IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 4, 2016

MEGAN E. SMITH v. JUSTIN L. SMITH

Direct Appeal from the Circuit Court for Rutherford County
No. 63741 J. Mark Rogers, Judge

No. M2015-01038-COA-R3-CV – Filed May 24, 2016

This is an appeal of an order modifying a party's child support obligation. The trial court granted Appellee's petition to downwardly modify her child support obligation based on a decrease in Appellee's income. Appellant objected, arguing that Appellee was voluntarily underemployed. The trial court found that Appellee was not underemployed and determined Appellee's income for the purpose of child support obligation by averaging the income she earned in each of her previous five positions. We affirm in part and vacate in part.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in part, Vacated in part, and Remanded

BRANDON O. GIBSON, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and JOHN W. MCCLARTY, J., joined.

Stephen Walker Pate, Murfreesboro, Tennessee, for the appellant, Justin L. Smith.

Megan E. Smith, Murfreesboro, Tennessee, did not file a brief.

OPINION

Background & Procedure

Justin L. Smith ("Appellant") married Megan E. Smith ("Appellee") on January 8, 2011. Appellant filed his complaint for divorce on October 19, 2011. The parties had one minor child by the time of the divorce trial. On October 25, 2011, Appellee filed her answer and counter complaint for divorce. The parties subsequently filed another round of amended complaints and answers before ultimately agreeing to mediation. The parties entered into a Marital Dissolution Agreement ("MDA") on December 11, 2011, whereby they stipulated to a divorce on the grounds of irreconcilable differences. The MDA also

divided the parties' personal property and debts and provided for a permanent parenting plan for the parties' minor child. On January 30, 2012, the circuit court entered an agreed order modifying Appellant's child support obligation, terminating Appellant's child support obligation, and ordering Appellee to pay Appellant forty-five dollars per month. The parties were divorced by final decree on January 31, 2012.

On September 11, 2013, the circuit court entered an agreed order modifying Appellee's child support obligation, increasing Appellee's obligation to $369.00 per month due to an increase in Appellee's income. On May 7, 2014, Appellee filed a petition to modify her child support obligation, asserting that since the entry of the last order she had received a substantial decrease in income and Appellant had received a substantial increase in income. The circuit court heard testimony in this matter on April 20, 2015, and issued its order on May 1, 2015. The parties stipulated that Appellant's monthly income was $3547, childcare paid by Appellee was $260 per month, and that Appellant paid a health insurance premium for the minor child in the amount of $59.39 per month. Appellee's income was the sole issue litigated before the court.

Appellee testified at length regarding her income history. From January 2012, the month of her divorce, to March 2012, Appellee worked at Advance America earning ten dollars per hour. In March 2012, Appellee left Advance America and began working for Neighborhood Title and Loan, where she earned $10.50 per hour until she left that job in June 2012. In August 2012, Appellee was hired as an Administrative Liaison for Boulevard Terrace, a nursing home, where she earned fifteen dollars per hour. Appellee's tenure at Boulevard Terrace ended in February 2013, when, according to Appellee, a new administrator came in and "let go [of] multiple people," including Appellee. Appellee stated that "[t]here was no excuse or reason for why I was getting let go. All I was given was unsatisfactory work performance." Following her termination from Boulevard Terrace, Appellee then worked as a waitress at Longhorn Steakhouse where she earned $2.15 per hour plus tips, and she indicated that she made anywhere from $50 to $90 per day working four or five days per week. In May 2013, Appellee left Longhorn and began working as an Admissions Coordinator at Green Hills Healthcare and Rehab in Nashville, Tennessee where she earned $19 per hour. Although she lacked a college degree, Appellee indicated that she was hired at Green Hills based in part on her four years' experience in health insurance in a previous job and also because the administrator at Green Hills had worked with Appellee at Boulevard Terrace prior to the arrival of that facility's new administrator.

According to Appellee, Green Hills suffered from high employee turnover, which led to "at least three" occasions where the marketing liaison position was empty. Because the marketing liaison position was empty, the number of admissions, for which Appellee was responsible as the Admissions Coordinator, dropped. Appellee testified

that "if [her] numbers fell down and were consistently down, [Green Hills] would let [her] go." Therefore, Appellee found herself doing the work of both positions in an attempt to keep her numbers up. Despite Appellee's efforts to maintain the numbers, she failed to meet her requirements and was given a performance action plan on July 30, 2014. Sensing that she was about to be fired, Appellee resigned her position in order to receive her paid time off, 30 days of insurance coverage, and a positive referral.

In September 2014, after applying for multiple jobs, Appellee began working full-time at Premier Orthopedics in Smyrna, Tennessee earning twelve dollars an hour. She admitted that working locally required her to take a pay cut compared to what she might be able to make if she were to continue to drive to Nashville. Appellee also emphasized that even if she chose to seek employment in Nashville that she did not think it likely that she would be able to earn the $19 per hour she made in her previous job, because that was a special circumstance based on a prior business connection.

In its oral ruling, the circuit court noted that while Appellee "voluntarily left" her job before she was about to be fired, "I don't think that it's that she's voluntarily [under]employed." The court then determined Appellee's income, stating

> So what I'm going to do in this case is to take – because I think that's what it says, consider the parties' past and present employment, and I took $10 per hour, $10.50 per hour, $15 per hour, $19 per hour, and the current of $12 per hour that she secures. That's 66.50. I divided it by five. That's $13.30 per hour. That's what I think she's capable of making without – by averaging it.

In its order, the court found that "[Appellee] did not quit her job but saw that she was about to be terminated." Further, the court also found that while Appellee "is currently earning $12.00 per hour" that "she has the ability to earn $13.30 per hour based upon her average work history making her monthly income $2305.33" for the purpose of determining her child support obligation.

Issue

Appellant raises one issue on appeal:

> I. Whether the trial court erred in calculating Appellee's gross income on an average of her earnings and not finding Appellee to be willfully under-employed.

Standard of Review

In nonjury cases, this Court's review is *de novo* upon the record of the proceedings in the trial court, with a presumption of correctness as to the trial court's factual determinations, unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d); *Union Carbide Corp. v. Huddleston,* 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's conclusions of law, however, are afforded no such presumption. *Campbell v. Florida Steel*, 919 S.W.2d 26, 35 (Tenn. 1996).

Analysis

Trial courts are required to modify an obligor's child support obligation only when a "significant variance" exists between the amount of support required by the Child Support Guidelines and the amount of the current support obligation. *See* Tenn. Code Ann. § 36–5–101(a)(1); *Willis v. Willis*, 62 S.W.3d 735, 738 (Tenn. Ct. App. 2001).

> A significant variance is defined as 'at least 15% if the current support is one hundred dollars ($100.00) or greater per month and at least fifteen dollars ($15.00) if the current support is less than $100 per month.' *See* Tenn. Comp. R. & Regs. tit. 10, ch. 1240–2–4–.02(3)[]. In cases where a downward modification is sought, such a variance supports modification unless the obligor is willfully and voluntarily unemployed or underemployed. *See id*. . . .
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> Whether a party is willfully and voluntarily underemployed is a question of fact, and the trial court has considerable discretion in its determination. *See Brooks v. Brooks*, 992 S.W.2d 403, 409 (Tenn. 1999) (Birch, J. dissenting). In making its determination, the trial court must consider the party's past and present employment and whether the party's choice to accept a lower paying job was reasonable and made in good faith. *See Ralston v. Ralston*, No. 01A01-9804-CV-00222, 1999 WL 562719, at *3 (Tenn. Ct. App. Aug. 3, 1999) (*no perm. app. filed*). However, when a party with child support obligations voluntarily leaves [their] employment and chooses to accept a job which provides significantly less income, courts are inclined to find willful and voluntary underemployment. *See Brooks*, 992 S.W.2d at 407. Additionally, when a party testifies that [they have] the ability to earn a greater income, courts have determined that constitutes evidence of willful underemployment. *See Anderson v. Anderson*, No. 01A01-9704-CH-00186, 1998 WL 44947, at *4 (Tenn. Ct. App. Feb. 6, 1998) (*no perm. app. filed*); *Beem v. Beem,* No. 02A01-9511-CV-00252, 1996 WL 636491, at *1 (Tenn. Ct. App. Nov. 5, 1996) (*no perm. app.*

> *filed*); *Riley v. Riley*, No. 03A01-9480-CH-00268, 1995 WL 311331, at *1 (Tenn. Ct. App. May 22, 1995) (*no perm. app. filed*); *Gutknecht v. Gutknecht*, No. 01A01-9101-CH-00015, 1991 WL 79560, at *1 (Tenn. Ct. App. May 17, 1991) (*no perm. app. filed*).

Willis, 62 S.W.3d at 738.

Here, the trial court found that Appellee "did not quit but saw that she was about to be terminated." While the record is clear that Appellee technically did, in fact, quit her job prior to being fired, the evidence does not preponderate against the circuit court's conclusion that Appellee did not leave her job "voluntarily." This is not a case where an employee with a well-paying job decided they would rather pursue another career even though it would bring in significantly less income. Whether Appellee preemptively quit in order to salvage her paid time off and insurance or waited until she was fired, the fact is that she was no longer going to be employed in that position earning $19 per hour. Simply, she did not voluntarily give up that income. With respect to whether Appellee testified that she had the ability to earn a greater income, the record demonstrates only that Appellee did not believe she would earn $19 an hour in another job because her earning capability at Green Hills was tied to having a prior business connection. While she admitted that she might be able to earn more if she drove to Nashville for work, there was no evidence before the court to suggest how much greater income, if any, she would earn in Nashville. Ultimately, a trial court must decide "whether the party's choice to accept a lower paying job was reasonable and made in good faith." *Willis*, 62. S.W.3d at 738. In this case, the circuit court determined that Appellee's choice was a reasonable one and that she was not voluntarily underemployed. Having reviewed the record, we cannot say that the evidence preponderates against the circuit court's finding that Appellee was not voluntarily underemployed.

However, while the determination of whether a party is voluntarily underemployed is a question of fact, a court's finding of facts lead it to make conclusions of law. Here, the court made its finding and then determined Appellee's income for the purpose of her child support obligation by averaging the income of Appellee's previous five positions. This was in error. Tennessee's Child Support Guidelines require trial courts to determine the parties' income by their gross incomes unless additional income should be imputed when a parent has been determined to be voluntarily unemployed or underemployed or when there is no reliable evidence of income. Tenn. Comp. R. & Regs. 1240–02–04–.04(3). Here, the court found that Appellee was not voluntarily underemployed and made no finding with respect to the reliability of the evidence of Appellee's income. However, even if the court had found no reliable evidence of Appellee's income, the Child Support Guidelines then set a precise dollar amount that should be imputed in those cases, which was not done here. According to the Child

Support Guidelines, a trial court only considers a party's past and present employment when determining the amount of income to impute to a party found to be voluntarily underemployed. Tenn. Comp. R. & Regs. 1240–02–04–.04(3).

Our review of the trial transcript suggests that the circuit court misapplied the guidelines in this case. As noted above, in its oral ruling, the court stated, "I don't think that it's that she's voluntarily [under]employed. So what I'm going to do in this case is to take – because I think that's what it says, consider the parties' past and present employment . . . ." and then averaged Appellee's past incomes. According to the guidelines, however, the court should have used Appellee's current pay rate to determine her income for the purposes of her child support obligation. Having determined that the court set the amount of Appellee's income in error, we must vacate the trial court's order with respect to the court's finding that Appellee is capable of making $13.30 per hour. We therefore remand to the trial court for further proceedings consistent with this opinion.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed in part and vacated in part. Costs of this appeal are taxed to the Appellant, Justin Smith, and his surety, for which execution may issue if necessary.

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BRANDON O. GIBSON, JUDGE