NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

K.A.W., Appellee v. S.J.W., Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1101 WDA 2012

Appeal from the Order Dated June 8, 2012
In the Court of Common Pleas of Mercer County
Domestic Relations at No(s): 276 DR 2012

BEFORE: BENDER, J., GANTMAN, J., and OLSON, J.

MEMORANDUM BY BENDER, J. FILED: May 24, 2013

S.J.W. (Father) appeals from the order dated June 8, 2012, that confirmed the order dated May 21, 2012, and directed Father to pay to K.A.W. (Mother) child support in the amount of $708.60 per month including arrearages. We vacate and remand.

Father and Mother were married in October of 2002 and were divorced in March of 2010. The child, who is the subject of this support action, was born in November of 2005. At the time of the divorce, the parties' marriage settlement agreement addressed all economic issues, the payment of child support, and a custody arrangement. However, on April 26, 2012, Mother filed the complaint for support that is at issue in this matter.[1] We further

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[1] No prior support order had been issued by the court.
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note that in a separate action Father has filed a petition to modify the present custody arrangement, which now provides him with custody only on his days off.

We glean the underlying facts from Father's testimony at the *de novo* hearing held before the trial court on June 8, 2012. Father testified that he began his employment with the Department of Corrections in April of 2004 at SCI Albion, which was located about an hour's drive each way from his home. Father further explained that it had been his intention to request a transfer from SCI Albion to SCI Mercer, which would reduce his commute to 25 minutes in each direction. However, Father was ineligible to request a transfer until he had completed at least one year at SCI Albion. After waiting the year, Father applied for a transfer to SCI Mercer in May of 2005, but no position became available there until April 1, 2012. Father accepted that position at the Mercer facility even though the new job reduced his rank and his pay.[2]

In response to Mother's filing of the support complaint on April 26, 2012, a support conference was held on May 21, 2012. The order issued that day reflected Mother's net income as $3,369.53 per month and Father's net income as $4,042.27 per month, an amount that was based upon

(Footnote Continued) ———————————

[2] Father had risen to the rank of sergeant at SCI Albion, but could not maintain that rank at SCI Mercer as that position was not available.

Father's earnings at SCI Albion. Father's support obligation was calculated to be $708.60 per month. Father filed a timely request for a *de novo* hearing, which was held on June 8, 2012. Father was the only witness to testify. The court recognized that "[t]he sole issue … was whether or not [Father's] income should be that of his previous employment, as determined by the conference officer, or his actual income." Trial Court Opinion (T.C.O.), 8/29/12, at 2.

Following the hearing, the court issued its order, stating:

> AND NOW, this 8th day of June, 2012, this matter being before the Court for a demand by the defendant from the order entered in this matter on May 21, 2012, and the sole issue involving whether or not the defendant's transfer resulting in a reduction in income should be used as the defendant's income for guideline determination, and all the factors being agreed, and THE COURT NOTING pursuant to Rule 1910.16-2(d) (1) that a voluntarily assumed lowering the pay in a job will generally have no effect on a support obligation, and THE COURT NOTING that the reason for the change was to allow the defendant to pursue more custody but did not increase his custody, and THE COURT FINDING this does not meet the exception, IT IS THE ORDER OF THIS COURT the demand is DISMISSED and the order of May 21, 2012 is REAFFIRMED.

Trial Court Order, 6/8/12. Therefore, the court "held [Father] to the income he was earning prior to the transfer and reaffirmed the Order of May 21, 2012." T.C.O. at 3.

Father timely appealed from the June 8, 2012 order and now raises one issue for our review:

> Did the Trial Court misapply Pa.R.C.P. 1910.16[-2](d)(1) when it failed to calculate support using [Father's] actual income?

Father's brief at 9. Accordingly, we must determine whether Father's income was correctly assessed.

Initially, we note that when reviewing a child support order, we are bound by the following well-settled standard:

> "In reviewing support orders, we are limited to considering whether, based on clear and convincing evidence, the trial court abused its discretion." ***Kersey v. Jefferson***, 791 A.2d 419, 422 (Pa. Super. 2002) (citation omitted). "An abuse of discretion requires proof of more than a mere error of judgment, but rather evidence that the law was misapplied or overridden, or that the judgment was manifestly unreasonable or based on bias, ill will, prejudice, or partiality." ***Id.*** at 423 (citation omitted).

Smedley v. Lowman, 2 A.3d 1226, 1228 (Pa. Super. 2010).

The pertinent statutory language is contained in Pa.R.C.P. 1910.16-2(d), which provides:

> **(d) Reduced or Fluctuating Income**.
>
> (1) Voluntary Reduction of Income. When either party voluntarily assumes a lower paying job, quits a job, leaves employment, changes occupations or changes employment status to pursue an education, or is fired for cause, there generally will be no effect on the support obligation.
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> * * * *
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> (4) Earning Capacity. Ordinarily, either party to a support action who willfully fails to obtain appropriate employment will be considered to have an income equal to the party's earning capacity. Age, education, training, health, work experience, earnings history and child care responsibilities are factors which shall be considered in determining earning capacity.

Moreover, "[u]nder Rule 1910.16-2(d)(1), if a party voluntarily accepts a lower paying job, there generally will be no effect on the support obligation.

A party may not voluntarily reduce his or her income in an attempt to circumvent his support obligation." ***Grigoruk v. Grigoruk***, 912 A.2d 311, 313 (Pa. Super. 2006) (citing ***Woskob v. Woskob***, 843 A.2d 1247, 1253-54 (Pa. Super. 2004); ***Dennis v. Whitney***, 844 A.2d 1267, 1269-70 (Pa. Super. 2004)). "However, when a parent has not voluntarily reduced his income to 'circumvent his support obligation[,]' this court 'can consider reducing the parent's child support obligation.'" ***Smedley***, 2 A.3d at 1228.

Father first indicates that no court ordered support obligation existed when he changed jobs and that Mother did not file the support complaint until 26 days after Father's job transfer. Thus, relying on ***Klahold v. Kroh***, 649 A.2d 701 (Pa. Super. 1994), Father contends that Pa.R.C.P. 1910.16-5(c)(1), the prior rule addressing voluntary reduction of income, was applied only to existing support orders. Therefore, because the father in ***Klahold*** had been fired for willful misconduct a year prior to the support hearing, this Court held that nothing in the record supported a finding that the father deliberately reduced his income to intentionally avoid his future support obligation. As a result, this Court concluded that the support obligation should be based on the father's "actual income[] and/or earning capacity." ***Id.*** at 704-05.

Father also addresses the trial court's failure to consider Father's intent when he decided to accept the transfer to SCI Mercer, which he recognized would reduce his income by about $1,500 per month. N.T.,

6/8/12, at 19. In ***Grigoruk***, this Court affirmed a reduction in a mother's support obligation after she was terminated for willful misconduct, concluding that the record supported a finding that her "job loss was not a result of [m]other's effort to avoid her support obligation." ***Grigoruk***, 912 A.2d at 313. The ***Grigoruk*** case emphasizes that under Rule 1910.16-2(d) a court must examine the party's intent, *i.e.*, whether he/she is trying to circumvent a support obligation.

The ***Smedley*** case likewise underscores the voluntariness of the reduction in income in order to circumvent the parent's support obligation. Although the trial court in ***Smedley*** recognized the father's entitlement to retire after thirty years as a police officer, it assigned an earning capacity above his pension amount but "far below his pre-retirement earnings…." ***Id.*** at 1229. After weighing the factors listed in Rule 1910.16-2(d)(4), this Court concluded that the "assigned earning capacity … did not amount to an abuse of discretion by the trial court." ***Id.***

Under the circumstances here, we conclude that the court abused its discretion by not considering Father's intent in regard to his changing jobs. Father planned to seek employment at the Mercer facility from the time he began working for the Department of Corrections at SCI Albion in 2004, even before the child was born. These facts do not support a finding that he transferred from SCI Albion to a lower paying position at SCI Mercer to circumvent his support obligation. Moreover, the court was informed that

Father was in the process of seeking additional time with his child through a custody proceeding, ***see*** N.T., 6/8/12, at 5, in light of the ample reduction in his commuting time to and from work. This uncontradicted information was not considered at all by the trial court. Rather, the court simply declared that Father had taken a lower paying position and, therefore, he was to be held to a support obligation based upon the higher salary he had earned at SCI Albion. This was an abuse of discretion that requires us to vacate the support order and remand the matter for a new calculation of Father's support obligation, taking into consideration the dictates of the cases cited above.

Order vacated. Case remanded for proceedings consistent with this memorandum. Jurisdiction relinquished.

Judge Olson concurs in the result.

Judgment Entered.

Nicholas V. Cusatti

Deputy Prothonotary

Date: May 24, 2013