

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA** \* **NO. 2005-CA-0506**  
**THROUGH THE** \*  
**DEPARTMENT OF SOCIAL** \* **COURT OF APPEAL**  
**SERVICES, OFFICE OF** \*  
**FAMILY SUPPORT IN THE** \* **FOURTH CIRCUIT**  
**INTEREST OF CHRISTOPHER** \*  
**AND CAMERON SHEPPARD,** \* **STATE OF LOUISIANA**  
**MINOR CHILDREN OF** \*  
**DEWAN SHEPPARD** \*

**VERSUS**

\*  
\* \* \* \* \*

**PIERRE PIERCE**

APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 93-5931, DIVISION "M"  
Honorable Paulette R. Irons, Judge

\* \* \* \* \*

**Judge Roland L. Belsome**

\* \* \* \* \*

(Court composed of Judge Patricia Rivet Murray, Judge Dennis R. Bagneris Sr., Judge Roland L. Belsome)

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**AFFIRMED**

On November 17, 2004, the trial court found Pierre Pierce, D.D.S. (Dr. Pierce) in contempt of court for failure to pay child support and denied his motion to reduce child support. Dr. Pierce appeals both rulings.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Pursuant to a judgment of paternity rendered by default on July 27, 1993, Dr. Pierce was declared to be the biological father of Dewan Sheppard's twin sons, Christopher and Cameron Sheppard. Dr. Pierce was initially ordered to pay \$150.00 per month in child support to the State of Louisiana, through the Department of Social Services (Appellee). Child support was subsequently set at \$1,032.00 per month via a consent judgment rendered on March 25, 1994. At that time, Dr. Pierce was also ordered to pay \$2,000.00 in back child support. On March 21, 1996, a second consent judgment was rendered, reducing Dr. Pierce's child support obligation to \$950.00 per month.

On November 17, 2004, the parties appeared before the Honorable Paulette R. Irons pursuant to the Department's motions for an increase in child support, past due child support, and contempt of court, together with Dr. Pierce's motion to reduce child support. The record reveals that Dr. Pierce's rule to reduce was initially filed on September 6, 2001; however, the matter was not heard until November 17, 2004.

Dr. Pierce graduated from dental school in 1993. Thereafter, he worked for another dentist until 1997 when he began operating as a sole practitioner. In connection with his rule to reduce, Dr. Pierce claimed that his income declined over the past few years. Specifically, Dr. Pierce testified that his gross income went from \$46,000 in 2000 to \$11,855.55 in 2003, with his net income showing a loss of \$45,533.00 after business expenses. Dr. Pierce further testified that he is deeply in debt and relies on family and friends for his support. Dr. Pierce filed a corporate bankruptcy in 2001 and a personal bankruptcy in 2002.

In connection with the Department's motion for past-due child support, the records of the Child Support Division of the District Attorney's Office demonstrated that Dr. Pierce was \$14,429.00 in arrears in his child support payments. Dr. Pierce did not dispute the amount of arrearages.

At the conclusion of the hearing, Dr. Pierce was held in contempt of

court for failure to pay child support. Arrears in the amount of \$14,429.00 were made executory, and Dr. Pierce was ordered to make a lump sum payment of \$5,000.00 within 30 days or face issuance of an attachment.

In a separate judgment, also dated November 17, 2004, the trial judge reduced Dr. Pierce's monthly child support obligation by \$255.00, but reapplied the \$255.00 per month to the arrearages. The record reflects that the \$255.00 reduction in the monthly child support obligation was not attributed to Dr. Pierce's reduced income. Rather, the trial judge made it clear that the reduction was based on Ms. Sheppard's testimony that she was receiving \$255.00 per month from a charitable organization in connection with Christopher's disability.

#### ASSIGNMENTS OF ERROR

1. The trial court erred in failing to reduce the amount of child support ordered in light of the income levels shown by the parties.
2. The trial court erred in ordering the incarceration of an insolvent defendant if he did not pay \$5,000.00.

#### LAW AND ANALYSIS

First, we note that Dr. Pierce misstated the trial court's disposition in his first assignment of error. The trial court actually reduced Dr. Pierce's monthly child support obligation from \$950.00 per month to \$695.00 per month, but also ordered Dr. Pierce to pay \$255.00 per month in payments on the \$14,000.00 outstanding in child support.

At trial the following facts were established. Dr. Pierce's earning history is as follows:

- 1 1993-97 - \$35-46,000 per year as an associate with other dentistry firms.
- 2 1997 - \$40,000
- 3 1998 - \$41,000
- 4 1999 - \$38,000
- 5 2000 - \$41,000
- 6 2001 - \$26,000
- 7 2002 - \$9,000

The trial court found no sufficient explanation for Dr. Pierce's decrease in earnings between 2000 and 2002. The trial court questioned Dr. Pierce on why his earnings decreased during this time, and Dr. Pierce only explained that his "debts had caught up with him." His client base had remained the same, he had not tried advertising to create more business, and did not consider becoming associated with a more established dentist to

return to his 1993-1997 peak salary of \$46,000.00 per year.

Specifically, the trial court found:

that Dr. Pierce was voluntarily underemployed; his income decreased and fluctuated significantly between approximately \$46,000.00 and \$9,000.00 per year over a span of about six years. Dr. Pierce is complacent with his career situation and it appears that he has made no effort to find more lucrative employment, nor has he attempted to make his dental practice more successful. Dr. Pierce is a dentist by trade and the Court is of the opinion that he should and could be making more than his reported \$11,855.00 per year in 2003.

Dr. Pierce contends that this was error by the trial court, and that he presented evidence that explained his debts. He has filed for both personal and commercial bankruptcy, and his student loan debt is also past due.

La. R.S. 9:311(A) provides: “[a]n award for support shall not be reduced or increased unless the party seeking the reduction or increase shows a material change in circumstances of one of the parties between the time of the previous award and the time of the motion for modification of the award.” It is well recognized, however, that not every change in circumstances warrants a reduction in child support. *State v. Battson*, 36,336, p. 4 (La. App. 2 Cir. 9/18/02), 828 So. 2d 132, 135. Louisiana jurisprudence distinguishes between voluntary and involuntary changes in circumstances. *Savage v. Savage*, 36,138, p. 6 (La. App. 2 Cir. 06/12/02), 821 So. 2d 603, 606. An involuntary change is one resulting from fortuitous

events or other circumstances beyond that person's control, such as loss of one's position or illness. A voluntary act rendering it difficult or impossible to meet one's support obligation is not a ground for release, in whole or in part, from the obligation. *Id.*

La. R.S. 9:315.9 provides:

If a party is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of his or her income earning potential, unless the party is physically or mentally incapacitated, or is caring for a child of the parties under the age of five years. The amount of the basic child support obligation obtained by use of this Section shall not exceed that amount which the party paying support would have owed had no determination of the other party's earning income potential been made.

Voluntary underemployment is a fact driven consideration. *Koch v. Koch*, 97-1600, p. 5 (La. 4 Cir. 4/22/98), 714 So. 2d 63, 66. Whether an obligor spouse is in good faith in reducing his income is a factual determination that will not be disturbed absent an abuse of discretion. *Id.*; *McDaniel v. McDaniel*, 2003-1763, p. 4 (La. App. 3 Cir. 5/19/04), 878 So. 2d 686, 689.

In the present case, when asked by the trial judge if there were any specific reasons why his income went from \$41,000.00 in 2000 to \$26,000.00 in 2001 then \$9,000.00 in 2003, Dr. Pierce's only explanation was that his expenses continued to increase and his financial obligations

finally caught up with him. He also testified that he had not tried to advertise his practice to bring in more business and that he had not considered working for or with another dentist to increase his income.

The trial court also found Dr. Pierce's testimony about his business deductions listed on his 2003 tax return incredible. When questioned regarding specific business deductions listed on his 2003 tax return, Dr. Pierce could not explain the deductions. The trial judge concluded that Dr. Pierce overstated his expenses and also took issue with the fact that, in spite of his diminished income and his child support arrearages, Dr. Pierce was able to make a charitable contribution in the amount of \$510.00. In Louisiana the trial court has discretion to determine what is an inappropriate expense when determining gross income for purposes of calculating child support. *Verges v. Verges*, 01-0208, p. 9 (La. App. 1 Cir. 3/28/02), 815 So. 2d 356, 362-363; *Stephenson v. Stephenson*, 37,323, p. 13 (La. App. 2 Cir. 5/14/03), 847 So. 2d 175, 183.

Dr. Pierce also contends that the trial court erroneously ignored evidence that showed that Ms. Sheppard's income had increased during the time Dr. Pierce's income decreased. Ms. Sheppard testified that she works on commission as a real estate agent. Ms. Sheppard's employment records revealed that she had a good year in 2002, making \$36,936.37. However, in



2001, 2003, and most of 2004, her yearly commission ranged from four thousand to seven thousand dollars.

Dr. Pierce put on evidence at trial that Ms. Sheppard had been featured in the newspaper for earning the Silver Star in real estate commissions for 2002 by her realty group, which was awarded to agents with commissions between \$45,000.00 and \$74,999.00. At trial, Ms. Sheppard testified that she believed this was a mistake. After reviewing the record, we cannot say that it was manifest error for the trial court to either find her explanation credible, or consider this evidence irrelevant in conjunction with Ms. Sheppard's uncontested average income from other years of around \$6,000 per year.

A trial court's factual findings and credibility determinations are entitled to great weight and will not be disturbed on appeal absent manifest error. *Stobart v. State of Louisiana, Through DOTD*, 617 So. 2d 880 (La. 1993). Considering the legal principles governing reductions in child support in light of the facts elicited at the hearing in the present case, we find no manifest error in the trial court's reduction of Dr. Pierce's child support to \$695 per month and the ordering of an additional payment of \$255 per month to the child support arrearage.

Lastly, Dr. Pierce argues that the trial court erred in holding him in

contempt of court for failure to pay a judgment against him. Appellee states,

the trial court did find (Dr. Pierce) in contempt during the November 17, 2004 hearing. He was ordered to pay \$5,000.00 or face 30 days incarceration. (Dr. Pierce) paid \$2,000.00 on January 27, 2005 at which time the state recalled the attachment that had been issued for (Dr. Pierce)'s arrest for failure to make the \$5,000.00 payment. (Dr. Pierce) was never jailed in this case and there is currently no outstanding attachment for him in this matter that could lead to his arrest.

Upon review of the record, Dr. Pierce is not under contempt, and we do not reach his second assignment of error because it is moot.

## **CONCLUSION**

For the foregoing reasons, the trial court's judgment is affirmed.

**AFFIRMED**