

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
September 11, 2007 Session

**BRENDI BUGALLA KAPLAN v. JOHN A. BUGALLA**

**A Direct Appeal from the Chancery Court for Williamson County  
No. 28272 The Honorable Russ Heldman, Chancellor**

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**No. M2006-02413-COA-R3-CV - Filed November 16, 2007**

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This is the second appeal of this post-divorce child support case. Husband/Appellant appeals the trial court's Order denying his petition to modify his child support obligation. Specifically, Husband/Appellant asserts that the trial court erred in finding that he is voluntarily underemployed, in imputing monthly income, in denying any modification of his support obligation, in setting his percentage of the children's extraordinary educational expenses, in awarding arrears for extraordinary educational expenses, and in awarding Wife/Appellee's attorney's fees and expenses. We reverse the Order of the trial court as to imputed income, base child support obligation, ongoing percentage of the children's private school tuition, arrears, and attorney's fees. We affirm the Order as to the trial court's finding of voluntary underemployed. Reversed in part, affirmed in part, and remanded.

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

W. FRANK CRAWFORD, J., delivered the opinion of the court, in which ALAN E. HIGHERS, P.J., W.S. and JEFFREY F. STEWART, SP.J., joined.

David W. Garrett of Nashville, Tennessee for Appellant, John A. Bugalla

Gregory D. Smith and Donna L. Roberts of Nashville, Tennessee for Appellee, Brendi Kaplan

**OPINION**

Brendi Kaplan ("Plaintiff," or "Appellee") and John A. Bugalla ("Defendant," or "Appellant") were divorced on May 10, 2002. The parties have two minor children, A.J.B. (d/o/b August 18, 1992) and Z.S.B. (d/o/b January 25, 1995). At the time of the divorce, the parties' children were attending private school in Nashville. At that time, Mr. Bugalla was working for Aon Corporation in Nashville, serving large corporate clients and their insurance needs. In this position, Mr. Bugalla was earning between \$279,000.00 and \$350,000.00 per year in the insurance business. Ms. Kaplan, an attorney, was earning approximately \$87,000.00 per year. In connection with the

divorce, the trial court approved a parenting plan, under which Mr. Bugalla would pay \$4,000.00 per month in child support. Because the parties were operating under the assumption that Ms. Kaplan would soon move to Chicago, and that the children would no longer need to attend private school, Mr. Bugalla was not ordered to pay a percentage of the children's tuition expenses going forward. However, Ms. Kaplan's plans did not materialize and, on September 4, 2002, she filed a petition that, in part, requested an increase in child support by requiring Mr. Bugalla to pay for private school tuition. The trial court issued an order on March 25, 2003, denying Ms. Kaplan's request for private school tuition. Thereafter, Ms. Kaplan appeal the trial court's decision to this Court. In *Kaplan v. Bugalla*, No. M2003-01012-COA-R3-CV, 2004 WL 2254014 (Tenn. Ct. App. Oct. 6, 2004), this Court upheld the trial court's decision. On December 6, 2004, Ms. Kaplan filed a Tenn. R. App. P. 11 Application for Permission to appeal this Court's decision to the Tennessee Supreme Court. Our Supreme Court granted certiorari on March 25, 2005, and oral argument was heard on October 5, 2005. In *Kaplan v. Bugalla*, 188 S.W.3d 632 (Tenn. 2006), the Supreme Court reversed the decision of the trial court and remanded the matter back to the Chancery Court for Williamson County.

Prior to the Supreme Court's April 13, 2006 decision, on October 31, 2005, Mr. Bugalla filed a Petition in the trial court, seeking a decrease in his child support obligation or termination of same due to a significant variance in his income. Specifically, Mr. Bugalla states that, effective December 31, 2004, his employment with Aon was terminated, and that he has not been able to procure employment since that time. On December 2, 2005, Ms. Kaplan filed her reply to Mr. Bugalla's Petition, along with a counter-petition, again seeking private school tuition payments from Mr. Bugalla. On March 20, 2006, Mr. Bugalla filed his answer to the counter-petition.

An Order was entered on April 18, 2006, setting a hearing for July 27, 2006, and also setting the issues contained in the remand from the decision of the Tennessee Supreme Court. Following that hearing, on August 16, 2006, the trial court entered its Order, which reads, in pertinent part, as follows:

**ORDERED** that Mr. Bugalla's Petition for Modification of Child Support is denied. The Court finds that Mr. Bugalla has the capability of earning \$29,339 per month, that he earned the following amounts over the last several years: 2002: \$274,997; 2003: \$392,162; 2004: \$389,068; and 2005: \$533,188. The average income found by the Court takes into account only the income earned by Mr. Bugalla for the years 2002-2004. The Court finds that Mr. Bugalla's efforts to find replacement employment after his termination from his former job have been lackluster and unconvincing, that Mr. Bugalla is voluntarily underemployed at this time, and that Mr. Bugalla's testimony was not credible. It is further

**ORDERED** that Ms. Kaplan is entitled to and is hereby awarded a judgment for back child support against Mr. Bugalla in the amount of \$91,755 for the private school expenses of the children for the school years of 2002-2003, 2003-2004, 2004-2005 and 2005-2006. This sum represents 80.83% of the children's private school

expenses already paid by Ms. Kaplan for those years. Mr. Bugalla's proportionate share of the total income of the parties during those years was 80.83%. Ms. Kaplan's proportionate share of the total income of the parties during those years was 19.17%. It is further

**ORDERED** that Ms. Kaplan is entitled to judgment for her attorneys fees and expenses in the appeals which followed the original denial of her request for private school expenses to be paid by Mr. Bugalla, and her attorneys fees in responding to Mr. Bugalla's Petition, in the amount of \$32,300. This sum represents the fees and expenses paid by Ms. Kaplan through June 2, 2006, and additional expenses incurred in the preparation and prosecution of this action since that date, plus the expenses associated with the preparation of the transcript on appeal. These expenses were [in]cured in the benefit of the minor children, and the judgment shall therefore be treated as additional child support. It is further

**ORDERED** that Mr. Bugalla shall pay, as additional child support, a proportionate share of the total private school expenses for [A.J.B.] and [Z.S.B.] for the 2006-2007 school year and all future years, pending further orders of this Court. The Court finds that this proportionate share shall be as follows: 78% to Mr. Bugalla and 22% to Ms. Kaplan....

On September 20, 2006, Mr. Bugalla filed a Motion to Alter or Amend the Judgment of the trial court. By Order of September 27, 2006, the trial court denied Mr. Bugalla's motion. Mr. Bugalla appeals and raises three issues for review as stated in his brief:

- I. Whether the Court erred by failing to reduce Mr. Bugalla's child support obligation and to grant other relief contained in his Petition?
  - A. The trial court erred by failing to find that there had been a significant variance in Mr. Bugalla's income.
  - B. The court erred in finding that Mr. Bugalla was voluntarily underemployed.
  
- II. Whether the Court erred in the allocation of the private school expenses between the parties?
  
- III. Whether the Court erred in awarding Ms. Kaplan \$32,300 in attorney's fees?

We first note that, because this case was tried by the court sitting without a jury, we review the case *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm absent error of law.

*See* Tenn. R. App. P. 13(d). Furthermore, when the resolution of the issues in a case depends upon the truthfulness of witnesses, the trial judge who has the opportunity to observe the witnesses in their manner and demeanor while testifying is in a far better position than this Court to decide those issues. *See McCaleb v. Saturn Corp.*, 910 S.W.2d 412, 415 (Tenn.1995); *Whitaker v. Whitaker*, 957 S.W.2d 834, 837 (Tenn.Ct.App.1997). The weight, faith, and credit to be given to any witness's testimony lies in the first instance with the trier of fact, and the credibility accorded will be given great weight by the appellate court. *See id.*; *see also Walton v. Young*, 950 S.W.2d 956, 959 (Tenn.1997).

T.C.A. § 36-5-101(g) (2006) governs the modification of child support, and provides, in relevant part, as follows:

(g)(1) Upon application of either party, the court shall decree an increase or decrease of support when there is found to be a significant variance, as defined in the child support guidelines established by subsection (e), between the guidelines and the amount of support currently ordered, unless the variance has resulted from a previously court-ordered deviation from the guidelines and the circumstances that caused the deviation have not changed. Any support order subject to enforcement under Title IV-D may be modified in accordance with § 36-5-103(f).

(2) The necessity to provide for the child's health care needs shall also be a basis for modification of the amount of the order, regardless of whether a modification in the amount of child support is necessary.

(3) The court shall not refuse to consider a modification of a prior order and decree as it relates to future payments of child support because the party is in arrears under that order and decree, unless the arrearage is a result of intentional action by the party.

In determining whether there is a significant variance, the court is guided by Section 1240-2-4-.05(2) of the Tennessee Child Support Guidelines, which section provides:

(2) Significant Variance Required for Modification of Order.

(a) Unless a significant variance exists, as defined in this section, a child support order is not eligible for modification; provided, however, the necessity of providing for the child's health care needs shall be a basis for modification regardless of whether a modification in the amount of child support is warranted by other criteria.

(b) For all orders that were established or modified before January 18, 2005, under the flat percentage guidelines, and are being modified

under the income shares provisions for the first time, a significant variance is defined as:

1. At least a fifteen percent (15%) change in the gross income of the ARP; and/or
2. A change in the number of children for whom the ARP is legally responsible and actually supporting; and/or
3. A child supported by this order becoming disabled; and/or
4. The parties voluntarily entering into an agreed order to modify support in compliance with these Rules, and submitting completed worksheets with the agreed order; and
5. At least a fifteen percent (15%) change between the amount of the current support order and the proposed amount of the obligor parent's pro rata share of the BCSO if the current support is one hundred dollars (\$100) or greater per month and at least fifteen dollars (\$15) if the current support is less than one hundred dollars (\$100) per month; or
6. At least a seven and one-half percent (7.5% or 0.075) change between the amount of the current support order and the amount of the obligor parent's pro rata share of the BCSO if the tribunal determines that the Adjusted Gross Income of the parent seeking modification qualifies that parent as a low-income provider.

(c) For all orders that were established or modified January 18, 2005 or after, under the income shares guidelines, 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 or, if the tribunal determines that the Adjusted Gross Income of the parent seeking modification qualifies that parent as a low-income provider, at least a seven and one-half percent (7.5% or 0.075) change between the amount of the current support order (not including any deviation amount) and the amount of the proposed presumptive support order.

**Review of Trial Court's Finding of Voluntary Underemployment, Imputation of Income, and Setting of Child Support Obligation:**

The evidence in record shows that Mr. Bugalla earned \$274,997 in 2002, \$392,000 in 2003, \$389,000 in 2004 and \$533,188 in 2005. Following the termination of his employment with Aon, Mr. Bugalla testified that he anticipated an income of \$7,500 for 2006. We concede that there was a significant variance in Mr. Bugalla's income following the termination of his employment.

Nonetheless, his entitlement to a modification of his support obligation under T.C.A. § 36-5-101(g) and Tenn. Comp. R. & Reg 1240-2-4-.05(2) may be negated by a finding of voluntary underemployment. Based in part upon the trial court's determination that Mr. Bugalla was not a credible witness, the lower court found that Mr. Bugalla was voluntarily underemployed, and denied him relief from his support obligation based upon that finding. Mr. Bugalla appeals this determination.

The factors to be considered by a court when making a determination of voluntary unemployment are found at Tenn. Comp. R. & Reg. 1240-2-4-.04(3)(2)(iii), which provides, in relevant part:

- (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;

Under Tennessee law, there is no presumption that a parent is willfully or voluntarily underemployed or unemployed; to the contrary, the party alleging that a parent is willfully or voluntarily underemployed or unemployed carries the burden of proof. Tenn. Comp. R. & Regs.1240-2-4-.04(3)(a)(2)(ii) ("The Guidelines do not presume that any parent is willfully and/or voluntarily under or unemployed."); *Richardson v. Spanos*, 189 S.W.3d 720, 727 (Tenn.Ct.App.2005).

Turning to the record, at the time of the hearing, Mr. Bugalla was fifty-eight years old, and had only a high school degree. Nonetheless, the fact that Mr. Bugalla was able to work his way up to a six-figure salary in the insurance field is proof of his abilities. In addition to his extensive experience, Mr. Bugalla testified that he has many contacts in the industry. Concerning his efforts to find new employment, Mr. Bugalla testified that he has solicited approximately sixty-one companies online, but that he has not, as of the date of the hearing in this matter, received even one offer of employment. However, the record shows that Mr. Bugalla has limited his job search solely to online inquiries. Despite his protestation that the internet is the new way of recruiting in the industry, we are troubled by the fact that Mr. Bugalla has not availed himself of his contacts, either by phone, in person, or in writing. In short, and from the record before us, we do not find that Mr. Bugalla has turned over every proverbial rock in his job search. Furthermore, there is no evidence of physical or mental problems that would impede his ability to work. In addition, and despite Mr. Bugalla's testimony that he expected to earn \$7,500 in 2006, the record reveals that he drives a two-year-old Mercedes C-240. From the record as a whole, and in light of the factors set out above, we conclude that the trial court did not err in finding that Mr. Bugalla is voluntarily underemployed.

A determination of voluntary underemployment allows the trial court to impute income in order to calculate a obligor parent's child support payments. *See* Tenn. Comp. R. & Reg. 1240-2-4-.04(3)(2)(i). In the instant case, the trial court imputed income of \$29,339 per month to Mr. Bugalla. Although there is reliable evidence in the record from which to determine Mr. Bugalla's past income, what is missing here is proof of his income potential. Despite the fact that Mr. Bugalla has earned large salaries in the past, we cannot overlook certain factors bearing on his ability to earn going forward. The record tells us that Mr. Bugalla's employment was terminated because of large-scale changes in the insurance industry, that he is nearly sixty years old, and that he has only a high school degree. Given the particular facts of this case, we cannot conclude that Mr. Bugalla's past earnings are necessarily indicative of his future earning potential. And, as noted above, the record provides us with no basis for determining what his future earnings might be, given the state of the industry, his age, and education. In the absence of such proof, Tenn. Comp. R. & Reg. 1240-2-4-.04(3)(2)(iv) gives guidance to the court in determining gross income for purposes of child support, to wit:

(iv) Imputing Income When There is No Reliable Evidence of Income.

(I) When Establishing an Initial Order

I. If a parent fails to produce reliable evidence of income (such as tax returns for prior years, check stubs, or other information **for determining current ability** to support or ability to support in prior years for calculating retroactive support); and

II. The tribunal has no reliable evidence of the parent's income **or income potential**;

III. Then, in such cases, gross income for the current and prior years shall be determined by imputing annual gross income of thirty-six thousand three hundred sixty-nine dollars (\$36,369) for male parents....

(II) When Modifying an Existing Order

I. If a parent fails to produce reliable evidence of income (such as tax returns for prior years, check stubs, or other information **for determining current ability to support**); and

II. The tribunal has no reliable evidence of that parent's income **or income potential**;

III. After increasing the gross income of the parent failing or refusing to produce evidence of income by an increment not to exceed ten

percent (10%) per year for each year since the support order was entered or last modified, the tribunal shall calculate the basic child support obligation using the increased income amount as that parent's gross income.

Tenn. Comp. R. & Reg. 1240-2-4-.04(3)(2)(iv) (emphasis added).

As noted above, while this record contains evidence from which to determine Mr. Bugalla's past earnings, it does not provide sufficient information on which to base a finding of his income potential. Consequently, the trial court's imputing income of \$29,339 per month to Mr. Bugalla, and its denial of his petition to modify his support obligation based upon that income, was error. We, therefore, reverse those portions of the trial court's order. The case will be remanded for determination of Mr. Bugalla's future earning potential in light of all relevant factors, and for the setting of Mr. Bugalla's base child support obligation based upon a reasonable monthly income. Upon remand, the trial court may solicit additional proof as to Mr. Bugalla's true earning potential and calculate income based upon that information, or the trial court may impute gross income based upon the factors set out in Tenn. Comp. R. & Reg. 1240-2-4-.04(3)(2)(iv), *supra*, and set base support accordingly.

### **Private School Tuition**

As set out above, the trial court ordered Mr. Bugalla to pay "\$91,755 for the private school expenses of the children for the school years of 2002-2003, 2003-2004, 2004-2005 and 2005-2006." According to the trial court's order, "[t]his sum represents 80.83% of the children's private school expenses already paid by Ms. Kaplan for those years. Mr. Bugalla's proportionate share of the total income of the parties during those years was 80.83%." The award of educational expenses arrears in this case is mandated by our Supreme Court in *Kaplan v. Bugalla*, 188 S.W.3d 632 (Tenn. 2006). In that Opinion, the Court first concludes that, "payment of extraordinary educational expenses is a separate component of an obligor's total child support obligation, that is, separate from the base child support...." The Court further holds that the significant variance standard of T.C.A. § 36-5-101(g) does not apply to extraordinary educational expenses. Rather, the Court rules that the "significant variance" standard now applies only in the context of modifications of base child support," and that, "at the time this case was filed [Ms. Kaplan's petition to modify was filed on September 4, 2002], the 'substantial and material change in circumstances' standard applied in cases involving modifications of child support payment of extraordinary educational expenses." The Court found that Ms. Kaplan had proved a substantial and material change in circumstances so as to warrant modification of Mr. Bugalla's support obligation to include some portion of the children's private school tuition. Consequently, we concede that Mr. Bugalla does owe some amount of arrears for his portion of these expenses. In calculating what portion of the extraordinary educational expenses to assign to the obligor parent, the Supreme Court states that "it is appropriate to consider the income of the custodial parent in considering whether a downward deviation from the total child support award (percentage plus extraordinary educational expense) would achieve equity.... Downward deviation in this context would spread the cost of tuition equitable [between] the parties." *Kaplan v. Bugall*, 188 S.W.3d at 635-36 (quoting *Barnett v. Barnett*, 27 S.W.3d 904, 909 (Tenn. 2000)).

As set out in its Order, *supra*, the trial court charged Mr. Bugalla with a static 80.83% of the children's private school tuition for the years 2002 through 2006. However, the record indicates that Mr. Bugalla's income did not remain constant during these years. According to the proof, Mr. Bugalla earned \$274,997 in 2002, \$392,000 in 2003, \$389,000 in 2004, and \$533,188 in 2005. The trial court's determination that Mr. Bugalla should be responsible for 80.83% of the children's tuition for these four school years fails to take into consideration two things. First, because Mr. Bugalla's income changed from year to year, it stands to reason that his proportionate share of the private school tuition should not have remained constant. Pursuant to our Supreme Court's ruling in *Kaplan*, *supra*, both parties' incomes for those years should have been considered in reaching an equitable distribution of the private school expenses. From the record before us, we do not conclude that the trial court considered variances in Mr. Bugalla's income in reaching the amount of arrears.

Furthermore, we cannot overlook the fact that, on October 31, 2005, Mr. Bugalla filed his petition to modify child support, which petition gives rise to the present appeal. Consequently, the calculation of arrears should not have included any time period beyond October 31, 2005. Because the trial court did not consider changes in Mr. Bugalla's income during the arrears period, and because the trial court charged Mr. Bugalla with arrears beyond October 31, 2005 (i.e. the trial court assigned arrears through the 2006 school year), we reverse the award of \$91,755 for extraordinary educational expense arrears, and remand for a proper determination of same pursuant to this Opinion and our Supreme Court's Opinion in *Kaplan*.

In addition to the award of arrears, the trial court also found Mr. Bugalla's proportionate share of the private school tuition for the "2006-2007 school year and all future years" to be 78% of the total tuition charged. In 2005, the year Mr. Bugalla filed his petition, the child support guidelines were revised to give guidance to the courts in determining the allocation of extraordinary educational expenses, to wit:

(d) Extraordinary Expenses.

The Schedule includes average child rearing expenditures for families based upon the parents' monthly combined income and number of children. Extraordinary expenses are in excess of these average amounts and are highly variable among families. For these reasons, extraordinary expenses are considered on a case-by-case basis in the calculation of support and are added to the basic support award as a deviation so that the actual amount of the expense is considered in the calculation of the final child support order for only those families actually incurring the expense. These expenses may be, but are not required to be, divided between the parents according to each parent's PI.

1. Extraordinary Educational Expenses.

(i) Extraordinary educational expenses may be added to the presumptive child support as deviation. Extraordinary educational expenses include...tuition...and other reasonable and necessary

expenses associated with...private elementary and/or secondary schooling that are appropriate to the parents' financial abilities and to the lifestyle of the child if the parents and child were living together.

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(iii) If a deviation is allowed for extraordinary education expenses, a monthly average of these expenses shall be based on evidence of prior or anticipated expenses and entered on the Worksheet in the deviation section.

Tenn. Comp. R. & Reg. 1240-2-4-.07(2)(d).

Because the trial court's allocation of 78% of the children's tuition to Mr. Bugalla was based, at least in part, upon the erroneous imputation of \$29,339 in monthly income, we also reverse this portion of the trial court's Order. Upon remand, the trial court should first determine a reasonable monthly income for Mr. Bugalla, should set his base support obligation in line with that income, and should then set his share of the children's private school tuition from October 31, 2005 going forward based upon the parties' respective incomes and in compliance with the relevant guidelines. In addition, Mr. Bugalla's private school tuition arrears should be re-calculated pursuant to the guidelines set out above, but should not be levied for any date beyond October 31, 2005.

### **Attorney Fees**

Mr. Bugalla also appeals the trial court's award of \$32,300 in attorney's fees and costs to Ms. Kaplan. In child support modification cases, T.C.A. § 36-5-103(c) gives courts the power to award "reasonable attorney fees...." The award of attorneys' fees is within the trial court's discretion. *Richardson v. Richardson*, 969 S.W.2d 931, 936 (Tenn. Ct. App.1997). Unless it "affirmatively appears that the trial court's decision was against logic or reasoning, and caused an injustice or injury to the party complaining," the trial court's exercise of discretion will not be reversed on appeal. *Marcus v. Marcus*, 993 S.W.2d 596, 601 (Tenn.1999) (citations omitted). Having concluded above that the trial court's calculations are flawed insofar as they are based upon the lower court's imputing an untenable monthly income to Mr. Bugalla, we likewise conclude that the trial court's award of \$32,300 in fees was against logic, and we reverse same. While the record supports our conclusion that Mr. Bugalla should not be charged with the lion's share of Ms. Kaplan's legal expenses, without a proper calculation of Mr. Bugalla's income, we cannot determine what, if any, portion of Ms. Kaplan's expenses should be charged to Mr. Bugalla in the interest of justice and equity. Therefore, upon remand, the trial court should revisit the award of attorney's fees in light of its findings on income, base support, ongoing private school tuition, and arrears.

Pursuant to T.C.A. § 36-5-103(c), Ms. Kaplan also asks this Court to award her attorney's fees and expenses incurred in defending this appeal. Based upon the relevant facts before us, and the conclusions reached herein, we find that it would be inequitable to grant Ms. Kaplan's request, and we respectfully decline same.

For the foregoing reasons, we reverse the trial court's Order except for its determination of voluntary underemployment. Pursuant to this Opinion, we remand this matter for determination of Mr. Bugalla's income, the setting of his base child support obligation, the setting of his ongoing share of the children's private school tuition, and calculation of private school tuition arrears. The trial court is also instructed to reconsider the award of attorney's fees in light of its findings on these matters. Costs of this appeal are assessed one-half to Appellant, John A. Bugalla, and his surety, and one-half to Appellee, Brendi Bugalla Kaplan.

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W. FRANK CRAWFORD, JUDGE