

FILED: October 9, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Marriage of

BARBARA GILMORE,
Petitioner-Respondent,

and

MELVIN AMBROSE,
Respondent-Appellant.

Washington County Circuit Court
C030893DRA

A149032

Keith R. Raines, Judge.

Argued and submitted on June 26, 2012.

John D. Peterson and Peterson, Peterson & Walchli, LLP filed the brief for appellant.

Michael R. Sahagian argued the cause and filed the brief for respondent.

Before Ortega, Presiding Judge, and Sercombe, Judge, and Hadlock, Judge.

ORTEGA, P. J.

Reversed and remanded for recalculation of mother's income and child support obligation.

1 ORTEGA, P. J.

2 Father in this dissolution case appeals a supplemental judgment modifying
3 child support. ORS 107.135(1)(a). The trial court, in that judgment, ordered mother to
4 pay child support in the amount of \$327 per month. Father asserts that the trial court
5 improperly failed to "impute income to mother in an amount consistent with that monthly
6 income she voluntarily left." In particular, after losing custody of the parties' only child
7 to father, mother retired from her job at age 56 and moved to Panama. The trial court
8 calculated mother's child support obligation using mother's actual retirement income. In
9 father's view, in calculating child support, the court improperly failed to utilize mother's
10 potential income pursuant to OAR 137-050-0715 (7/1/10).¹ We agree with father and,
11 therefore, reverse and remand.

12 On appeal, father requests that we exercise our discretion to review the trial
13 court's decision *de novo*. See ORS 19.415(3)(b) (providing for discretionary *de novo*
14 review on appeal in certain equitable actions); *Turner and Muller*, 237 Or App 192, 194-
15 98, 238 P3d 1003 (2010), *rev den*, 350 Or 231 (2011) (exercising discretion to conduct *de*
16 *novo* review in a domestic relations case). However, in our view, this is not an
17 exceptional case justifying exercise of *de novo* review. See ORAP 5.40(8)(c) ("The
18 Court of Appeals will exercise its discretion to try the cause anew on the record or to
19 make one or more factual findings anew on the record only in exceptional cases.").

¹ Throughout this opinion, we cite the version of OAR 137-050-0715 that was certified effective July 1, 2010. Although the rule was amended in 2013, those amendments do not affect the resolution of this appeal.

1 Accordingly, we review the trial court's decision for legal error and "state the facts
2 consistently with those found by the trial court to the extent that there is evidence to
3 support them." *Nice v. Townley*, 248 Or App 616, 618, 274 P3d 227 (2012).

4 In 2003, mother filed a petition for dissolution of marriage, and the trial
5 court entered a general judgment of dissolution in 2005. At that time, mother was
6 awarded sole custody of the parties' child; father had parenting time and was ordered to
7 pay child support. In 2008, father sought modification of the dissolution judgment,
8 asserting that he should be awarded custody of child. The court appointed a custody
9 evaluator and, in June 2009, entered a supplemental judgment awarding custody to father,
10 subject to mother's parenting time.

11 In October 2010, father filed a motion to modify mother's parenting time.
12 In an affidavit in support of the motion, father stated that he had received an email from
13 mother stating that she would be moving out of town on October 14, 2010, and that child
14 had informed him that she and mother were moving to Panama. Mother's response
15 confirmed that she had, indeed, moved to Panama without child. In January 2011, father
16 filed a motion to modify the dissolution judgment to require mother to pay child support.
17 Thereafter, the court entered a supplemental judgment modifying mother's parenting time
18 and, in May 2011, held a hearing on the issue of child support.

19 At the hearing, mother testified that, because of an early retirement
20 incentive offered by her employer, she had voluntarily retired from her job at Portland
21 Community College (PCC) in August 2010 at the age of 56. She received \$2,130 each

1 month in public employee retirement (PERS) benefits; while teaching at PCC she had
2 earned \$6,450 each month. At the time mother elected to retire, child was 10 years old.

3 According to mother, she had decided to retire and move for "the emotional
4 and the physical and the mental health of [child] after * * * father had been awarded
5 custody" in view of the problematic relationship between mother and father and his wife:

6 "[Child] was being really deeply affected by that, and I didn't feel--I didn't--
7 I couldn't think of any other way to get her out of the middle than for * * *
8 one of us to be farther away."

9 Mother further explained:

10 "I weighed all the pros and cons, and I realized that if I were going to retire,
11 knowing how little money I was going to get when I retired, and if I was
12 going to move away to keep [child] out of all of this, that I had to move
13 someplace where the cost of living was really low."

14 According to mother, she chose Panama primarily

15 "for the cost of living because of my reduced income. I didn't feel like I
16 could afford to live anywhere in the United States that was--I don't know
17 what the word is--desirable, I guess, to me, based on the amount of income
18 that I was getting."

19 Mother also stated that she was not able to work in Panama.

20 Father, for his part, described child's special needs and discussed the
21 medical expenses associated with those special needs. He stated that, among other
22 things, child required tutoring, medication, and treatment by a psychologist for children
23 with special needs. With respect to the child support that mother should be required to
24 pay, father asserted that she could not "elect to retire with a ten-year-old, particularly a
25 ten-year-old child with special needs, and expect that [her] child support is going to be

1 established at an income level that is about 30 percent of what [she has] the capability of
2 earning." He emphasized that mother was unemployed and had reduced income solely as
3 the result of her own choices. According to father, child is "entitled to the full support of
4 both of her parents" and, under the circumstances, the "child support guidelines require
5 the use of potential income, and that potential is what she was earning at PCC."

6 Mother, in turn, argued that she "appropriately retired under the rules of
7 PERS" and that there was "nothing wrong with what she did." She asserted that, "if you
8 retire appropriately under the rules of where you're working, * * * that ends the
9 discussion." Also, as to potential income, mother contended that, because she now lives
10 in Panama and cannot work there, there are "no real additional funds that she can make."

11 The court did not discuss mother's potential income, instead concluding that
12 her income "for purposes of child support" is the \$2,130 she actually receives in
13 retirement benefits. The court reasoned:

14 "[T]he move to Panama is consistent with so many different steps
15 along the way, all of which are not well considered, all which seem to
16 ignore the overall consequences, all which seem to be, in the Court's
17 opinion, almost irrational. But are all consistent.

18 " * * * * *

19 "[I]n reality, she doesn't think like I think. She doesn't think like
20 [father] thinks. * * * The reason she is in Panama is because she doesn't
21 think the way we think. I couldn't imagine retiring at age 56. That's just--
22 and just lay around all day long, I just can't imagine that. But that's not for
23 me to judge, except to see whether it's totally inconsistent with all the other
24 things I've seen along the way, and it isn't.

25 "And she's, in her way, created peace for the child, and created peace
26 for [father] by being so far away. I mean, so removed that she can't cause
27 you any problems. And she can't cause the child any problems. And while

1 I don't want to reward non-bad behavior, or the absence of bad behavior by
2 saying, 'Oh well, then you can do whatever you want to now because there's
3 no bad behavior.' But by the same token, I have to see whether or not it is--
4 it makes sense to me that this is the consequence of a bunch of tumble
5 downs. And I think that it is."

6 The court subsequently entered a supplemental judgment ordering mother
7 to pay child support in the amount of \$327 per month. That amount was calculated based
8 on mother's actual retirement income and father's income from employment. The court
9 noted that father incurs health care costs for child "as well as additional expenses
10 associated with [her] special needs" and that cash medical support was a component of
11 the child support award.

12 On appeal from the judgment, father contends that the trial court erred
13 when it calculated child support based on mother's actual income from retirement
14 benefits rather than evaluating her potential income based on her monthly salary before
15 her voluntary retirement. Mother responds that "[t]his case simply boils down to [the]
16 very basic question" of whether a party who chooses "to retire at an age that is
17 appropriate under the retirement guidelines of his or her employer" must "be held to a
18 potential income standard as opposed to their retirement income." In mother's view, her
19 "retirement income is her actual income, and no other income should be imputed to her if
20 she appropriately retired."

21 The parties' arguments raise the issue of whether the trial court properly
22 applied the child support guidelines in this case. When considering whether the trial
23 court correctly calculated a party's income under the guidelines, we "review the trial

1 court's interpretation of the guidelines for legal error." *McMurchie and McMurchie*, 256
2 Or App 712, 721, 304 P3d 751 (2013).

3 ORS 25.275(1) provides that "[t]he Division of Child Support of the
4 Department of Justice shall establish by rule a formula for determining child support
5 awards[.]" As directed in that statute, the division "has established a formula for
6 determining child support awards. The formula is set out in the Oregon Child Support
7 Guidelines (the guidelines), OAR 137-050-0070 to 137-050-0675." *McMurchie*, 256 Or
8 App at 715. The guidelines formula "has three basic steps. The first step is to determine
9 the parents' presumed incomes. The second step is to use the parents' presumed incomes
10 to determine their presumed support obligations. The third step is to determine if the
11 presumed support obligations are unjust or inappropriate." *Id.* (citations omitted).

12 Thus, to calculate a parent's child support obligation, the court must first
13 determine the parent's income. "The guidelines define 'income'; they also distinguish
14 between 'actual income' and 'potential income' and specify when a parent's income is
15 presumed to be the parent's 'actual income' and when it is presumed to be the parent's
16 'potential income.'" *Id.* at 721.

17 Pursuant to OAR 137-050-0715,

18 "(1) 'Income' means the actual or potential gross income of a parent,
19 as determined in this rule.

1 "(2) 'Actual income' means all earnings and income from any source,
2 except provided in section (4).^[2] Actual income includes but is not limited
3 to:

4 "(a) Employment-related income including salaries, wages,
5 commissions, advances, bonuses, dividends, severance pay, pensions, and
6 honoraria;

7 "(b) Return on capital, such as interest, trust income and annuities;

8 "(c) Income replacement benefit payments including Social Security
9 benefits, workers' compensation benefits, unemployment insurance
10 benefits, disability insurance benefits;

11 "(d) Gifts and prizes, including lottery winnings;

12 "(e) Income from self-employment, rent, royalties, proprietorship of
13 a business, or joint ownership of a partnership or closely held corporation *
14 * *; and

15 "(f) Expense reimbursement or in kind payments received by a
16 parent in the course of employment, self-employment, or operation of a
17 business are income to the extent they reduce personal living expenses.

18 "* * * * *

19 "(5) 'Potential income' means the greater of:

20 "(a) The parent's probable full-time earnings level based on
21 employment potential, relevant work history, and occupational
22 qualifications in light of prevailing job opportunities and earnings levels in
23 the community; or

24 "(b) The amount of income a parent could earn working full-time at
25 the current state minimum wage."

26 A parent's income is presumed to be that parent's potential income

² Under OAR 137-050-0715(4), "[c]hild support, adoption assistance, guardianship assistance, and foster care subsidies are not considered income for purposes of" calculating child support.

1 "in the following scenarios:

2 "(a) An unemployed parent;

3 "(b) A parent employed on less than a full-time basis;

4 "(c) A parent with income less than Oregon minimum wage for full-
5 time employment; or

6 "(d) A parent with no direct evidence of any income."

7 OAR 137-050-0715(6). On the other hand, a parent's income is presumed to be actual
8 income

9 "in the following scenarios:

10 "(a) A parent working full-time at or above the state minimum wage;

11 "(b) A parent unable to work full-time due to a verified disability;

12 "(c) A parent receiving workers' compensation benefits;

13 "(d) An incarcerated obligor as defined in OAR 137-055-3300; or

14 "(e) When performing a calculation for temporary modification
15 pursuant to ORS 416.425(13),^[3] except as provided in section (9) of this
16 rule."

17 OAR 137-050-0715(7). Pursuant to OAR 137-050-0715(8), the presumptions regarding
18 actual and potential income "may be rebutted by a finding that the presumption is
19 inappropriate in light of the parent's probable full-time earnings level based on
20 employment potential, relevant work history, and occupational qualifications in light of

³ Under that statute, where support enforcement services are being provided pursuant to ORS 25.080, "the administrator may move to suspend the order or judgment and issue a temporary modification order" when there "is a period of significant unemployment" and a "party to the support order or judgment experiences an employment-related change of income as defined by rule in ORS 416.455."

1 prevailing job opportunities and earnings levels in the community."

2 "[U]nder OAR 137-050-0715(6), a parent's income is *presumed to be his or*
3 *her potential income* if the parent is unemployed, is employed on a less-
4 than-full-time basis, has an income less than Oregon minimum wage for
5 full-time employment, or lacks direct evidence of any income. Under OAR
6 137-050-0715(7), a parent's income is *presumed to be his or her actual*
7 *income* if the parent is working full-time at or above the state minimum
8 wage, is unable to work full-time due to a verified disability, is receiving
9 workers' compensation benefits, or is incarcerated as defined in OAR 137-
10 050-3300. Essentially, a parent's income is presumed to be the parent's
11 potential income when the parent is capable of working full-time for at least
12 minimum wage, but is not doing so, and a parent's income is presumed to
13 be the parent's actual income in all other situations."

14 *McMurchie*, 256 Or App at 724 (emphasis in original); *see McCarthy and McCarthy*, 170
15 Or App 183, 192, 12 P3d 519 (2000) (the court "*must* consider potential income when a
16 parent is employed less than full time" (emphasis in original)); *Harper and Harper*, 122
17 Or App 9, 13, 856 P2d 334, *rev den*, 318 Or 246 (1993), *cert den*, 511 US 1108 (1994)
18 (the court must base child support on potential income where a parent is unemployed or
19 employed less than full time). Although those presumptions are rebuttable under OAR
20 137-050-0715(8), for the presumption to be rebutted, the court must make a finding that
21 the presumption is not appropriate in light of what the parent would likely be able to earn
22 if working full time. Furthermore, "[n]othing requires the court to find that the parent
23 became [unemployed or] underemployed in bad faith" before it may utilize potential
24 income in calculating child support. *Harper*, 122 Or App at 13.

25 Here, mother is unemployed. Therefore, under OAR 137-050-0715(6), her
26 income is presumed to be her potential income (rather than her actual income). Mother's
27 potential income (under the circumstances) is her probable full-time earnings based on,

1 among other things, her relevant work history and occupational qualifications. As noted,
2 there was evidence that mother had been employed as a teacher at PCC and that she
3 earned \$6,450 each month in that job. Furthermore, the evidence was that mother retired
4 from her employment and moved out of the country voluntarily. She was offered an
5 early retirement incentive that she chose to accept and she decided to move away
6 because, in her view, it would be better for child's mental and emotional health. The
7 court should have determined mother's potential income in this case.

8 We further reject mother's assertion that, where a parent retires in
9 compliance with the terms of her retirement program, potential income should not be
10 evaluated. Contrary to mother's framing of the issues, our resolution does not depend on
11 an assessment of "what the appropriate retirement age is." A parent is free to make
12 retirement choices as he or she sees fit, but the guidelines impose the burden of those
13 choices on the retiring parent, not on the child and the other parent. The guidelines
14 contemplate that a parent in mother's circumstances, who voluntarily reduces her earning
15 by retiring early and moving out of the country, nonetheless retains an obligation to
16 support her child based on her economic ability.

17 Moreover, contrary to the trial court's apparent understanding, bad faith is
18 *not* required in order to justify using potential income to calculate child support. Rather,
19 under the guidelines, the income of a parent in mother's circumstances is presumptively
20 that parent's potential income and, furthermore, the court may appropriately use evidence
21 of a parent's past average income and occupational qualifications to determine that

1 potential income. *See, e.g., Harper*, 122 Or App at 13. Finally, although the
2 presumption that potential income is the parent's income for child support purposes may
3 be rebutted, such a rebuttal requires a finding that use of the parent's potential income is
4 inappropriate in view of economic circumstances that may affect the parent's earning
5 ability.

6 Here, the trial court determined that mother did not act in bad faith when
7 she voluntarily retired and moved and, based on that determination, used her actual
8 income to calculate child support. In so doing, the court did not follow the steps required
9 under the guidelines. In particular, the court did not determine mother's presumed
10 income (that is, her potential income) and calculate child support based on that, nor did
11 the court make any finding that the presumption regarding presumed income had been
12 rebutted. Accordingly, we must reverse and remand for the court to calculate child
13 support as required under the guidelines.

14 Reversed and remanded for recalculation of mother's income and child
15 support obligation.