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MICHAEL J. O'BRIEN *v.* KATHLEEN E. O'BRIEN
(AC 31990)

Lavine, Sheldon and West, Js.

Argued January 5—officially released October 16, 2012

(Appeal from Superior Court, judicial district of Fairfield, Hon. Howard T. Owens, Jr., judge trial referee)

Steven D. Ecker, with whom, on the brief, was *Ann Walsh Henderson*, for the appellant (plaintiff).

George J. Markley, for the appellee (defendant).

Opinion

SHELDON, J. In this marital dissolution action, the plaintiff, Michael J. O'Brien, appeals from the judgment of the trial court with respect to several of the financial orders entered at the time of its final decree. Among other orders herein challenged is the court's unallocated award of alimony and child support for the defendant, Kathleen E. O'Brien, and the parties' minor children.[1] Central to the plaintiff's challenge to this award is his claim that, in so ordering, the court failed to consider and apply the child support guidelines (guidelines).[2] On this score, the plaintiff complains, more particularly, that the court erred by failing to determine the presumptive amount of child support under the guidelines, failing to make a finding that the application of the guidelines would be inequitable or inappropriate in this case, and failing to indicate that it was deviating from the guidelines when it fashioned its unallocated alimony and child support order.[3] Because we agree with the plaintiff that the court erred in entering its unallocated alimony and child support order without considering and applying the guidelines, and we conclude that that order is inextricably interwoven with the mosaic of other financial orders which were entered at the time of the final decree, we reverse the court's judgment with respect to all of its final financial orders and remand this case for a new trial on all financial issues. The plaintiff also claims that the court abused its discretion in ordering him to pay the defendant $50,000 in attorney's fees to defend this appeal. Because such an order must be based upon the financial circumstances of the parties, and those financial circumstances may be materially affected by the new financial orders issued on remand, the award of appellate attorney's fees must also be remanded for further consideration.

The following facts are relevant to our resolution of this appeal. The parties were married in 1985, and three children were born of the marriage—the first child on August 9, 1994, the second child on July 2, 1996, and the third child on May 19, 2000. The plaintiff filed an action seeking dissolution of the parties' marriage on January 30, 2008. In its memorandum of decision filed on September 18, 2009, the court rendered judgment dissolving the parties' marriage, adopting a parenting plan formulated by the parties, and ordering, inter alia, that "[t]he plaintiff shall pay to the defendant, during his lifetime or until the defendant's death or remarriage, the following percentages of his 'gross annual earned income from employment,' as hereinafter defined, as unallocated alimony and child support: a. [45] percent of the plaintiff's 'gross annual earned income from employment' from October 1, 2009 until January 30, 2015; b. [c]ommencing February 1, 2015, [40] percent of the plaintiff's 'gross annual earned income from

employment' through July 2, 2024; c. [f]rom July 2, 2024, until the death of either party or the defendant's remarriage, whichever shall first occur as defined by statute, [20] percent of the plaintiff's 'gross annual earned income from employment' as alimony."[4] This appeal followed.[5] Thereafter, on February 25, 2010, the defendant filed a postjudgment motion for attorney's fees to defend this appeal. The court granted that motion, issuing an order that the plaintiff pay the defendant $50,000 in appellate attorney's fees. The court subsequently articulated the basis of this order as follows: "The defendant is defending an appeal that is frivolous. To not award her attorney fees to defend could undermine other awards."

On appeal, although the plaintiff presents several claims of error with respect to the court's unallocated award of alimony and child support, we will focus on the most fundamental of those claims—that in fashioning that award, the court erred in failing to consider and apply the guidelines. On this score, to reiterate, the plaintiff specifically claims that the court erred by failing to determine the presumptive child support amount under the guidelines, failing to make a finding that the application of the guidelines would be inequitable or inappropriate under the circumstances of this case, and failing to indicate that it was deviating from the guidelines when it entered its unallocated, or "total family support," order pursuant to § 46b-215a-3 (b) (5) of the Regulations of Connecticut State Agencies. We agree.

We begin our analysis of the plaintiff's claim by identifying the appropriate standard of review. "An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Notwithstanding the great deference accorded the trial court in dissolution proceedings, a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law." (Citation omitted; internal quotation marks omitted.) *Williams* v. *Williams*, 276 Conn. 491, 496–97, 886 A.2d 817 (2005).

"The legislature has enacted several statutes to guide courts in fashioning child support orders. General Statutes § 46b-84 provides in relevant part: '(a) Upon or subsequent to the annulment or dissolution of any marriage or the entry of a decree of legal separation or divorce, the parents of a minor child of the marriage, shall maintain the child according to their respective abilities, if the child is in need of maintenance. . . . (d) In determining whether a child is in need of mainte-

nance and, if in need, the respective abilities of the parents to provide such maintenance and the amount thereof, the court shall consider the age, health, station, occupation, earning capacity, amount and sources of income, estate, vocational skills and employability of each of the parents, and the age, health, station, occupation, educational status and expectation, amount and sources of income, vocational skills, employability, estate and needs of the child. . . .'

"To ensure the appropriateness of child support awards, General Statutes § 46b-215a provides for a commission to oversee the establishment of child support guidelines. General Statutes § 46b-215b requires that '[t]he . . . guidelines . . . be considered in *all* determinations of child support amounts . . . . [T]here shall be a rebuttable presumption that the amount of such awards which resulted from the application of such guidelines is the amount of support . . . . A specific finding on the record that the application of the guidelines would be inequitable or inappropriate in a particular case, as determined under criteria established by the Commission for Child Support Guidelines under section 46b-215a, *shall be required* in order to rebut the presumption in such case.'

"The guidelines incorporate these statutory rules and contain a 'schedule' for calculating 'the basic child support obligation,' which is based on the number of children in the family and the combined net weekly income of the parents. Regs., Conn. State Agencies § 46b-215a-2b (f). Consistent with . . . § 46b-215b (a), the guidelines provide that the support amounts calculated thereunder are the correct amounts to be ordered by the court unless rebutted by a specific finding on the record that the presumptive support amount would be inequitable or inappropriate. Regs., Conn. State Agencies § 46b-215a-3 (a). The finding *must* include a statement of the presumptive support amount and explain how application of the deviation criteria justifies the variance. Id.; see also General Statutes § 46b-215b (a). This court has stated that the reason why a trial court must make an on-the-record finding of the presumptive support amount before applying the deviation criteria is to 'facilitate appellate review in those cases in which the trial court finds that a deviation is justified.' . . . In other words, the finding 'will enable an appellate court to compare the ultimate order with the guideline amount and make a more informed decision on a claim that the amount of the deviation, rather than the fact of a deviation, constituted an abuse of discretion.' " (Citation omitted; emphasis added.) *Kiniry* v. *Kiniry*, 299 Conn. 308, 318–20, 9 A.3d 708 (2010); see also *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 367–70, 999 A.2d 721 (2010); *Maturo* v. *Maturo*, 296 Conn. 80, 91, 995 A.2d 1 (2010); *Unkelbach* v. *McNary*, 244 Conn. 350, 367–68, 710 A.2d 717 (1998); *Favrow* v. *Vargas*, 231 Conn. 1, 29, 647 A.2d 731 (1994); *Budrawich* v. *Budraw-*

ich, 132 Conn. App. 291, 299–300, 32 A.3d 328 (2011).

Our Supreme Court has recognized that "the guidelines evolved from an experimental, intentionally nondirective and flexible approach to the imposition of standards that are *presumptively binding* on the court or magistrate . . . . [I]n general . . . the ensuing work of the commission substantially circumscribes the traditionally broad judicial discretion of the court [to deviate from the guidelines] in matters of child support." (Emphasis added.) *Favrow* v. *Vargas*, 222 Conn. 699, 715, 610 A.2d 1267 (1992). Our Supreme Court recently emphasized the importance of the mandatory application of the guidelines to all cases involving minor children, including those cases involving families with high incomes, in *Maturo* v. *Maturo*, supra, 296 Conn. 80. The court there held: "[T]he applicable statutes, as well as the guidelines, provide that *all* child support awards must be made in accordance with the principles established therein to ensure that such awards promote 'equity,' 'uniformity' and 'consistency' for children 'at *all income levels*.' . . . [Child Support and Arrearage Guidelines (2005), preamble], § (c) (1) and (2), p. ii; id., § (e) (6), p. vi. [Section] § 46b-84 specifically instructs that courts shall consider various characteristics and needs of the child in determining whether support is required, the amount of support to be awarded and the respective abilities of the parents to provide such support. Although the guidelines grant courts discretion to make awards on a 'case-by-case' basis above the amount prescribed for a family at the upper limit of the schedule when the combined net weekly income of the parents exceeds that limit, which is presently $4000; Regs., Conn. State Agencies § 46b-215a-2b (a) (2); the guidelines also indicate that such awards should follow the principle expressly acknowledged in the preamble and reflected in the schedule that the child support obligation as a percentage of the combined net weekly income should decline as the income level rises. Thus, an award of child support based on a combined net weekly income of $8000 *must* be governed by the same *principles* that govern a child support award based on a combined net weekly income of $4000, even though the former does not fall within the guidelines' *schedule*. Finally, although courts may, in the exercise of their discretion, determine the correct percentage of the combined net weekly income assigned to child support in light of the circumstances in each particular case, including a consideration of other, additional obligations imposed on the noncustodial parent, any deviation from the schedule or the principles on which the guidelines are based must be accompanied by the court's explanation as to why the guidelines are inequitable or inappropriate and why the deviation is necessary to meet the needs of the child. See also General Statutes § 46b-84 (d)." (Emphasis added.) *Maturo* v. *Maturo*, supra, 94–96.

"Neither this court, nor the trial court, is at liberty, where a particular family enjoys a relatively high income, to disregard the significant progress that has been made in standardizing child support awards since the advent of the guidelines. See 42 U.S.C. § 667 (b) (2) (1988). Removing consideration of the guidelines from child support decisions deprives high income families of the fairness and consistency the guidelines require and leaves the trial and appellate courts adrift, unanchored to the core principles that guide support awards in cases falling within the guidelines' schedule." *Maturo* v. *Maturo*, supra, 113.[6]

Here, based upon our review of the record, it is evident that the court failed to follow, or even make reference to, the guidelines. Nor did the court, as required by the guidelines, determine the presumptive amount of child support to be awarded thereunder.[7] Moreover, having failed to determine the presumptive amount of child support under the guidelines, the court was not in a position to, and did not, make a finding as to whether application of the guidelines would be inappropriate or inadequate in this case. We are thus left to speculate both as to the presumptive child support amount and as to whether, and if so why, the circumstances of this case warranted a deviation from that amount.

The defendant argues, and the dissent agrees, that, because the court issued an unallocated award of alimony and child support, the guidelines do not apply. The law supports no such conclusion. In any marital dissolution action involving minor children, it is axiomatic that the court must fashion orders providing for the support of those children. There is no exception to this mandate, and certainly none for unallocated awards of alimony and child support, which necessarily include amounts for both child support and spousal support. Indeed, our Supreme Court recently confirmed in *Tomlinson* v. *Tomlinson*, 305 Conn. 539, 558, 46 A.3d 112 (2012), that an unallocated order "necessarily includes a portion attributable to child support in an amount *sufficient to satisfy the guidelines*." (Emphasis added.) *Tomlinson* also confirmed that, when making an unallocated order, the court must: first, determine the presumptive child support amount; second, explicitly find that an award in the presumptive amount would be inequitable or inappropriate under the circumstances of the case; and third, explicitly find that, in those circumstances, the entry of an unallocated or total family support order is a justifiable deviation from the presumptive amount for one of the reasons set forth in the guidelines themselves. Id., 558–59. Those reasons are explained in the guidelines as follows: "In some cases, child support is considered in conjunction with a determination of total family support, property settlement, and tax implications. When such considerations will

not result in a lesser economic benefit to the child, it may be appropriate to deviate from presumptive support amounts for the following reasons only: (A) division of assets and liabilities, (B) provision of alimony, and (C) tax planning considerations."[8] See Regs., Conn. State Agencies § 46b-215a-3 (b) (5). The fact that the guidelines explicitly authorize the making of an unallocated award of alimony and child support as a permissible deviation from the presumptive amount thereunder undermines the defendant's argument and the dissent's suggestion that the guidelines do not apply at all in cases where such unallocated orders are issued.

For the foregoing reasons, we conclude that the court abused its discretion in entering its unallocated award of alimony and child support without considering and applying the guidelines or the principles espoused therein. It erred, more particularly, by failing to determine the presumptive amount of child support under the guidelines, failing to explain that that amount was inequitable or inappropriate, and failing to explain its basis for deviating from the guidelines.

Financial orders in dissolution proceedings often have been described as a mosaic, in which all of the various financial components are carefully interwoven with one another. *Gershman* v. *Gershman*, 286 Conn. 341, 351, 943 A.2d 1091 (2008). Because the court's support orders, particularly its spousal support or alimony order, are informed by and reflective of the parties' incomes and assets, as affected by the court's other financial orders, the entirety of the mosaic must be refashioned whenever there is error in the entering of any such interdependent order. See id., 352. Accordingly, we reverse the judgment of the trial court with respect to all of its financial orders, including, but not limited to those orders challenged on appeal.

As to the court's challenged award of appellate attorney's fees, we recognize that that award was issued postjudgment, not at the time of the entry of the other financial orders which were issued on the date of dissolution. That award is thus not part of the mosaic of final financial orders by which the court initially attempted to chart the parties' financial future. Even so, as the following authorities make clear, the ordering of attorney's fees is itself dependent upon the relative financial circumstances of the parties, as affected by the court's final financial orders. For that reason, the attorney's fees award here at issue must also be reconsidered in light of the new mosaic of financial orders that the court will issue on remand in this case.

"General Statutes § 46b-62 governs the award of attorney's fees in dissolution proceedings and provides that the court may order either spouse . . . to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the criteria set forth in [§] 46b-82. These criteria include the length

of the marriage, the causes for the . . . dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to [§] 46b-81 . . . . General Statutes § 46b-82. In making an award of attorney's fees under § 46b-82, [t]he court is not obligated to make express findings on each of [the] statutory criteria. . . . Courts ordinarily award counsel fees in divorce cases so that a party . . . may not be deprived of [his or] her rights because of lack of funds. . . . Where, because of other orders, both parties are financially able to pay their own counsel fees they should be permitted to do so. . . . An exception to th[is] rule . . . is that an award of attorney's fees is justified even where both parties are financially able to pay their own fees if the failure to make an award would undermine its prior financial orders . . . ." (Citations omitted; internal quotation marks omitted.) *Misthopoulos* v. *Misthopoulos*, supra, 297 Conn. 385–86.

Here, the court did not make a finding as to the defendant's ability to pay her own attorney's fees. Rather, as previously noted, it opined in its articulation that the plaintiff's appeal was frivolous, and thus that the failure to award the defendant attorney's fees to defend the appeal would undermine the court's other financial orders for her maintenance and support. In so doing, the court properly recognized that its award of attorney's fees is a function of the parties' financial circumstances. Those circumstances, however, depend directly upon the final financial orders issued by the court in its dissolution judgment. Not until the parties' assets are finally divided and their respective rights and obligations to give or receive financial support to or from each other are finally determined can the parties' ability to pay for their own attorney's fees be ascertained; nor, if it is determined that the parties do have the ability to pay their own attorney's fees, can it finally be determined if the failure to award appellate attorney's fees to the defendant would undermine the court's other financial orders for her maintenance and support. Accordingly, because the court's financial orders will be reconsidered in their entirety on remand, its award to the defendant of $50,000 in appellate attorney's fees must also be remanded for reconsideration in light of the new financial orders that will be issued at that time.

The judgment is reversed only as to the court's financial orders, including the award of appellate attorney's fees, and the case is remanded for a new trial on all financial issues.

In this opinion WEST, J., concurred.

[1] The plaintiff also claims that the court erred in failing to assign to the defendant an earning capacity and thus consider that earning capacity in rendering its financial orders and improperly ordering him to maintain a life insurance policy for the defendant's benefit for as long as his lifetime

alimony obligation to the defendant endures. The dissent has opined that the trial court's judgment should be affirmed with respect to these additional claims. Because we reverse the judgment of the trial court on the basis explained herein, and remand the case for a new trial on all financial issues, we offer no view on those claims.

[2] The guidelines are set forth in § 46b-215a-1 et seq. of the Regulations of Connecticut State Agencies and are promulgated by the commission for child support guidelines established pursuant to General Statutes § 46b-215a.

[3] With regard to the court's child support order, the plaintiff also claims that the court failed to consider or base its award on the needs of the children; that the court improperly based the support order on his gross income rather than his net income; that the award exceeds the maximum presumptive percentage of income permitted under the child support guidelines; and that the court improperly based the award on a percentage of his fluctuating income. Again, because we are reversing the court's financial orders for the reasons set forth herein, and we thus are remanding the case for a new trial on all financial issues, we need not address these additional claims of error.

[4] The plaintiff also claims that when the court later issued a clarification of the judgment, it improperly changed the unallocated award in a substantial and material way. Because we reverse the judgment of the court and the periodic orders will be reconsidered in their entirety, we need not address the court's purported clarification

[5] In its memorandum of decision dissolving the parties' marriage and issuing associated financial orders, the court did not set forth any findings as to the parties' incomes, careers or earning capacities, other than noting that the "[defendant] has been away from her career for some period" and that "she will take little time in reacquiring her exceptional skills." On December 3, 2010, in a subsequent articulation in response to an order from this court, the court indicated that: "At the time of the dissolution the court found that [the] defendant was a stay-at-home mother and she served in that capacity at the plaintiff's request. Obviously, after the children [are] grown, she would have earning capacity based on her education and prior abilities. It would be premature to assess earning capacity for some future date. Obviously, the defendant is well educated, earned large sums of money, and she has maintained her skills. . . . The court considered the parties' lifestyle during the marriage and the necessity of protecting the wife for the rest of her life. As of April 21, 2009, according to [the] plaintiff's [financial] affidavit, he had gross earnings and gross income of $17,414 per week gross which resulted in a net [of] $10,900 per week."

[6] We note that, not only have the guidelines evolved from a guide to a mandate in all cases in which there are minor children, but the treatment of high income situations has also changed. When the guidelines were established in 1991, they explicitly indicated that they did not apply to cases in which the parties' combined net weekly income exceeded $1500. Rather they established that $1500 was the presumptive minimum level for families exceeding that income. In 1994, the guidelines were revised to establish, inter alia, a new presumptive minimum level of $1750, and eliminated the language that stated that the guidelines do not apply to high income situations. The subsequent revisions to the guidelines, in 1999 and 2005, abide by the principle of the 1994 version, but raise the highest levels of income, and thus the minimum presumptive amounts of child support, to $2500 and $4000, respectively.

[7] As noted, in its initial memorandum of decision dissolving the parties' marriage, the court made no finding as to the parties' incomes.

[8] We recognize that there are federal tax benefits to an unallocated award. When an award is categorized as unallocated, since no part of that award is expressly fixed as child support, the Internal Revenue Code provides that the entire amount may be treated as alimony for taxation purposes, and thus deducted as alimony by the payor. See Internal Revenue Code, 26 U.S.C. §§ 71, 215. There is, however, no statutory or decisional law suggesting that, if a court decides to make an unallocated award of alimony and child support, it need not, as a preliminary matter, determine the presumptive amount of child support under the guidelines. To the contrary, the court's obligation to fix the presumptive support amount is unchanging, whether or not it ultimately decides to deviate from the guidelines by fashioning such an order. Finally, we do not suggest that, in fashioning an unallocated award, a court must specify how much of that award is earmarked for child support, for such a requirement would frustrate the beneficial tax purposes of an unallocated award. Simply, in fashioning an award of total family

support, the court should examine the guidelines, determine the presumptive amount of support thereunder, and then explain its basis for deviating from the guidelines in light of the unfairness or inappropriateness of following them in the case before it. In this regard, the dissent's analysis conflates a court's *finding* of the presumptive amount of child support owed pursuant to the guidelines with the issuance of a child support *order* in that amount.