STATE OF MICHIGAN

COURT OF APPEALS

TAMMY L. COOK, f/k/a TAMMY L. BOSSENBROEK, Plaintiff-Appellee, v JAMES F. BOSSENBROEK, Defendant-Appellant.	UNPUBLISHED October 9, 2012 No. 297209 Kent Circuit Court LC No. 05-001214-DM
TAMMY L. COOK, f/k/a TAMMY L. BOSSENBROEK, Plaintiff-Appellee/Cross-Appellant, v JAMES F. BOSSENBROEK, Defendant-Appellant/Cross-Appellee.	 No. 299594 Kent Circuit Court LC No. 05-001214-DM

Before: DONOFRIO, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

In these consolidated appeals, defendant appeals by leave granted a February 11, 2010 order wherein the trial court held that a uniform child support order (UCSO) the parties agreed to was void as a matter of law (Docket No. 297209). Defendant also appeals by leave granted the trial court's July 22, 2010 order awarding plaintiff $31,908 per year in child support; plaintiff cross-appeals by leave granted the same order (Docket No. 299594). We affirm.

The parties entered into a marital dissolution agreement (MDA), and the trial court incorporated the agreement into a judgment of divorce on June 6, 2006. The judgment provided that the parties would share physical custody of the parties' three remaining minor children and that child support would be governed by the MDA and a UCSO, which provided that neither

party had any obligation to pay monetary child support and that the parties acknowledged that this was a deviation from the Michigan Child Support Formula (MCSF). The UCSO referenced the terms of the MDA as one of the reasons for the deviation. The MDA, in turn, provided that neither party owed child support absent a change in physical custody.

On August 28, 2009, plaintiff moved for full physical custody of the two remaining minor children and for child support. Plaintiff argued that the UCSO was void in that it failed to comply with MCL 552.605, which provides in relevant part as follows:

> (1) If a court orders the payment of child support under this or another act of the state, this section applies to that order.
>
> (2) Except as otherwise provided in this section, the court shall order child support in an amount determined by application of the child support formula . . . *The court may enter an order that deviates from the formula 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*:
>
> (a) The child support amount determined by application of the child support formula.
>
> (b) How the child support order deviates from the child support formula.
>
> (c) The value of property or other support awarded instead of the payment of child support, if applicable.
>
> (d) The reasons why application of the child support formula would be unjust or inappropriate in the case.
>
> (3) Subsection (2) does not prohibit the court from entering a child support order *that is agreed to by the parties and that deviates from the child support formula, if the requirements of subsection (2) are met*. [Emphasis added.]

The trial court held that the UCSO failed to meet the statutory requirements in MCL 552.605(2) and declared the UCSO void as a matter of law. Then, following an evidentiary hearing, the trial court ordered defendant to pay $31,908 per year in child support, a 50 percent downward departure from the amount calculated under the MCSF.

On appeal, defendant contends that the trial court erred when it declared the UCSO void under MCL 552.605. Defendant maintains that the statute was inapplicable in this case because, under the terms of the UCSO, the trial court did not order the payment of any child support. This issue presents a question of law that we review de novo. *Peterson v Peterson*, 272 Mich App 511, 516; 727 NW2d 393 (2006).

MCL 552.605(1) provides: "*If a court orders the payment of child support* under this or another act of the state, *this section applies to that order*" (emphasis added). The Support and Parenting Time Act (SPTA), MCL 552.601 *et seq*., defines the term "support," to include "the

payment of money for a child . . . ordered by the circuit court" and, "may include payment of the expenses of medical, dental and other health care . . . and educational expenses." MCL 552.602(ee). The SPTA defines the term "support order" as "an order entered by the circuit court for the payment of support, whether or not a sum certain." MCL 552.602(ff).

We find that MCL 552.605 is applicable in this case because the UCSO amounted to an order for "the payment of child support" that was ordered by the circuit court. First, under MCL 552.602(ee), a payment of money for a child is child support. The UCSO incorporated the terms of the MDA, which required the parties to make monetary support payments for the children if either of the parties' parenting time increased. Although the amount of the payments was not articulated, a support order need not be set forth as a sum certain. MCL 552.602(ff). By incorporating the MDA, the UCSO ordered that the parties pay money for the support of the minor children under certain circumstances. Hence, the UCSO amounted to an order for child support that triggered MCL 552.605(1).

Furthermore, the UCSO was a child support order because it mandated that defendant provide health insurance coverage for the minor children, that defendant pay 80 percent of the minor children's medical costs, and that plaintiff pay 20 percent of the minor children's medical costs. Under MCL 552.602(ee), "payment of expenses for medical, dental, and other health care" falls within the definition of child "support."

Finally, the UCSO was a child support order because it incorporated the terms of the MDA that included a provision mandating that both parties pay the minor children's pre-college tuition expenses. Such expenses are a form of child "support." MCL 552.602(ee).

Next, defendant argues that, even if MCL 552.605 did apply to the UCSO, the order "substantially complied" with MCL 552.605(2). We disagree.

As noted above, MCL 552.605(3) provides that a trial court may enter a child support order agreed upon by the parties if that order complies with MCL 552.605(2). Here, the UCSO failed to comply with three of the four requirements of MCL 552.605(2). First, when it entered the UCSO, the trial court did not set forth in writing or on the record the amount of child support defendant would have owed under the MCSF. Second, since there is no finding with respect to defendant's obligation under the MCSF, the trial court could not have indicated how the UCSO deviated from the MCSF. Third, in entering the UCSO, the trial court did not indicate the "value of the property or other support awarded instead of the payment of child support." The MDA, which was incorporated into the UCSO, contained provisions concerning plaintiff's alimony and those documents showed that plaintiff received certain property. But there is no finding with respect to what portion of that amount served as a substitute for defendant's obligation to pay child support. Thus, the UCSO also failed to satisfy MCL 552.605(2)(c).

Finally, in respect to this issue, defendant argues that deviation from MCL 552.605(2) is necessary to avoid an "unreasonable result." In fact, though, *Laffin v Laffin*, 280 Mich App 513, 520-521; 760 NW2d 738 (2008), held that compliance with MCL 552.605(2) is mandatory.

Next, defendant argues that, instead of declaring the UCSO void and entering a new order, the trial court should have simply revised the UCSO so it would conform to the

requirements of MCL 552.605(2). Defendant asserts that this was appropriate because the parties entered into the MDA which contained an "implementing provision." Regardless of the parties' agreement, the trial court had discretion to enter a child support order. See *Johns v Johns*, 178 Mich App 101, 106; 443 NW2d 446 (1989) ("[a]n agreement by the parties regarding support will not suspend the authority of the court to enter a support order"). In addition, a trial court must always "ensure that a child support order is just, even if the parties agree to a support order that deviates from the guidelines." *Laffin*, 280 Mich App at 520. As discussed in more detail below, the trial court did not err in entering the new child support order.

Next, defendant argues that the trial court erred in computing his income for purposes of the new child support order. "Whether the trial court properly applied the [MCSF] to the facts of the case involves a question of law that this Court reviews de novo." *Borowsky v Borowsky*, 273 Mich App 666, 672; 733 NW2d 71 (2007). Interpretation of the MCSF and relevant statutes also involves a question of law that we review de novo. *Id*. We review matters committed by the MCSF to the discretion of the trial court for abuse of that discretion. *Id*. We review for clear error any of the trial court's factual findings. *Id*.; MCR 2.613(C).

"It is well settled that children have the right to receive financial support from their parents and that trial courts may enforce that right by ordering parents to pay child support." *Borowsky*, 273 Mich App at 672-673. "However, once a trial court decides to order the payment of child support, the court must 'order child support in an amount determined by application of the child support formula . . . .'" *Id*. at 673, quoting MCL 552.605(2).

To calculate how much money a parent has available for support, a court must first determine each parent's net income under the MCSF. *Borowsky*, 273 Mich App at 673. "Net income" is defined as "all income minus the deductions and adjustments permitted by [the MCSF]." 2008 MCSF 2.01(A). "Thus, in order to calculate net income, the trial court must first ascertain and then total the parents' various sources of income." *Borowsky*, 273 Mich App at 674. The MCSF broadly defines "income" under 2008 MCSF 2.01(C).

Defendant contends that the trial court erred in utilizing a three-year average from 2007 to 2009 to determine his income for purposes of the MCSF.

"The MCSF does not specifically require trial courts to examine the parents' financial information for any particular period. . . ." *Borowsky*, 273 Mich App at 685. But 2008 MCSF 2.02(B) provides that "[w]here income varies considerably year-to-year due to the nature of the parent's work, use three' years' information to determine that parent's income." In this case, it is undisputed that defendant's income varied from year-to-year. Therefore, the trial court did not err in utilizing a three-year average to determine defendant's income. 2008 MCSF 2.02(B).

Next, defendant contends that the trial court erred when calculating his income by incorporating interest from a loan defendant made to one of his business partnerships. Defendant maintains that the loan was uncollectable because the partnership was struggling financially.

We find that the trial court properly imputed interest owed to defendant from the loan. Pursuant to 2008 MCSF 2.01(C)(5) and (9), and MCL 552.602(m), "income" includes interest and debts owed to an individual. Here, during his testimony defendant agreed that the

partnership's ledger showed that it owed him interest on the loan. Further, to the extent that defendant argues the interest and the loan were uncollectable, his argument is undermined by evidence that the partnership had substantial gross receipts in 2008 and 2009 and paid significant salaries to defendant and other individuals.

Next, defendant argues that the trial court erred by including capital gains that arose from defendant's sale of assets that he received under the terms of the MDA.

Under the MCSF, "income" includes capital gains "*to the extent they result from recurring transactions*." 2008 MCSF 2.01(C)(6) (emphasis added). The MCSF does not define the word "recurring." Because undefined terms must be given their plain and ordinary meanings, we may properly consult a dictionary. *Haynes v Neshewat*, 477 Mich 29, 36; 729 NW2d 488 (2007). *Random House Webster's College Dictionary* (1997) defines the term "recurring" as "to occur again, as an event." Defendant had capital gains every year during the three-year period the trial court considered. Indeed, defendant described himself as a real estate investment professional. Evidence showed that his multiple business interests repeatedly produced capital gains income. Hence, the trial court did not clearly err in determining that defendant had capital gains from recurring transactions. Furthermore, regardless of what property was awarded under the MDA, the capital gains were not produced until after the divorce, and, under the MCSF, "the objective in determining net income is to establish, as accurately as possible, how much money a parent should have available for support." 2008 MCSF 2.01(B). Therefore, we conclude that the trial court properly included the capital gains in its computation of defendant's income.

Next, defendant argues that the trial court erred when it refused to consider his amended 2009 tax return. At trial, defendant introduced his 2009 IRS Form 1040. Defendant's original 1040 showed a negative adjusted gross income of $1,315,794. Then, on June 23, 2010, during the evidentiary hearing, defendant revised his 2009 tax return to show that he had $144,580 in additional losses that year. The trial court refused to consider the return.

We find that the trial court did not err in refusing to consider defendant's revised tax return. 2008 MCSF 2.01(A) provides, "[a] parent's 'net income' used to calculate support *will not be the same as* that person's take home pay, *net taxable income*, or similar terms that describe income for other purposes" (emphasis added). This Court has explained that, when applying the MCSF, "although the trial court should examine a party's tax returns in order to determine net income, the deductions permitted for tax purposes do not necessarily correspond to the deductions permitted for purposes of determining child support." *Borowsky*, 273 Mich App at 676. Instead, the relevant focus is on establishing "as accurately as possible, how much money a parent should have available for support." 2008 MCSF 2.01(B).

Here, the trial court did not err by finding that the revised 2009 tax return did not affect how much money defendant had available for support. In revising his return, defendant utilized a tax deduction related to his partnership. This deduction did not necessarily correspond with deductions relevant for determining child support. The trial court considered defendant's original tax return, and it could have concluded that defendant's motive for revising the tax return was to avoid paying child support.

Next, both defendant and plaintiff contend that the trial court erred by departing 50 percent down from the guidelines. Defendant contends that the court departure should have been a 100-percent downward, while plaintiff contends that the trial court should not have deviated from the guidelines.

"A trial court must presumptively follow the MCSF when determining the child support obligation of parents." *Ewald v Ewald*, 292 Mich App 706, 714; 810 NW2d 396 (2011), citing MCL 552.605. However, a trial court has discretion to deviate from the MCSF where application of the formula would be "unjust or inappropriate." 2008 MCSF 1.04(A); *Stallworth v Stallworth*, 275 Mich App 282, 283-284; 738 NW2d 264 (2007). Specifically, under the MCSF, a court may consider any factor it deems relevant in deciding whether to deviate from the formula. 2008 MCSF 1.04(D). The MCSF also lists non-exclusive factors for determining when application of the formula "may produce an unjust or inappropriate result." 2008 MCSF 1.04(E).

In this case, the trial court applied the MCSF and determined that, under the formula, defendant would owe approximately $63,816 per year in child support. The court then departed from the guidelines by 50 percent and ordered defendant to pay $31,908 per year in child support. The court knew that plaintiff received approximately $3.5 million in the divorce settlement agreement, considered that the parties' initially did not intend that either party would pay child support, and noted that plaintiff testified that she had more than sufficient assets to support the two minor children.

Based on the trial court's findings, we cannot conclude that the trial court abused its discretion in deviating from the MCSF. Under the MCSF, reasons for departing from the formula include where a parent "earns an income of a magnitude not fully taken into consideration by the formula," and a court may consider "[a]ny other factor the court deems relevant to the best interests of the child." 2008 MCSF 1.04(E)(9), (18). Here, the formula did not take into account plaintiff's substantial settlement agreement. Specifically, under the MDA, plaintiff received nearly $2.9 million in cash and a home with $600,000 of equity. The agreement was structured in a way that allowed plaintiff to have sufficient resources to provide for the two minor children. Indeed, plaintiff agreed under oath that she had more than enough finances to care for the children despite the fact that she had not sought any employment outside the home. Furthermore, plaintiff and defendant shared physical custody, and under the parties' divorce agreement, defendant was required to provide health insurance for the children, and pay for 80-percent of the children's uninsured medical costs.

Plaintiff also argues that the departure from the MCSF amounted to an unfair "punishment," in part because the court improperly imputed income to her. A trial court may impute income under 2008 MCSF 2.01(G), when it determines that a parent is "voluntarily unemployed or underemployed, or has an unexercised ability to earn . . ." The formula provides a non-exclusive list factors for a court to consider whether to impute income. 2008 MCSF 2.01(G)(2)(a)-(k).

In this case, the trial court properly considered relevant factors for imputing income. *Id*. Specifically, the court considered plaintiff's prior employment experience, educational level, special skills or abilities, and evidence that plaintiff was able to earn income, which are factors (a), (b), and (h). The court recognized that plaintiff had been a stay-at-home mom for the

majority of her adult life but that she had the ability to work as a teacher's aide or in food service given her experience with homeschooling and operation of an event-hosting business. The trial court recognized that plaintiff was relatively young and had a long work life ahead of her, factor (c). The trial court considered that plaintiff had minor children living in the home, but also noted that plaintiff's husband was unemployed and, if needed, capable of caring for the children while plaintiff worked, factors (d), (i) and (j). The court also considered plaintiff's diligence in seeking employment, factor (g), when it noted that plaintiff testified that she did not have any desire to seek employment. The court considered availability of opportunities and prevailing wage rates in the local geographical area, factors (e) and (f), and concluded that plaintiff had the ability to obtain employment in the food service industry or as a teacher's aide given her qualifications. The court reasoned that these positions would only pay minimum wage of $7.40 per hour. In sum, the trial court properly considered the relevant factors under 2008 MCSF 2.01(G)(2), and did not abuse its discretion by imputing $11,500 of income to plaintiff.

Defendant argues that the trial court should have departed 100-percent downward from the MCSF considering the parties' prior agreement and that the children were well provided for. Again, the trial court exercised its discretion in reviewing the matter. And, for numerous reasons set out both above and below, we are unable to hold that the trial court abused its discretion, i.e., that its decision falls outside the range of principled outcomes and notwithstanding that we or another judge might have decided the matter differently.

Here, the trial court took the settlement agreement into account and considered the children's needs when it deviated 50 percent below the child support guidelines. Moreover, regardless of the parties' intentions, a trial court must ensure that the agreement meets all legal requirements. *Laffin*, 280 Mich App at 520. And, each party received a large amount of property in the settlement agreement. Defendant also received a 100-percent interest in the parties' business entities. In sum, based on the entire record, we conclude after de novo review that the trial court did not err in applying MCL552.605, nor did it abuse its discretion under the MCSF.

We affirm. Neither party having prevailed in full no taxable costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Donald S. Owens