

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs October 14, 2015

**STATE EX REL. MARIA BROWN v. ANDREW BROWN**

**Appeal from the Chancery Court for Williamson County  
No. 34730 Walter C. Kurtz, Chancellor**

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**No. M2014-02497-COA-R3-CV – Filed February 8, 2016**

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Mother filed a post-divorce petition seeking an increase in child support. Father opposed the petition, insisting that Mother was voluntarily underemployed. The trial court found that there was a significant variance between the current obligation and the obligation set by the Tennessee Child Support Guidelines. The trial court further found that Mother was not voluntarily underemployed and ordered an increase in Father’s child support obligation. Father appealed. Because the evidence does not preponderate against the trial court’s finding that Mother is not voluntarily underemployed, we affirm.

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

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which CHARLES D. SUSANO, JR., C.J., and J. STEVEN STAFFORD, P.J., W.S., joined.

Misty D. Parks, Spring Hill, Tennessee, for the appellant, Andrew Brown.

Herbert H. Slatery, III, Attorney General and Reporter; Rebekah A. Baker, Senior Counsel, Nashville, Tennessee, for the appellee, State of Tennessee ex rel. Maria Brown.

**OPINION**

On October 21, 2008, Maria Brown (“Mother”) and Andrew Brown (“Father”) were granted a divorce. At the time of the divorce, the parties’ only minor child was three years old. The parties’ final divorce decree incorporated a permanent parenting plan that allocated equal parenting time to Mother and Father and set Father’s child support

obligation at \$29.00 per month. The child support worksheet set Mother's gross monthly income at \$3,666.00 and Father's gross monthly income at \$4,250.00.<sup>1</sup>

On July 25, 2014, Mother filed a petition for modification of child support through the office of Child Support Services alleging a significant variance between the Tennessee Child Support Guidelines and the amount of support currently ordered, justifying a modification in child support. The trial court heard Mother's petition for modification on November 4, 2014.

The parties stipulated that Father pays \$212 per month for the child's portion of the health insurance premium and that neither parent would be given credit for the payment of any work-related child care for the purposes of child support calculation. The parties also stipulated that Father's current income was \$4,639.81 per month and that Mother's was \$1,451.77 per month. The parties further stipulated Mother's past years' income at the following amounts: \$43,698.00 for 2008; \$41,117.00 for 2009; \$42,305.00 for 2010; \$51,719.00 for 2011; \$11,033.00 for 2012; and \$15,868.00 for 2013. The parties did not stipulate that Mother's current income reflected her earning capacity or potential; thus leaving this the dispositive issue to be decided by the trial court.

At the hearing, Father asserted that the trial court should find that Mother was voluntarily underemployed and impute income to her at her proven earning capacity of \$4,309.92 per month based on her earnings in 2011. The only testimony presented to the trial court was that of Mother. In the record before us, we are provided with a statement of the evidence summarizing Mother's testimony as follows:

Mother testified that at the time of the entry of the original Permanent Parenting Plan and establishment of the original Child Support Worksheet, she was employed with Fifth Third Bank Corporation as a Personal Banking Representative.

When Mother began her job with Fifth Third Bank she lived in Franklin, Tennessee and commuted to work in Nashville, Tennessee.

Mother testified that her work hours with Fifth Third Bank Corporation were 9:00 a.m. to 5:00 p.m. Monday through Friday.

Mother testified that she remained in that position from prior to the parties' divorcing in October 2008 until sometime in November 2011, at which

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<sup>1</sup> Mother and Father each received a credit for work-related child care in the amount of \$242.50 per month. Father received an additional credit for the child's portion of the health insurance premium in the amount of \$152.00 per month.

time she gave notice to her employer of her intention to quit her job with Fifth Third Bank Corporation.

Mother testified that after she quit her job with Fifth Third Bank, she learned that other employees at the branch were laid off, as the branch eliminated the Personal Banking service.

Mother testified she was very good at her job.

Mother testified that there were other banks in the area that offered Personal Banking service.

Mother testified that the reason she decided to quit her job with Fifth Third Bank Corporation was that there was more than an hour commute to work in Nashville from Spring Hill each way, she was therefore losing time with the parties' minor child, and she believed that the child's best interest would be better served by her being able to spend more quality time with the child.

Mother also conceded in her testimony that Father, who also lives in Spring Hill, also works in Nashville but he works on 24 hour on 48 hour off rotating shift.

Mother testified that she decided to relocate from Franklin, Tennessee to Spring Hill, Tennessee to be near Father.

Mother testified that she was currently attending school full-time at Columbia State to obtain a degree as a Radiology Technician.

Mother testified that she anticipated having obtained her degree as a Radiology Technician in the spring of 2016.

Mother testified that she anticipated her starting income once she had obtained her degree to be approximately \$35,000 per year.

Mother testified that she currently is attending school full-time and is working full-time at NHC Place at Cool Springs with an income of \$1,451.77 per month.

Mother testified that she commutes to Franklin, Tennessee from Spring Hill for her employment with NHC Place.

In the trial court's order entered November 4, 2014, the court found that Mother was "not underemployed as she's motivated by the best interest of the child." The statement of the evidence provides the following regarding the trial court's ruling: "The Court found that pursuant to the Tennessee Child Support Guidelines section 1240-2-4-04(3)(a)(2)(iii)(vi) Mother's decision to quit her job with Fifth Third Bank in order to spend more time with the child was in the child's best interest and it benefitted the quality of life of the child and, therefore, set Mother's income at current income of \$1,451.77 per month."<sup>2</sup>

The trial court set Mother's income at her current monthly income of \$1,451.77. The trial court also entered a deviation of \$41.00 per month in Father's favor "due to equity." The child support worksheet states that the trial court "deviated from the Guidelines due to equity ([Father] should not have to bear the full amount of [Mother's] decrease in income due to going back to school and working full-time)." The trial court set Father's child support at \$380.00 per month and ordered Father to provide health insurance for the child and to pay 76% of all medical costs not covered by insurance.

On appeal, Father contends the trial court erred by failing to find Mother willfully or voluntarily underemployed and by failing to impute income in accordance with Mother's earning potential or capacity for child support purposes. Neither party assigns error to the \$41.00 downward deviation in favor of Father.

#### ANALYSIS

Setting child support is a discretionary matter. *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248-49 (Tenn. Ct. App. 2000) (citing *State ex rel. Coleman v. Clay*, 805 S.W.2d 752, 755 (Tenn. 1991)). That discretion is bounded on all sides by the child support guidelines. *Smith v. Darmohray*, No. M2003-00236-COA-R3-JV, 2004 WL 904095, at \*4 (Tenn. Ct. App. Apr. 27, 2004) (citing *Butler v. Butler*, 680 S.W.2d 467 (Tenn. Ct. App. 1984)). We review the record de novo with a presumption that the court's factual findings are correct, absent a showing that the evidence preponderates to the contrary. Tenn. R. App. P. 13(d); see *Berryhill v. Rhodes*, 21 S.W.3d 188, 190 (Tenn. 2000).

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<sup>2</sup> Tennessee Child Support Guidelines section 1240-2-4-04(3)(a)(2)(iii)(vi) is one of the factors to be considered by the trial court when determining willful and voluntary unemployment or underemployment. It reads as follows:

Whether unemployment or underemployment for the purpose of pursuing additional training or education is reasonable in light of the parent's obligation to support his/her children and, to this end, whether the training or education will ultimately benefit the child in the case immediately under consideration by increasing the parent's level of support for that child in the future[.]

To the extent the trial court exercises its discretion to set child support, we review such decisions pursuant to the deferential “abuse of discretion” standard. *Richardson v. Spanos*, 189 S.W.3d 720, 725 (Tenn. Ct. App. 2005), *perm. app. denied*, (Tenn. 2006). This standard requires us to consider (1) whether the decision has a sufficient evidentiary foundation, (2) whether the court correctly identified and properly applied the appropriate legal principles, and (3) whether the decision is within the range of acceptable alternatives. *Kaatrude*, 21 S.W.3d at 248. “A trial court will be found to have ‘abused its discretion’ when it applies an incorrect legal standard, reaches a decision that is illogical, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party.” *Richardson*, 189 S.W.3d at 725.

## I. MODIFICATION OF CHILD SUPPORT

The modification of child support is governed by Tenn. Code Ann. § 36-5-101(g). *See Kaplan v. Bugalla*, 188 S.W.3d 632, 636 (Tenn. 2006). The initial inquiry in a petition for child support modification is “whether there is a ‘significant variance’ between the current obligation and the obligation set by the Guidelines.” *Id.* (quoting *Huntley v. Huntley*, 61 S.W.3d 329, 335 (Tenn. Ct. App. 2001)). The parent seeking to modify a child support obligation has the burden to prove that a significant variance exists. *Turner v. Turner*, 919 S.W.2d 340, 345 (Tenn. Ct. App. 1995). Even though a significant variance is proven, the trial court may deny a petition for modification of child support if the variance is the result of willful or voluntary underemployment. The burden of proving that a significant variance is the result of willful or voluntary underemployment is on the party opposing the modification. *Richardson*, 189 S.W.3d at 727; *Demers v. Demers*, 149 S.W.3d 61, 69 (Tenn. Ct. App. 2003).

In this case, Father does not dispute that using Mother’s current income of \$1,451.77 per month would create a significant variance. Father contends that the significant variance is the result of Mother’s “intentional choice” to leave her employment in favor of a lesser paying position. Accordingly, Father, as the party opposing the modification, has the burden of proving that the significant variance is the result of Mother’s willful or voluntary underemployment. *Richardson*, 189 S.W.3d at 727; *Demers*, 149 S.W.3d at 69.

## II. WILLFUL AND VOLUNTARY UNEMPLOYMENT

The Tennessee Child Support Guidelines specify that additional gross income can be imputed to a parent in the following circumstances: (1) if a tribunal determines the parent is willfully and/or voluntarily underemployed; (2) if there is no reliable evidence of the parent’s income; or (3) if the parent owns a substantial amount of non-income producing assets. TENN. COMP. R. & REGS. 1240-2-4-.04(3)(a)(2)(i). “The Guidelines do

not presume that any parent is willfully and/or voluntarily under or unemployed.” TENN. COMP. R. & REGS. 1240-2-4-.04(3)(a)(2)(ii).

This court discussed in depth the legal concept of willful or voluntary underemployment or unemployment in *Pace v. Pace*, No. M2009-01037-COA-R3-CV, 2010 WL 1687740 (Tenn. Ct. App. Apr. 26, 2010), *no perm. app. filed*. We stated:

“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.” TENN. COMP. R. & REGS. § 1240-02-04-.04(3)(a)(2)(ii)(I). However, “[i]f a parent’s reasons for working in a lower paying job are reasonable and in good faith, the court will not find him or her to be willfully and voluntarily underemployed.” *Owensby v. Davis*, No. M2007-01262-COA-R3-JV, 2008 WL 3069777, at \*4, n.7 (Tenn. Ct. App. July 31, 2008). Although it is not required that parents intend to avoid their child support obligations by their actions, “willful or voluntary unemployment or underemployment must result from an intent on the part of the parent to reduce or terminate his or her income.” *Wilson v. Wilson*, 43 S.W.3d 495, 497 (Tenn. Ct. App. 2000). The child support guidelines provide the trial court with several factors it may consider in making this determination. “Determining whether a parent is willfully and voluntarily underemployed and what a parent’s potential income would be are questions of fact that require careful consideration of all the attendant circumstances.” *Reed v. Steadham*, No. E2009-00018-COA-R3-CV, 2009 WL 3295123, at \*2 (Tenn. Ct. App. Oct. 14, 2009) (quoting *Owensby*, 2008 WL 3069777, at \*4). The trial court has considerable discretion in its determination of whether a parent is willfully or voluntarily underemployed. *Hommerding v. Hommerding*, No. M2008-00672-COA-R3-CV, 2009 WL 1684681, at \*7 (Tenn. Ct. App. June 15, 2009) (citing *Eldridge v. Eldridge*, 137 S.W.3d 1, 21 (Tenn. Ct. App. 2002)); *see also Willis v. Willis*, 62 S.W.3d 735, 738 (Tenn. Ct. App. 2001). 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. April 2, 2009), and “we accord substantial deference to the trial court’s decision, especially when it is premised on the trial court’s singular ability to ascertain the credibility of the witnesses.” *Reed*, 2009 WL 3295123, at \*2.

*Pace*, 2010 WL 1687740, at \*8 (footnote omitted).

Father does not challenge the reliability of evidence of Mother's income. In fact, Father stipulated as to Mother's income being \$1,451.77 per month. Additionally, Father did not introduce any evidence that Mother has substantial non-income producing assets to justify imputing additional income to her. Accordingly, the only basis for imputing income is a determination that Mother is willfully or voluntarily underemployed.

Mother testified without contradiction that the reason she decided to quit her job at Fifth Third Bank was because she was losing time with the parties' minor child due to the long commute. Mother also testified without contradiction that she believed that the child's best interest would be better served by her being able to spend more quality time with the child. After quitting her job at Fifth Third Bank, Mother obtained fulltime employment in the health care industry at NHS Place in Franklin, Tennessee. There is no evidence that Mother turned down any personal banking related employment. Mother further testified that, in addition to working fulltime, she is also attending school fulltime to obtain a degree as a Radiology Technician and that once she obtains said degree, she anticipates her starting income to be approximately \$2,916.00 per month – approximately \$1,465.00 more per month than her current income.

The trial court found that Mother was not voluntarily underemployed and that she was motivated by the child's best interests. The trial court considered the evidence and the attendant circumstances, and found Mother's reasons for working in a lower-paying job to be reasonable.

Father had the burden of proving that Mother was willfully and voluntarily underemployed. *Richardson*, 189 S.W.3d at 727 (citing *Demers*, 149 S.W.3d at 69). Based on the undisputed evidence that Mother resigned from a higher-paying job for no reason other than to spend more time with her child and to be a better mother, we cannot say that the evidence preponderates in favor of finding that Mother is voluntarily underemployed. *See Roland v. Roland*, No. M2014-02032-COA-R3-CV, 2015 WL 5719833, at \*12 (Tenn. Ct. App. Sept. 29, 2015) (holding that the trial court's decision to impute additional income to the mother lacked an evidentiary basis and constituted an abuse of the court's discretion when the evidence established that the mother "resigned from a higher paying job for no reason other than to be closer to her children and to be a better mother"), *no perm. app. filed*. Accordingly, we affirm the trial court's finding that Mother was not voluntarily underemployed for purposes of determining her child support obligation.

Having reviewed the child support worksheet, we conclude that it complies with the mandates of the Tennessee Child Support Guidelines; accordingly, we affirm the trial court's modification of child support.

**IN CONCLUSION**

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Father.

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FRANK G. CLEMENT, JR., JUDGE