IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

TONEY DOUGLAS,

Appellant,

v.

Case No. 5D20-2574
LT Case No. 2019-DR-2036

SHERRICE BRYSON DOUGLAS,

Appellee.

_____/

Opinion filed October 8, 2021

Appeal from the Circuit Court
for Seminole County,
Donna L. McIntosh, Judge.

Mark A. Skipper and Steve W. Marsee, of Law Office of Mark A. Skipper, P.A., Orlando, for Appellant.

Sherrice Bryson Douglas, Riverview, pro se.

Rev. James T. Golden, Bradenton, for Appellee.

EDWARDS, J.

Former Husband, Toney Douglas, appeals several rulings contained in the final judgment of dissolution of the marriage to Former Wife, Sherrice

Bryson Douglas. Former Husband alleges error or abuse of discretion regarding imputation of income to him, while failing to impute income to Former Wife. He also appeals awards of unequal distribution of marital assets, retroactive alimony and child support, future child support, durational alimony, setting aside funds for the children's education, and Former Wife's attorney's fees. We affirm in part and reverse in part with remand to the trial court for further proceedings.

Imputation of Income

After almost eight years of marriage, Former Wife petitioned for dissolution of marriage. She had been a stay-at-home wife the entire marriage and took care of the parties' two children while Former Husband was employed as a professional basketball player. He began his career in the NBA but recently has found himself playing on a variety of European teams. His earnings in each of his two NBA seasons, for which there is evidence in the record, exceeded one million dollars; the European league salaries were significantly less. One European team he played for went bankrupt, and another team he was under contract with played no games the entire season due to the COVID pandemic. Thus, over time, his earnings went down.

Former Husband argues that the trial court improperly imputed income to him; however, there was no imputation of income to him. Rather, the trial court found that Former Husband's claim that he was under contract for a total of $45,000 to play the 2020 season was not credible. Although he claimed to have signed that contract, no copy was offered into evidence.[1] Former Wife presented the testimony of a financial expert whose analysis of Former Husband's bank accounts suggested a much higher salary. Thus, while conflicting, there was competent substantial evidence to support the trial court's determination of his then-present earnings.

Former Husband also argues that the trial court erred in failing to impute income to the unemployed Former Wife. "As the party seeking to impute income, Former Husband bears the burden to show 'both employability and that jobs are available.'" *Jorgensen v. Tagarelli*, 312 So. 3d 505, 507 (Fla. 5th DCA 2020) (quoting *Dottaviano v. Dottaviano*, 170 So. 3d 98, 100 (Fla. 5th DCA 2015)); *see also Andrews v. Andrews*, 867 So. 2d 476, 478 (Fla. 5th DCA 2004) (reversing imputed income because former husband "failed to establish by testimony or evidence a range of salaries

[1] Former Husband has alternatively claimed that his salary for that time frame was $4,500 per month less expenses. The trial court denied his motion for continuance after that court did not receive a copy of that contract, despite counsel hand delivering same to chambers. He has not appealed the denial of the continuance.

being paid for current and available employment opportunities in the [relevant geographical] area for which [the wife] was qualified"). Although Former Husband presented some national employment data, he offered no evidence of what pay rates and jobs were locally available for which Former Wife was qualified. In the absence of such evidence, the trial court did not abuse its discretion in declining to impute income to Former Wife. The absence of any abuse of discretion is further demonstrated by evidence that Former Wife had never worked outside the home during the marriage and had recently unsuccessfully applied for over thirty different jobs during their separation. As to both issues referred to by Former Husband as imputation of income, we affirm.

Retroactive Spousal and Child Support

The trial court found Former Wife was entitled to retroactive temporary spousal and child support in the amount of $310,446.00. The final judgment explicitly did not differentiate what amount was spousal versus child support. It was improper for the trial court to fail to identify which share of the retroactive award was for child support and which share was for temporary spousal support because that failure makes it impossible for an appellate court to conduct a meaningful review. *See Blum v. Blum*, 769 So. 2d 1142,

1143 (Fla. 4th DCA 2000) (citing *Burkhart v. Burkhart*, 620 So. 2d 225, 226 (Fla. 1st DCA 1993)).

The trial court arrived at that combined retroactive figure based upon spending by Former Wife after excluding Former Husband's access to, and thereby having control of, two of the parties' savings accounts which totaled $540,525.00. During the pendency of the dissolution proceedings, Former Wife spent $310,446.00 on what she described as her support, payment of marital expenses, and support of the parties' two children. The trial court did not actually determine what Former Wife's needs for temporary spousal support were during that time frame nor what the precise child support should have been. That determination is required for both retroactive awards. *See* § 61.30(17), Fla. Stat. (2017); *see also Ditton v. Circelli*, 888 So. 2d 161,162 (Fla. 5th DCA 2004).

Additionally, the trial court failed to give Former Husband any credit for having provided any support for Former Wife or their children, despite the fact that the $310,446.00 came from marital savings generated by his earnings. Section 61.30(17)(b), Florida Statutes (2017), provides, in pertinent part: "In determining the retroactive [child support] . . . the court shall consider . . . [a]ll actual payments made by a parent to the other parent or the child or third parties for the benefit of the child throughout the proposed

retroactive period." *Julia v. Julia*, 263 So. 3d 795, 798 (Fla. 4th DCA 2019). Accordingly, we find the trial court abused its discretion by awarding $310,446.00 as retroactive alimony and child support and failing to give Former Husband any credit against that payment. We remand for reconsideration and recalculation consistent with this opinion, and entry of an amended, appropriately detailed, final judgment.

Educational Fund Set-Aside

In addition to treating $310,446.00 of the $540,525.00 in joint savings as retroactive temporary spousal and child support, the trial court ordered the balance of $230,079.00 to be set aside to be used solely for the children's education. That set-aside was in addition to the $1,926 monthly child support award. That money had been in a joint account in both spouse's names and was not a 529 Plan nor otherwise designated as an educational or college fund for the children.[2] Although the parties resolved their parental issues by written agreement, their parenting plan did not include any stipulations about payment of college educational expenses.

[2] Certain qualified tuition programs under I.R.C. § 529(c)(2)(B) are commonly referred to as "529 Plans." *See* 13 Fla. Prac., Estate Planning § 31:12 (2020–2021 ed.).

Former Husband correctly argues that the trial court abused its discretion in ordering that educational set-aside. "[A]ny obligation a parent has to fund the college education of an adult child is moral, not legal, and [ ] the court cannot require a parent to pay those expenses unless the parties have contracted for them in a marital settlement agreement." *Wagner v. Wagner*, 136 So. 3d 718, 720 (Fla. 2d DCA 2014) (citing *Madson v. Madson*, 636 So. 2d 759, 761 (Fla. 2d DCA 1994)); *Riera v. Riera*, 86 So. 3d 1163, 1167–68 (Fla. 3d DCA 2012). Accordingly, we reverse the educational set-aside provided for in the final judgment and remand for equitable distribution of that money.

Income Taxes and Accountant's Fees

The trial court found that there were no outstanding federal income taxes for 2017 and determined that the parties owed approximately $48,000 in income tax for 2018. The undisputed and unrebutted testimony was that the parties' tax returns for those years were prepared by their accountant who charged $13,600.00 for that service. Nevertheless, the trial court assigned that expense solely to Former Husband in computing the equitable distribution. There is no competent substantial evidence to support that ruling; thus, we reverse that portion of the final judgment and remand for

entry of an amended equitable distribution that treats that expense as a marital obligation.[3]

Remaining Issues

We affirm without need for further discussion as to all remaining issues raised by Former Husband. By a separate order, we deny Former Husband's motion for appellate attorney's fees.

AFFIRMED; in part; REVERSED, in part; and REMANDED with instructions.

LAMBERT, C.J., and DUCKWORTH, B.F., Associate Judge, concur.

[3] By a separately issued order, we quash and vacate a post-judgment order entered during the pendency of this appeal, which re-evaluated the parties' income tax obligations and responsibility for payment of accounting fees. We found the trial court lacked jurisdiction under the circumstances.