

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

TIMOTHY GILES TINNIN v. JENNIFER MICHELLE STAMPS

**Direct Appeal from the Juvenile Court for Davidson County
No. 9819-44388 Betty Adams Green, Judge**

No. M2006-02156-COA-R3-CV - Filed December 19, 2007

The trial court increased Father's child support obligation upon determining Father's earning capacity had increased from \$75,000 in 1999 to \$250,000 in 2006. Pursuant to Tennessee Code Annotated § 27-3-128, we remand for further findings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Remanded

DAVID R. FARMER, J., delivered the opinion of the court, in which ALAN E. HIGHERS, P.J., W.S., and HOLLY M. KIRBY, J., joined.

James H. Drescher, Nashville, Tennessee, for the appellant, Timothy Giles Tinnin.

D. Scott Parsley and Michael K. Parsley, Nashville, Tennessee, for the appellee, Jennifer Michelle Stamps.

MEMORANDUM OPINION¹

Timothy Giles Tinnin (Mr. Tinnin) and Jennifer Michelle Stamps (Ms. Stamps) are the parents of a child born October 9, 1998. In January 1999, the juvenile court referee determined Mr. Tinnin had an earning capacity of \$75,000 per year and set child support at \$215 per week. On April 28, 2004, Ms. Stamps filed a petition to increase child support, alleging Mr. Tinnin's income had increased significantly. Following extensive discovery and trial in May and June 2006, the trial court

¹Rule 10 of the Rules of the Court of Appeals of Tennessee provides:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION", shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

determined Mr. Tinnin's earning capacity had increased to \$250,000 per year and granted Ms. Stamps' petition to increase child support retroactive to the filing of her petition. The trial court also awarded Ms. Stamps attorney's fees in the amount of \$16,186.51. Mr. Tinnin appeals, asserting there is insufficient evidence in the record to support the trial court's finding of increased earning capacity and that the trial court erred in awarding Ms. Stamps attorney's fees. Pursuant to Tennessee Code Annotated § 27-3-128, we remand for further findings to be included in the trial court's order.

Standard of Review

We review the trial court's findings of fact *de novo*, with a presumption of correctness. Tenn. R. App. P. 13(d); *Berryhill v. Rhodes*, 21 S.W.3d 188, 190 (Tenn. 2000). We will not reverse the trial court's factual findings unless they are contrary to the preponderance of the evidence. *Id.* Insofar as the trial court's determinations are based on its assessment of witness credibility, appellate courts will not reevaluate that assessment absent evidence of clear and convincing evidence to the contrary. *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002). Our review of the trial court's conclusions on matters of law, however, is *de novo* with no presumption of correctness. *Taylor v. Fezell*, 158 S.W.3d 352, 357 (Tenn. 2005). We likewise review the trial court's application of law to the facts *de novo*, with no presumption of correctness. *State v. Thacker*, 164 S.W.3d 208, 248 (Tenn. 2005).

Discussion

The trial court increased Mr. Tinnin's child support obligation based not on a finding that Mr. Tinnin's income per se has increased, but upon determining that Mr. Tinnin has an earning capacity in excess of his asserted income. Further, the trial court based this determination not on a finding of voluntary underemployment, but upon a determination that Mr. Tinnin's assertions with respect to his income are not credible in light of his lifestyle and the value of his landscaping business.

The trial court made twenty findings in its order. Those relevant to our review here, as numbered and stated by the trial court, are:

6. B&T Landscaping is a company that Mr. Tinnin bought his partner out of in December 2000, and became 100% stockholder. He testified he makes most of the decisions. His wife, Shellie Tinnin at that time was the president, secretary and treasurer of the company.
7. Mr. Tinnin testified that there are 1000 shares of a company known as B&T Landscaping, which was later merged into B&T Acquisition in 2004, of which he currently owns 500 shares, his current wife owns 300 shares, his parents own 100 shares and his in-laws own 100 shares. In essence, Mr. Tinnin gave away half of this business.

8. Randy Robertson, Vice President of First State Bank testified that Mr. Tinnin represented that he owned 100% of the stock in B&T Landscaping which resulted in a loan to him and that Mr. Tinnin had never advised that any of the stock had been pledged for other loans, though it had.
9. At some point Mr. Tinnin borrowed \$130,000.00 from his parents and/or his in-laws (he could not remember who gave him what amount of money) and in return he gave his parents 100 shares and his in-laws 100 shares of B&T as collateral. Once the company paid the loan back, Mr. Tinnin testified he let his parents and in-laws keep the shares because they “took a risk” and he saw no need to take the shares back. The Court finds this was an obvious attempt to try to hide assets.
10. Sometime several years later, Mr. Tinnin had to reorganize his organization due to not having a partner as a current party in the company and based on the Patriot Act he had to reorganize. In September 2004, Mr. Tinnin completed a personal financial statement saying that B&T had a market value of two point two million dollars to three million dollars.
11. At one point, Mr. Tinnin claimed to have an employee that was making \$77,000-\$78,000.00 while he was allegedly only making \$60,000.00.
12. Since child support was originally set based on an ability to earn \$75,000.00 annually, Mr. Tinnin has had two other children, . . . and These children go to daycare At the time child support was originally set Mr. Tinnin lived in a 2400 square foot home and now has built a home that is approximately 5800 square feet. The house is appraised at \$540,000.00. He paid \$320,000.00 for said house, (triple what his previous house was). Further, he has sold his previous house that had a house note of \$710.00 per month, and is living in a home that has a mortgage with taxes and insurance of \$3,159.08 per mom [sic] (at least four times what it was). There was a deposit into his checking account of April, 2005 of \$31,000 from the sale of his former house.
13. Mr. Tinnin and his wife have two separate checking accounts, one account is with Regions Bank, which is their separate “personal” account and one is with First State Bank, which is a separate “rental” account. For the year 2005, the deposits to these two accounts totaled \$265,567.31. Mr. Tinnin and his current wife that he married in April, 2000, both drive vehicles that are paid for by the company as well as the insurance.

14. Mr. Tinnin testified that he has had a decrease in his current income to around \$58,000.00 annually, despite the tremendous change in his lifestyle and the gross receipts of his business. This is simply not credible.
15. Mr. Tinnin claimed on his income expense statement that he, his wife and his two children spend approximately \$250.00 per month for food. This also is not credible.
16. Mr. Tinnin[’s] tax return for 2005 reflected Gross Receipts of \$6,095,762 (having almost tripled in three years) to B&T Landscaping, Inc., and after deduction for various items (which were not all proven to be reasonable and necessary for producing the income), said return evidenced taxable income of \$198,111.00.
17. Mr. Tinnin[’s] lifestyle changes and proof presented are totally inconsistent with his testimony that his only income is \$58,000.00 annually.
18. Based on the foregoing, the Court finds that Mr. Tinnin’s testimony regarding his income is not credible and that his earning capacity is at least \$250,000.00 annually and therefore child support is set based on his ability to earn \$250,000.00 per year.

These findings indicate the trial court’s determination that, based on the gross receipts of Mr. Tinnin’s landscaping company coupled with the building of his new home, Mr. Tinnin’s assertion that he earns approximately \$58,000 simply is not credible. However, the trial court failed to make any additional findings of a lifestyle that would indicate an income in the amount of \$250,000.² The trial court’s calculation of Mr. Tinnin’s earning capacity, as we perceive it, is based on a conclusion that Mr. Tinnin is sheltering assets in his landscaping company.

Although we are loathe to disturb the trial court’s credibility assessments without clear evidence to the contrary, the trial court’s findings as they currently exist do not support its determination of an earning capacity in the amount of \$250,000. This amount seems somewhat arbitrary in light of the record. On the other hand, we cannot say that the evidence preponderates against the trial court’s factual findings, or that the trial court erred in its conclusion that Mr. Tinnin’s effective income is greater than \$58,000 per year. Moreover, we are not insensitive to the difficulties faced by the trial court in a situation where the obligor parent is self-employed and is able to limit or conceal his or her income. *See e.g., Koch v. Koch*, 874 S.W.2d 571 (Tenn. Ct. App. 1993). As we stated in *Sandusky v. Sandusky*:

²At oral argument, Mr. Tinnin conceded that the value of the vehicle supplied by his company arguably would be included in the calculation of his income

A self-employment situation where an obligor spouse or parent can control the salary he or she receives may raise issues requiring the court to examine “whether the potential exists for the obligor to manipulate his reported income either by failing to aggressively solicit business or by inflating his expenses, thereby minimizing his income.” *Beem v. Beem*, No. 02A01-9511-CV-00252, 1996 WL 636491 at *4 (Tenn. App. Nov. 5, 1996) (no Tenn.R.App.P. 11 application filed). Another way to manipulate reported income is to pay a lower salary and not pay dividends, allowing the corporation to accumulate as retained earnings profits which would otherwise be distributed as dividends to the sole shareholder.

Where a business is solely owned, the company’s accumulation of retained earnings can be considered in determining the income available to the sole shareholder who has set his or her own salary. *See Higgs v. Higgs*, No. 01A01-9702-CV-0057, 1997 WL 691530 at *3 (Tenn. App. Nov. 7, 1997) (no Tenn.R.App.P. 11 application filed) (in arguing his alimony obligation should be reduced, husband relied upon his salary, ignoring the fact that the retained earnings of his corporation were available to him); *Needham v. Needham*, No. 03A01-9706-GS-00221, 1997 WL 789953 at *7 (Tenn. App. Dec. 23, 1997) (perm. app. denied June 22, 1998) (in determining whether husband’s solely owned company’s value had increased, the court observed that had husband paid himself dividends and larger salary, they would have been marital property).

Sandusky v. Sandusky, No. 01A01-9808-CH-00416, 1999 WL 734531, at *4 (Tenn. Ct. App. Sept. 22, 1999). Although the trial court’s findings in this case suggest a conclusion that Mr. Tinnin has manipulated his income in a self-employment situation, the findings do not support the trial court’s somewhat arbitrary conclusion that Mr. Tinnin’s earning capacity more than tripled over the course of approximately seven years.

Section 27-3-128 of the Tennessee Code provides:

The court shall also, in all cases, where, in its opinion, complete justice cannot be had by reason of some defect in the record, want of proper parties, or oversight without culpable negligence, remand the cause to the court below for further proceedings, with proper directions to effectuate the objects of the order, and upon such terms as may be deemed right.

Tenn. Code Ann. § 27-3-128(2000). This section authorizes a remand for further proceedings to correct a defect in the record or some oversight of the trial court that has occurred absent “culpable negligence.” *Id.*; *Killian v. Campbell*, 760 S.W.2d 218, 222 (Tenn. Ct. App. 1988). The section “does not authorize courts to indulge piecemeal and protracted litigation concerning facts that should have obviously been established at the original trial.” *Killian*, 760 S.W.2d at 222. Rather, it permits a remand geared to correction, rather than a remand after reversal, where justice so requires. *First Tenn. Bank Nat’l Ass’n v. Hurd Lock & Mfg.*, 816 S.W.2d 38, 40 (Tenn.Ct.App.1991). The taking

of additional proof upon remand under the section is permissible when necessary to effectuate complete justice, but is not required. *See id.; Bd. or Comm'r of Roane County v. Parker*, 88 S.W.3d 916, 921 (Tenn. Ct. App.2002)(distinguishing remand under § 27-3-128 from remand for new trial and holding trial court correctly limited evidence on remand to purpose imposed by appellate court rather than permitting a new trial); *First Tenn. Bank*, 816 S.W.2d at 41 (holding trial court required to conduct those proceedings necessary to effectuate complete justice, which may include the taking of additional proof).

In light of the foregoing, we remand this case in accordance with section 27-3-128 for further findings with respect to Mr. Tinnin's income and with respect to whether Mr. Tinnin is sheltering or funneling assets through his landscaping business. Upon remand, the trial court is instructed to reconsider its findings with respect the amount of Mr. Tinnin's effective income, and to make specific findings to support its determination of that amount.

Holding

This matter is remanded to the trial court for further findings pursuant to Tennessee Code Annotated § 27-3-128. In light of this holding, Mr. Tinnin's issue with respect to attorney's fees is pretermitted, and Ms. Stamps' request for attorney's fees on appeal is denied. Costs of this appeal are taxed one-half to the Appellee, Jennifer Michelle Stamps, and one-half to the Appellant, Timothy Giles Tinnin, and his surety, for which execution may issue if necessary.

DAVID R. FARMER, JUDGE