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

JOHN L. PICCININI,

Appellant,

v. Case No. 5D20-528

JESSICA A. WAXER,

Appellee.

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Opinion filed July 2, 2021

Appeal from the Circuit Court
for Orange County,
Donald A. Myers, Jr., Judge.

Elizabeth Siano Harris, of Harris Appellate Law Office, Mims, for Appellant.

Shannon L. Akins, of Law Office of Shannon L. Akins, P.A., Orlando, and David T. Roberts, of The Roberts Family Law Firm, P.A., Orlando, for Appellee.

LAMBERT, C.J.

ON MOTION FOR REHEARING

Appellant, John L. Piccinini, moves for rehearing and to correct a "factual error" regarding the opinion issued on May 14, 2021, in this case. We agree with Appellant that there was a factual error contained in footnote 2 of the opinion that should be corrected. Accordingly, we withdraw our prior opinion and substitute this corrected opinion in its place. The disposition remains the same.

Appellant also raises in his motion for rehearing our prior denial, by separate order, of the respective motions for appellate attorney's fees. We vacate that previous order and, by separate contemporaneous order, provisionally grant both motions and remand to the trial court for consideration of these motions. Appellant's motion for rehearing is otherwise denied.

John L. Piccinini ("Father") appeals the amended final judgment of paternity entered following trial regarding the then-two-year-old son he has with Jessica A. Waxer ("Mother"). Father raises seven issues here for reversal. His first argument is that the judgment must be reversed because of the combined effect of the trial court's allegedly-unreasonable delay in entering the judgment and the alleged errors in the court's factual findings that Father contends are not supported by the record. We affirm, without further discussion, on this issue, as well as on Father's second and third

arguments that the trial court erred in awarding Mother sole parental responsibility of the minor child and also in allowing her to relocate with the child from Orlando to Jacksonville.

Father next argues that the trial court reversibly erred when it awarded him only supervised timesharing with the minor child. Based upon the evidence presented at trial and in consideration of the broad discretion given to trial courts in formulating a timesharing plan, *see Schwieterman v. Schwieterman*, 114 So. 3d 984, 987 (Fla. 5th DCA 2012), we conclude that the trial court did not abuse its discretion in ordering the supervised timesharing.

Father's fifth argument is that the court erred in failing to set forth in its amended final judgment the specific steps that he needs to take to be able to obtain unsupervised timesharing with his son. In *C.N. v. I.G.C.*, 291 So. 3d 204, 207 (Fla. 5th DCA 2020), we rejected a similar argument made in a modification of timesharing proceeding that a trial court's order is legally insufficient for failing to set forth with particularity the steps that a party must take in order to regain or restore lost timesharing. The mother in *C.N.* appealed our decision to the Florida Supreme Court, which recently agreed with us that a final judgment modifying a preexisting parenting plan is not legally deficient simply for failing to give such specific steps. *See C.N. v.*

I.G.C., 46 Fla. L. Weekly S93 (Fla. Apr. 29, 2021). Accordingly, we affirm the trial court on this issue.[1]

Father next argues that the trial court erred regarding his award of holiday timesharing with his son. On this point, we agree. The amended judgment merely provides that "if the father should want time with the minor child during any specific holiday, the father shall obtain the consent of the mother at least two (2) weeks in advance of the holiday." We see this provision as improperly placing Father's holiday timesharing with his son essentially at the discretion of Mother and not of the court. *See generally Letourneau v. Letourneau*, 564 So. 2d 270 (Fla. 4th DCA 1990). As the amended final judgment provides no explanation why Father has scheduled supervised timesharing with his son on other, non-holiday days, yet no definitive timesharing on holidays, we direct that, on remand, the trial court shall provide Father with scheduled holiday timesharing, to be exercised with any supervisory safeguard as the court deems necessary.

[1] We note that the parties' child is now five years old. Whether the present circumstances of the parties and child have sufficiently changed over the ensuing years to support Father having additional or unsupervised timesharing with the minor child would be a matter to be first brought back before the trial court upon the filing of a proper petition for modification to allow the court to assess the evidence under the "applicable statutory requirements." *See C.N.*, 291 So. 3d at 207–08.

Lastly, Father contends that the trial court erred in imputing income to him at a level greater than his current income and thereafter using the imputed income figure when determining both his current and retroactive child support obligations. Father is correct.

The trial evidence showed that one week before the minor child was born, Father voluntarily left a job at which he was earning $68,378.91 per year. Five days after the child's birth, Father filed the instant paternity action. Trial was held in this case approximately twenty-six months later. At that time, Father was working in a business owned by his parents earning an annual salary of $30,000.

In calculating Father's child support obligation, the trial court imputed income to Father at his aforementioned greater income. In doing so, the court made two specific findings to justify its imputation of income. First, it found that Father had voluntarily left his prior job. Second, the court determined that any present inability of Father to earn his former income was the result of Father's "criminal activities," which the court wrote would not be a valid excuse to prevent the imputation of income.[2]

[2] Father was convicted of two felonies related to the injury and later death of the family dog. He served a fifty-one-week jail sentence that was followed by community control and then probation. However, Father had left his prior, higher-paying job several months before being arrested on these

To properly impute income to an unemployed or underemployed spouse or parent under section 61.30(2)(b), Florida Statutes (2018), our court has held that a trial court must first find that "any 'termination of income was voluntary'; and second, that the spouse's underemployment was owing to 'less than diligent and bona fide efforts to find employment paying income at a level equal to or better than that formerly received.'" *Frerking v. Stacy*, 266 So. 3d 273, 276 (Fla. 5th DCA 2019) (quoting *Schram v. Schram*, 932 So. 2d 245, 249–50 (Fla. 4th DCA 2005)).

The trial court here essentially determined that Father was underemployed at his $30,000-per-year job. While the trial evidence supported the required finding made by the court as to the first prong for imputation of income—that Father's termination of his income from his prior, higher-paying job was voluntary—the court made no findings as to the requisite second prong. In its defense, Mother, as the party having the burden of proving Father's underemployment,[3] presented no evidence to the

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felonies, and he had finished serving his jail sentence approximately three months before the instant paternity trial.

[3] *See Frerking*, 266 So. 3d at 276 ("The burden of proving underemployment rests with the party moving for imputation." (citing *Andrews v. Andrews*, 867 So. 2d 476, 478 n.2 (Fla. 5th DCA 2004))).

trial court to show that Father was being less than diligent and bona fide in seeking employment at his previous, higher income level.

We further conclude that the trial court erred in its finding that Father's alleged inability to earn his prior income was related to his criminal convictions. While "an individual's actions that lead to incarceration are voluntary for purposes of [section 61.30]" regarding imputation of income for child support purposes, *Wilkerson v. Wilkerson*, 220 So. 3d 480, 483 (Fla. 5th DCA 2017), no testimony or other evidence was presented at trial that any alleged inability of Father to earn his prior salary was related to or caused by his criminal convictions. Thus, this separate finding by the court to justify imputing income to Father at his prior salary was not supported by competent substantial evidence. *See Tutt v. Hudson*, 299 So. 3d 568, 570 (Fla. 2d DCA 2020) ("A trial court's imputation of income must be supported by competent, substantial evidence." (citing *Schlagel v. Schlagel*, 973 So. 2d 672, 675 (Fla. 2d DCA 2008))).

Accordingly, because Mother failed to meet her evidentiary burden of proving Father's underemployment, we reverse the trial court's imputation of income to Father. On remand, the trial court is directed to redetermine Father's child support obligation without the imputation of income. Furthermore, because the trial court awarded to Mother retroactive child

support that was based or calculated on Father's imputed income, the amount of the retroactive child support awarded is reversed with directions that, on remand, the trial court shall recalculate the total retroactive child support award as well.

AFFIRMED, in part; REVERSED, in part; REMANDED for further proceedings consistent with this opinion.

WALLIS and EDWARDS, JJ., concur.