IN THE SUPREME COURT OF MISSOURI

SC90996

TANYA L. LINDHORST,

Appellant,

v.

ERIC J. LINDHORST,

Respondent.

Appeal from the Circuit Court of the County of St. Louis
Twenty-First Judicial Circuit
The Honorable Robert S. Cohen, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

This case originates from the divorce of the Appellant, Tanya L. Lindhorst (now known as Tanya L. Templeton), from the Mr. Lindhorst, Eric J. Lindhorst. L.F. at 18, 97[1]. The parties were married on June 10, 1989 and bore two children, Taylor Michelle Lindhorst, then age five, and Alexander Christian Lindhorst then age twenty-one months. L.F. at 18-19. The nine-year marriage was dissolved on April 21, 1998. Under the terms of the original dissolution decree, Mr. Lindhorst was required to pay child support on behalf of his two children in the amount of one thousand, one hundred dollars ($1,100.00) each month, and to pay maintenance to Ms. Templeton in the amount of one thousand dollars ($1,000.00) each month. L.F. at 18-19, 22-24,89-91,9798

At the time that the original decree was entered, Mr. Lindhorst was employed on a full-time basis as an attorney for Deutsche Financial Services, earning monthly salary of approximately fifty-five hundred dollars ($5,500.00). L.F. at 19, 97-98.. Ms. Templeton was employed on a part-time basis as a registered nurse for a private physician, earning monthly salary of approximately one-thousand, three hundred and

[1] "L.F." refers to the legal file Appellant submitted to this Court on October 19, 2009. "Tr." refers to the transcript of the modification hearing in the trial court below.

eighty-seven dollars ($1,387.00). L.F. at 19, 97-98. As part of its original decree, the trial court found, that Ms. Templeton, "suffers from a physical impairment due to rheumatoid arthritis that arguably prevents her from being able to work more than approximately twenty (20) hours in a given work week and is also the primary custodian of two minor children, aged 5 years and 21 months. In light of this physical impairment and the ages of the minor children who are in wife's custody, Wife requires and should be entitled to receive maintenance from Husband..." (emphasis added). L.F. at 22. Since the entry of the original decree, Mr. Lindhorst has remained employed as an attorney, working as in-house counsel for an international banking corporation and then for a major law firm, before creating his own law firm, Eric J. Lindhorst & Associates, LLC, where his area of practice includes small business clients. L.F. at 99-100. Ms. Templeton was employed prior to the dissolution, from 1994 until 2003 by, John B. Costello, M.D., who also has been her treating physician and rheumatologist for over fifteen years. Tr. at 89. Ms. Templeton applied for disability benefits through the Social Security Administration, in April 16, 2003 and the request was denied. L.F. at 99, Tr. at "After an application for reconsideration [granted in December, 2004, Tr. 96], an Administrative Judge found Mother to be disabled, effective March 15, 2003, based upon rheumatoid arthritis, anemia, and hypothyroidism, and other factors… Mother was awarded a monthly award from Social Security Disability for herself and for the minor children…of $1,215.60 per month for herself and $334 per month for each child, for a total of $1,883.60 per

month, which is not subject to State or Federal income tax." L.F. 99. Tr. at 166.

Mother stipulated that her only claimed disability which would prevent her from working is R.A. L.F. at 6, 101; Tr. at 11. The Court heard testimony from Dr. Brasington, Director of the Rheumatology Clinic at Washington University School of Medicine and found him to be "eminently well qualified to offer opinions regarding Mother's condition. The court also heard testimony from Dr Costello, and found him "likewise a highly educated highly trained and highly experienced physician specializing in the diagnosis and treatment of R.A." as well as "Mother's treating physician and previous long term employer." L.F. at 102. The Court found itself in "a difficult position given that two qualified experts have reached very different conclusions concerning Mother's ability to work." L.F. at 102. Dr. Costello testified that, in his opinion, Ms. Templeton "is not gainfully employable at all." L.F. at 32. Subsequently, the trial Court found "Dr. Brasington's testimony to be more persuasive as it relates to Mother's R.A and her ability to work."L.F. at 103.

"Dr. Brasington testified that, even assuming Mother's symptoms existed to the extent that they were reflected in the Social Security documents from 2003 and 2004, :the patient that exists today" is not disabled and, therefore, able to work." L.F. at 104

The court heard testimony from Father's witness, Mr. Tim Kaver, a vocational expert with England & Company. Mr. Kaver prepared a report which included Mother's educational and employment background, as well as Mother's statements regarding her physical limitations. He met with Ms. Templeton, obtained a detailed

work history, educational background and medical history from her. Tr. at 214. "After conduction a labor market survey, and based on Mother's reported education and employment history as a registered nurse, Mr. Kaver testified that Mother would be able to earn an income with a full time salary range of $45,00.00 per year to $52,000.00 per year based on a sedentary level of activity. L.F. at 105. Mr. Kaver testified that corresponding part time positions were available, based on his expertise and his actual placement of employees in the medical field Tr. at 224-225. The Court reviewed a variety of jobs included in Mr. Kaver's report (L.F. at 105) and imputed "income from part time employment to Mother of 20 hours per week at $20.00 per hour, for 48 weeks a year, or an average of $1600.00 per month. The Court recognizes this as income in addition to her Social Security disability benefit." L.F. at 106.

Ms. Templeton did not offer any rebuttal evidence of the labor market for employment of a person with her education, work history and physical condition. In fact, Ms. Templeton testified that she had not sought employment since receiving her social security disability benefits. L.F. 105.

Based upon Mr. Lindhorst's income, Ms. Templeton's imputed income and her Social Security benefits, the economies achieved by sharing living expenses with Ms. Templeton's parents, Ms. Templeton's Second Amended Income and Expense Statement, and noting the children's social security benefits to be "relevant", the court found Ms. Templeton to be in need of $500.00 per month in maintenance to meet her reasonable living expenses.

The trial court granted an increase in child support to $1,273.00, retroactive to January I, 2009. L.F. at 107.

At trial, the Court found Ms. Templeton's Amended Statement of Income and Expenses in summary form, thus, "useless to a trial Judge in Family Court and granted leave to file a Second Statement of Income and Expenses in its traditional form. The Court took notice of the initial income and expense statement filed with the case. The trial court denied Ms. Templeton's motion to compel Mr. Lindhorst to pay certain healthcare costs of their children and to pay the bank fees incurred by her. L.F. at 108. The trial court maintained that it "did not hear sufficient evidence to reconcile all claims made by Mother, all credits due Father and the net result" on the issue to render a ruling. L.F. at 104. Ms. Templeton attempted to cross-examine Mr. Lindhorst on payment of healthcare costs incurred by Ms. Templeton on behalf of the children. Tr. at 496. The Court stated that Ms. Templeton had not properly filed a Motion to Determine Amounts Due, whereupon, Ms. Templeton withdrew the exhibits L.F. at 140, Tr. at 496-497. The Court retained jurisdiction over the issue in its final Judgment. L.F. at 108.

ARGUMENT

I. The decision of the trial Court to reduce Ms. Templeton's maintenance is neither so arbitrary nor unreasonable as to shock one's sense of justice, but rather, is a fair and reasonable judgment after considering all of the financial resources of the parties.

"A motion to modify maintenance will be affirmed unless it is unsupported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. We will defer to the trial court on its decision to modify, even if the evidence could support a different conclusion. *Petersen v. Petersen*, 214 S.W. 3d 355, 359. "When the amount of the maintenance award, which is within the discretion of the trial court, is questioned on appeal, we review for an abuse of that discretion. *Id* at 359. "Judicial discretion is abused when the court's judgment is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock one's sense of justice and indicate a lack of careful consideration." *Hileman v. Hileman*, 909 S.W. 2d 675, [2][3] (Mo. Ct. App.1995) (c*ase transferred to Supreme Court, retransferred to Court of Appeals original opinion reinstated 1995*). The burden of proving an abuse of discretion rests with the party challenging the award of maintenance. *In re the Marriage of York*, 185 S.W. 3d 794 (Mo. Ct. App. 2006).

A. Ms. Templeton's additional income, cohabitation with parents, and ability to be employed constitutes a change in circumstances so substantial and continuing as to form a basis for modification of maintenance.

"[T]he court, in determining whether or not a substantial change in circumstances has occurred, shall consider all financial resources of both parties, including the extent to which the reasonable expenses of either party are, or should be, shared by a spouse or other person with whom he or she cohabits, and the earning capacity of a party who is not employed." §452.370.1, RSMo 2000.

The trial court properly found that Mr. Lindhorst met his burden of proving a substantial and continuing change when considering all three criteria.

First, Ms. Templeton presented evidence and the Court found that she now receives additional income in the amount of $1,215.60 per month from Social Security Disability benefits plus an additional $668.00 Social Security benefits for her children. Tr. 99, 155. The Social Security Disability Benefits were awarded and based on a variety of medical conditions, only one of which was a factor in the maintenance awarded in the underlying Dissolution. L.F. 99, 101. The Court recognized this benefit as income. L.F. 106.

Second, Templeton testified that she shares a home with her parents and has lived with them since approximately 2002. Tr. 150. She testified that she voluntarily pay them $1,100 per month for living with them and pays $407.62 for car payments

on a car owned by her parents. L.F. 152, 156. Templeton testified that her Amended Income and Expense Statement does not reflect her expenses which are paid by her parents. L.F. 152. The evidence of expenses presented by Templeton did not clearly reflect which household expenses were Templeton's and which were her parents. L.F. 106. Thus, the Court could that "some of the expenses are shared and economies are achieved". L.F. 106. *Payne v. Payne*, 206 S.W. 3d 379 (Mo. Ct. App. 2006)

Third, through extensive medical testimony by two qualified experts, the trial court properly found that Templeton did, indeed, have income earning capacity despite the fact that she had not sought employment following a disability determination five years prior to the Motion to Modify.

Templeton called her personal physician, Dr. John B. Costello, to testify to her medical condition. Tr. 6. Lindhorst called as his medical expert Dr. Richard Brasington, Director of the Rheumatology Clinic at Washington University School of Medicine to testify as to Templeton's medical condition. Tr. 354. The Court heard testimony by each party's medical expert regarding their qualifications. Both experts Curriculum Vitae were admitted in to evidence without objection from either party. Tr. 6-8, 375. The Court found both experts to be well-qualified to testify as to Templeton's physical condition. L.F. 102. The trial Court heard extensive testimony from Mr. Lindhorst's expert, Dr. Brasington and from Ms. Templeton's treating physician and former employer, Dr. Costello. Both experts reached "very different

conclusions regarding Mother's ability to work" L.F. 102. The trial Court found Dr. Brasington's testimony to be more persuasive "as it relates to Mother's R.A." L.F. 103. "Dr. Brasington testified that, even assuming Mother's symptoms existed to the extent that they were reflected in the Social Security documents from 2003 and 2004, "the patient that exists today is not disabled and, therefore, able to work." L.F. at 104 When reviewing a trial court's determination of maintenance for abuse of discretion, the court reviews the evidence in a light favorable to the decree, disregarding evidence to the contrary and "deferring to the trial court even if the evidence presented could support a different conclusion. *Roche v. Roche*, 289 S.W. 3d 747 (Mo. Ct. App. 2009)

On appeal, the Eastern District stated, "It was the trial court's duty to resolve the issue and make credibility determinations, and we defer to that finding." Citing *Rustemeyer v. Rusetmeyer*, 148 S.W.3d 867 at 870 (Mo. Ct. App. 2004). While Templeton argues that she presented contrary testimony as to her ability to work, the Court of Appeals properly relied on *Zillner v. Zillner*, 875 S.W. 2d 585, 586 (Mo. App. 1994) in finding that the trial court was not required to accept wife's testimony. A trial court is free to believe or disbelieve all, part or none of the testimony of any witness. *In Re the Marriage of Thompson*, 24 S.W. 3d 751, 756 (Mo. App. 2000).

On appeal, the Court does not retry a case, but accepts as true the evidence and reasonable inferences there from in the light most favorable to the prevailing party and disregard(s) contradictory evidence. *Rustemeyer v. Rustemeyer*, 148 S.W.3d 867

at 871 (Mo. Ct. App. 2004). The Court recognizes "the superior position of the trial court to judge factors such as credibility, sincerity, character of the witnesses, and other intangibles that are not revealed in a trial transcript. Id.

Given the above evidence and testimony, a finding of a substantial and continuing change to warrant a reduction in maintenance is not so shocking as to render the decision unjust. The substantial and continuing change is this: at the time of the original decree, Ms. Templeton had the ability to work 20 hours per week and did so. At the time of the hearing on her Motion to Modify, Ms. Templeton had the ability to work 20 hours per week, at a minimum, made no attempts to find a job, and received an additional $1,883.60, per month, not subject to State and Federal tax, in disability benefits for herself and her children. L.F. at 99. "A spouse, if physically capable, has a duty to become self-supporting." *Rustemeyer v. Rustemeyer*, 148 S.W.3d 867 at 871 (Mo. Ct. App. 2004) In determining whether a substantial change of circumstances has occurred, the trial court must consider all financial resources of both parties. § 452.370.1 RS Mo (2000).

Templeton would have you believe that Lindhorst's increase income prevented him from meeting his burden of proving a substantial change in circumstances to prevent a reduction in maintenance. Lindhorst's income is relevant only in so far as it is evidence of his ability to pay maintenance. § 452.370.1 RS Mo (2000) It is

undisputed that the trial Court found that Mr. Lindhorst's income had increased from to $5,500.00 per month to $10,417.00 per month[2].

Following the original decree, Ms. Templeton had two sources of income, $1,000.00 per month in the form of maintenance and $1,387.00 per month from a part-time nursing position. Templeton was not required to seek full time employment and found to be in need of maintenance in part because of her health, her work experience, her employment and in part because of the age of the children. L.F. 98. At the hearing on Ms. Templeton's Motion to Modify Child Support, the Court found that Ms. Templeton had numerous financial resources: maintenance, Social Security Disability benefits in the amount of $1,883.60 per month, tax-free income, the benefit of shared expenses by cohabiting with her parents and the ability to work, at a minimum, 20 hours per week. The Court specifically recognized the imputed income "as income in addition to her Social Security disability benefit." L.F at 106.

Missouri courts have held that "a social security disability determination is not binding on Missouri courts, especially where, as here, the determination was more than four years before trial. *In re the Marriage of Liljedahl*, 942 S.W. 2d 919 (Mo. Ct. App. 1996) (Rehearing and Transfer denied) While the Court appropriately stated that it is not required to include the children's income from Social Security in to Form

[2] Lindhorst did not contend, nor did the court find, that he was unable to pay maintenance at the rate assigned, another potential factor in determining a substantial and continuing change in circumstances warranting a reduction in maintenance.

14, the Court noted that "the $668.00 per month that Mother receives from Social Security for the children, is, among other factors, relevant." L.F. at 106.

Katsantonis v. Katsantonis, 245 S.W. 3d 925 (Mo. Ct. App. 2008) follows the rule in *Rustmeyer* in stating that the change in circumstances must involve a departure from prior know conditions, including those known at the time of dissolution. *Katsantonis* at 928. As applied to the facts of this case, it is clear that the trial Court in the original decree did not foresee the additional Social Security Disability income, as Ms. Templeton was working and continued to work, on a part-time basis for a number of years following the dissolution. While Ms. Templeton did work part-time at the time of the original decree and has the ability to work, at a minimum, part-time now, the unforeseen change is not the minimal change in income but the additional income she receives despite her ability to work. Not only could the Court or the parties not predict that Ms. Templeton would receive SSDI, but it could also not predict the improvement in Appellant's health after beginning a new pharmacological regimen. L.F. 104, Tr. 105. Looking at the issue from another perspective, Appellant's inability to work in the past was nothing more than a temporary change in circumstance not so substantial and continuing as to warrant a continuation in maintenance in the amount of $1,000.00 per month, when, in fact, she began receiving $1,215.60 in benefits for herself and an additional $668.00 for her children.

Ms. Templeton relies on *Batka v. Batka*, 171 S.W. 3d 757 (Mo. Ct. App. 2005) which found that there was insufficient evidence to support a modification where the parties stipulated that wife was "disabled" prior to marriage and was not working. At modification, the wife was still disabled and still not working. The case did not indicate that she began receiving social security disability benefits following the dissolution. Similarly, *Draper v. Draper* 982 S.W. 2d 289 (Mo. Ct. App. 1998) can be distinguished in its ruling that husband was properly denied his request to reduce his maintenance obligation because the changes in financial circumstances of the parties were not substantial and continuing. The Court considered the reasonable needs of the disabled obligor- Husband, and Wife was found to be sufficiently employed.

It should be noted that Ms. Templeton receives her disability benefits based on a number of medical conditions, of which R.A. is only one. L.F. 102.

B. The trial Court found that Ms. Templeton was not disabled rather, she was able to work at a minimum, 20 hours per week. She has an affirmative duty to work, justifying the Court's income imputed to Ms. Templeton.

Not only did the Court hear testimony from two medical experts, but also had benefit from observing Ms. Templeton first-hand as well as observing videotaped evidence of Ms. Templeton performing various physical activities. "Dr. Brasington was able to observe Mother's functioning on video tape under numerous conditions and circumstance and at times when Mother was not aware that she was providing

information to be used in the evaluation of her condition. Based on Dr. Brasington's testimony, and the Court's own observations, the Court finds that Mother is not totally disabled and is able to perform work. At a minimum, part time employment, primarily in a sedentary position, appears feasible and appropriate." L.F at 103.

The Court, in its findings, and as observed by expert Brasington, noted an extensive list of observations of Ms. Templeton's ability "to engage in yard work, "climb ladders", "grip a pair of loppers and trim bushes in her front yard", "squat down to do yard work and stand back up without any aid", "walk in heels", "walk briskly enough to pass up other people walking and without any sign of abnormal gait", "walk barefoot on lava rock", "use her wrists to gesticulate freely", " carry groceries, "carry a large aluminum ladder", "hang Christmas lights stand on a foot stool and raising her arms above her head for a substantial period of time", "feed the Christmas lights in and out of lattice work on her front porch", "carry two trash cans rather than roll them", "carry an infant in a "pumpkin seat" without any sign of difficulty", "demonstrate, in other ways, her ability to use her wrists, shoulders, hips, knows ankles and balls of her feet, all of which are parts of the body in which R.A manifests itself." L.F. 103-104.

The Court would come to the conclusion that Ms. Templeton was able to work, at a minimum of 20 hours per week at a sedentary position; this is not only a fair and just finding but a quite generous finding for Ms. Templeton.

"Maintenance awards under § 452.335 serve the purpose of permitting the receiving spouse to readjust financially during a period of dependency until that spouse can achieve a reasonable measure of self-sufficiency. *Cates v. Cates* 819 S.W. 2d 731, 736 (Mo. Banc 1991). That Ms. Templeton receives disability benefits should not preclude her demonstrated ability to obtain suitable employment at a minimum of 20 hours per week. That Ms. Templeton has not even sought employment is a significant fact.

To award maintenance in an unlimited amount, for an unlimited duration, deters the spouse from seeking full-time employment which would enable the obligor to move for a modification. "To resolve this dilemma, Missouri courts have imposed an affirmative duty on the recipient spouse to seek adequate employment to become self supporting. *Hileman v. Hileman,* 909 S.W. 2d 675 (Mo. Ct. App 1995).

Ms. Templeton has the ability and the affirmative duty to seek, at a minimum, suitable, part-time employment and cannot rely on disability benefits to substitute this duty when she has the ability be employed.

C. The Court properly considered all of the evidence presented to it in determining that Templeton could meet her reasonable needs with a lesser amount of maintenance.

Ms. Templeton filed three Income and Expense Statements over the course of this litigation, L.F. 1, 14, Tr. 153-154 the second of which the Court found

unusable in its format Tr. 154. The Court considered the Ms. Templeton's original Statement of Income and Expenses, admitted her Amended Statement of Income and Expenses, subject to cross-examination Tr.153-154, Ex. 18. and granted leave to file her Second Amended Statement of Income and Expenses, filed post-trial. L.F. 101, 106. The Court took judicial notice of the original Statement of Income and Expenses filed in the Modification. Tr. 155, lines 7-10. The Court found that Ms. Templeton shared expenses and achieved certain "economies" by living with her parents. L.F. at 106. The Court determined the income of the parties. L.F. at 101, 106.

Templeton testified that at the time of the original dissolution, she lived on her own along with her minor children. Tr. 150. She testified that she moved in with her parents, permanently, at least three years following the dissolution (approximately 2002). Tr. 150. The Court found Ms. Templeton to be in need of $500.00 per month to meet her reasonable needs L.F. 106. The parties did not file motions for findings of fact to determine which, if any Ms. Templeton's expenses were found to be reasonable or unreasonable. Under Missouri Supreme Court Rule 73.01, where neither party requests specific findings, "all fact issues…shall be considered as having been found in accordance with the result reached. *In re the Marriage of York,* 185 S.W. 3d 794 (Mo. Ct. App. 2006).

II. The income imputed to Ms. Templeton was supported by substantial evidence, was not against the weight of the evidence and was not an abuse of discretion.

"The principles relative to reduction and imputation of a spouse's income in child support cases are equally applicable in modification of maintenances." *Monning v. Monning*, 53 S.W. 3d 241, 248 (Mo. Ct. App. 2001), quoting *Ramsey v. Ramsey*, 965 S.W. 2d 365, 372 (Mo. Ct. App. 1998). It is within the trial court's discretion to impute income to underemployed or unemployed parents. *Payne v. Payne*, 206 S.W. 3d 379 at 384. The Court will consider imputing income to parties to discourage underemployment in order to evade supporting their children and will impute income to a parent based on best efforts to find employment suitable to their abilities. *Payne* at 384. In *Payne*, the Court of Appeals found an abuse of discretion in imputing income to a parent based on expert testimony of jobs which did not include suitable employment within the metropolitan St. Louis area. Both parties produced vocational experts, one limiting his opinion to employment, suitable to the ability of the Father, within the metropolitan area. The Court found an abuse of discretion when the trial Court relied on the expert witness testimony of a higher income, based on employment out of state. The expert in the case at bar specifically limited his investigation to suitable employment for Ms. Templeton within the metropolitan area.

The income imputed to Ms. Templeton was based on substantial evidence including testimony and market survey by qualified vocational expert, Mr. Tim Kaver of England & Company. Kaver's Curriculum Vitae was admitted in to evidence without objection. No rebuttal evidence was offered by Templeton. In addition to the extensive market survey, Mr. Kaver testified that 50% of his employment involves actually placing professionals such as Ms. Templeton in medical positions in the metropolitan St. Louis area, and included hourly requirements in a variety of combination of schedules. Tr. at 224-225. Mr. Kaver expressed his expert opinion when stating, "I'm familiar with the job market, primarily because I place nurses in the field every year. Usually when I testify as an expert witness, I conduct a labor market survey to demonstrate or prove that there are openings at that time. I'm familiar with the job market because I spend half my time actually placing people in jobs, including the medical field." Tr. at 227.

> Q. So when you clarify your report, you are not making that up, you are being honest with the Court, saying yes, there are part-time jobs available out there for people on a sedentary level?
>
> A. Yes, that is true. Tr.at 228.

In the Court's findings, "Mr. Kaver testified that Mother would be able to earn an income with a full time salary range of $45,000.00 per year to $52,000.00 per year based on a sedentary level of activity. A sedentary job is one which would include the

freedom of movement and the ability to alternately sit and stand. Mr. Kaver was asked to conduct his report based on that level of activity and not one which requires a higher level of activity.

Judge Cohen states in his findings, "Mr. Kaver considered the job of Nurse Case Manager/Social Services with a salary of $42,000.00 per year. The Court has reviewed a variety of jobs included in Mr. Kaver's report. L.F. 105

Ms. Templeton relies on *Wightman v. Wightman*, 295 S.W. 3d 183 (Mo. Ct. App. 2009) in arguing that income cannot be imputed based solely on speculation. However, in *Wightman*, the decision to impute income was based on amounts determined by past employment, not based on market surveys or testimony by a vocational expert as to positions available, but merely based on the testimony of the parties. The *Wightman* court, on appeal, indicated that the parties themselves speculated as to what income they would expect to earn. The Court of Appeals noted that, in imputing income for purposes of Form 14, the trial Court had not considered the community in which Mother (would) work. In the instant case, the Court heard detailed testimony on the available positions for which Ms. Templeton would qualify in the Metropolitan St. Louis area, by an expert who actually places nurses in such positions. It is significant that the parties in *Wightman* were actually employed or actively seeking employment. Id at 188. Ms. Templeton, in this case testified that she

had not even attempted to seek employment following her award of disability benefits. L.F. at 105

Monning v. Monning, 53 S.W. 3d 241 (Mo. Ct. App 2001) should be followed on it's clear statement as to what factors indicate an abuse of discretion and can be similarly distinguished in its holding. In *Monning*, the court found an abuse of discretion in ordering imputed income based on the higher of two experts' findings. The Court found "no evidence was presented indicating that similar employment was available at a greater rate of pay", "no evidence was presented of any other similar job possibilities in the area", and "no evidence was presented of part-time jobs available in the area that Husband could perform" Id at 246-247. In Ms. Templeton's case, Mr. Lindhorst's expert testified that he actually places nurses, with Ms. Templeton's qualifications and physical limitations, in part-time positions and that they are available in the area. Tr. 227-228.

III. The trial court properly found Templeton to be in need of five-hundred dollars to meet her reasonable needs.

There is no indication from the record on appeal upon which the trial court can be found to have erred in finding Templeton in need of a reduced amount of maintenance to meet her reasonable needs. The Court of Appeals properly ruled that the issue of the maintence calculation and award were not reviewable absent the inclusion of her Second Amended Statement of Income and Expenses. It is

impossible to glean from the Legal File and Exhibits filed whether the court used both imputed income and Social Security Disability income in it's calculation. Such determination may not even be discerned absent a finding of the specific calculation, which was not requested. "Where, as here, the record does not contain all documents necessary for this court to determine the issue presented, our review is impossible and the claim of error must be dismissal." *Wallace v. Wallace*, 269 S.W.3d 469 479 (Mo. App. 2008) *motion for rehearing/transfer denied Nov. 13, 2008 application for transfer denied Dec. 16, 2008.*

First, Templeton did not properly preserve this issue on appeal in that Templeton did not introduce in to evidence or move for judicial notice of any applicable federal statute or regulation regarding social security disability law or regulation. A party is entitled to have the merits of his case reviewed upon the evidence properly introduced at the trial of his present claim and the trial court should not take into account evidence which the party has had no opportunity to refute, impeach or explain. *Mince v. Mince*, 481 S.W.2d 610, 614 (Mo.App.1972) Templeton maintains that she introduced in to evidence the pertinent federal regulations regarding her disability status and her ability to work part-time. She may have referred to federal regulations in her Brief in Opposition to Lindhorst's post-trial Motion to Amend, however, as that document was not included in the Legal File, this Court cannot review the claim. See *Bridgeman v. Bridgeman*, 63 S.W.3d 686 (Mo. App. 2002) where wife was not entitled to review of claim for

maintenance, where she failed to include exhibit in appellate record pertaining to her alleged income and expenses. See also *Zimmer v. Zimmer,* 862 S.W. 2d 355 (Mo. App. 1993) where points on appeal were denied based on claims of deficient findings of fact which were attributed to the "slipshod manner n which some of the evidence was offered." *Id*. at 359.

Second, Templeton did not file any Post-Trial Motions indicating that the trial court Findings and Conclusions of Law contained any error or inconsistency of law, as provided for in Rule 78.07(c). Like *Wilson-Trice v. Trice*, 191 S.W. 3d 70, 72 (Mo. App. 2006) had Templeton included allegations of inconsistent findings related to the ability to work and receive disability benefits, the trial court could have addressed the issue and amended or clarified its findings. As such, Templeton's claim of error is not preserved for appeal.

Third, on Lindhorst's post-trial Motion to Amend, the trial court properly ruled that Social Security Disability Benefits for the children were properly excluded from the Form 14 Child Support Form (Mo. Ct. Rule 88.01). "The principles relative to reduction and imputation of spouse's income in child support cases are equally applicable in modification of maintenance cases." *Monning v. Monning*, 53 S.W. 3d 241 (Mo. App. 2001. In the instant case, the court properly imputed income to Templeton, excluded all Social Security Disability Income and determined the amount of maintenance needed, then included the imputed income

and reduced maintenance in the Child Support calculation. L.F. 110. Absent missing exhibits upon which the trial court relied, this Court should find that maintenance was determined along the same principles and instructions as the Child Support, accept as true the evidence and reasonable inferences there from and in the light most favorable to the judgment. *see Rustemeyer v. Rustemeyer*, 148 S.W.3d 867 at 871 (Mo. Ct. App. 2004)

Fourth, Templeton failed to include in the Record on Appeal or in the filed exhibits her Second Amended Statement of Income and Expenses, Lindhorst's post-trial Motion to Amend, Templeton's Brief in Opposition to Lindhorst's Motion to Amend or any evidence of citation to the U.S. Code of Federal Regulations governing Social Security Disability regulations. Although Templeton includes C.F.R. citations in his Appellate Brief and his Substitute Brief in the Application for Transfer, there is a conspicuous absence of any such citation in the Legal File or Trial Transcript. As in *Bridgeman v. Bridgeman* 63 S.W.3d 686 (Mo. App. 2002) cited above, Templeton's claim of error in maintenance determination should not be reviewed for lack of necessary exhibits filed on appeal.

Fifth, and finally, there is no evidence presented to this court that the trial court even included both imputed income and Social Security Disability Income in its calculation of Templeton's reduced maintenance. *See Bridgeman v. Bridgeman*.

Ms. Templeton is precluded from arguing that she would stop receiving Social Security disability if she were to continue to be employed in a substantial gainful activity following a trial work period. (*See In re the Marriage of Liljedahl*, 942 S.W. 2d 919 (Mo. Ct. App. 1997) where wife's testimony showed an explicit reluctance to obtain full-time employment which would void her disability benefits.) Ms. Templeton raises the same issue and similarly testified that she did not know how employment would affect her disability status L.F at 108-109. No evidence was introduced by either party regarding Ms. Templeton's future federal disability status. The trial Court, in its findings stated that "the finding of disability entered on December 3, 2004, is not controlling in this case. See *Pemberton v. Pemberton*, 756 S.W. 2d 660, 663 (Mo. Ct. App 1988). The Court notes that the Social Security disability ruling is based, in part, on evidence of medical conditions other than R.A. which Mother does not claim in this case to be a contributing factor to her inability to work. Furthermore, this Court has had the opportunity to consider evidence of Mother's R.A. as it exists today, some 5 years after Social Security made its finding. L.F. at 102. Ms. Templeton, in discovery, asked the Court to redact all references to medical conditions, other than R.A. from her records. Ms. Templeton did not introduce evidence to support her argument, did not cite relevant federal regulations and did not request findings of fact on the speculative future disability status of Appellant and should be barred from arguing the point on appeal.Tr. at 11.

This Court has held that "Its function is not to hear evidence and, based thereon, to make an original determination….It is not the function of the appellate court to serve as advocate for any party on appeal. That is the function of counsel." *Thummel v. King*, 570 S.W. 2d 679, 686 (Mo. 1978) (en banc)When counsel files a deficient brief, the court is left advocating for a party or undertaking additional research and briefing to supply the deficiency. "Courts should not be asked or expected to assume such a role." *Id*. It further stated that to do so would be unfair not only to the parties at bar, but also the parties awaiting disposition in pending cases.

The trial court judge indicated as much when Templeton attempted to present an argument about speculative future insurance costs. Judge Cohen specifically stated that Templeton was expecting him to now undertake "Social Security administration" Tr. 132. Again, Templeton attempted to present an argument without citing relevant statutes, regulations or authority.

It is important to point out to the Court that Ms. Templeton, should she still qualify for benefits and be denied for reason of part-time employment, and find herself in need of additional maintenance to meet her reasonable needs, will continue to have, under the current order, the ability to file another Motion to Modify Maintenance.

IV. The trial Court was within its discretion to award that the increase in child support be retroactive to January 1, 2009 and doing so does not constitute an abuse of discretion.

"The effective date for modification of a child support award, subsequent to the filing of a motion to modify, is a matter within the trial court's discretion (citing *McMickle v. McMickle*, 862 S.W.2d 477, 485 (Mo. App W.D. 1993) We will not disturb the trial court's determination absent a clear abuse of that discretion, *Id*." *Payne v. Payne*, 206 S.W. 3d 379, 386 (Mo. Ct. App. 2006). This Court in *Payne* upheld the trial Court in declining to award the child support retroactively, finding that Husband's unemployment caused a depletion of his considerable assets. In the instant case, the trial Court specifically found relevant Ms. Templeton's additional Social Security Disability Benefits for her and her children to be relevant factors in the case (though appropriately excluded children's benefits from the Form 14 Child Support Calculations). Again, absent an award so shocking and unjust, there is no evidence of abuse of discretion. Ms. Templeton refers to facts not in evidence in attempting to manufacture rebuttal evidence but makes no reference to the Legal File. The Circuit Court of St. Louis County Local Rule 68.9 provides for a presumption that child support in a modification shall be retroactive to the later date of filing movant's statement of income and expenses or the date of service. It should be noted that Ms. Templeton's Second Amended Statement of Income and Expenses was filed

after the trial concluded. The trial Court decision to make the increased child support retroactive to January 1, 2009 should be affirmed.

CONCLUSION

The judgment should be affirmed. As the trial Court noted in its findings, "Unfortunately, this is but the most recent chapter of a contentious, bitter, destructive, and shockingly expensive legal battle between the parties." L.F. at 106. The Court took great pains to carefully weigh the evidence and testimony of the parties and witnesses and to justly apply the law in rendering its Judgment to modify the underlying Decree of Dissolution. The modification is just and fair to all parties, including the children. There comes a time when the parties must come to rest and the case concluded. Absent the finding of a shocking and unreasonable decision, this Judgment of Modification should be affirmed.

CERTIFICATE OF COMPLIANCE

The undersigned certifies, in accordance with Rule 84.06(c), that this brief contains the information required in Rule 55.03, complies with the page limits set forth in Rule 4.06(b) in that this brief appears, based upon computer software, to contain a total of 7,431 words, excluding those contained in the cover, certificate of service, this certificate of compliance, the signature block, appendix, table of contents and table of authorities, and that a disk containing a copy of this brief is being filed contemporaneously herewith and has been scanned for viruses and is virus-free.

_____/S/_____

CERTIFICATE OF SERVICE

The undersigned certifies that two (2) copies of Respondent's brief and one copy of the brief contained on a disk were served by U.S. Post, pre-paid, on Appellant's counsel, Mr. Craig Hoefer, Lathrop & Gage LLP, 10 South Broadway, Suite 1300, St. Louis, MO 63101, this 12th day of October, 2010.

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APPENDIX