[Cite as *McLaughlin v. Kessler*, 2012-Ohio-3317.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

KEVIN J. McLAUGHLIN, et al.,	:	
Plaintiffs-Appellees,	:	CASE NO. CA2011-09-021
	:	O P I N I O N
- vs -		7/23/2012
	:	
MILDRED KESSLER, n.k.a. ANDERS,	:	
Defendant-Appellant.	:	

APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. H20014172

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HUTZEL, J.

{¶ 1} Defendant-appellant, Mildred Kessler, appeals a decision of the Fayette County Court of Common Pleas, Juvenile Division, regarding the modification of her child support obligation.

{¶ 2} Kessler and plaintiff-appellee, Kevin McLaughlin, had two children together. Their first daughter, Faith McLaughlin, was born on December 22, 1998, and their second daughter, Grace McLaughlin, was born on October 11, 2000. McLaughlin received full custody of both children in December 2000.

{¶ 3} Initially, the parties agreed that Kessler would pay $50 per month in child support. However, in 2002, the trial court increased Kessler's child support obligation to $106.11 per month, based upon her gross annual employment income of $3,847.44.

{¶ 4} In 2008, Kessler was found in contempt for failing to pay her child support as ordered. The trial court sentenced Kessler to ten days in jail, but suspended the sentence upon the condition that Kessler paid her child support arrearages. The court also ordered Kessler to seek employment at a minimum of five places per week, and to report her efforts to the Fayette County Child Support Enforcement Agency ("CSEA"). On March 18, 2009, the trial court imposed three days out of the possible ten-day jail sentence upon finding that Kessler had failed to pay her child support and to seek work as ordered. On September 16, 2009, the court imposed the remaining seven days on Kessler's sentence, due to her continued failure to abide by the court's orders.

{¶ 5} In June 2011, CSEA moved to modify Kessler's existing child support obligation. Following a hearing on the motion, the trial court found that Kessler was voluntarily unemployed, and as a result, imputed a gross annual employment income to her in the amount of $15,392. In calculating Kessler's imputed income, the court summarily stated, without further explanation, that "Obligor is voluntarily unemployed and [the court] imputes an income to her based upon minimum wage of $7.40 per hours x 40 hours per week x 52 weeks * * *." (sic.) Using the imputed income, the trial court also increased Kessler's child support obligation from $106.11 per month to $321.31 per month, inclusive of processing fees.

{¶ 6} Kessler timely appeals, raising one assignment of error for review:

{¶ 7} THE TRIAL COURT ERRED, AS A MATTER OF LAW, WHEN IT FOUND MILDRED ANDERS INTENTIONALLY UNEMPLOYED AND IMPUTED INCOME TO HER WITHOUT EVAULUATING THE STATUTORILY REQUIRED FACTORS FOR THE IMPUTATION OF INCOME FOR CHILD SUPPORT [sic].

{¶ 8} Within her single assignment of error, Kessler presents three arguments related to the trial court's decision to modify her child support obligation.

{¶ 9} An appellate court will not reverse a child support modification absent an abuse of discretion. *Cooper v. Cooper*, 12th Dist. No. CA2003-05-038, 2004-Ohio-1368, ¶ 18. An abuse of discretion is more than an error in judgment or law and connotes that the trial court's decision is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 10} The modification of a child support order is governed by the requirements of R.C. 3119.79. *Cooper* at ¶ 18. In order to justify the modification of an existing support order, the moving party must demonstrate a substantial change in circumstances that "render[s] unreasonable an order which once was reasonable." *Banfield v. Banfield*, 12th Dist. Nos. CA2010-09-066, CA2010-09-068, 2011-Ohio-3638, ¶ 18. R.C. 3119.79(A) provides that a substantial change of circumstances occurs when a court recalculates the actual annual obligation required pursuant to the schedule and worksheet and the resulting amount is ten percent greater or less than the existing actual annual child support obligation. *Id.*; *Groves v. Groves*, 12th Dist. No. CA2008-06-059, 2009-Ohio-931, ¶ 11.

{¶ 11} Here, after finding that Kessler was voluntarily unemployed, the trial court completed a new child support computation worksheet to reflect Kessler's imputed annual income of $15,392. Using the imputed income, the trial court increased Kessler's annual child support obligation to $3,780.07, which was well over a ten percent increase in her

existing actual annual obligation of $1,248.31.[1]

{¶ 12} On appeal, Kessler first argues that her new child support obligation is invalid because the trial court erroneously imputed income to her as a voluntarily unemployed parent.

{¶ 13} In calculating child support, a trial court must determine the annual income of each of parent. For an unemployed or underemployed parent, income is the "sum of the gross income of the parent and any potential income of the parent." R.C. 3119.01(C)(5)(b). Potential income includes imputed income that a trial court determines the parent would have earned if fully employed based upon the criteria set forth in R.C. 3119.01(C)(11)(a)(i)-(x). However, before a trial court may impute income to a parent, it must first find that the parent is voluntarily unemployed or underemployed. R.C. 3119.01(C)(11). *See also Banfield*, 2011-Ohio-3638 at ¶ 18; *Justice v. Justice*, 12th Dist. No. CA2006-11-134, 2007-Ohio-5186, ¶ 8.

{¶ 14} As a preliminary matter, we note that Kessler argues that the trial court's finding of her voluntary unemployment is against the manifest weight of the evidence. However, whether a parent is voluntarily unemployed is a question of fact for the trial court that will not be disturbed on appeal absent an abuse of discretion. *Rock v. Cabral*, 67 Ohio St.3d 108, 112 (1993); *Moser v. Moser*, 12th Dist. No. CA2005-09-109, 2006-Ohio-5381, ¶ 8. As discussed above, an abuse of discretion connotes that the trial court's decision is arbitrary, unreasonable, or unconscionable. *Blakemore*, 5 Ohio St.3d at 219. Further, this court has previously held that a parent who claims that the other parent is voluntarily unemployed bears the burden of proof on that issue. *See Groves*, 2009-Ohio-931 at ¶ 8. Thus, McLaughlin had the burden of proving that Kessler was voluntarily unemployed before the trial court could impute income to her.

1. The annual child support calculations excluded the two percent processing fee.

{¶ 15} Upon a review of the record, we find that McLaughlin presented insufficient evidence during the hearing to prove that Kessler was voluntarily unemployed. In fact, the trial court's finding of Kessler's voluntary unemployment is in direct conflict with Kessler's uncontroverted testimony as to her efforts to obtain work.

{¶ 16} During the hearing, Kessler testified that she had last worked in 2009 as a temporary employee of Crestar, where she earned $8.25 per hour. Kessler's placement with Crestar lasted for two weeks. Kessler also testified that she had recently applied for "[j]ust about everything I can get my hands on. * * * It's nothing in particular, actually * * * all different kinds of places." Kessler specifically stated that she had applied for positions at a local laundromat, K-Mart, Wal-Mart, Dollar Tree, and Dollar General. Kessler also indicated that she was listed with several temporary employment agencies located near her home in Mt. Sterling, including Spherion, Remedy, and Act One.

{¶ 17} McLaughlin offered absolutely no testimony or evidence in the hearing to refute Kessler's testimony. On appeal, McLaughlin argues that the record itself contains sufficient evidence of Kessler's voluntary unemployment. Specifically, McLaughlin cites the judgment entries dated March 18, 2009, and September 16, 2009, wherein the court sentenced Kessler to jail for failing to abide by its order to seek work at a minimum of five places per week. However, during the hearing, McLaughlin failed to present evidence or testimony on this issue. Moreover, we fail to see the relevance of the 2009 judgment entries, where McLaughlin did not prove that there were additional employment opportunities available in the Mt. Sterling area for high school-educated individuals like Kessler, or that Kessler had the skills, experience, or ability to engage in other employment outside of the work for which she had already applied.[2] *See Meeks v. Meeks*, 10th Dist. No. 05AP-315, 2006-Ohio-642, ¶ 36.

2. Such evidence, although specifically related to imputing income under R.C. 3119.01(C)(11), is also relevant here.

{¶ 18} Under these circumstances, we find that McLaughlin failed to meet his burden of demonstrating Kessler's voluntary unemployment. It follows that the trial court abused its discretion in ignoring the testimony that was presented, and in finding that Kessler was voluntarily unemployed.

{¶ 19} Accordingly, we sustain Kessler's first sub-argument.

{¶ 20} In her second and third sub-arguments, Kessler contends that the trial court lacked sufficient evidence to support its calculation of imputed income pursuant to R.C. 3119.01(C)(11). In light of our disposition of the voluntary unemployment issue, these arguments are rendered moot and will not be addressed. *See* App.R. 12(A)(1)(c). However, because the parties may file similar motions in the future, we caution the court to fully consider the criteria set forth in R.C. 3119.01(C)(11)(a) for determining imputed income, including the availability of employment in the geographic area, the prevailing wage and salary levels, Kessler's special skills and training, if any, and whether Kessler has the ability to earn the imputed income. *See Justice*, 2007-Ohio-5186; *Henderson v. Henderson*, 3rd Dist. No. 10-03-20, 2004-Ohio-1856, ¶ 6-7.

{¶ 21} Judgment reversed and cause remanded for proceedings consistent with this opinion.

HENDRICKSON, P.J., and PIPER, J., concur.