Kentucky Rules of Civil Procedure (CR) 98(3) can be read to require the clerk to include the video record as part of the complete record on appeal or it can be read to be the appellant's responsibility to tell the clerk what video record should be transmitted on appeal. While existing precedent in Kentucky makes it clear that the appellant has the responsibility to ensure that the record on appeal is complete, it should be the clerk's responsibility to produce the complete video record without waiting for the appellant to designate it. As an appellate court, we have the authority to order the clerk to supplement the record when the clerk fails in this duty. However, we did not take this step here as the factual determinations that Christopher takes issue with do not play a role in our analysis of whether the family court abused its discretion in making its ultimate rulings.

Christopher argues the family court erred in finding there was no substantial and continuing change in his financial conditions, he was voluntarily underemployed and in imputing him with his prior earnings. We disagree.

"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." *Gossett v. Gossett*, 32 S.W.3d 109, 112 (Ky.App. 2000). In calculating the parents' support obligations, under the child support guidelines 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). KRS 403.212(3) establishes that "[t]he child support obligation set forth in the child support guidelines table shall be divided between the parents in proportion to their combined monthly adjusted parental gross income."

An obligor having lower actual earnings, 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, 440 (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 402.213(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.

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, 946 P.2d 1291, 1296 (1997) (citations omitted)).

While Christopher established that based on his part-time income there would be a fifteen percent or greater change in the amount of child support due each month pursuant to the child support worksheet calculations, which is rebuttably presumed to be a material change in his circumstances, we agree with the family court that Christopher has not established his current reduced income

constitutes a substantial and continuing change in circumstance that makes him less capable of earning his most recent income level. Instead, the record supports the family court's finding that Christopher frequently changes jobs and his income level varies, but there is no reason to believe that he cannot soon be earning a similar income to before, once he has full-time employment. The record shows that in less than two years, since the first income withholding order was issued in June 2016, Christopher has had at least seven different positions. Even in the time since Christopher filed his motion after becoming unemployed until a hearing was held on the matter (less than six months), Christopher obtained new employment, was terminated and then began to work part-time. It was appropriate for the family court to impute full-time income to Christopher commensurate with his prior employment history. Under the circumstances, we will not disturb the family court's discretion.

Given Christopher's work history, we are hopeful that during the elapse of time for us to hear his appeal that he is now gainfully employed full-time in the bar or restaurant industry and making a similar income to before. However, should Christopher continue to experience trouble obtaining full-time employment that pays commensurate with his previous wages, and be able to provide evidence that this is caused by a substantial and continuing change in his circumstances, he can certainly file another motion to reduce his child support.

Christopher alternatively argues that modification is appropriate to excuse him from paying child support because he has relatively equal care of child. This argument was not made in his motion and not mentioned by the family court in its order and Christopher does not indicate how or whether it was preserved. Accordingly, it would be proper for us to summarily deny this argument.

However, even if it is considered on the merits, Christopher's argument is not well-taken. He has failed to show any material change in the amount of timesharing since the time of the decree. Additionally, two overnights a week is not nearly equal timesharing. Christopher would not have been entitled to a deviation at the time of the decree and is certainly not entitled to a modification now.

Accordingly, we affirm the Jefferson Family Court's order denying Christopher's motion to reduce his child support obligation based upon a change in circumstances.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Timothy Denison Louisville, Kentucky	Earl C. Mullins, Jr. Louisville, Kentucky