FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-1331

YANN GERVILLE-REACHE,
Former Husband,

Appellant,

v.

INA GERVILLE-REACHE, Former
Wife,

Appellee.

On appeal from the Circuit Court for Duval County.
W. Gregg McCaulie, Judge.

October 23, 2020

ON MOTION FOR REHEARING

PER CURIAM.

The former husband's motion for rehearing is granted. The previous opinion issued on June 11, 2020, is withdrawn, and the following is issued as the decision of the Court.

We initially reversed only the portion of the order on appeal requiring the former husband to pay child support due from June 2018 through January 2019 because there was no evidence that those amounts were still owing. The former wife conceded error, and the record showed the former husband had become current on

the payments in December 2018. We again reverse that portion of the order on appeal.* We initially affirmed the trial court's determination that the former husband was voluntarily underemployed and its decision to impute income to him. On rehearing, we affirm the trial court's finding of voluntary underemployment; however, its decision to impute $120,000 in income was not supported by competent, substantial evidence. As such, we must reverse the order on appeal.

Facts

In October 2017, the parties entered a consent child-support order wherein the former husband agreed to pay a scaled amount of child support for their two children and one hundred percent of the children's tuition until they entered public school in 2018 and 2019, respectively, as well as the children's expenses and health insurance. In November 2017, the former husband was involuntarily terminated from his job. He undertook a job search in the logistics field for several months without success. In January 2018, he obtained his real estate license and pivoted his attention to developing a career in real estate.

In March 2018, the former husband filed a supplemental petition for downward modification of child support that alleged despite his best efforts, he had not been able to find comparable

* We decline to consider the former wife's argument that the trial court meant to order the former husband to pay tuition arrearages as that argument was not preserved by filing a motion for rehearing below. *See Hentze v. Denys*, 88 So. 3d 307, 311 (Fla. 1st DCA 2012) (concluding an alleged error that appeared for the first time in the final order was unpreserved because the aggrieved party failed to file a motion for rehearing). Further, the former wife did not raise this issue in a cross-appeal; therefore, it is not properly before the Court for consideration. *See MacKenzie v. Centex Homes*, 208 So. 3d 790, 792 (Fla. 5th DCA 2016) (recognizing in the absence of a cross-appeal, the appellee may only defend the lower court's order and may not seek affirmative relief from any part of the order).

employment. The former wife countered that he was voluntarily underemployed and asked the trial court to impute income to him for purposes of calculating child support. She also moved to have the former husband held in contempt for failing to pay child support, tuition, and other expenses.

In 2019, a hearing on the motions was held. The testimony showed that from 2005 to 2017, the former husband worked in logistics. In all but the final seven months of that period, he earned between $35,000 and $100,000. He accepted a higher paying director job in 2017 with an annual salary of $150,000. However, in November 2017, after only seven months on the job, he was involuntarily terminated. The former husband made an initial job search in the logistics field and after several months, abandoned that search to pursue a career in real estate. He testified he chose real estate because it had been an ambition of his in the past, he wanted to own his own business, and real estate provided him flexibility to spend more time with his children. At the time of the hearing, he was caring for his two-year-old child with his new wife while working from home. He earned $38,000 over his first year in real estate. When asked how he would provide for his children with a reduced and speculative income, he acknowledged that the child-support guideline worksheet he submitted to the court had the former wife paying him child support instead of him paying her child support.

In the order on appeal, the trial court granted the former wife's motion for contempt and denied the former husband's petition for downward modification because it found he was voluntarily underemployed. In doing so, the trial court found the former husband had admitted there were logistics jobs in the Jacksonville area that he could get earning $120,000. On appeal, the former husband argued the trial court's order should be reversed because it was premised upon the court's erroneous determination that he was voluntarily underemployed.

Analysis

A trial court's decision on child support is reviewed for an abuse of discretion. *See Wood v. Wood*, 162 So. 3d 133, 135 (Fla. 1st DCA 2014). The court's decision to impute income will be affirmed if supported by competent, substantial evidence. *Swain*

v. Swain, 932 So. 2d 1214, 1215 (Fla. 1st DCA 2006). Before imputing income to a parent, the trial court performs a two-step analysis. First, it must conclude that the termination of income was voluntary; second, it must determine whether any subsequent underemployment "resulted from the [parent's] pursuit of his own interests or through less than diligent and bona fide efforts to find employment paying income at a level equal to or better than that formerly received." *Schram v. Schram*, 932 So. 2d 245, 249 (Fla. 4th DCA 2005) (citations omitted).

It is undisputed that the former husband was involuntarily terminated from his logistics job. This fact does not end the analysis because Florida courts also consider what the parent has done since the prior employment. *See Guard v. Guard*, 993 So. 2d 1086, 1090 (Fla. 5th DCA 2008). Even after involuntarily losing a job, a parent may still choose a path in which he or she becomes voluntarily underemployed to support imputing income. *See id.* (affirming decision to impute income to husband who involuntarily lost his job, but became voluntarily underemployed by pursuing his interests in an unprofitable family business); *see also Connell v. Connell*, 718 So. 2d 842, 843 (Fla. 2d DCA 1998) (finding sufficient evidence to support voluntary underemployment where husband was involuntarily terminated from $45,000-a-year job as a welder and started a lawn care business earning $1,100 per month). The trial court did not abuse its discretion in finding the former husband was voluntarily underemployed. *See Windsor v. Windsor*, 262 So. 3d 853, 854–55 (Fla. 1st DCA 2018) (recognizing a former husband's decision to pursue a less profitable business for lifestyle reasons was competent, substantial evidence of his voluntary underemployment to support imputing income to him for child-support purposes). Because there was competent, substantial evidence to support the finding, we affirm the trial court's decision to impute income to the former husband. *See* § 61.30(2)(b), Fla. Stat. (2019) (providing that income shall be imputed to a parent for child-support purposes when the court finds the parent is voluntarily underemployed).

Though we affirm the finding of voluntary underemployment, we agree with the former husband that there was not competent, substantial evidence to support imputing a salary of $120,000. The trial court based this figure on the former husband's admission

that there were available logistics jobs in the area that paid between $120,000 and $130,000. However, the former husband never said he could get these jobs. In fact, he applied for fifty to sixty logistics industry jobs and had been rejected for all of them. He also explained why he was not competitive for those jobs.

There was insufficient evidence to show the former husband had the present ability to earn $120,000 in logistics in his community. *See Windsor*, 262 So. 3d at 855 (reversing amount of income imputed because it lacked evidentiary support). As the entirety of the trial court's order was premised upon its decision to impute $120,000 in income to the former husband, we reverse the order on appeal and remand for further proceedings. On remand, the court should also revisit its rulings on the supplemental petition for downward modification, contempt, and attorney's fees as those rulings were based upon its decision to impute $120,000 in income to the former husband.

REVERSED and REMANDED.

ROBERTS, ROWE, and LONG, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

William S. Graessle and Jonathan W. Graessle of William S. Graessle, P.A., Jacksonville, for Appellant.

Stephanie A. Sussman of Bledsoe, Jacobson, Schmidt, Wright & Sussman, Jacksonville, for Appellee.