NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

N.L.C., Appellee v. W.J.B., Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 443 WDA 2012

Appeal from the Order of February 14, 2012,
in the Court of Common Pleas of Erie County,
Domestic Relations at No. NS200002722
Case No. 854102781

BEFORE: BOWES, LAZARUS and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.: FILED: May 6, 2013

Father appeals from the child support order entered following a *de novo* hearing on his motion for modification of his support obligation. Father claims the trial court erred in: (1) setting an earning capacity for Father where he presented unrebutted medical evidence that he is currently unable to work due to injuries sustained from a motor vehicle accident as well as complications from surgery; (2) failing to consider Father's unreimbursed medical expenses and ongoing expenses as a factor for deviation from the support guidelines; and (3) failing to allow Father to testify at the hearing by electronic means. We affirm.

*Retired Senior Judge assigned to the Superior Court.

In reviewing Father's claims, we are mindful that:

> [O]ur standard of review over the modification of a child support award is well settled. A trial court's decision regarding the modification of a child support award will not be overturned absent an abuse of discretion, namely, an unreasonable exercise of judgment or a misapplication of the law. ***See Schoenfeld v. Marsh***, 418 Pa. Super. 469, 614 A.2d 733, 736 (Pa. Super. 1992). An award of support, once in effect, may be modified via petition at any time, provided that the petitioning party demonstrates a material and substantial change in their circumstances warranting a modification. ***See*** 23 Pa.C.S.A. § 4352(a); ***see also*** Pa.R.C.P. 1910.19. The burden of demonstrating a "material and substantial change" rests with the moving party, and the determination of whether such change has occurred in the circumstances of the moving party rests within the trial court's discretion.

Plunkard v. McConnell, 962 A.2d 1227, 1229 (Pa. Super. 2008).

Mother and Father are the parents of one minor child who is the subject of the instant support action. Pursuant to a September 26, 2002, order, Father's monthly child support obligation was initially set at $300.00. Mother petitioned for modification of the support order in May 2006. Pursuant to a June 20, 2006, interim order, Father was assessed an earning capacity of $1960.00 net per month based upon his prior employment and his support obligation was increased to $433.33 per month. This order became a final order. In September 2006, Father filed a petition for modification requesting a decrease in support, due, in relevant part, to his claim that he does not earn the income that has been assessed for calculation of support. Following a hearing, the court entered an interim order denying Father's petition for modification as a final order. Father did not appeal this order. Thereafter, on August 31, 2007, Father petitioned the

court for modification requesting a decrease in support due to a material and substantial change in the custody and visitation schedule. On February 27, 2008, following a hearing, the court entered its interim order dismissing Father's petition as a final order. This order was subsequently affirmed by this Court. [***N.L.C. v. W.J.B.***], 964 A.2d 449 (Pa. Super. 2008) (unpublished memorandum).

The trial court summarized the additional relevant facts as follows:

> . . . Father, on April 12, 2010 filed a Petition for Modification of an Existing Support Order requesting a decrease in his support obligation due to his incapacitation from an accident rendering him unable to work. Following a May 10, 2010 support conference, the conference officer issued a May 26, 2010 Summary of Trier of Fact and recommended Order in the amount of $433.33 per month,[1] which reflected a downward deviation in Father's support obligation in consideration of his care of another minor child, but denied suspension of the support obligation as Father's alleged disability was not preventing him from earning income. On June 16, 2010, Father filed a Demand for Court Hearing. Following an August 25, 2010 hearing, this Court issued an Order of the same date making the May 26, 2010 Order a final order.
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> On September 24, 2010, Father filed a Notice of Appeal from the August 25, 2010 Order. In his Statement of Matters Complained of on Appeal, Father alleged:
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>> 1. The Honorable Court erred in failing to find that the defendant was disabled and as such incapable of employment.
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>> 2. The Honorable Court erred in failing to suspend his child support obligation in the above case.

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[1] Father was assessed a net monthly income of $1,978.52 based on an earning capacity previously established by the court.

> This Court, pursuant to Pennsylvania Rule of Appellate Procedure 1925, issued an October 21, 2010 Opinion in support of its August 25, 2010 Order. In sum, the Court reasoned that Father's claims of disability were suspect, that Father was not credible and that there was not competent evidence that Father had a medical issue which resulted in a substantial and continuing involuntary decrease in his income. On January 19, 2011, Father discontinued his appeal.
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> On March 4, 2011, Father filed a Petition for Modification of an Existing Support Order alleging that he was disabled and requesting a decrease in his support obligation. Following a support conference, Father's Petition was dismissed upon the recommendation of the conference officer. Father filed a Demand for Court Hearing. Following a June 13, 2011 support *de novo* hearing at which Father's counsel presented documentation indicating that Father was hospitalized, this Court issued a June 16, 2011 Order dismissing Father's Petition without prejudice. *See* N.T. *Support DeNovo and Contempt Hearings*, June 13, 2011.
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> Father, on August 22, 2011, filed a Motion for Modification and Leave to Bypass Support Conference alleging, in relevant part, that Father's medical condition and ability to work required the Court's consideration. A *de novo* hearing was scheduled for October 13, 2011, which was continued at Father's request. Ultimately, the *de novo* hearing was scheduled for February 1, 2012. Father, on the afternoon of January 31, 2012, presented a Motion to Allow Testimony by Electronic Means requesting, for health reasons, to participate in the next day's hearing by telephone. This Court denied the same.

Trial Court Opinion, 04/30/12, 1-3. Following the *de novo* hearing, the court ordered, *inter alia*, Father to pay $433.33 per month for the support of his child through February 29, 2012. The court prorated Father's personal injury settlement of $65,614.71 over thirty-eight months giving Father additional income of $1726.70 per month and a net income of $3,705.22. Effective March 1, 2012, through April 30, 2015, the court ordered Father to pay $633.56 per month for support, which reflected a downward deviation in

Father's support obligation in consideration of his care of Father's other child. Effective May 1, 2015, the court ordered Father's support obligation be decreased to $433.33 per month. Father's timely appeal followed.

In his first claim, Father argues the court erred in establishing an earning capacity for him when he presented unrebutted medical evidence that he was unable to work as a result of injuries sustained in a January 17, 2010, automobile accident as well as from complications from a May 24, 2011, surgery. Father argues the trial court erred in refusing to consider evidence submitted at the August 25, 2010, hearing on Father's prior petition for modification as well as additional evidence at the instant hearing on Father's subsequent petition for modification.

As this Court has stated:

> [A] person's support obligation is determined primarily by the parties' actual financial resources and their earning capacity. Although a person's actual earnings usually reflect his earning capacity, where there is a divergence, the obligation is determined more by earning capacity than actual earnings. Earning capacity is defined as the amount that a person realistically could earn under the circumstances, considering his age, health, mental and physical condition, training, and earnings history.

Woskob v. Woskob, 843 A.2d 1247, 1251 (Pa. Super. 2004) (citations omitted).

With regard to reduced or fluctuating income, the support guidelines provide:

> (d) Reduced or Fluctuating Income.

> (2) *Involuntary Reduction of, and Fluctuations in, Income.* No adjustments in support payments will be made for normal fluctuations in earnings. However, appropriate adjustments will be made for substantial continuing involuntary decreases in income, including but not limited to the result of illness, lay-off, termination, job elimination or some other employment situation over which the party has no control unless the trier of fact finds that such a reduction in income was willfully undertaken in an attempt to avoid or reduce the support obligation.
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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.

Pa.R.C.P. 1910.16-2(d)(2) and (4).

With regard to Father's claim that the court erred in establishing an earning capacity for him based on his alleged inability to work as a result of the January 17, 2010, motor vehicle accident, the trial court found this claim to be an improper attempt by Father to relitigate an issue that was previously decided by the court. We agree. As the trial court noted, on August 25, 2010, following a *de novo* hearing, the trial court denied Father's petition to suspend his support obligation due to his alleged injuries from the January 17, 2010, accident based on its determination that Father's alleged disability was not preventing him from earning income. Trial Court Opinion, 04/30/12, at 5. Father discontinued his appeal of this order. Father cannot obtain review of the trial court's determination that he was not unable to work as a result of the January 17, 2010, accident by raising the identical issue in a petition for modification. ***See Florian v. Florian***, 689 A.2d 968,

971-72 (Pa. Super. 1997) (stating "a party may not attempt to relitigate matters adjudicated in the existing support order; a petition to modify an order of support cannot be a substitute for an appeal."); ***see also Beegle v. Beegle***, 652 A.2d 376, 378 (Pa. Super. 1994) (stating "[a]llegations of error in the factual findings of a lower court are properly addressed by filing exceptions and an appeal to this Court, not by filing a petition to modify in the same court that rendered the order."). Thus, because Father did not pursue a timely appeal of the court's determination that he was not unable to work as a result of the January 17, 2010, accident, he may not do so now. Additionally, any attempt by Father to present additional evidence of his previously litigated claim in his petition for modification was improper.

With regard to Father's claim that the trial court erred in establishing an earning capacity for him when he presented unrebutted medical evidence that he was unable to work as a result of complications from a May 24, 2011, surgery, the trial court did consider Father's evidence in this regard as this issue had not been previously litigated. However, the court determined that Father's medical issues did not warrant an adjustment in his support obligation. The trial court explained its decision as follows:

> In support of his argument that he is unable to work, Father presented the deposition testimony of Dr. Kaushik Das, the medical doctor who performed Father's May 24, 2011 surgery. Dr. Das recommended surgery based upon his diagnosis that Father had herniated discs and early myelopathy, a condition that is consistent with injuries sustained in a motor vehicle accident. After discussions with Father about his career as a singer, Dr. Das decided to perform the surgery in a manner that would not cause any problems with Father's vocal cords. Dr. Das performed the surgery on May 24, 2011. As a result of a complication from the surgery, Father was initially paraplegic,

although, he began moving his legs within a few days and began improving over the next several weeks. Father remained hospitalized until June 14, 2011 and then underwent inpatient rehabilitation. Dr. Das testified that Father has made "quite a bit of progress" since the surgery, that he is able to walk, and that "he's definitely better." Father is, however, "slightly worse than he was before the surgery." Father is unable to move like a normal person, however, he can walk with [a] cane and take a few steps without any assistance; he is just slower. Dr. Das opined that Father is currently disabled from employment.

Father's physical ailments do not warrant an adjustment in his support obligation. Specifically, the Court is not convinced that [F]ather's medical condition has resulted in a substantial and continuing involuntary decrease in his income. First, although Father suffered unfortunate complications from surgery, it is clear that the substantial impact was temporary in nature. Specifically, Dr. Das's testimony was optimistic that Father "may get back to close to what he was before the surgery as far as strength" and that, although he may still have problems with dexterity, he may be able to ambulate independently without a cane. Dr. Das further testified that this improvement should plateau by about twelve months after surgery. Moreover, Dr. Das testified that Father's condition is only "slightly worse" than it was prior to surgery. Meanwhile, this Court determined, just nine months prior to surgery, that Father's condition was not preventing him from earning income in his profession.

Furthermore, although Dr. Das testified that Father is currently unemployable, it became clear from his testimony that his assessment was not made in relation to Father's actual training and work history.[fn1] Instead, Dr. Das' assessment of current disability is related to limitations on lifting anything more than 5 pounds and typing. The types of activities that would aggravate Father's condition would be lifting 10 or 20 pounds over his head, any activity "where he's standing on his head," climbing or reaching with sudden movements. Father can, however, sit for an hour, two hours, or longer, as long as he is able to change position. Father is capable of using a computer mouse. Moreover, there is no physical limitation on Father's ability to compose music. When asked about Father's specific profession, Dr. Das testified as follows:

> [Mother's counsel:] Okay. So would you say that creatively he's not precluded from-he was an artist. I mean, creatively he's not going to be impaired from here on.
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> [Dr. Das:] I think that-you know, that's not-I guess he would not be-depending on the medications. When he's in pain and he's on a lot of medications, obviously he's not going to be able to function. So from what I hear from him is that he sometimes needs a lot of medications, and other days he has less pain and he does not need as many medications. So theoretically and creatively, he should not be permanently impaired. He may have good days and bad days, so his productivity may not be what it was. But I cannot see why he can't think or come up with ideas.

> *See* Petitioner's Exhibit 1 at 25. Accordingly, it is clear that Dr. Das was not taking into consideration Father's particular profession when stating that he was unemployable. To the contrary, the testimony of Dr. Das confirms that Father, who may be unemployable in occupations requiring lifting above his head or standing on his head, is not limited by his condition to work in his field of training and work experience. Instead, consistent with Father's behavior throughout the ten year history of this case, Father's evidence is once again inconsistent with his argument, indicating that he has merely found another excuse not to support his child.
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> Accordingly, the Court did not find that [F]ather's medical issues resulted in a substantial and continuing involuntary decrease in income.
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> FN1 Father is a singer and a background actor. Moreover, he designs and installs audiovisual systems in private homes. Father also does website design, graphic design and video editing as a source of income.

Trial Court Opinion, 04/30/12, at 7-9 (certain citations and footnotes omitted).

Father's argument is essentially that the trial court erred in not accepting the testimony of Father's doctor that Father is currently disabled from employment. As this Court has stated, "[w]hen the trial court sits as fact finder, the weight to be assigned the testimony of the witnesses is within its exclusive province, as are credibility determinations, [and] the court is free to choose to believe all, part, or none of the evidence presented." ***Mackay v. Mackay***, 984 A.2d 529, 533 (Pa. Super. 2009). The trial court explained its rationale for the weight it gave to this testimony and for its determination that Father's evidence failed to establish that his medical issues resulted in a substantial and continuing involuntary decrease in income. The trial court's findings in this regard are supported by the record and its conclusions are not unreasonable. We find no error in this regard.

In his second claim, Father argues the trial court erred in failing to grant Father a deviation of his support obligation where Father received a personal injury settlement of $65,000, but presented evidence that he had unpaid medical bills of $152,000 and continued to incur medical expenses.

Rule 1910.16-5 sets forth the relevant factors the court must consider when deciding whether to deviate from the basic support obligation calculated under the support guidelines. Pa.R.C.P. 1910.16-5 provides:

> (a) Deviation. If the amount of support deviates from the amount of support determined by the guidelines, the trier of fact shall specify, in writing or on the record, the guideline amount of support, and the reasons for, and findings of fact justifying, the amount of the deviation.

> Note: The deviation applies to the amount of the support obligation and not to the amount of income.
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> (b) Factors. In deciding whether to deviate from the amount of support determined by the guidelines, the trier of fact shall consider:
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> (1) unusual needs and unusual fixed obligations;
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> (2) other support obligations of the parties;
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> (3) other income in the household;
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> (4) ages of the children;
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> (5) the relative assets and liabilities of the parties;
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> (6) medical expenses not covered by insurance;
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> (7) standard of living of the parties and their children;
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> (8) in a spousal support or alimony pendente lite case, the duration of the marriage from the date of marriage to the date of final separation; and
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> (9) other relevant and appropriate factors, including the best interests of the child or children.

Pa.R.C.P. 1910.16-5(a)-(b).

As this Court has stated, "a court generally has reasonable discretion to deviate from the guidelines if the record supports the deviation." ***Silver v. Pinskey***, 981 A.2d 284, 296 (Pa. Super. 2009).

> The trier of fact is required to consider all relevant factors and any one factor alone will not necessarily dictate that the amount of support should be other than the guideline figure. Rather, the trier of fact must carefully consider all the relevant factors and make a reasoned decision as to whether the consideration thereof suggests that there are special needs and/or circumstances which render deviation necessary.

. . .

> The presumption is strong that the appropriate amount of support in each case is the amount as determined from the support guidelines. However, where the facts demonstrate the inappropriateness of such an award, the trier of fact may deviate therefrom. This flexibility is not, however, intended to provide the trier of fact with unfettered discretion to, in each case, deviate from the recommended amount of support. Deviation will be permitted only where special needs and/or circumstances are present such as to render an award in the amount of the guideline figure unjust or inappropriate.

Ball v. Minnick, 648 A.2d 1192, 1196 (Pa. 1994).

In declining to grant Father a deviation based upon his medical expenses not covered by insurance, the trial court explained:

> [T]he Court has consistently found, over the ten year course of this case, that Father has an earning capacity greater than he claims and that he has not been credible with regard to his income and assets.[fn3] Father has obscured this Court's view of his income and assets, but, it is clear that both are greater than he will allow the Court to see. It is not in the best interests of the child to credit Father for his liabilities when there is not a clear picture of his assets.
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> FN3 For example, as the Court pointed out in its 2008 Opinion, Father successfully maintains two households in two different states and he regularly travels between them. It is unclear, however, how Father is able to maintain this lifestyle on the meager salary that he claims. Moreover, despite his claim that he lacked income at that time, Father testified that, in addition to his audio visual work, he had already worked on two major feature films in 2008, he made a television appearance and had two nightclub jobs. See April 22, 2008 Opinion. In its October 21, 2010 Opinion, this Court again found that Father lacked credibility.

Trial Court Opinion, 04/30/12, at 11.

Thus, because the court was uncertain as to the full extent of Father's assets, Father failed to carry his burden to demonstrate that the unreimbursed medical expenses necessitated a deviation. We cannot say the court's decision was an abuse of discretion.

Father's final claim is that the trial court erred in failing to allow Father to testify by telephone at the *de novo* hearing where Father is disabled and lived in Brooklyn, New York and was not well enough to travel to the hearing.

Pa.R.C.P. 1930.3 provides, that "[w]ith the approval of the court upon good cause shown, a party or witness may be deposed or testify by telephone, audiovisual or other electronic means at a designated location in all domestic relations matters." Pa.R.C.P. 1930.3. The comments to the rule state that "[i]t is contemplated that use of telephone testimony will be the exception rather than the rule." Pa.R.C.P. 1930.3, Explanatory Comment-1994.

The trial court explained its decision as follows:

> In the last hours of the business day before Father's 11:00 a.m. *de novo* and contempt hearings,[2] Father's counsel submitted to the Court a request for Father to participate in the proceedings telephonically. In his Motion to Allow Testimony by Electronic Means, counsel alleged that, on the morning before the day of the hearing, his client notified him that, for health reasons, he was unable to travel to participate in the next day's hearing. If Father's health is as poor as he wants this Court to believe, he

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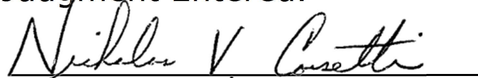
[2] A contempt hearing for Father's failure to pay support was held on the same day as the *de novo* hearing.

> was aware long before the few hours preceding the hearing that he was incapable of travel. Instead, Father waited until just hours before his hearing to inform the Court and opposing counsel that he would not be present to testify. Allowing Father, who has been found incredible on more than one occasion, to testify outside the physical presence of the Court about his physical limitations would clearly impede this Court's ability to assess his credibility. Moreover, when Father makes claims related to his physical ability to ambulate, it is prejudicial to Mother to find out in the hours before the hearing that the Court will not have the opportunity to see Father. It is further noteworthy that allowing telephone testimony would allow Father to avoid immediate incarceration upon a finding of contempt, if such a finding were made at the support contempt hearing scheduled to immediately follow the February 1st *de novo* hearing.

Trial Court Opinion, 04/30/12, at 12. We cannot conclude the trial court erred in determining Father did not demonstrate good cause to participate by telephone at the hearing on his request for modification. The court did not believe Father's claim that he was incapable of traveling to the hearing. Moreover, given the nature of Father's claims regarding his physical condition and the court's concern that allowing Father to testify outside of the court's presence would impede its ability to assess Father's credibility, the court's desire for Father to be present before the court when testifying was not unreasonable. Father is entitled to no relief on this claim.

Order affirmed.

Judgment Entered.



Deputy Prothonotary

Date: 5/6/2013