

RENDERED: FEBRUARY 10, 2006; 2:00 P.M.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-001895-MR

BILLY SCOTT FITZGERALD

APPELLANT

v. APPEAL FROM OWEN CIRCUIT COURT  
HONORABLE STEPHEN L. BATES, JUDGE  
ACTION NO. 01-CI-00028

KARLA ANN FITZGERALD

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, JOHNSON, AND TACKETT, JUDGES.

TACKETT, JUDGE: Billy Scott Fitzgerald (Scott) appeals from an order of the Owen Circuit Court denying his motion to reduce his child support obligation. Scott argues that he has experienced a substantial change in his ability to generate the amount of income he had at the time his child support obligation was established. The trial court found that Scott was voluntarily underemployed. We agree and affirm the trial court's order.

Scott and Karla Fitzgerald (Karla) were divorced in 2001 and the parents of two minor children. Prior to the parties' separation, Scott was self-employed as the sole proprietor of a hauling business. Loans on his business equipment were secured by farming and rental properties he owned. Karla was the bookkeeper and dispatcher for the business, but Scott made the phone calls that resulted in hauling contracts. His gross income for the last three years of the marriage was \$90,000.00 (1998), \$140,000.00 (1999), and \$162,000.00 (2000). When the parties decided to separate, Scott announced that he was quitting the business and he went to work for his brother making \$15.00/hour. Karla testified that business was good and additional work was available when Scott abruptly quit. Subsequently, his real property and one of his dump trucks were repossessed.

The trial court's original judgment was entered in January 2002. Scott's gross income was found to be \$5,724.00 per month, a figure supported by the testimony of both parties as fairly representative of what he had earned the last several years of their marriage. In August 2002, Scott filed his first motion to reduce his child support arguing, as he does here, that his income had been substantially reduced. The trial court denied this motion. In May 2004, Scott filed another motion requesting a decrease in his child support and reporting income

of only \$37,066.00 for 2003. He argued that he was incapable of making any more than that and, thus, was entitled to a decrease in his child support. The trial court found that Scott was presenting the same arguments contained in his August 2002 motion and that he retained the ability to make more money by exercising the entrepreneurial skills displayed during his marriage. The trial court's order, dated August 17, 2004, found Scott to be voluntarily underemployed and denied his motion to reduce his child support. This appeal followed.

Scott contends that the standard of review in a determination of child support is whether the trial court abused its discretion. His appellate brief centers around his contention that he experienced a material change in employment circumstances between the time his marriage ended and the present time. This argument does not adequately address the basis of the trial court's order which is the factual finding that Scott is voluntarily underemployed. The trial court's factual findings may not be disturbed on appeal if they are supported by substantial evidence. Scott's income in the original judgment was determined based on testimony from both parties. The trial court's current order noted that the evidence Scott was presenting in support of his second request for child support reduction was largely similar to the evidence he had produced in support of his August 2002 petition.

Scott points to our decision in McKinney v. McKinney, 813 S.W.2d 828 (Ky. App. 1991), in support of his contention that he is not voluntarily underemployed. The trial court found McKinney distinguishable because it involved a parent whose employment was involuntarily terminated due to his employer's decision to reduce the number of employees at its plant. We agree, but find that the case at hand more closely resembles Gossett v. Gossett, 32 S.W.3d 109 (Ky. App. 2000), which involved a parent who, while married, worked a forty hour per week job and actively sought overtime as well as working a second job part-time. After the parties divorced, Gossett decreased his overtime and quit his second job voluntarily. The trial court held that, as a matter of law, he could not be considered voluntarily underemployed since the additional income he earned during the marriage came from overtime and a second job. We disagreed and held that it was a factual determination, permitting the trial court to consider on remand whether to impute a higher income due to voluntary underemployment.

The Owen Circuit Court's order found that Scott was voluntarily underemployed within the meaning of Kentucky Revised Statute 403.212(2)(d) which reads as follows:

d) If 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 . . . recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community. A court may find a parent to be voluntarily unemployed or underemployed without finding that the parent intended to avoid or reduce the child support obligation.

The order stated that Scott "has been a resourceful self-employed person for most of his life and has produced . . . great income prior to the separation of the parties." The trial court's order went on to find that Scott "has the *ability* to make a greater income if he chooses to exercise the entrepreneurial skills he exercised during the marriage of the parties." (Emphasis in original.) The trial court concluded, with appropriate employment, he could earn income in amounts similar to what he was earning during the marriage.

Scott argues that the trial court has ordered him to do the impossible. He chooses to interpret the order as a requirement that he resume his hauling business. He, therefore, contends that the order is erroneous because he lost real property which served as collateral for his dump truck which was also repossessed. Nowhere in the trial court's order does it state that Scott must earn a living operating a hauling business. The trial court simply finds that Scott, with his demonstrated past success in running his own business, is capable of earning more than \$15.00 an hour working for his brother. Scott fails to prove that the trial court's factual

determination that he is voluntarily underemployed is unsupported by the evidence.

For the foregoing reason, the judgment of the Owen Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Marcus S. Carey  
Erlanger, Kentucky

BRIEF FOR APPELLEE:

N. Jeffrey Blankenship  
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