

NOT DESIGNATED FOR PUBLICATION

No. 101,702

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

STEPHANIE S. BETHUNE,  
*Appellee,*

and

JEFFREY R. BETHUNE,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Johnson District Court; SARA WELCH, judge. Opinion filed  
January 29, 2010. Affirmed.

*Timothy E. Keck*, of Olathe, for appellant.

*Tamara S. Hatheway*, of Bernstein, Rodarte & Hatheway, P.C., of Kansas City,  
Missouri, for appellee.

Before McANANY, P.J., GREEN and MALONE, JJ.

*Per Curiam:* Jeffrey R. Bethune appeals the district court's journal entry and divorce decree which found he was deliberately underemployed and imputed an annual income of \$30,000. Jeffrey contends the district court erred by finding he was deliberately underemployed and, thus, the district court abused its discretion by ordering him to pay \$571 per month for child support and \$231 per month for 67 months for spousal maintenance.

Jeffrey and Stephanie Bethune were married on March 21, 1992. On December 21, 2007, Stephanie filed for divorce and obtained a temporary order from the district court awarding her custody of the couple's three minor children, including temporary child support and maintenance payments. The case proceeded to an evidentiary hearing, which the court held on October 31, 2008.

At the hearing, Jeffrey testified he was a service consultant for a Honda dealership until December 2007, when he was terminated because his employer discovered a previously undisclosed felony conviction. Jeffrey's income prior to his termination was \$51,208 in 2005, \$53,012 in 2006, and \$41,148 in 2007. Jeffrey testified that he looked for work within the automotive industry and insurance industry after his termination. Nonetheless, Jeffrey remained unemployed from December 2007 until the date of the hearing, relying on unemployment compensation as his primary means of income. Jeffrey testified that he did not have any prospects for future employment.

After hearing the evidence, the district court determined that Stephanie's annual income was \$16,154 and Jeffrey's imputed annual income was \$30,000. In determining Jeffrey's imputed income, the district court specifically found that Jeffrey was deliberately underemployed for the purpose of avoiding child support. In making this finding, the district court noted:

"You [Jeffrey] have been unemployed since December of '07. In the ten months that you claim to have been applying for jobs, you have applied for jobs outside your area of expertise only twice . . . . You claim to have looked for jobs high and low and everywhere, but I have not seen a resume, I have not seen a single application. I have not seen a single rejection letter from any employer. . . . By your own admission you're a talented mechanic, and yet, you have not applied for a single, solitary position as a mechanic since this case has been pending."

Noting that Jeffrey had the requisite skills to be earning \$45,000 per year, the district court imputed an annual income of \$30,000, reasoning that Jeffrey's prior felony conviction diminished his earning potential. Based on the \$30,000 annual income determination, the district court ordered Jeffrey to pay \$571 per month for child support and \$231 per month for 67 months for spousal maintenance. Jeffrey timely appealed.

On appeal, Jeffrey challenges the district court's determination that he was deliberately underemployed for the purpose of avoiding child support. Jeffrey contends that the district court abused its discretion by ordering him to pay \$571 per month for

child support and \$231 per month for spousal maintenance. We will first address the order for child support and then separately address the order for spousal maintenance.

Generally, a district court's order determining the amount of child support will not be disturbed on appeal absent an abuse of discretion. *In re Marriage of Scott*, 263 Kan. 638, 645, 952 P.2d 1318 (1998) (quoting *In re Marriage of Denning*, 22 Kan. App. 2d 226, 914 P.2d 576 [1996]). The district court abuses its discretion only when no reasonable person would take the same view adopted by the court. *In re Marriage of Hoffman*, 28 Kan. App. 2d 156, 158, 12 P.3d 905 (2000), *rev. denied* 270 Kan. 898 (2001). The party who claims the district court abused its discretion bears the burden of showing such abuse. *Scott*, 263 Kan. at 647.

In making a child support determination, the district court may impute income to the noncustodial parent if the parent is deliberately unemployed or, as the district court determined here, deliberately underemployed. Kansas Child Support Guidelines, sec. II. F. 1 (2009 Kan. Ct. R. Annot. 114). Specifically, "[w]hen there is evidence that a parent is deliberately underemployed for the purpose of avoiding child support, the court may evaluate the circumstances to determine whether actual or potential earnings should be used." Kansas Child Support Guidelines, sec. II. F. 1. d. (2009 Kan. Ct. R. Annot. 114).

Jeffrey argues that his job termination was involuntary, and he relies on *In re Marriage of Johnson*, 24 Kan. App. 2d, 631, 634, 950 P.2d 267 (1997), *rev. denied* 264

Kan 821 (1998), for support that involuntary termination undercuts a finding of deliberate unemployment. In *Johnson*, the court found no error in not imputing income when the husband secured new employment within 2 days of his termination and began a better job 1 month after being terminated for testing positive for marijuana. 24 Kan. App. 2d at 633-34. In reaching this decision, the court noted that "[v]oluntary conduct that results in an involuntary loss of income does not necessarily determine that a parent is deliberately unemployed or underemployed." 24 Kan. App. 2d at 634.

However, Jeffrey's case is clearly distinguishable from *Johnson*. While Jeffrey's initial unemployment was involuntary, he had yet to obtain any employment by the time of trial, nearly a year after his involuntary termination. Jeffrey failed to supply the court with any documentation to support his claim that he applied for numerous jobs during his prolonged period of unemployment.

District courts should have flexibility when imputing income to deliberately underemployed parents and should take both past earnings and potential employment opportunities into account when making such determinations. 2 Elrod and Buchele, *Kansas Family Law Handbook* § 14.25, p. 356 (rev. 1999). Here, the district court provided a well-reasoned foundation for imputing Jeffrey's annual income of \$30,000. The district court first noted that at the time of trial, Jeffrey had been unemployed for nearly a year. During this time, Jeffrey claimed to have applied for numerous mechanic jobs, but he had not provided any documentation supporting his exhaustive search for

employment. Jeffrey's prolonged unemployment and failure to show substantial efforts in finding employment despite a marketable skill-set provided the district court with a sound rationale in which to determine Jeffrey was deliberately underemployed.

Moreover, the district court considered Jeffrey's 3 previous years of income and his own account of his current talents and abilities in determining the appropriate amount of imputed income. The district court reasonably determined that Jeffrey could earn an annual income of \$45,000 based on these factors. However, in light of Jeffrey's prior felony conviction, the district court imputed a reduced annual income of \$30,000, reasoning that a felony conviction provides a measurable impediment to realizing full employment potential. The district court's determination of Jeffrey's imputed income was based upon substantial competent evidence presented at the hearing. Based on this determination, the district court did not abuse its discretion by ordering child support payments in the amount of \$571 per month.

Jeffrey also challenges the district court's order that he pay Stephanie \$231 per month for spousal maintenance. Jeffrey contends that because the district erred in imputing his annual income of \$30,000, it follows that the district court abused its discretion when it awarded maintenance based on the \$30,000 income.

K.S.A. 2008 Supp. 60-1610(b)(2) provides that the district court "may award to either party an allowance for future support denominated as maintenance, in an

amount the court finds to be fair, just and equitable under all of the circumstances." The district court has wide discretion regarding spousal maintenance, and a judgment awarding maintenance will not be disturbed on appeal absent a clear abuse of discretion. *In re Marriage of Hair*, 40 Kan. App. 2d 475, 483, 193 P.3d 504 (2008), *rev. denied* 288 Kan. \_\_ (2009).

We have already determined that the district court's determination of Jeffrey's imputed annual income of \$30,000 was based upon substantial competent evidence, and the district court did not abuse its discretion by awarding monthly child support payments based on this income. It follows, therefore, that the district court did not abuse its discretion by awarding monthly maintenance payments based upon the same amount of income. In addition, the district court made additional findings to support its maintenance determination. Specifically, the district court noted that Stephanie's current income level required her to be on state-funded health insurance and food stamps. The district court also found that Stephanie needed time to build a client base for her hair styling business which she had put on hold to support her family during the 15-year marriage. Based upon the evidence presented at the hearing, the district court did not abuse its discretion by ordering Jeffrey to pay \$231 per month for 67 months for spousal maintenance.

Affirmed.