STATE OF MICHIGAN

COURT OF APPEALS

FAMILY INDEPENDENCE AGENCY and ROSANNA COX, Plaintiffs-Appellees,	UNPUBLISHED April 17, 2001
v LARRY J. KRIST, Defendant-Appellant.	No. 217733 St. Clair Circuit Court LC No. 98-001911-DS

Before: Bandstra, C.J., and Gage and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from an order entered by the trial court requiring him to pay $26 per week to plaintiff Rosanna Cox for support and maintenance of their minor son, Jeremiah Cox.[1] We affirm in part, reverse in part, and remand for further consideration.

The parties were married on June 14, 1992 and divorced on June 23, 1997. Approximately two weeks after the divorce was finalized, plaintiff discovered she was two months pregnant. Plaintiff received Medicaid to pay for prenatal care and delivery of the child. Jeremiah was born on March 12, 1998, and on April 30, 1998, both parties acknowledged paternity by executing an affidavit of parentage. On June 16, 1998, the FIA filed a complaint against defendant for non-support. The trial court referred the matter to the Friend of the Court (FOC) for a report and recommendation. In a report dated December 7, 1998, the FOC recommended that defendant pay $26 per week for support of Jeremiah. The FOC reasoned that because defendant was unemployed, income should be imputed to defendant based on a presumed ability to earn a minimum wage. The FOC also recommended that the parties share joint legal custody with physical custody being awarded to plaintiff.

[1] Defendant petitioned the trial court for a transcript at the public's expense; however, the trial court denied the motion on the basis that MCR 2.002(A)(2), governing waiver or suspension of fees and costs for indigent persons, applies only to filing fees required by law and does not include the cost of a transcript. Accordingly, no transcripts are available for this Court's review. However, on April 8, 1999, the parties entered into the record a stipulation of facts on which the facts related in this opinion are based.

After the FOC recommendation was issued, defendant moved for joint legal and physical custody of Jeremiah. Defendant also filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that it was improper for the FOC to impute income because his only source of income was State Disability Assistance (SDA) and food stamps. Defendant subsequently filed a second motion for summary disposition pursuant to MCR 2.116(C)(4), arguing that because the parties were not married, the trial court lacked jurisdiction over the matter pursuant to § 1 of the Family Support Act, MCL 552.451; MSA 24.222(1), which specifies that the act applies to married parents.

At a hearing on February 4, 1999, the trial court denied both of defendant's motions for summary disposition and adopted the FOC's recommendation that defendant pay $26 per week in support based on an imputed income level. The trial court also entered a stipulated order for parenting time pursuant to the parties' agreement that plaintiff continue to have physical custody of the child and defendant have visitation on Wednesdays and Sundays, until further order of the court.[2] On February 10, 1999, the trial court entered an order of filiation and support consistent with its prior ruling, requiring defendant to pay $26 per week in child support, among other things. The order also stated that, "per agreement of the parties, the parties shall share joint legal custody with physical custody awarded to the Plaintiff."

Defendant moved to stay execution of the order of filiation and support pending appeal, arguing that the payment of child support would work a financial hardship on him. The trial court denied defendant's motion for a stay and referred defendant's prior motion for custody and parenting time to the FOC for a report and recommendation. On April 20, 1999, the FOC issued another report, declining to make a recommendation on the issue of custody and visitation because the investigator had been informed by the parties that they intended to marry shortly. On September 29, 1999, the trial court entered an order providing that defendant shall have supervised parenting time on Wednesdays and Sundays in addition to a number of other terms relating to visitation.[3]

Defendant first argues that the trial court erred in denying his motion for summary disposition pursuant to MCR 2.116(C)(4) on the basis that the trial court lacked subject matter jurisdiction over the parties where language from the complaint and the order referred to a section of the Family Support Act, MCL 552.451; MSA 25.222(1), applying only to married persons. We disagree.

Whether a court has subject matter jurisdiction over a case is a legal question subject to de novo review by this Court. *Phinesee v Rogers*, 229 Mich App 547, 558; 582 NW2d 852 (1998); *Bd of Co Rd Comm'rs for the Co of Eaton v Schultz*, 205 Mich App 371, 375; 521 NW2d 847 (1994). Subject matter jurisdiction is the court's right "to exercise judicial power over that

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[2] As noted previously, we have no transcript of this hearing, and the stipulated facts make no mention of any testimony presented at the hearing on the issue of child custody.

[3] The September 29, 1999, order for parenting time inexplicably states that it was prepared by defendant's attorney, despite the fact that defendant's attorney was dismissed from the case one month earlier. In addition, neither defendant nor his attorney signed the order.

class of cases; not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending." *Adams v Adams*, 100 Mich App 1, 16; 298 NW2d 871 (1980), quoting *Joy v Two-Bit Corp*, 287 Mich 244, 253; 283 NW 45 (1938). In Michigan, the family division of circuit court has sole and exclusive jurisdiction over divorce cases and ancillary matters, such as the present action. MCL 600.1021(a)(viii); MSA 27A.1021(a)(viii). The statute conferring the circuit court's jurisdiction specifically includes all actions brought under "Act No. 138 of the Public Acts of 1966, being sections 552.451 to 552.459 of the Michigan Compiled Laws." *Id.* Jurisdiction over children of divorced parents remains in the court which granted the divorce until the youngest child attains the age of 19, regardless of the manner in which a pleading is drafted. *Adams, supra* at 17; MCL 552.17a; MSA 25.97(1). Thus, contrary to defendant's contention, the trial court was vested with subject matter jurisdiction to hear this action. MCL 600.1021; MSA 27A.1021. Further, any ambiguity in plaintiff's complaint by virtue of the fact that she was no longer married when she initiated the lawsuit did not prejudice defendant or "render [plaintiff's] request incapable of resolution by the court." *Adams, supra* at 18.

Defendant next argues that the trial court improperly imputed income to him when his sole means of support consisted of $246 SDA and $125 food stamps per month. We agree.

Child support is ordered by the trial court in accordance with the Michigan Child Support Formula Manual, published by the FOC Bureau pursuant to legislative mandate. *Ghidotti v Barber*, 459 Mich 189, 196; 586 NW2d 883 (1998). See MCL 552.519(3)(a)(iv); MSA 25.176(19)(3)(a)(iv). The child support formula "shall be based upon the needs of the child and the actual resources of each parent." MCL 552.519(3)(a)(vi); MSA 25.176(19)(3)(a)(iv). When assessing a parent's ability to pay child support, the trial court is not limited to consideration of a parent's actual income. *Good v Armstrong*, 218 Mich App 1, 5; 554 NW2d 14 (1996). However, for purposes of determining child support, the formula excludes means tested sources of income,[4] including SDA and food stamps, and deems imputation of income inappropriate for means tested sources of income. Michigan Child Support Formula Manual, tenth rev, 1998, pp 6, 8.

However, where a parent has a voluntarily unexercised ability to pay child support, imputation of income is permitted even for those parents receiving means tested income. *Ghidotti, supra* at 198. Before imputing income to a parent, the court must evaluate a number of factors to determine the parent's actual ability and likelihood to earn the imputed income, including the parent's employment history, available work opportunities, education and skills, diligence in trying to become employed, the parent's personal history, assets, health and physical ability to obtain gainful employment, availability to work, and the geographical location of defendant. *Id.* at 199; *Sword v Sword*, 399 Mich 367, 378-379; 249 NW2d 88 (1976); Michigan Child Support Formula Manual, supra at 8. The trial court's evaluation of these factors is essential to ensuring "that any imputation of income is based on an actual ability and likelihood of earning the imputed income." *Ghidotti, supra* at 199. To allow imputation of income without

[4] The phrase "means tested income" refers to federal welfare benefits paid to eligible low-income individuals or families. *Ghidotti, supra* at 191, n 1.

the necessary evaluation "would be pure speculation and a clear violation of the requirement that child support be based upon the actual resources of the parents." *Id.*

In this case, defendant submitted undisputed evidence that he was engaged in full time care of his disabled, elderly father and that he was unable to participate "in any type of outside or in-home work." His sole source of income consisted of $246 SDA and $125 in food stamps per month. In imputing income to defendant, the trial court simply concluded that defendant was unemployed and had the ability to earn a minimum wage without engaging in the requisite evaluation of the aforementioned factors and without making any findings on the record with respect to whether defendant had an unexercised ability to pay child support.[5] *Sword, supra*; *Ghidotti, supra*. Therefore, because the trial court did not articulate its reasons for imputing income to defendant in light of the relevant factors, we reverse the support order and remand for further consideration. *Id.*

Next, defendant argues that the trial court abused its discretion in awarding physical custody of the minor child to plaintiff without conducting a hearing or making findings of fact on the statutory best interests factors. We agree.

On February 4, 1999, the trial court held a hearing on defendant's motions for summary disposition on matters unrelated to custody. At that time, the parties stipulated to a visitation agreement and the trial court entered an order entitled "temporary order for parenting time" stating that defendant would have supervised visitation "*until further Order of this Court.*" [Emphasis added]. On February 10, 1999, the trial court issued an order of filiation and support consistent with its prior ruling. The trial court then referred defendant's motion for custody and visitation to the FOC for a report and recommendation, suggesting that the issue was not finally resolved. On this record, we conclude that the parties' parenting time agreement, in form and substance, was a temporary agreement for visitation pending final disposition of the custody dispute after review by the FOC, not a final resolution of the matter. Further, the trial court's February 4 and 10, 1999 orders regarding parenting time as well as its September 29, 1999, order of filiation and support was entered without a hearing on the best interests factors and improperly relied on the parties' temporary custody agreement. We note that defendant's missing signature from the September 29, 1999 order regarding parenting time further suggests that the parties never came to a permanent agreement on custody or parenting time. Thus, because we conclude that the trial court's February 10, 1999 order of filiation and support did not finally resolve the matter of custody, and the trial court erroneously relied on the parties' temporary agreement in its September 29, 1999 order of filiation and support, we remand for further proceedings on this issue.

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[5] Similarly, the FOC recommendation did not refer to any of the factors enumerated in the Child Support Formula Manual or the *Sword* opinion for imputing income, and stated no basis for its imputation of income, concluding only that "Mr. Krist [defendant] is not employed and an ability to earn minimum wage is imputed for him." Nor did plaintiffs allege any facts to support their conclusory allegation that defendant had sufficient ability to provide support for his child and that imputation of income was appropriate.

Finally, defendant argues that the trial court erred in denying his motion to reassign the action to the same judge who granted the parties' divorce. We do not find it necessary to decide this question. Instead, on remand, we instruct the family court to assign this case, if possible, to the judge who granted the parties' divorce; therefore allowing the issues of parenting time, child custody, and child support to be determined as a motion to amend the judgment of divorce. See MCL 600.1021(1)(a) and (h); MSA 27A.1021(1)(a) and (h); MCL 600.1023(1); MSA 27A.1023(1).

Affirmed in part, reversed in part, and remanded for further consideration consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder