NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

A.J.H., Appellee v. F.D.N., Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 729 MDA 2012

Appeal from the Order Entered March 16, 2012
In the Court of Common Pleas of Tioga County
Civil Division at No(s): 0053-FS-09

BEFORE: BOWES, OLSON, and WECHT, JJ.

MEMORANDUM BY BOWES, J.: **FILED MAY 23, 2013**

F.D.N. ("Father") appeals from the March 16, 2012 order denying his petition to modify his child support obligation. We affirm.

A.J.H. ("Mother") instituted this action by filing a support complaint against Appellant, who responded with a complaint for divorce and custody. There was one child born of the marriage, P.N., a daughter. On March 18, 2009, a support order was entered, and the parties reached an accord with respect to the custodial arrangements. After entering a marital settlement agreement, Father and Mother were granted a divorce on August 17, 2010.

On September 16, 2011, Mother initiated proceedings to modify the existing support order. On October 13, 2011, a final support order was entered in this action. At that time, Mother's net monthly income was calculated at $1,634.37, and Father's net income was determined to be

$1,989.89. Father was ordered to pay monthly support in the amount of $225.92.

Less than two months later, on December 6, 2011, Father petitioned to lower his support obligation. He averred, "I was working two jobs and have now went to just one. My income is now lower therefore I feel there should be a decrease in support." Petition, 12/6/11, at ¶ 2. A conference was held, and the hearing officer denied Father's request based upon a determination that Father voluntarily quit his employment. Father objected and requested a *de novo* hearing, which was conducted on March 16, 2012.

At the *de novo* hearing, Father's counsel informed the court that Father and Mother had worked fulltime at the same facility, Metamora, and made approximately the same amount of income. Father's counsel "stipulate[d] to the facts that during the period the parties were married my client had, we'll call it a side job, a hobby of taxidermy," which brought in additional income. N.T. Hearing, 3/16/12, at 1. Father asked for a reduction in support based upon a straightforward position. Father decided to become a fulltime taxidermist and, prior to the end of 2011, left his Metamora job to fulfill that desire. He asked that his earning capacity be based solely on what he was earning at Metamora when he quit rather than the income from his fulltime job and part-time taxidermy business. ***Id***. ("[Father's] intent [was] to transfer from fulltime employment over to making taxidermy his fulltime employment''; Fathers income should be

based "on an earning capacity at his fulltime wages from his prior employer, but we don't then add on what was the hobby income[.]")

Mother countered that Father's income was "calculated all along since the party's separation as the Metamora income and the taxidermy income." ***Id***. at 7. She noted that the taxidermy business was started in 2004, continued after the parties were married in 2005, and was included in the child support obligation calculated earlier in this lawsuit. She argued that if Father wanted to leave Metamora of his own accord to start a new business, his support should be based, as required by the law, on his historical earnings because that decision resulted in a voluntary reduction in income.

The court agreed with Mother's position that Father's voluntary decision to reduce his income to seek other employment opportunities was not a basis for reducing his support obligation, and it indicated that it intended to keep the October 13, 2011 support order intact.

At that point, Father indicated that he wanted to create a record to include his 2011 Metamora W-2 and the 2011 taxidermy income. Mother noted that a calculation of the parties' actual earnings was conducted just prior to entry of the October 13, 2011 support order and that Father's December 6, 2011 petition for modification did not claim that Father's earnings were incorrectly calculated for purposes of that order.

The court responded that the income information Father sought to introduce was irrelevant to the purely legal question before it, *i.e.*, whether

the historical fulltime earnings from Metamora solely should be used to calculate Father's support obligation. The court then denied Father's petition for modification.

In this ensuing appeal, Father raises two issues: "Whether the Trial Court erred in failing to hold a hearing *de novo* and permitted [sic] testimony by [Father]?"; and "Whether the Trial Court erred in assessing [Father's] earning capacity based on two jobs when he voluntarily gave up one of the two jobs?" Father's brief at 4.

Initially, we set forth our standard of review herein:

> When evaluating a support order, this Court may only reverse the trial court's determination where the order cannot be sustained on any valid ground. We will not interfere with the broad discretion afforded the trial court absent an abuse of the discretion or insufficient evidence to sustain the support order. An abuse of discretion is not merely an error of judgment; if, in reaching a conclusion, the court overrides or misapplies the law, or the judgment exercised is shown by the record to be either manifestly unreasonable or the product of partiality, prejudice, bias or ill will, discretion has been abused.

Summers v. Summers, 35 A.3d 786, 788 (Pa.Super. 2012) (quoting ***Krebs v. Krebs***, 944 A.2d 768, 772 (Pa.Super. 2008)).

Based upon the procedural posture of this case, we conclude that Father was not improperly denied the right to present the proffered evidence at the *de novo* hearing. Father's petition for modification was filed less than two months after there was a calculation of the parties' actual earnings. In the petition for modification, Father never claimed that he was earning less

than the amount assigned to him in the October 13, 2011 order; he merely sought elimination of his part-time taxidermy income.

At the beginning of the March 16, 2012 *de novo* hearing, Father stipulated that he voluntarily left Metamora and elected to pursue his taxidermy business. In his petition, and at the inception of the hearing, the only issue before that court was whether his earning capacity should be calculated on his past Metamora income or on both the Metamora income and the historical income his part-time taxidermy business earned. Once this issue was resolved adversely to Father, there was no calculation to be performed.

Father maintains on appeal that he was improperly precluded from presenting "any evidence on his earning capacity," Father's brief at 7, but Father did not allege in his December 6, 2011 petition for modification that the earning capacity assigned to him for purposes of the October 13, 2011 order was incorrect. All Father sought at the *de novo* hearing was removal of the taxidermy income. At the hearing, Father wanted to present his 2011 Metamora W-2 earnings. However, in the December 6, 2011 request to modify, Father admitted that he had already left Metamora so any 2011 W-2 from that company would have been based upon a partial year of employment rather than his fulltime earnings. Father's taxidermy income for 2011 was not relevant to his sole contention, which was his child support obligation should be based upon his historical Metamora earnings and not

any of his taxidermy-business profit. Hence, the evidence that Father sought to introduce at the *de novo* hearing was not pertinent to any issue before the trial court.

The second issue raised in this appeal is whether Father's earning capacity for child support purposes should be calculated solely based upon what he earned at Metamora before he quit. As we observed in ***Smedley v. Lowman***, 2 A.3d 1226, 1228 (Pa.Super. 2010), Pa.R.C.P. 1910.16–2(d)(1)[1] prohibits a change in a support obligation due to a voluntary reduction of income. Specifically, Pa.R.C.P. 1910.16–2(d)(1) provides, "*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." Indeed: "It is beyond question that in Pennsylvania, a person's income must include his earning capacity, and a voluntary reduction in earned income will not be countenanced; instead, child support will continue to be calculated based upon earning capacity rather than actual earnings." ***Mencer v. Ruch***, 928 A.2d 294, 299 (Pa.Super. 2007).

We have consistently rejected an obligor's attempt to reduce child support due to an income reduction based upon the obligor's volitional

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[1] We note Pa.R.C.P. 1910.16-2 was amended in 2013.

decision to change employment, even if that change is designed to increase the obligor's future income rather than avoid child support. Illustrative of this principle is the case of ***Portugal v. Portugal***, 798 A.2d 246 (Pa.Super. 2002). Therein, the mother was a veterinarian who, rather than working as a veterinary assistant at an established practice, opened her own business with the intention of building an enterprise that would produce substantially more earnings. We rejected the mother's attempt to have her actual earnings, rather than her earning capacity as evidenced by what she could have earned as an assistant at an extant clinic, be used to calculate the parties' respective child support obligations. We observed that Pa.R.C.P. 1910.16-2(d)(1) expressly states that if a party to a support proceeding voluntarily assumes a lower paying job, that party's child support obligation is unaffected. ***See also Kersey v. Jefferson***, 791 A.2d 419 (Pa.Super. 2002) (father left job to pursue medical degree; earnings at prior job were properly used to calculate child support). In this case, Father admittedly left his Metamora job of his own free will. He cannot modify his support obligation based upon his own choice to take another career path and thereby reduce his income. The motivation for that decision is not relevant.

On appeal, Father attempts to reframe the issue by suggesting that he cannot be forced to hold down a fulltime and part-time job. No one is forcing Father to work two jobs, which is simply not the issue before this Court. Nevertheless, Father cannot decrease his support obligation based

upon his voluntary decision to reduce his income, which for seven years prior to his 2011 petition to reduce his support obligation included both earnings from a fulltime job and income from a part-time hobby.

Father relies upon ***Haselrig v. Haselrig***, 840 A.2d 338 (Pa.Super. 2003), where we decided that an obligor's spousal support obligation could not be based upon two fulltime jobs that were held temporarily to help meet a child support obligation arising from prior relationships. Unlike in ***Haselrig***, however, Father's obligation is for child support, not spousal support. Moreover, he is not being imputed earnings from two fulltime jobs, and he did not hold his part-time job temporarily. For seven years, Father worked at Metamora while performing taxidermy work on the side. He did so prior to and during the marriage and continued to do so until his child support obligation was set on October 13, 2011. Then, immediately after he was ordered to pay about $200 a month in child support, he decided to become a fulltime taxidermist. This volitional reduction in income is not a basis for a reduction in child support. Indeed, in ***Akers v. Akers***, 540 A.2d 269, 269 (Pa.Super. 1988), *superseded on other grounds as noted in* ***Jackman v. Pelusi***, 550 A.2d 199, 206 (Pa.Super. 1988), we concluded that a father's child support obligation should be calculated based upon his earnings from both a fulltime and part-time job.

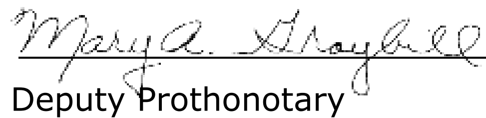
While Father also suggests that there is no record support for a determination of his earning capacity, we disagree. The figure was

calculated on October 13, 2011, after Mother requested an increase in child support and merely two months before he sought his reduction. As noted, Father never claimed that the said support order contained an incorrect calculation of his earnings.

Father is not required to work two jobs; however, his child support obligation cannot be reduced by his volitional decision to reduce his income to pursue a career as a taxidermist. Perceiving no abuse of discretion in this case, we must affirm.

Order affirmed.

Judgment Entered.



Deputy Prothonotary

Date: 5/23/2013