IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

HEATHER JORGENSEN,

Appellant,

v. Case No. 5D19-2132

MICHAEL TAGARELLI,

Appellee.

_____/

Opinion filed July 2, 2020

Appeal from the Circuit Court
for Hernando County,
Don Barbee, Jr., Judge.

Eric R. Maier, of Older, Lundy & Alvarez,
Tampa, for Appellant.

Kimberly Scarano, of Jeffrey P. Cario,
P.A., Brooksville, for Appellee.

TRAVER, J.

Heather Jorgensen ("Former Wife") appeals a second amended final judgment and order denying attorney's fees in her divorce action against Michael Tagarelli ("Former Husband"). Jorgensen raises four issues, three of which merit discussion. The trial court incorrectly imputed income to Former Wife by relying solely on past earnings, and it miscalculated Former Husband's business income by classifying his equitable distribution

equalizing payments as a business expense. These determinations impacted the parties' child support obligations and Former Wife's potential entitlement to attorney's fees.

We first address the trial court's imputation of income to Former Wife. She worked as a self-employed insurance broker during most of the parties' four-year marriage, but in 2016, her income increased to $118,000 as a full-time employee. After the parties separated, Former Wife voluntarily left her full-time job and returned to working as a self-employed insurance broker, earning about $38,000 a year.

This Court reviews imputed income for abuse of discretion and affirms if the imputed income is supported by competent and substantial evidence. *Hudson-McCann v. McCann*, 50 So. 3d 735, 737 (Fla. 5th DCA 2010). The party asserting that the spouse is voluntarily unemployed or underemployed has the burden of proof. *Middleton v. Middleton*, 79 So. 3d 836, 836 (Fla. 5th DCA 2012). Subject to exceptions not relevant to this appeal, trial courts "shall" impute monthly income if they find a parent is voluntarily unemployed or underemployed. *See* § 61.30(2)(b), Fla. Stat. (2019). Trial courts determine "the employment potential and probable earnings level of the parent" from her "recent work history, occupational qualifications, and prevailing earnings level in the community if such information is available." *See id*.

Competent and substantial evidence supports the trial court's conclusion that Former Wife was voluntarily underemployed. Indeed, her own testimony sustains this conclusion. But the trial court imputed income by relying solely on Former Wife's past earnings, and we have held that this is erroneous. *See Guard v. Guard*, 993 So. 2d 1086, 1090 (Fla. 5th DCA 2008); *Freilich v. Freilich*, 897 So. 2d 537, 544 (Fla. 5th DCA 2005). As the party seeking to impute income, Former Husband bears the burden to show "both

employability and that jobs are available." *Dottaviano v. Dottaviano*, 170 So. 3d 98, 100 (Fla. 5th DCA 2015) (quoting *Julia v. Julia*, 146 So. 3d 516, 522 (Fla. 4th DCA 2014)); *see also Andrews v. Andrews*, 867 So. 2d 476, 478 (Fla. 5th DCA 2004) (reversing imputed income because former husband "failed to establish by testimony or evidence a range of salaries being paid for current and available employment opportunities in the [relevant geographical] area for which [the wife] was qualified").

We therefore reverse the imputation of income to Former Wife for the three time periods at issue (eight months in 2017; January 1, 2018, through April 30, 2019; and May 1, 2019, forward). On remand, the trial court should conduct an evidentiary hearing on Former Wife's current earning ability, followed by an adjustment of the child support awards, as necessary.

We next address the trial court's classification of Former Husband's monthly installment payments to Former Wife as a business expense. Equitable distribution was not a disputed trial issue because the parties reached a pre-trial settlement agreement. The parties' primary marital asset was a mobile home park they co-owned as tenants by the entirety through a limited liability company. Former Wife renounced all rights to the mobile home park, and Former Husband promised to pay her $525,000. This payment comprised six monthly payments of $16,667 and seventy-two subsequent monthly payments of $6458, which included three-percent interest. The trial court classified the seventy-two monthly payments as a business expense and deducted twelve monthly

payments totaling $77,496 from Former Husband's annual business income to calculate child support for the period commencing May 1, 2019.[1]

This Court reviews for abuse of discretion the trial court's determination of a party's net income and affirms if the determination is supported by competent and substantial evidence.[2] *See Moore v. Moore*, 157 So. 3d 435, 435 (Fla. 2d DCA 2015). The parties agree that the $77,496 annual reduction is not a statutorily allowed deduction from business income. *See* § 61.30(3), Fla. Stat. (2019) (listing "allowable deductions" from income). Accordingly, the issue is whether Former Husband's payments are properly excluded from business income as business expenses—that is, "ordinary and necessary expenses required to produce income." *See id.* § 61.30(2)(a)(3) (defining business income as "gross receipts minus ordinary and necessary expenses required to produce income"). The party claiming a disputed business expense bears the burden of proving the expense is proper. *See Hodge v. Hodge*, 129 So. 3d 441, 443 (Fla. 5th DCA 2013).

The record does not support the trial court's conclusion that the monthly installment payments are a business expense. Rather, they reflect an equalizing payment made over time pursuant to the parties' settlement. Former Husband's contrary argument is belied by the nature of the business interests at issue and the express terms of the parties' settlement agreement. The parties owned their interests in the mobile home park as

[1] The final judgment did not provide for a change in the parties' child support obligations when Former Husband satisfied his monthly payment obligations under the parties' settlement. Presumably, Former Wife would have had to petition for modification at that time.

[2] Former Wife has not demonstrated the trial court abused its discretion by reducing Former Husband's business income by $18,250.15 in real estate taxes and $15,000 in attorney's fees.

tenants by the entirety. These interests were marital assets. *See* § 61.075(6)(a)(3), Fla. Stat. (2019) ("All personal property titled jointly by the parties as tenants by the entireties, whether acquired prior to or during the marriage, shall be presumed to be a marital asset."). The parties agreed their settlement resolved all issues relating to their assets and liabilities. Indeed, the trial court found that the parties' settlement agreement resolved "[a]ll marital property" and "all property issues not related to support."

Former Husband offers no legal authority to support his contention that the monthly installment payments are a business expense. Section 61.30(2)(a)(3) excludes business expenses from business income because the funds "are expected to be used by the business to cover its expenses and therefore are not available to the shareholder-spouse to satisfy court-ordered financial obligations upon dissolution of marriage." *Zold v. Zold*, 911 So. 2d 1222, 1228–29 (Fla. 2005) (explaining that both the alimony statute and the child support statute "focus on income that is *available* to a spouse"). Although the funds at issue are not technically "available" to pay child support, that is only because Former Husband is using the funds to satisfy the parties' equitable distribution settlement. *See Fast v. Fast*, 654 So. 2d 958, 959 (Fla. 3d DCA 1995) ("[W]e reject the husband's implicit argument that the wife should pay a higher percentage of child support because she agreed to receive payments over time representing her one half interest in the former marital home, rather than receive immediate payment of her one-half share of the house."). Former Husband should not be permitted to "double dip" by receiving credit for the payments in both the property settlement and the child support calculation. *See Valladares v. Junco-Valladares*, 30 So. 3d 519, 523–24 (Fla. 3d DCA 2010) (holding that

the trial court erred in considering mortgage pay-downs under both equitable distribution and alimony calculations).

We therefore reverse the trial court's calculation of Former Husband's business income commencing May 1, 2019. On remand, the trial court should recalculate Former Husband's business income and the parties' child support obligations.

Finally, we address Former Wife's argument that the trial court erred by declining to award her reasonable attorney's fees. On remand, the trial court should reconsider this issue after calculating Former Wife's imputed income, if any, and Former Husband's business income.

AFFIRMED IN PART; REVERSED IN PART; and REMANDED with INSTRUCTIONS.

WALLIS and EISNAUGLE, JJ., concur.