IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 22, 2013 Session

KIMBERLY MEEKS v. BRYANT LEO MEEKS

Appeal from the Circuit Court for Montgomery County
No. MCCCCVDV11447 Michael R. Jones, Judge

No. M2013-01203-COA-R3-CV - Filed March 6, 2014

In this child support case, Father appeals the trial court's determination that he was voluntarily underemployed. We have reviewed the record and the relevant authority and find that the trial court did not err in concluding that Father was underemployed for the purpose of calculating his child support obligation. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, M.S., P.J., and RICHARD H. DINKINS, J., joined.

Thomas R. Meeks, Clarksville, Tennessee, for the appellant, Bryant Leo Meeks.

Jonathan Bradley Miley, Wende J. Rutherford, Nashville, Tennessee, for the appellee, Kimberly Meeks.

OPINION

FACTUAL AND PROCEDURAL HISTORY

After having been previously married to each other and divorced, Kimberly Meeks ("Mother") and Bryant Meeks ("Father") were married for a second time in September 2010; the parties have two minor children. On March 7, 2011, Mother filed a complaint for divorce. The trial court held a hearing on May 31, 2011 and named Mother the primary residential parent of the parties' children and set Father's temporary child support obligation at $992.00 per month. The court held a final hearing on February 28, 2012. At that time, Father was employed as a mortgage originator and Mother worked at a Shoney's restaurant.

On March 15, 2012, the court entered an opinion[1] stating: "The father has made varying amounts at different financial institutions. At this point, it is unknown what he may be earning based on commissions. Based on past experience his yearly income should exceed $80,000.00. For child support purposes, the father's monthly income shall be $6,6666[.]67."

On March 6, 2012, Father was terminated from his employment. On March 22, 2012, Father filed a motion requesting the court to "grant a moratorium" on child support because he had lost his job and had a decrease in income. In his motion, Father stated that he was terminated "based on the [bank's] allegation that [he had] violated company policy in recording a conversation [he] had with a District Manager."

On July 10, 2012, the trial court entered a final decree of divorce incorporating its March 15 opinion. The court set Father's income at $6,666.67 for child support purposes and set Father's child support obligation at $1,002 per month. The court also awarded Mother back child support from Father's income tax refund in the amount of $1,984. On August 1, 2012, Father filed a motion to alter or amend the trial court's July 10 final decree asserting that he lost his job and that he had been unable to find employment. On September 11, 2012, Father filed a letter from Screening and Selection Services evidencing that Envoy Mortgage would not hire him due to his criminal background check revealing a felony forgery charge.[2]

While Father's motion to alter or amend was pending, the parties filed several motions for contempt, modification of the parenting plan, and ex parte custody which were consolidated and heard at a March 5, 2013 hearing. The trial court entered an opinion on March 18, 2013 which was incorporated into the trial court's final order entered April 22, 2013. In its March 18 opinion, the court stated:

> After the hearing on the divorce (February 28, 2012[)], and after the court entered its opinion (March 15, 2012) and prior to the entering of the Final Decree (July 10, 2012), the father filed a Motion for Moratorium on payment of child support. (March 22, 2012). Upon reading the entire motion, the court determined to consider this as a motion to reduce child support.

The court modified Father's income beginning in March 2012 to $6,000 and found him to be willfully underemployed stating:

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[1] According to the parties' briefs on appeal, this opinion was never distributed to the parties until the final decree of divorce was entered on July 10, 2012.

[2] Father was on probation for forgery for signing Mother's name to an income tax refund check without her permission.

8. The father is found to be willfully underemployed based on the Child Support Guidelines, Chapter 1240-2-4 (Rule 1240-2-4-.04), and the Court's finding that the father's criminal history will not allow the Court to find that [Father] makes less than $6,000.00 per month commencing March 2012, until further orders of this Court.

9. [Father], after the divorce hearing on February 28, 2012, did lose his employment with his employer on March 6, 2012.

10. [Father] was not able to find employment with a financial institution after his termination from employment because of [] not meeting the legal criteria which was mandated by Federal Law to serve as a mortgage originator until December 24, 2012.

11. [Father] became eligible to apply for a mortgage originator's license at the end of August, 2012, but had to pass certain criteria and certain tests promulgated by the State and Federal Government before receiving his license.

Father filed a motion to alter or amend the trial court's April 22, 2013 order asserting that the trial court erred in finding him underemployed because he was "never convicted of a criminal act whatsoever." On May 3, 2013, Father filed a Rule 60 Motion requesting the court to modify his child support obligation due to his payment of medical insurance for the children. The trial court held a hearing on Father's motion to alter or amend on May 3, 2013. At the conclusion of the hearing, the court stated:

> This matter, of course, has been heard by this Court not only on this domestic situation but in the criminal court. There's been testimony that Mr. Meeks committed a criminal act by forging a check. That is a criminal act. The Court is not going to close its ears to other testimony and other hearings that I've had in this matter.
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> So, I believe that it - - basically on his testimony, that he was underemployed because of his criminal activity and forging that check. So I'm not going to alter or amend.

The court denied Father's motion to alter or amend by order entered May 9, 2013. Also on May 9, the court entered an order modifying Father's child support obligation to $850 per month "commencing March 2013" due to Father's payment of monthly medical premiums for the children.

Father appeals asserting that the trial court erred in considering "matters not submitted

to the trial court in the hearing" held on March 5, 2013 in finding him willfully underemployed.

STANDARD OF REVIEW

Our review of the trial court's findings of fact is de novo upon the record, accompanied by a presumption of correctness, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *Kendrick v. Shoemake*, 90 S.W.3d 566, 569-70 (Tenn. 2002). The trial court's conclusions of law are reviewed de novo, with no presumption of correctness. *Kaplan v. Bugalla*, 188 S.W.3d 632, 635 (Tenn. 2006).

ANALYSIS

Awards of child support are governed by the Child Support Guidelines ("the Guidelines"), promulgated by the Tennessee Department of Human Services Child Support Services Division. Tenn. Code Ann. § 36-5-101(e)(2); *see also* Tenn. Comp. R. & Regs. 1240-02-04-.01. These Guidelines have the force of law, *Jahn v. Jahn*, 932 S.W.2d 939, 943 (Tenn. Ct. App. 1996), and are intended to "assure that children receive support reasonably consistent with the parent or parents' financial resources." *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248-49 (Tenn. Ct. App. 2000). Even with the adoption of the Guidelines, trial courts retain a certain amount of discretion in their decisions regarding child support, which decisions we review under an abuse of discretion standard. *Richardson v. Spanos*, 189 S.W.3d 720, 725 (Tenn. Ct. App. 2005). A trial court abuses its discretion when it has applied an incorrect legal standard or has reached a decision which is against logic or reasoning that caused an injustice to the party complaining. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001).

When considering a petition to modify child support,[3] the trial court must determine whether there is a significant variance[4] between the obligor's current obligation and that set by the Guidelines. *See* Tenn. Code Ann. § 36-5-101(g); *Kaplan v. Bugalla*, 188 S.W.3d at 636. In certain circumstances, the trial court may deny the petition even if a significant variance is proven; for example, if the party opposing the modification proves the variance

[3] Neither party argues that the trial court erred in concluding that Father's March 22, 2012 motion was a petition to modify child support. We will analyze the trial court's decision accordingly.

[4] A significant variance is defined as "at least a fifteen percent (15%) change between the amount of the current support order (not including any deviation amount) and the amount of the proposed presumptive support order." Tenn. Comp. R. & Regs. 1240-02-04-.05(2)(c). There is evidence to support a finding that Father could establish a significant variance following his termination in March 2012.

in child support is the result of willful or voluntary underemployment. *Richardson*, 189 S.W.3d at 727; *Demers v. Demers*, 149 S.W.3d 61, 69 (Tenn. Ct. App. 2003). Whether a parent is willfully or voluntarily underemployed is a question of fact, and the trial court "has considerable discretion in its determination." *Eldridge v. Eldridge*, 137 S.W.3d 1, 21 (Tenn. Ct. App. 2002). A trial court's determination regarding willful and voluntary underemployment is entitled to a presumption of correctness. *Johnson v. Johnson*, No. M2008-00236-COA-R3-CV, 2009 WL 890893, at *7 (Tenn. Ct. App. Apr. 2, 2009).

In the present case, the trial court found Father to be willfully underemployed. In support of this conclusion, the court cited Tenn. Comp. R. & Regs. 1240-02-04-.04 and stated that Father's "criminal history" required the court to find that Father could make at least $6,000.00 per month.

Pursuant to Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2)(ii)(I):

> A determination of willful and/or voluntary underemployment or unemployment is not limited to choices motivated by an intent to avoid or reduce the payment of child support. The determination may be based on any intentional choice or act that adversely affects a parent's income. *Criminal activity and/or incarceration shall not provide grounds for reduction of any child support obligation.* Therefore, *criminal activity and/or incarceration shall result in a finding of voluntary underemployment or unemployment under this section*, and child support shall be awarded based upon this finding of voluntary underemployment or unemployment.

(Emphasis added).

Father argues that the trial court erred when it "elected to go outside the [Father's] pleadings . . . to find the Husband willfully under-employed based on the trial judge's personal and independent knowledge as the criminal court judge in the case of State v. Bryant Leo Meeks, Docket No. 41100298." Notwithstanding the fact that the trial judge did preside over Father's criminal proceeding, we have reviewed the record and find ample evidence in the record before us to support the trial court's finding that Father engaged in criminal activity by forging Mother's name to an IRS document. For example, in Father's March 15, 2012 motion to waive court costs, Father stated, as grounds for relief that:

> 1. The Movant entered a plea to the underlying charge (fraud-by signing his wife's name to the IRS check refund for the year 2010). Although the alleged victim, Kim Meeks - now Gibbs, did not work for the entire year of 2010, and the monies refunded by the IRS was solely earned by the

> Defendant, the Defendant did sign the alleged victim, Kim Meeks' name to the 2010 IRS check refund and entered a settlement for pretrial diversion on the 6th day of May, 2011.

Father submitted a pretrial brief on March 4, 2013, in which he stated, in paragraph 14:

> [Father] was unable to be employed as a mortgage originator after his termination with the bank because of the indictment [he] received stemming from him signing his wife['s] name to [his] income tax refund check from the previous year. The Obama administration in 2011, tightened up the banking laws which prohibits employment of a person to act as a mortgage originator that has a felony record. Previous thereto, [Father] was able to work for the bank using their mortgage originator's license. . . . [Father] applied for six or seven jobs on a monthly basis and was told that he was either too qualified and educated or he was unqualified due to a felony conviction.

Other evidence of Father's criminal activity included a background check Father submitted reflecting a felony forgery charge, as well as testimony at the March 5, 2013 hearing, in which Father referred to his "criminal history" and his "federal indictment."[5] At various points in the record Father admits to forging Mother's signature on an IRS document. Thus, there is sufficient, independent evidence from which the trial court could conclude that Father engaged in criminal activity. Father's argument that the trial court impermissibly considered evidence outside the record ignores the pleadings he submitted regarding his criminal activity and is without merit.

Next, Father contends that the trial court erred in finding he was underemployed based on his indictment for forgery. We have reviewed the pleadings and relevant testimony and find that the trial court did not abuse its discretion in finding Father to be voluntarily underemployed. A finding of underemployment "is not limited to choices motivated by an intent to avoid or reduce the payment of child support." Tenn. Comp. R. & Regs. 1240-02-04-.04-(3)(a)(2)(ii)(I). The Guidelines squarely address the question of whether child support should be reduced based upon criminal activity. *See also State ex rel. Laxton v. Biggerstaff*, No. E2009-01707-COA-R3-JV, 2010 WL 759842, at *5 (Tenn. Ct. App. Mar. 5, 2010) (discussing the application of Tenn. Comp. R. & Regs. 1240-02-04-.04-(3)(a)(2)(ii)(I) in the context of a parent's incarceration). Tennessee Rules and Regulations 1240-02-04-.04-(3)(a)(2)(ii)(I) states that, "criminal activity . . . shall result in a finding of voluntary

[5] When asked why he was unable to earn $6,000 to $7,000 per month as a mortgage originator, Father responded: "I've been out of the market for approximately 15 months. I have a damaged reputation. I have people around town talking to me that I've got federal indictments for forgery."

underemployment . . . ." The Guidelines' use of the term "shall" requires mandatory compliance. *See, e.g., Bellamy v. Cracker Barrel Old Country Store, Inc.*, 302 S.W.3d 278, 281 (Tenn. 2009) (quoting *Stubbs v. State*, 393 S.W.2d 150, 154 (1965) ("'When 'shall' is used . . . it is ordinarily construed as being mandatory and not discretionary.'")).

Father's criminal activity—forgery—adversely affected his ability to find employment in his chosen profession. Indeed, Father's primary argument on appeal is that he was unable to procure employment as a mortgage originator due to his adverse criminal background check. Therefore, we hold that the trial court did not err in its application of the Guidelines and did not abuse its discretion in determining that Father was voluntarily underemployed for purposes of his child support payment.

CONCLUSION

For the foregoing reasons, we affirm the trial court in all respects. Costs of appeal are assessed against Father.

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ANDY D. BENNETT, JUDGE