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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000568-ME

SHAWNTA D. BOTTOMS

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE ANGELA J. JOHNSON, JUDGE
ACTION NO. 15-CI-501339

RODNEY T. BOTTOMS

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART AND REMANDING

** ** * ** * ** *

BEFORE: ACREE, CLAYTON AND J. LAMBERT, JUDGES.

ACREE, JUDGE: Shawnta Bottoms appeals the Jefferson Family Court's March 7, 2017 order granting appellee Rodney Bottoms' motion to terminate child support. We affirm in part, vacate in part, and remand for additional proceedings as explained herein.

Shawnta and Rodney were married August 8, 1990. Three children were born of the marriage. The parties were divorced by Decree of Dissolution of Marriage entered in the family court on February 17, 2016. Two of the parties' children had emancipated by the time the decree was entered; the unemancipated child, born August 23, 2002, was then thirteen years old (Child).

Prior to entry of the decree, the parties entered into a settlement agreement which was incorporated into the decree. They agreed to joint custody of Child with equal parenting time.¹ Rodney also agreed to pay Shawnta \$466.00 per month in child support, and \$1,400.00 per month in maintenance. They agreed the maintenance payment would terminate when Shawnta began receiving Rodney's military pension.

In November 2016, Rodney filed a motion to modify child support. He asserted he retired from the United States Army as of October 31, 2016, thereby reducing his pay from over \$8,000 per month to approximately \$2,300 per month. Shawnta opposed the motion.

The family court held a hearing on the motion in February 2017. Rodney testified he was forty-six years old and had recently retired from the Army after twenty-eight years of service because "it was just time." He explained he was suffering from a myriad of health issues affecting his neck, shoulders, knees, back,

¹ The parties agreed to an alternating week on/week off schedule.

hips, and feet. Two weeks prior to the hearing Rodney underwent rotator cuff surgery and had an upcoming hip surgery scheduled. Rodney testified he was currently unable to work.

Rodney submitted his retiree account statement as evidence of his income; the statement was submitted into evidence without objection. He testified his total retirement pay is \$4,310.00 per month of which Rodney receives \$2,363.88. The balance of \$1,946.12 benefits Shawnta; she receives \$1,665.93 directly and the remaining \$280.19 funds a survivor's benefit that will guarantee she receives Rodney's retired pay after his death.² Rodney also testified that he receives \$3,127.81 per month from the Department of Veterans' Affairs, resulting in a gross monthly income of approximately \$5,400.00 per month.

Shawnta also testified at the hearing. She stated she was working full-time at Norton Hospital, earning \$15.61 per hour, with a gross monthly income of \$2,705.73. Shawnta testified she works overtime a few times a month, earning time-and-a-half for any overtime hours worked. In addition to her employment, Shawnta receives \$1,665.93 per month from Rodney's military retirement, for a total gross monthly income of approximately \$4,371.66.

² The Survivor Benefit Program is a Department of Defense sponsored and subsidized program that provides up to 55 percent of a service member's retired pay to an eligible beneficiary upon the death of the member. Shawnta, as a former spouse, is the eligible beneficiary.

The family court, exercising its discretion, found the child support paid by Rodney to Shawnta no longer appropriate. Notably, relying on Rodney's retiree account statement, the family court concluded Rodney received \$4,310.00 in monthly gross income. It then reasoned that the parties shared equal parenting time with Child and earned near equal amounts of income: \$4,310.00 by Rodney and \$4,371.66 by Shawnta. By order entered March 7, 2017, the family court terminated Rodney's child support obligation. Shawnta appealed.

The family court enjoys broad discretion "in the establishment, enforcement, and modification of child support." *Artrip v. Noe*, 311 S.W.3d 229, 232 (Ky. 2010). An order modifying child support is reviewed for an abuse of that discretion. *Commonwealth, Cabinet for Health and Family Services v. Ivy*, 353 S.W.3d 324, 329 (Ky. 2011). An abuse of discretion occurs when the family court's decision is "unreasonable, unfair, arbitrary or capricious." *Caudill v. Caudill*, 318 S.W.3d 112, 115 (Ky. App. 2010).

Shawnta presents two arguments to this Court. First, she contends the family court erred in finding Rodney demonstrated a material, substantial, and continuing change in circumstances to warrant modification of the prior child support order. Second, she argues the family court made an erroneous factual finding when it miscalculated Rodney's gross monthly income. We find merit only in Shawnta's second argument.

Shawnta contends the family court erroneously found Rodney's monthly gross income to be \$4,310.00 when, in fact, his gross income exceeded \$5,000 per month. She argues the family court's factual finding was clearly erroneous because it was unsupported by substantial evidence.³ We agree.

The family court, relying on the first page of Rodney's retiree account statement, concluded Rodney earned \$4,310.00 per month. The statement does reflect this amount. However, Rodney testified, and the retiree account statement reflects in subsequent pages, that of that amount he pays \$1,946.12 each month to Shawnta, reducing his gross monthly retirement income from \$4,310.00 per month to \$2,363.88. The family court did not calculate that reduction of Rodney's gross monthly income. That was not the only miscalculation.

Rodney also testified at the February 2017 hearing that he receives \$3,127.81 per month from Veterans' Affairs. The family court did not account for this additional income.

Based on Rodney's testimony alone, bolstered by his retiree account statement, Rodney receives \$2,363.88 per month in retirement pay and \$3,127.81 per month from Veterans' Affairs, resulting in a gross monthly income of

³ Perhaps the more prudent course of action would have been for Shawnta to bring the family court's miscalculation to its attention by way of a Kentucky Rules of Civil Procedure (CR) 59.05 motion, thereby alleviating the expense and anxiety of a lengthy appeal. However, our rules do not require such a motion to preserve error for appellate review. CR 59.06.

\$5,491.69. The family court's finding that Rodney earned \$4,310.00 per month is factual error.⁴

The family court based its decision to terminate Rodney's child-support obligation on two factors: equal parenting time and nearly equal monthly incomes. Now that we have determined the latter to be factually faulty, the grounds upon which the family court decided the case has eroded. Rodney in fact earns a little over one thousand dollars more per month than Shawnta. This amount is not unmeaningful and certainly gives rise to the possibility that the family court's modification decision might have been different if the correct facts had been considered.

Accordingly, we will vacate the ruling to the extent it is based on this finding and remand for the family court to re-calculate Rodney's gross monthly income using the evidence submitted during the February 2017 hearing and to reconsider its order terminating Rodney's child support obligation in light of that recalculation.

Shawnta also argues the family court erred in finding Rodney demonstrated a substantial and continuing change in circumstances sufficient to justify terminating his child support obligation. Her argument has several facets, none of which we find meritorious.

⁴ Rodney does not challenge the family court's miscalculation in his brief.

In Kentucky, “[t]he provisions of any decree respecting child support may be modified only as to installments accruing subsequent to the filing of the motion for modification and only upon a showing of a material change in circumstances that is substantial and continuing.” KRS⁵ 403.213(1). The statute further provides that the “[a]pplication of the Kentucky child support guidelines^[6] to the circumstances of the parties at the time of the filing of a motion or petition for modification of the child support order which results in equal to or greater than a fifteen percent (15%) change in the amount of support due per month shall be rebuttably presumed to be a material change in circumstances.” KRS 403.213(2); KRS 403.211(2) (“[I]n any proceeding to modify a support order, the child support guidelines in KRS 403.212 shall serve as a rebuttable presumption for the establishment or modification of the amount of child support.”).

Shawnta contends the family court failed to consider whether Rodney’s voluntary decision to retire was objectively reasonable. Shawnta argues Rodney voluntarily chose to retire at the age of forty-six years old, which is twenty years before the anticipated retirement age for most Americans, thereby voluntarily reducing his income and causing harm to his minor child. She argues his health

⁵ Kentucky Revised Statutes.

⁶ Kentucky’s child support guidelines are found at KRS 403.212(7).

problems, which she claims occurred after his voluntary retirement, do not make his election to retire reasonable.

We reject Shawnta's position that it was objectively unreasonable for Rodney to retire. He served twenty-eight years in the United States Army. Despite not yet reaching traditional retirement age, Rodney devoted a substantial portion of his life to serving his country. He is among that group of citizens which the Supreme Court of the United States refers to as "those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575, 63 S.Ct. 1223, 1231, 87 L.Ed. 1587 (1943). He did so for a period of time deemed appropriate by Congress to entitle him to retirement pay. We find nothing unreasonable in his decision to retire after such service.

Rodney also confirmed he was suffering from a myriad of health issues and he was unable to currently work. While Rodney did not *explicitly* testify that he retired due to his health concerns, he testified that he had come to believe it was time for him to retire and then described the medical problems he was experiencing. These included recent rotator cuff surgery, upcoming hip surgery, and issues with his back, knees, and even feet. Contrary to Shawnta's position, there is no evidence Rodney's health concerns all arose after his retirement. Furthermore, there is no evidence Rodney intended to return to work. His retirement appears to be permanent. Rodney's retirement and corresponding

reduction in income amounts to a substantial and continuing change in circumstances sufficient to justify modifying child support. The family court did not err in so finding.

We also reject Shawnta's argument that the family court erred in refusing to declare Rodney voluntarily unemployed or underemployed. Shawnta contends that because Rodney's retirement was not objectively reasonable under the totality of the circumstances, the family court had no need to consider any changed circumstances, such as Rodney's decrease in gross income, and his retirement should be treated as voluntary underemployment. We disagree.

It is well-settled that in establishing or modifying child support, the family court "may impute income to a party it finds to be voluntarily unemployed or underemployed." *McKinney v. McKinney*, 257 S.W.3d 130, 134 (Ky. App. 2008). The applicable statute explains that:

[i]f a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income Potential income shall be determined based upon employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community.

KRS 403.212(2)(d). "[I]f the court finds that earnings are reduced as a matter of choice and not for reasonable cause," KRS 403.212(2)(d) authorizes the family court to "attribute income to a parent up to his or her earning capacity." *Snow v.*

Snow, 24 S.W.3d 668, 673 (Ky. App. 2000). In so doing, however, the family court “must consider the totality of the circumstances in deciding whether to impute income to a parent.” *Polley v. Allen*, 132 S.W.3d 223, 227 (Ky. App. 2004).

The family court’s order reveals it found Rodney’s decision to retire to be entirely reasonable, particularly in light of his medical concerns. The family court, aware of the totality of the circumstances, including the parties’ current incomes and custody arrangement, was not convinced Rodney was voluntarily unemployed or underemployed. *See id.* While there is evidence from which the family court *may* have reached a contrary result, we see nothing here requiring it to have done so. *Gossett v. Gossett*, 32 S.W.3d 109, 111 (Ky. App. 2000) (“[W]hether a child support obligor is voluntarily underemployed is a factual question for the family court to resolve.”).

Furthermore, though Rodney’s gross monthly income decreased because of his retirement, he still earns more than ample money to provide for Child. There is no allegation or evidence that Child’s reasonable needs are not being met. We decline to interfere with the family court’s decision not to find Rodney voluntarily unemployed or underemployed and to not impute income to Rodney.

For the foregoing reasons, we affirm the Jefferson Family Court's March 7, 2017 order to the extent it declined to find Rodney underemployed and declined to impute to him additional income. However, we vacate the family court's finding that Rodney earned \$4,300 gross income per month, and remand for additional proceedings. On remand, we direct the family court to re-calculate Rodney's monthly gross income in accordance with the evidence submitted during the February 22, 2017 hearing and this Opinion. The family court is under no obligation to receive additional evidence as to this fact, but may do so if so inclined and within its discretion. We direct that the family court then reconsider its decision to terminate Rodney's child support obligation in light of Rodney's re-calculated gross monthly income. Nothing in this opinion should be construed as suggesting any particular outcome upon the family court's reconsideration.

ALL CONCUR.

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