

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 28, 2007 Session

MARC A. GLINSTRA v. CANDICE M. LANNIN-GLINSTRA

**Appeal from the Chancery Court for Williamson County
No. 32565 Russ Heldman, Judge**

No. M2006-02113-COA-R3-CV - Filed on August 27, 2007

In this divorce case, the Trial Court apparently determined that Marc A. Glinstra (“Father”) was willfully and voluntarily underemployed and set his income at \$5,000 per month. Utilizing that figure, the Trial Court set Father’s child support obligation and thereafter concluded that Candice M. Lannin-Glinstra (“Mother”) was entitled to rehabilitative alimony of \$1,500 per moth for a period of four years, and alimony in solido of \$10,000 for payment of attorney fees. Father appeals the Trial Court’s determination that he was willfully and voluntarily underemployed and that, therefore, his income should be set at \$5,000 per month. Father also challenges the amount of his child support payment and claims that the Trial Court erred when it determined that Mother was entitled to alimony. We vacate those portions of the Trial Court’s judgment determining Father’s income and setting his child support and alimony obligations, and remand for further proceedings consistent with this opinion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery
Court Affirmed in Part and Vacated in Part; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

J. Timothy Street, Franklin, Tennessee, for the Appellant, Marc. A. Glinstra.

Virginia Lee Story, Franklin, Tennessee, for the Appellee, Candice M. Lannin-Glinstra.

OPINION

Background

This is a divorce case with the primary issue on appeal surrounding the Trial Court's implicit determination that Father was voluntarily underemployed and that \$5,000 per month in gross income should be imputed to him. Father challenges this determination which significantly affected the amount of child support and alimony Father was ordered to pay.

The parties were married on October 24, 1998, and Mother filed a complaint for divorce on June 1, 2006. The parties have two daughters who currently are ages 3 and 6. Following a trial in August of 2006, the Trial Court entered its final decree granting Mother a divorce based on Father's inappropriate marital conduct. Mother was designated as the children's primary residential parent and a schedule setting forth Father's co-parenting time was established. The Trial Court also classified property as marital or separate, and divided the marital property. None of the Trial Court's decisions concerning who is the primary residential parent, Father's co-parenting time, or the classification and division of property are at issue in this appeal.¹

Father's issues on appeal center on his challenge to the Trial Court's implicit determination that he was willfully and voluntarily underemployed and that income should be imputed to him in the amount of \$5,000 per month. The proof at trial relevant to the issues on appeal is sparse.

Mother was 34 years old at the time of trial. Mother has an associate's degree in culinary arts and was one class short of obtaining a bachelor of science degree in food service management. Mother worked full-time at Red Lobster until the parties' second child was born in June of 2004. Because their second child had severe acid reflux disease, Mother quit her job to stay home initially and take care of the child.

Mother currently works at the Legends Golf Course on Wednesday through Saturday. Mother also works part-time at the Sidetrack Pub and Grill. Mother has taken the first part of the real estate exam and is in the process of obtaining a real estate affiliate broker license. Mother hoped to complete the real estate exam within the next 45 days. At trial, Mother requested alimony of \$1,500 per month for a period of four years. Mother testified that four years would be a sufficient amount of time to rehabilitate herself to the point where she could earn at least \$45,000 per year. Mother acknowledged, however, that she probably could return to Red Lobster and earn approximately \$50,000 per year.

Mother testified that during the marriage, Father's employment involved a "little bit of everything." According to Mother:

¹ Father apparently was involved in separate litigation with Mother's parents regarding his claimed ownership interest in the marital residence, which was titled in Mother's parents' names. Husband's attorney announced at oral argument that this other litigation had been resolved and, therefore, the Trial Court's actions in this case as it pertained to the marital residence are no longer at issue here.

I mean he was in the car dealerships, but his stability in his jobs was never there. I mean he was constantly turning jobs over, whether it was dealership, mortgages, pressure washing....

Q. Was that a problem during the marriage, his stability in employment?

A. Yes, ma'am, because we never knew if we were going to be able to make money and pay our bills.

Mother added that after the court hearing establishing a temporary parenting plan, Father was terminated from his job. By the time of trial, Husband was behind \$2,265 in temporary support payments.

Father testified at trial that he was 40 years old and had a bachelor's degree from Ball State University. Father worked briefly at several car dealerships during the marriage. Father was employed in the finance department at a Mazda dealership for a two month period where he earned approximately \$3,650 per month. Father testified that his most recent job at a car dealership was with Roberts Chevrolet. Father earned between \$5,200 to \$5,300 per month for four months before his employment with Roberts Chevrolet was terminated because his position was eliminated.

Father also had been operating a pressure washing business from time to time on a part-time basis, and he began operating that business full-time when he lost his job at the Chevrolet dealership. According to Father, approximately fifty percent of the gross income from the pressure washing business is applied to cover the cost of materials, equipment and supplies. In July of 2006, Father had gross income of approximately \$1,350 after covering the cost of materials, equipment, and supplies. Father had \$1,200 in gross income for the first eleven days of August. According to Father's business income tax return, after deducting the cost of goods sold, he had gross income from his pressure washing business of \$32,096 in 2004, and \$26,689 in 2005. This averages approximately \$2,450 in gross monthly income, after expenses for materials, equipment, and supplies, for that two year period. Father testified that he was hoping to build his pressure washing business to the point where he had gross income in the amount of \$3,500 per month, after subtracting the cost of goods sold.

Father had an impending job interview with a cellular phone company. The job he was interviewing for paid between \$35,000 and \$40,000 per year. Father did not know if he would be offered that job. After losing his job at the Chevrolet dealership, Father attempted, without success, to obtain a finance position at various businesses.

As relevant to this appeal, the final judgment entered by the Trial Court provides as follows:

Counsel for Mother is directed to prepare a child support worksheet using Mother's gross monthly income at \$2,500 per

month and Father's income at \$5,000 per month and using the sum of \$100 per month as child care costs for Mother. The Court finds that Father has the ability to earn \$5,000.00 per month....

The Court has carefully considered all statutory factors as well as existing case law and finds that Wife is the disadvantaged spouse and awards her rehabilitative alimony in the amount of \$1,500.00 per month for a period of four (4) years. Said alimony shall be payable beginning September 1, 2006, and shall continue on the 1st of each month thereafter for a period of four years (48 months). The Court also finds that as Wife is disadvantaged from an economic standpoint and that it would be appropriate to award her a portion of her attorney's fees and she is therefore awarded the sum of \$10,000 as prayed for in Wife's prayer for relief as alimony *in solido*.

Following entry of the final judgment, Father filed a motion for a new trial or to alter or amend the judgment. The Trial Court denied this motion. Father appeals raising the following issues, which we quote:

- I. Whether the Trial Court Committed Reversible Error When it Imputed Income to Husband Without a Finding That Husband was Willfully or Voluntarily Underemployed.
- II. Whether the Amount of Income Imputed to Husband was Clearly Erroneous Where Neither Party Anticipated That Amount, and Husband had Earned the Amount for Only Four Months in the Past Five Years.
- III. Whether the Trial Court Erroneously Awarded Rehabilitative Alimony of \$1,500 per Month for Four Years Where the Record Shows This was in Excess of Wife's Durational Need and Husband's Ability to Pay.
- IV. Whether the Trial Court's Award of \$10,000 in Attorney Fees as Alimony *in Solido* was Clearly Erroneous Where This Left Husband with a Negative Marital Estate.

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted “under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts.” *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

In relevant part, the Child Support Guidelines (the “Guidelines”), Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)2 (2006) provide as follows:

2. Imputed Income.

(i) Imputing additional gross income to a parent is appropriate in the following situations:

(I) If a parent has been determined by a tribunal to be willfully and/or voluntarily underemployed or unemployed;
or

(II) When there is no reliable evidence of income; or

(III) When the parent owns substantial non-income producing assets, the court may impute income based upon a reasonable rate of return upon the assets.

(ii) Determination of Willful and/or Voluntary Underemployment or Unemployment.

The Guidelines do not presume that any parent is willfully and/or voluntarily under or unemployed. The purpose of the determination is to ascertain the reasons for the parent’s occupational choices, and to assess the reasonableness of these choices in light of the parent’s obligation to support his or her child(ren) and to determine whether such choices benefit the children.

(I) A determination of willful and/or voluntary under or unemployment is not limited to occupational choices motivated only by an intent to avoid or reduce the payment of child support. The determination may be based on any intentional choice or act that affects a parent’s income.

(II) Once a parent that has been found to be willfully and/or voluntarily under or unemployed, additional income can be allocated to that parent to increase the parent's gross income to an amount which reflects the parent's income potential or earning capacity, and the increased amount shall be used for child support calculation purposes. The additional income allocated to the parent shall be determined using the following criteria:

I. The parent's past and present employment; and

II. The parent's education and training.

* * *

(iii) Factors to be Considered When Determining Willful and Voluntary Unemployment or Underemployment. The following factors may be considered by a tribunal when making a determination of willful and voluntary underemployment or unemployment:

(I) The parent's past and present employment;

(II) The parent's education, training, and ability to work;

* * *

(IV) A parent's extravagant lifestyle, including ownership of valuable assets and resources (such as an expensive home or automobile), that appears inappropriate or unreasonable for the income claimed by the parent;

* * *

(VII) Any additional factors deemed relevant to the particular circumstances of the case....

In *Richardson v. Spanos*, 189 S.W.3d 720 (Tenn. Ct. App. 2005), this Court discussed willful and voluntary underemployment as follows:

When called upon to determine whether a parent is willfully and voluntarily unemployed or underemployed, the courts will consider the factors in Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(d)(2), as well as the reasons for the party's change in employment. *Demers v. Demers*, 149 S.W.3d 61, 69 (Tenn. Ct.

App. 2003); *Eldridge v. Eldridge*, 137 S.W.3d 1, 21 (Tenn. Ct. App. 2002). If 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. *Willis v. Willis*, 62 S.W.3d at 738. The courts are particularly interested in whether a parent's change in employment is voluntary or involuntary, *Eldridge v. Eldridge*, 137 S.W.3d at 21, and are more inclined to find willful and voluntary underemployment when a decision to accept a lower paying job is voluntary. *Demers v. Demers*, 149 S.W.3d at 69.

Richardson, 189 S.W.3d at 726. The *Richardson* Court also observed that the burden is on the custodial parent to prove that the obligor parent is willfully or voluntarily underemployed. *Id.* at 727 (citing *Demers v. Demers*, 149 S.W.3d 61, 69 (Tenn. Ct. App. 2003)). See also *Wilson v. Wilson*, 43 S.W.3d 495, 497 (Tenn. Ct. App. 2000) ("Although there is no requirement that a parent intended to avoid their child support obligations by their actions, we do think that 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.").

In the case now before us, while the Trial Court apparently made an implicit finding that Father was voluntarily underemployed, there was no such express finding. The final judgment makes no reference whatsoever to willful or voluntary underemployment. There is no mention of the applicable Guidelines or an analysis of how the factors set forth in the Guidelines impacted the Trial Court's decision. We can only speculate on what compelled the Trial Court to make this finding as the evidence does not support such a finding.

The proof at trial was that for a period of approximately only four months, Father earned slightly over \$5,000 per month. There was no proof that Father ever made that much money at any other time in his life. Father's leaving this one job where he earned slightly over \$5,000 per month for four months was not a voluntary choice on his part as his employment was terminated by his employer because the position was eliminated. We hold that the facts preponderate against a finding that \$5,000 of monthly income should be imputed to Father for purposes of determining his child support payment, and the judgment of the Trial Court setting Father's child support obligation is vacated.

For the same reasons, the judgment of the Trial Court that \$5,000 of monthly income should be imputed to Father for purposes of determining his alimony obligation also must be vacated. "The two most relevant factors in determining the amount of alimony awarded are the economically disadvantaged spouse's need and the obligor spouse's ability to pay." *Broadbent v. Broadbent*, 211 S.W.3d 216, 222 (Tenn. 2006). At trial, there was considerable disagreement as to whether Mother's claimed monthly expenses were reasonable. In Mother's statement of income and expenses, her total claimed monthly expenses for her and the children exceeded the parties' combined income by almost \$1,100.² Unfortunately, the Trial Court made

² In Mother's statement of income and expenses, she listed her monthly income at \$2,166.66 and Father's monthly income at \$4,145.85, for a combined total of \$6,312.51. Mother then listed her monthly expenses at \$5,346 without taking the children into account, and \$7,406 when the children were taken into account.

no mention as to either Mother's or Father's reasonable monthly expenses. Until we know whether Father has an ability to pay and the amount of Mother's actual need, we cannot ascertain whether alimony is appropriate under the relevant statutory provisions. We are unable to make such determinations from the record before us. Therefore, the Trial Court's award of rehabilitative alimony and alimony in solido is vacated.

On remand, the Trial Court must determine whether Father is voluntarily or willfully underemployed. If the Trial Court concludes that he is, then the Trial Court must determine the appropriate amount of Father's imputed monthly income, keeping in mind our conclusion that the facts preponderate against a finding that Father's imputed monthly income is \$5,000, and then set Father's child support accordingly. If the Trial Court concludes that Father is not voluntarily or willfully underemployed, then Father's child support obligation should be set based on his actual income. On remand as to alimony, the Trial Court must determine the parties' reasonable monthly expenses as well as Father's ability to pay and Mother's need. Then, applying the statutory factors set forth in Tenn. Code Ann. § 36-5-121 (2005), the Trial Court must determine whether an award of alimony is appropriate in this case, and, if so, the specifics as to the type, amount, and duration. In all other respects, the judgment of the Trial Court, including the determination that Wife is entitled to a divorce, is affirmed.

Conclusion

_____The judgment of the Trial Court is vacated in part, affirmed in part, and remanded to the Trial Court for further proceedings consistent with this Opinion and for collection of costs below. The costs on appeal are assessed against the Appellee, Candice M. Lannin-Glinstra.

D. MICHAEL SWINEY, JUDGE