STATE OF MICHIGAN

COURT OF APPEALS

DENISE GEORGE,

Plaintiff-Appellee,

v

VINCENT GEORGE,

Defendant-Appellant.

UNPUBLISHED
August 28, 2008

No. 277186
Oakland Circuit Court
LC No. 99-629937-DM

Before: Murray, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

I. Overview

Plaintiff Denise George and defendant Vincent George married in 1994 and divorced in 2001. Two children were born during the marriage. In 2002, the trial court awarded Denise George sole custody of the children and ordered Vincent George to pay child support. In 2004, Vincent George moved to reduce the amount of child support. In April 2005, the trial court adopted a Friend of the Court (FOC) referee's recommendation, reducing Vincent George's child support obligation to $877.56 a month for two children, and $604.98 a month for one child.

Vincent George filed an application for leave to appeal, challenging the amount of income that was imputed to him for purposes of calculating child support. This Court granted the application in part and remanded the matter for additional findings "with respect to the factors set forth in MCL 552.605(2)."[1] After the trial court issued a supplemental decision reaffirming its original decision, Vincent George filed another application for leave to appeal, which this Court denied "for lack of merit in the grounds presented."[2] The Michigan Supreme

[1] *George v George*, unpublished order of the Court of Appeals, entered December 16, 2005 (Docket No. 263889).

[2] *George v George*, unpublished order of the Court of Appeals, entered October 20, 2006 (Docket No. 269313).

Court, in lieu of granting leave to appeal, subsequently remanded the case to this Court for consideration as on leave granted.[3] We affirm.

II. Basic Facts And Procedural History

A. Background Facts

Denise George filed her divorce complaint in 1999, alleging that Vincent George was earning more than $100,000 annually from a family-owned commercial maintenance company and that he was able to contribute to the children's support. A trial was held over three days in September and October 2000, and in February 2001, the trial court entered a judgment of divorce awarding the parties joint legal and physical custody of the children. The trial court also ordered Vincent George to pay $53.24 a week in child support.

In 2001, Denise George moved for sole legal and physical custody of the children, due largely to Vincent George's behavioral and psychological problems.[4] Denise George also moved for modification of child support. Vincent George then filed his own motion for a change of custody.

In February 2002, the trial court entered an order awarding Denise George sole physical custody of the children. The trial court permitted Vincent George supervised visitation and referred the parties' motions to modify child support to the FOC for investigation and recommendation.[5] In the interim, the trial court ordered Vincent George to pay child support of $200 a week, until the trial court could conduct an evidentiary hearing in September 2002.

In September 2002, the trial court found that Denise George had a gross annual income of $35,000 a year and that Vincent George had imputed annual income of $80,000 a year. The trial court then modified the child support as follows:

> IT IS FURTHER ORDERED that in accordance with the Michigan Child Support Guidelines, the Defendant, VINCENT GEORGE's, child support obligation is modified, retroactive to May 30, 2001, to reflect the sum of $273 per week for two children, and $177.00 per week when one child is subject to the Order. Child Support shall remain in full force and effect until each child attains the age of eighteen years or graduates from high school, whichever is later, but not beyond the age of nineteen years.

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[3] *George v George*, 477 Mich 1067; 728 NW2d 868 (2007).

[4] Vincent George was incarcerated multiple times for contempt for failing to pay child support. In Docket No. 238569, this Court denied Vincent George's application for leave to appeal one of the contempt orders. *George v George*, unpublished order of the Court of Appeals, entered March 14, 2002 (Docket No. 238569), lv den 467 Mich 882 (2002).

[5] Vincent George filed a claim of appeal from this order in Docket No. 240280, but the claim was dismissed by stipulation. *George v George*, unpublished order of the Court of Appeals, entered November 12, 2002 (Docket No. 240280).

The trial court later corrected its order to make the child support payments retroactive to only October 21, 2001.

The trial court conducted another evidentiary hearing in December 2002, to consider whether to hold Vincent George in contempt for failing to pay child support. Following that hearing, the trial court again concluded that Vincent George had income of $80,000 a year:

> Based upon the argument, testimony presented and exhibits entered into evidence, as well as well-settled case law authority, the Court finds that Defendant's net annual income is Eighty Thousand ($80,000.00) Dollars per year, retroactive to October, 2001. The Court makes this determination in part upon the fact that the testimony and evidence reveals that Defendant is capable of making a significantly greater sum than that which he currently reports based upon Defendant's failure to devote a significant amount of time and effort to his business as well as Defendant's failure to report all of the actual cash received from his business(es).

In June 2003, Vincent George petitioned to modify his support payments due to a change in his income and a loss of business. The FOC referee proposed that Vincent George pay total support of $877.56 a month for two children and $604.98 a month for one child, effective June 1, 2003.[6] The referee's recommendation consisted only of the amounts of recommended support; it did not include any factual findings.

Vincent George objected to the referee's recommendation and proposed findings, arguing that it was improper for the referee to impute annual income of $40,141.80 to him when he previously earned only $14,138.07. He argued that he was starting a new business, that his current annual income was only $16,900, and that his income was not expected to rise higher than $20,400. Vincent George also claimed that he was working part time for a cleaning service, in addition to trying to start his own new company. In support of his objections, Vincent George submitted United States Department of Labor statistics from 2003 and claimed that the amount of imputed income was excessive and well beyond the national averages reflected in the labor statistics. In April 2005, the trial court entered an order adopting the referee's recommendation.

Vincent George moved for reconsideration of the trial court's decision on the ground that there was no justification or rationale contained in the proposed order, or in any FOC report, to explain the reasons for imputing income to Vincent George. Vincent George specifically argued that the referee failed to provide written support for her recommendation, contrary to MCL 552.17 and *Burba v Burba*.[7] Vincent George also argued that he was not able to challenge the referee's findings regarding his income without knowing the basis for the referee's decision,

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[6] The amount of child support for the two children consisted of $758.25 a month for support, $94.00 a month for health insurance premiums, and $25.31 a month for ordinary health care expenses.

[7] *Burba v Burba*, 461 Mich 637, 649; 610 NW2d 873 (2000).

thereby violating his right to due process. In response, the trial court ordered the parties and the referee to appear for a rehearing on the referee's recommendation.

The trial court arranged for the FOC referee to be present at the hearing so that she could explain her recommendation. The referee explained that she conducted three or four hearings, each lasting two to four hours, to determine Vincent George's child support obligation. Counsel did not represent Vincent George at those hearings. The referee admitted that she threw out her notes from the hearings and all other work product and was relying only on her memory to explain what occurred. Because the hearings were extensive, the referee did not believe she could convey all the information in written findings, so she made her ruling on the record.

According to the referee, in the past, when Vincent George owned a business, the trial court had imputed income of $80,000 a year to him and calculated his child support payments on that amount. Since that time, however, Vincent George had lost his business and was trying to rebuild his commercial cleaning service. Although Vincent George had not had his own business for a while, the referee thought that he had been building the new business for quite some time. The referee looked at the business and the amount of income it would generate. The referee also believed that owning a business was a luxury and that Vincent George still had an obligation to support his children; if the business was not generating enough money to pay child support, Vincent George was expected to find another source of income. When the referee made her findings on the record, she advised the parties that she would impute income to Vincent George of between $15,000 and $50,000, based on the evidence. Although Vincent George claimed he earned only $14,000, she informed him that she would not impute that amount to him based on his ability to run a business: Vincent George could earn that amount working a minimum wage job and the referee would not impute the minimum wage to Vincent George. The referee also noted that Vincent George was obviously intelligent based on his representation of himself in these proceedings.

The referee then explained how she arrived at her final figure for Vincent George's income:

> What I did was after taking all of my evidence, everything that I had, everything that I had in front of me, as I indicated earlier, I no longer have the work product, it's been discarded, and I imputed to Mr. George forty thousand dollars a year. Now that is less than twenty dollars an hour, that is approximately nineteen dollars and twenty-two cents an hour and my reasoning for that is Mr. George cannot stand up in good conscience and say I'm building a business and therefore I should only have to pay child support based on what my business made this year, which is fourteen thousand dollars. That's not reasonable, it's not equitable and it is not required by the Michigan Child Support Guidelines. The Michigan Child Support Guidelines clearly says in a self-employed business situation you have to look at the big picture and try to figure out, number one, what is the income and number two, is that reasonable.
>
> I have people come in front of me all day long and say I'm breaking my back trying to make a business work but I'm only making minimum wage and my response is well then maybe you don't have the luxury of having a business,

> maybe you need to go and get a real job, because you're going to be held to a different standard.
>
> Now I did not hold Mr. George to the standard that [the trial court] held him to; I did not expect him to have the eighty thousand dollar a year income when building a business; but I did impute to him, thinking it was reasonable that for a man of his capability, his intelligence, his experience, his work experience—if he could not make his business to earn less than twenty dollars an hour, then that would be a reasonable sum for him to earn. That is basically in a nutshell how my decision was made.

The referee's recommendation reduced Vincent George's child support obligation by approximately $200 a month from what the trial court had ordered him to pay. Even though Vincent George filed his motion in 2004, the referee also recommended that the change be made retroactive to June 2003 because Vincent George had previously filed a motion for a reduction of his support payments.

Vincent George's counsel objected to the referee's reasons for imputing $40,000 in annual income to Vincent George, asserting that Vincent George was essentially working as a janitor and had only a high school education. He argued that Vincent George's income should be based on what a janitor would earn. Furthermore, defense counsel believed that the referee was required to produce a written report of her findings. Defense counsel also incorporated into his comments the labor statistics that Vincent George had submitted with his written objections.

The trial court refused to conduct a de novo hearing, and in June 2005, the trial court entered an order affirming its original decision to adopt the referee's recommendation.

B. Vincent George's First Application for Leave to Appeal

In Docket No. 263889, Vincent George filed an application for leave to appeal the trial court's April 2005 order in which the trial court adopted the FOC's recommendation. In December 2005, this Court granted Vincent George's application, in part, for the following reasons:

> The Court orders that the application for leave to appeal is GRANTED IN PART, and this matter is REMANDED to the trial court with direction that the court articulate on the record its findings with respect to the factors set forth in MCL 552.605(2). *Burba v Burba*, 461 Mich 637, 644-645; 610 NW2d 873 (2000). To the extent defendant challenges the reasonableness of the earnings imputed to him, the application for leave to appeal is DENIED without prejudice to defendant refiling the application pursuant to MCR 7.205(F), supported by the pertinent transcripts of the evidentiary hearings and other documentary evidence considered by the friend of the court referee and circuit court in making the decision as to the amount of income to impute to defendant. This order shall have immediate effect. MCR 7.215(F)(2).

On remand, the trial court issued additional findings and again adopted the referee's findings that Vincent George had an annual imputed income of $40,000. In making its findings,

the trial court found that 2004 United States Department of Labor statistics supported the referee's recommendation because they showed that 75 percent of workers in supervisory positions for cleaning offices earned $19.02 an hour, or $39,570 a year.

C. Vincent George's Second Application for Leave to Appeal

In Docket No. 269313, Vincent George filed an application for leave to appeal from the trial court's March 2006 order. In his application, Vincent George argued that it was improper for the trial court to consider the 2004 labor statistics in its supplemental findings and that it should have limited its review to the evidence previously submitted. He further argued that his right to due process was violated when the trial court issued its supplemental findings without first providing him with notice and offering him the opportunity to be heard.

In October 2006, this Court denied Vincent George's application for leave to appeal "for lack of merit in the grounds presented." In April 2007, the Michigan Supreme Court, in lieu of granting leave to appeal, remanded the case to this Court "for consideration as on leave granted."

III. Scope Of The Remand OrderAugust 28, 2008

A. Standard Of Review

Vincent George argues that the trial court improperly violated the scope of this Court's remand order in Docket No. 263889 when it relied, in part, on 2004 United States Department of Labor wage statistics in concluding that it was proper to impute income to Vincent George of approximately $40,000 a year for purposes of determining his child support obligation. Vincent George argues that the statistics should not have been considered because they had not been introduced previously. We review de novo the issue of law regarding whether the trial court complied with this Court's original order.[8]

B. Analysis

When a matter is remanded to a lower court for further proceedings, the lower court may take such action as law and justice require so long as that action is not inconsistent with the appellate court's judgment.[9] If the appellate court does not include any instructions in its remand order, the lower court possesses the "'same power as if it made the ruling itself.'"[10] But where the appellate court provides clear instructions in its order, it is improper for the lower court to exceed the scope of that order.[11] On remand, a lower court must strictly comply with the

[8] *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004).

[9] *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005).

[10] *Id*., quoting *People v Fisher*, 449 Mich 441, 447; 537 NW2d 577 (1995).

[11] *Id*.

appellate court's order and may not do on remand what the higher courts could not do on appeal.[12]

Vincent George correctly asserts that because this Court's earlier remand order only directed the trial court to "articulate on the record its findings with respect to the factors set forth in MCL 552.605(2)," and did not allow the trial court to reopen proofs, the trial court could not properly consider new evidence on remand.[13]

In this case, however, the trial court's consideration of the 2004 labor statistics does not require reversal. Vincent George first offered the federal labor statistics in support of his objections to the referee's recommendation. And although Vincent George asked the trial court to consider the Department of Labor's 2003 statistics for a janitorial position rather than a supervisory position, because he advocated use of the Department of Labor's wage statistics as a basis for evaluating the referee's recommendation, we cannot conclude that the trial court erred in considering those statistics, albeit for a different year and different job level. Vincent George, in effect, admitted that the federal labor statistics were generally reliable, and he has not asserted that the 2004 version was inaccurate or unreliable. Further, because the proceedings on Vincent George's motion to modify support did not begin until 2004, and because it was undisputed that Vincent George was operating his own cleaning service business, the trial court appropriately looked to the 2004 statistics for a supervisory cleaning services position, rather than a janitorial position, in evaluating the referee's recommendation.

IV. Due Process

A. Standard Of Review

Vincent George's argues that reversal is required because the trial court's consideration of the 2004 labor statistics violated his right to procedural due process. We review de novo whether a trial court violated a defendant's right to due process.[14] However, we will not reverse based on a violation of procedural due process if the outcome of the case would remain the same.[15]

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[12] *Id*. at 544-545; *South Macomb Disposal Auth v American Ins Co*, 243 Mich App 647, 653; 625 NW2d 40 (2000).

[13] See *In re Complaint of Rovas Against Ameritech Mich*, 276 Mich App 55, 65; 740 NW2d 523 (2007) (stating that it was improper for the Public Service Commission to consider on remand an affidavit that was not previously offered because this Court did not allow the commission to reopen the record).

[14] *Dep't of Community Health v Risch*, 274 Mich App 365, 377; 733 NW2d 403 (2007).

[15] *Feaster v Portage Pub Schools*, 210 Mich App 643, 655-656; 534 NW2d 242 (1995), rev'd on other grounds 451 Mich 351 (1996); *Verbison v Auto Club Ins Ass'n*, 201 Mich App 635, 640-641; 506 NW2d 920 (1993).

B. Analysis

"[D]ue process is a flexible concept, the essence of which is to ensure fundamental fairness."[16]

> "Due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker. The opportunity to be heard does not mean a full trial-like proceeding, but it does require a hearing to allow a party the chance to know and respond to the evidence."[17]

As indicated previously, Vincent George advocated that the trial court consider the federal labor statistics in its review of the referee's recommendation. Because Vincent George introduced the labor statistics as a basis for evaluating the referee's recommendation and was given the opportunity to challenge the referee's recommendation at the June 2005 hearing, the trial court's decision to consider those statistics, albeit for a different year and a different position, did not violate Vincent George's right to procedural due process.

Moreover, where a trial court raises an issue sua sponte, due process can be satisfied by allowing the parties to address the issue on rehearing and by showing that the trial court erred in resolving the case on the basis of an issue not raised by the parties.[18] Apart from the fact that it Vincent George injected the issue of the Department of Labor wage statistics, albeit for 2003, Vincent George also has the opportunity to demonstrate on appeal that the trial court's consideration of the 2004 labor statistics was misplaced. He has not done so. He does not assert that the 2004 labor statistics are inaccurate or unreliable, nor has he demonstrated that they are not applicable to his situation. Accordingly, we decline to reverse for this reason.

V. Referee Hearing Record

A. Standard Of Review

Vincent George also argues that reversal is required because the referee never set forth her findings in a written report after conducting the evidentiary hearing. We review de novo the application of statutes and court rules.[19]

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[16] *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005) (internal citations omitted).

[17] *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 606; 683 NW2d 759 (2004), quoting *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995).

[18] *Paschke v Retool Industries* (*On Rehearing*), 198 Mich App 702, 706; 499 NW2d 453 (1993), rev'd on other grounds 445 Mich 502 (1994).

[19] *Associated Builders & Contrs v Wilbur*, 472 Mich 117, 123-124; 693 NW2d 374 (2005).

B. Analysis

Vincent George relies on the Michigan Supreme Court's decision in *Burba v Burba* to argue that the referee was required to prepare a written report of her findings. However, *Burba* merely requires that a court carefully articulate its reasons for deviating from the child support formula; it contains no express mandate that those reasons be articulated in writing.[20] To the contrary, under MCL 552.605(2), a court may deviate from the child support guidelines "if the court determines from the facts of the case that application of the child support formula would be unjust or inappropriate and sets forth in writing *or on the record* all of the following . . . ." Likewise, MCR 3.215(E)(1) provides that a referee must make a statement of the findings in a written, signed report *or* on the record. Therefore, the referee had the option of setting forth her findings *either* in writing or on the record. In this case, the referee did not issue written findings and there is no record of the referee hearings that contain the referee's findings. But because of this situation, the trial court conducted a hearing at which the referee was allowed to appear and explain her decision, thus providing a record of the basis for her decision. Furthermore, the trial court also gave its findings on the record based on the referee's recommendation. Accordingly, we conclude that Vincent George has failed to show that reversal is required because of the referee's failure to prepare a written report of her findings.

Affirmed.

/s/ Christopher M. Murray
/s/ William C. Whitbeck
/s/ Michael J. Talbot

[20] *Burba*, *supra* at 644.