BRUCE W. FULTON *v.* KATHLEEN M. FULTON
(AC 36429)

Lavine, Beach and Mihalakos, Js.

Argued November 17, 2014—officially released April 28, 2015

(Appeal from Superior Court, judicial district of Litchfield, Sheedy, J. [dissolution judgment]; Pickard, J. [motions for modification of alimony and child support].)

Kenneth J. McDonnell, for the appellant (plaintiff).

John M. Andreini, for the appellee (defendant).

Opinion

MIHALAKOS, J. The plaintiff, Bruce W. Fulton, appeals from the judgment of the trial court denying his postjudgment motions for modification of child support and alimony pursuant to a substantial change of circumstances. On appeal, the plaintiff claims that the court improperly limited its inquiry to his financial affidavit without considering the other financial factors that guided the court at the time of the dissolution of the parties' marriage. We reverse the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. On April 4, 2007, the marriage of the parties was dissolved and the parties' separation agreement was incorporated into the dissolution judgment. In pertinent part, the plaintiff agreed to pay alimony to the defendant, Kathleen M. Fulton, in the amount of $750 per week for an indefinite period of time and child support in the amount of $275 per week until the minor child reached the age of majority or graduated from high school, whichever event first occurred. Both parties filed financial affidavits on the date of judgment. The plaintiff's affidavit listed Fulton Foundations, Inc., as his employer, a gross weekly wage of $1317.87, and a net weekly wage of $850. The plaintiff listed weekly expenses of $937.50. The defendant's affidavit also listed her employer as Fulton Foundations, Inc., with a gross weekly wage of $747.35, a net weekly wage of $550, and weekly expenses of $1562.85.

On the date of dissolution, the court noted that the child support guidelines suggested that the plaintiff pay $192 per week and that the agreement of $275 was an upward deviation from the child support guidelines. The plaintiff stated that he agreed to pay more "because I want to take care of my child financially as much as I can."[1] The court further noted the upward deviation during its canvas of the plaintiff when it stated, "[w]ith regard to the agreement you have made to pay the [defendant] child support, and certain other agreements which you have also entered into, they can perhaps be described as generous. You have every reason to expect, I guess, that the income you will receive from Fulton Foundations, Inc., will underwrite all of the obligations that you have undertaken under the terms of this agreement; is that correct?" The plaintiff stated "yes" to this question. On the same date, the defendant testified that the separation agreement was fair and that the discovery into the plaintiff's finances and assets was thorough and adequate. In the final colloquy, the court again acknowledged the deviation from the child support guidelines. "This is an upward deviation. [The plaintiff] has been asked questions about that. I find that his earning power is at least at the present time superior to that of [the defendant], and the [plaintiff] understands and readily accepts the increased obliga-

tion that he undertakes by that order. I commend him for being willing to do the same."

On March 18, 2013, the plaintiff filed postjudgment motions for modification of child support and alimony. During a hearing on August 21, 2013, the parties submitted financial affidavits. The plaintiff's financial affidavit listed Fulton Foundations, Inc., as his employer. It showed a gross weekly wage of $881 and a net weekly wage of $678. With the inclusion of his support payments to the defendant, the plaintiff noted total weekly expenses of $1512. During his testimony, the plaintiff stated that in his original financial affidavit dated April 4, 2007, he calculated his average weekly income only for the thirteen weeks prior to the date of the affidavit, rather than his expected annual earnings, or an average of past annual earnings.[2] The plaintiff stated that despite his statement of his earnings, the dissolution court accepted his more than guidelines financial child support obligation in the dissolution agreement, because of extrinsic information, specifically, tax documentation, submitted to the court on the date of the dissolution judgment.

The plaintiff sought to introduce his tax returns in support of his claim of a substantial change of circumstances, and the defendant's counsel objected. The court then stated: "Well, [counsel], you're objecting to that, but don't I need to know this? I mean, it's pretty apparent that with income, gross income of $1317, and net income of $850, he really couldn't pay $750 a week in alimony plus $275 in child support. I mean, when I looked at this file, I said what's the story here? It doesn't make any sense. So, I need to know the facts, don't I?" The defendant's counsel responded, "I believe the case law establishes that you cannot look behind—beyond the affidavit and the sworn to representations in determining what the income was at the time of the judgment."

In its December 18, 2013 memorandum of decision, the court, *Pickard*, *J.*, framed the dispositive issue as follows: "is the court bound to use the financial affidavit filed by the plaintiff at the time of the dissolution as a starting point, or may the court look at the 'real' income of the plaintiff at that time?" In its well reasoned analysis, the court, citing *O'Bymachow* v. *O'Bymachow*, 12 Conn. App. 113, 118–19, 529 A.2d 747, cert. denied, 205 Conn. 808, 532 A.2d 76 (1987), concluded: "[T]his court must look at the plaintiff's financial affidavit filed at the time of the dissolution as the starting point in determining whether there has been a substantial change of circumstances in the plaintiff's income. To permit the plaintiff to argue that his income, in fact, was much higher than he showed on his own financial statement would be unfair and inequitable." The court then compared the plaintiff's financial affidavit filed at the time of the dissolution with evidence of his current

financial situation and concluded that there had not been a substantial change of circumstances. The court, therefore, denied the plaintiff's motions for modification.

On appeal, the plaintiff claims that the court erred when it declined to consider extrinsic evidence to determine whether there had been a substantial change in his financial circumstances. The plaintiff reasons that the dissolution court considered and relied on extrinsic information, specifically, tax returns, which allowed it to conclude that the separation agreement was fair and equitable under the circumstances, despite the inadequacy of the plaintiff's income to support a weekly obligation of $750 in alimony and $275 for child support. The plaintiff argues that, when ruling on his motions for modification, the court should have considered both his financial affidavit and his tax returns to determine whether there had been a substantial change of circumstances.

The defendant argues that the court properly denied the plaintiff's motions for modification, citing *O'Bymachow* v. *O'Bymachow*, supra, 12 Conn. App. 113, in that consideration of facts beyond those in the four corners of the plaintiff's financial affidavit would have been improper. In the alternative, the defendant argues that, even if the court were to look beyond the financial affidavit, the plaintiff has failed to present evidence that there was a change of his earning *capacity* that would amount to a substantial change of circumstances.

Before addressing the plaintiff's claim on appeal, we first note the applicable standard of review. "An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Thus, unless the trial court applied the wrong standard of law, its decision is accorded great deference because the trial court is in an advantageous position to assess the personal factors so significant in domestic relations cases . . . . With respect to the factual predicates for modification of an alimony [or child support] award, our standard of review is clear." *Sabrowski* v. *Sabrowski*, 105 Conn. App. 49, 52–53, 935 A.2d 1037 (2007).

"Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Our deferential standard of review, however, does

not extend to the court's interpretation of and application of the law to the facts. It is axiomatic that a matter of law is entitled to plenary review on appeal." (Citation omitted; internal quotation marks omitted.) *Princess Q. H.* v. *Robert H.*, 150 Conn. App. 105, 112, 89 A.3d 896 (2014).

The sole issue on appeal is whether the court, which premised its decision upon *O'Bymachow*, correctly decided that it was required by law to consider only the plaintiff's financial affidavit submitted at the time of the dissolution judgment as the starting point in determining whether there had been a substantial change of circumstances.[3] We acknowledge the longstanding principal that we allow every reasonable presumption in favor of the correctness of the court's action, and although "[w]e will not substitute our judgment for that of the trial court"; (internal quotation marks omitted) *O'Bymachow* v. *O'Bymachow*, supra, 12 Conn. App. 116; "we may conclude that a court abused its discretion by misapplying the relevant law." *Marshall* v. *Marshall*, 119 Conn. App. 120, 133, 988 A.2d 314, cert. granted on other grounds, 296 Conn. 908, 993 A.2d 467 (2010) (appeal dismissed November 18, 2010). On the basis of the specific facts of this case, we find that the court's conclusion that it was absolutely bound by the figures in the plaintiff's financial affidavit submitted at the time of the dissolution judgment was erroneous and, thus, conclude that the court abused its discretion when it misapplied the relevant law.

"[General Statutes §] 46b–86 governs the modification or termination of an alimony or support order after the date of a dissolution judgment. When . . . the disputed issue is alimony [or child support], the applicable provision of the statute is § 46b-86 (a) (3), which provides that a final order for alimony may be modified by the trial court upon a showing of a substantial change of the circumstances of either party. . . . Under that statutory provision, the party seeking the modification bears the burden of demonstrating that such a change has occurred. To obtain a modification, the moving party must demonstrate that circumstances have changed since the last court order such that it would be unjust or inequitable to hold either party to it. Because the establishment of changed circumstances is a condition precedent to a party's relief, it is pertinent for the trial court to inquire as to what, if any, new circumstance warrants a modification of the existing order." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Olson* v. M*ohammadu*, 310 Conn. 665, 671–72, 81 A.3d 215 (2013). In addition, "[w]e recognize that a party seeking modification of financial orders incident to a marital dissolution judgment must clearly and definitely establish an uncontemplated substantial change of the circumstances of either party which demonstrates that continuation of the prior order would be unfair and improper." (Footnote omitted;

internal quotation marks omitted.) *O'Bymachow* v. *O'Bymachow*, supra, 12 Conn. App. 116.

The accuracy of financial affidavits submitted at the time of dissolution has proven to be central to the issue of modification on appeal. See id., 118–19. As a result, "[o]ur cases have uniformly emphasized the need for full and frank disclosure in . . . [financial] affidavits. A court is entitled to rely upon the truth and accuracy of sworn statements required by . . . the Practice Book, and a misrepresentation of assets and income is a serious and intolerable dereliction on the part of the affiant which goes to the very heart of the judicial proceeding." (Internal quotation marks omitted.) *Billington* v. *Billington*, 220 Conn. 212, 219–20, 595 A.2d 1377 (1991).

In the present case, the court rejected use of the plaintiff's tax returns in order to determine his actual income at the time of dissolution. It relied on *O'Bymachow* for the proposition that it would be unfair and inequitable to permit the plaintiff to take advantage of values that he did not state on his affidavit. In its memorandum of decision, the court analyzed the plaintiff's financial means on the basis of his 2007 financial affidavit, specifically, a net income of $850 per week. The court contrasted this figure against the financial affidavit filed before it on August 21, 2013, in which the plaintiff stated a net income of $678 per week. The court also reviewed the plaintiff's tax records from 2010 through 2013, and concluded that, although the plaintiff appeared to suffer a decline in income from 2010 through 2012, "based on the most current evidence available to the court, the plaintiff is not suffering in 2013 from a substantial reduction in his income from that shown on his 2007 affidavit."

In *O'Bymachow* v. *O'Bymachow*, supra, 12 Conn. App. 119, the plaintiff submitted a financial affidavit at the time of dissolution in 1982, which listed the values of two businesses he owned as "unknown." Effectively, the businesses were deemed to have no value. Id., 118. The parties and the court were entitled to rely on that evidence at that time, and the court approved the parties' dissolution agreement. Id., 118–19. At a hearing on the defendant's motion for modification in 1985, the plaintiff testified that, at the time of the dissolution, the businesses were worth $260,000. Id.,118. On appeal, this court framed the issue to be whether the financial base at the time of the dissolution judgment in October, 1982, was to be determined by reference to the values of the plaintiff's businesses in October, 1982, as established in the October, 1985 modification proceedings, or whether that base was to be determined by reference to the values, or lack thereof, attributed to them by the plaintiff at the time of the dissolution judgment in October, 1982. Id. This court held that for the purpose of determining whether a substantial change of circum-

stance had occurred, "those values must be compared to the values, or lack thereof, as represented in the 1982 proceedings," concluding that it would be "unfair and inequitable to permit [the plaintiff] in October, 1985, to take advantage of value which he did not disclose [at the time of the dissolution judgment]." Id., 118, 119.

In *O'Bymachow*, this court, in essence, concluded that it would be unfair and inequitable to allow the plaintiff to introduce evidence of his businesses at his 1985 modification hearing and allow them to be retroactively applied to his 1982 dissolution proceedings. See id., 119. Put another way, it would have been unfair to allow the plaintiff to take advantage of undisclosed business values of $260,000, and then argue there was a loss of those values to support his motion for modification. This court reasonably assumed that the "unknown" values included in the plaintiff's 1982 financial affidavit, which the court then accorded zero value, had been factored into the trial court's acceptance of the parties' dissolution agreement. See id. This court, therefore, held that the financial affidavit submitted on the date of dissolution was to be used as a starting point to assess a change of circumstances for purposes of a modification analysis, and it would be inequitable to consider evidence to the contrary. Id.

In the present case, the plaintiff presented to the dissolution court a financial affidavit, which indicated thirteen weeks of his 2007 income. Evidence was presented that indicated that his actual annual earnings were significantly more than what he had listed on his affidavit. There was an offer of evidence to suggest that the plaintiff had not concealed facts or acted in bad faith with regard to his business or income in order to reduce his financial obligations at the time of the dissolution. The plaintiff reported a net weekly wage of $850 in his 2007 financial affidavit and agreed to a combined weekly child support and alimony obligation of $1025. The plaintiff represented only his income for the thirteen weeks prior to the date of his affidavit, rather than an annual average, which resulted in a failure to report his full and complete earnings in the affidavit. The dissolution court then adopted what the plaintiff relied upon in order to fulfill his financial responsibilities. The defendant expressed her satisfaction with the inquiry into the plaintiff's finances at the time of the dissolution.

We take the opportunity to explain the holding of *O'Bymachow*. The parties and the court are entitled to rely on the financial affidavits submitted at the time of the dissolution, which are presumed to be reliable for that purpose. If, however, a party makes a preliminary showing that an affidavit submitted at the time of the dissolution was inaccurate, that the error was not intentional or misleading to the court or another party, and that it would thus be inequitable to rely only on the

mistaken information, a postdissolution court may consider factors other than the financial affidavit in deciding whether there has been a substantial change of circumstances. A party may make an offer of proof, under oath, showing inaccuracy and the reason for the inaccuracy. If the facts in such a showing, if true, satisfy the requirements stated here, the court may, in such limited circumstances, use amended values in determining whether there has been a substantial change of circumstances.

Although there is merit to the bright line approach of relying solely upon the financial affidavits submitted at the time of the dissolution and we anticipate few departures, we conclude that exclusive reliance can result in knowing injustice. By contrast, the facts in *O'Bymachow* suggest that departure from the financial affidavit would have resulted in unfairness in that case. In the present case, however, the court held, in effect, that no facts would be sufficient to contradict the values in the plaintiff's 2007 affidavit. We disagree and, therefore, reverse the judgment of the trial court and remand the case for further proceedings to determine whether a sufficient preliminary showing, as previously outlined, triggers an inquiry into the values to use for the starting point of the comparison, and if so, whether the presumption of reliability of the dissolution agreement has been overcome.

The judgment is reversed and this case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

[1] On the date of the dissolution, the plaintiff and defendant had one minor child. The parties' two adult children were not referenced in the separation agreement because of their age.

[2] The Judicial Branch financial affidavit form (JD-FM-6 Rev. 1-03) filed by the plaintiff on the date of dissolution instructs the affiant to use a weekly income average of "not less than 13 weeks." The plaintiff has suggested that winter is the slow season for his foundation business. Because his dissolution affidavit was signed in April, 2007, the thirteen weeks that he used to calculate his average weekly income occurred during the winter.

[3] The court's memorandum of decision stated, "[b]ased only on the *O'Bymachow* decision, I conclude that this court must look at the plaintiff's financial affidavit filed at the time of the dissolution as the starting point in determining whether there has been a substantial change of circumstances in the plaintiff's income."