

# Commonwealth of Kentucky

## Court of Appeals

NO. 2005-CA-002598-MR

DONNIE JOE MILLS

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT  
HONORABLE CHARLES W. BOTELER, JR., JUDGE  
ACTION NO. 04-CI-00678

BOBBI JARRETT MILLS

APPELLEE

OPINION  
AFFIRMING

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BEFORE: STUMBO AND WINE, JUDGES; GUIDUGLI,<sup>1</sup> SENIOR JUDGE.

WINE, JUDGE: Donnie Joe Mills (Donnie) appeals from a judgment and decree of the Hopkins Circuit Court dissolving his marriage to Bobbi Jarrett Mills (Bobbi). He argues that the trial court erred by considering his overtime pay in setting the maintenance award to Bobbi. We cannot find that the trial court clearly erred or abused its discretion in setting maintenance. Hence, we affirm.

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<sup>1</sup> Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Donnie and Bobbi were married on September 3, 1976, in Hopkins County, Kentucky. Two children were born of the marriage, both of whom have reached the age of majority. The parties separated on May 2, 2003, and Donnie filed a petition for dissolution of the marriage on August 16, 2004.

The trial court referred the matter to a domestic relations commissioner (DRC) for a hearing on the contested issues regarding division of property and debt and Bobbi's request for maintenance. After conducting an evidentiary hearing, the DRC issued her report on May 6, 2005.

In pertinent part, the DRC concluded that Bobbi is entitled to maintenance. The DRC noted that Bobbi was the primary caregiver for the children throughout the marriage. While Bobbi also worked throughout the marriage, the DRC found that she earns approximately \$2,612.00 in gross monthly income, and her net income is approximately \$1,912.00 per month. Based upon projected living expenses of \$2,493.00 per month, the DRC found that her expenses exceeded her net income by \$581.00 per month.

With regard to Donnie, the DRC found his net earnings for 2004 were approximately \$3,310.00 per month. Although this amount reflects a significant amount of overtime pay, the DRC determined that Donnie was capable of earning this amount on a regular basis. Based on projected living expenses of \$2,498.00, the DRC found that Donnie's expenses were \$812.00 per month less than his monthly income. Therefore, the DRC found that Donnie was able to pay Bobbi maintenance in the amount of \$575.00 per

month. Accordingly, the DRC recommended that Donnie pay maintenance to Bobbi in that amount until her death or remarriage.

Thereafter, Donnie filed exceptions to the DRC's report, specifically arguing that the DRC erred in considering his overtime pay. He stated that his employer has significantly cut overtime and such income was no longer available to him. He also argued that it is unfair to require him to work overtime, but not to impute overtime pay to Bobbi. The trial court overruled Donnie's exceptions and adopted the DRC's recommended order as to maintenance. This appeal followed.<sup>2</sup>

The trial court has dual responsibilities to satisfy before awarding maintenance. It must make relevant findings of fact and secondly, "exercise its discretion in making a determination of maintenance in light of those facts." *Perrine v. Christine*, 833 S.W.2d 825, 826 (Ky. 1992).

Donnie does not take issue with the trial court's findings concerning Bobbi's income, earning capacity and expenses. The trial court also found that Bobbi lacks sufficient property, including marital property apportioned to her, to provide for her reasonable needs, and she is unable to support herself through appropriate employment. KRS 403.200(1). Donnie does not challenge the sufficiency of these findings. Consequently, there is no question that Bobbi is entitled to maintenance.

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<sup>2</sup> After Donnie filed his notice of appeal, he filed a motion with the trial court to terminate or reduce his maintenance obligation, again based on the reduced availability of overtime pay. But since these proceedings occurred after Donnie filed his notice of appeal, the evidence presented in support of that motion is not before this Court.

Once it is established that maintenance is appropriate, KRS 403.200(2) directs the court to set the amount and duration of maintenance after considering enumerated factors, including “(f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.” Donnie argues that his overtime pay is not guaranteed and, therefore, the trial court should not have considered it for purposes of determining his ability to meet his needs while paying maintenance to Bobbi.

Donnie further argues that it is not fair for the court to impute overtime income to him which is no longer available to him. But contrary to his assertions, the DRC’s findings, as adopted by the trial court, do not require him to work overtime to pay maintenance. Rather, based on the evidence presented at the time of the evidentiary hearing, the DRC simply found that Donnie had failed to prove that his earning capacity had declined. There is substantial evidence to support this conclusion.

Donnie is employed as a factory worker at General Electric (GE). As previously noted, his average net monthly income for 2004 was \$3,310.00. Donnie testified that, during the first nine months of 2004, he worked all available overtime, including thirty-three Saturdays and thirteen Sundays. After September 2004, GE substantially reduced overtime for its employees. By the time of the evidentiary hearing, Donnie testified that he was working 37.5 hours per week, but was being paid for 40 hours, and his net income had dropped to \$2,100.00 per month.

In support of his claim of reduced income, Donnie introduced a payroll summary for the period ending January 2, 2005. However, the summary shows earnings for only 20 hours, including 7 hours of holiday pay and 13 hours of pay with a shift bonus. Since this summary covered a holiday period, the DRC concluded that it was not indicative of Donnie's earnings.

Donnie also introduced previous payroll summaries back to September 17, 2004. Except for the first pay period, these summaries indicate that Donnie generally worked 2.5 hours of overtime per week over this period. Donnie did not introduce his payment summaries for the pay periods prior to September 2004, so it is not clear if this represents a reduction in the amount of overtime which Donnie previously worked.

As an appellate court, this Court is not "authorized to substitute its own judgment for that of the trial court on the weight of the evidence, where the trial court's decision is supported by substantial evidence." *Leveridge v. Leveridge*, 997 S.W.2d 1, 2 (Ky. 1999), *citing Combs v. Combs*, 787 S.W.2d 260, 262 (Ky. 1990). Donnie's evidence did not definitively show that the recent reduction in his income was likely to be continuing. Consequently, we cannot find that the trial court clearly erred by basing Donnie's income on the monthly average of his 2004 annual income.

Likewise, we cannot find that the trial court clearly erred by including Donnie's overtime pay in setting his maintenance obligation. While there are no Kentucky cases which directly discuss this issue, this Court addressed a similar issue in the context of setting child support. *Gossett v. Gossett*, 32 S.W.3d 109 (Ky.App. 2000).

In *Gossett*, the obligor parent had a history of working two jobs and considerable overtime. After the separation, he quit his part-time job and ceased working overtime, but he continued to work a 40-hour work week. The trial court in *Gossett* declined to impute income to the parent, concluding that he “is not required by law to maintain more than one job or to work to the exclusion of any other activities of life.”

On appeal, this Court reversed. The Court agreed, as a general rule, that a trial court should not impute to a person income from more than one job. However, this Court emphasized that this is not a rule to be applied in all cases as a matter of law.

Depending upon the circumstances peculiar to each case, particularly where there is a history of a spouse having had two jobs, the trial court may find it appropriate to consider imputing to a spouse income from more than one job. The court should consider the previous history of employment, the occupational qualifications, the extent to which the parent may be under employed in the primary job, the health of the individual, the needs of the family, the rigors of the primary job and the second job, and all other circumstances.

*Id.* at 112, citing *Cochran v. Cochran*, 14 Va. App. 827, 830, 419 S.E.2d 419, 421 (1992).

We find this discussion is equally applicable to determining a spouse’s income for maintenance purposes. Donnie’s income during 2004 is consistent with his income during prior years. Given Donnie’s employment history, it was reasonable for the trial court to conclude that he would work any available overtime. Furthermore, by using Donnie’s average monthly income for 2004, the DRC took into account any likely fluctuations in the availability of overtime. The DRC applied the same method to

determine Bobbi's monthly income. Finally, the trial court recognized that Donnie could obtain a modification of his maintenance obligation by presenting more sufficient evidence of a substantial and continuing decline in his income. KRS 403.350.

Based on the evidence available at the time of the evidentiary hearing, we cannot find that the trial court clearly erred in determining Donnie's income. Where the trial court's factual findings are supported by substantial evidence, the award of maintenance is left to the trial court's sound discretion. *Gentry v. Gentry*, 798 S.W.2d 928, 937 (Ky. 1990), *citing* KRS 403.200(2). We cannot say that the trial court abused its discretion in fixing the amount of maintenance in this case.

Accordingly, the judgment of the Hopkins Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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