NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

MICHAEL MIRABELLA, Appellant, v. MARY F. MIRABELLA, Appellee.	)	Case No. 2D18-4219

Opinion filed December 18, 2019.

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Hillsborough County; Lisa D. Campbell, Judge.

N. Burton Williams, of N. Burton Williams, P.A., Lithia, for Appellant.

W. Dale Gabbard, of The Law Office of W. Dale Gabbard, Esquire, P.A., Tampa, for Appellee.

ATKINSON, Judge.

Michael Mirabella, the husband, appeals the circuit court's nonfinal order regarding temporary child support. He argues that the circuit court lacked jurisdiction to modify the wife's child support obligation and arrearages established in a final administrative support order. The husband also contends that the circuit court erred in

imputing income to him. We affirm the order with respect to the husband's imputation of income. However, we reverse and remand the order retroactively modifying the wife's child support obligation and arrearages.

The parties were married in New York on April 18, 1998. They have three minor children. The parties agreed for the husband to give up his employment of sixteen years in New York, cash in his retirement plan worth approximately $60,000, and move to Florida, where the wife accepted a job offer. Since the parties moved to Florida, the husband has remained unemployed and currently lives with the minor children. On June 2, 2016, the husband filed a petition for dissolution of marriage.

Due to the wife's alleged failure to pay adequate child support, the husband applied for food stamps. On December 9, 2016, the Florida Department of Revenue, Child Support Program (the Department) filed a notice of proceeding to establish an administrative support order. See § 409.2563(4), Fla. Stat. (2016). On February 28, 2017, a final administrative support order was entered establishing the wife's child support obligation. The Department found the wife's actual net monthly income was $4238.98, and the husband's imputed net monthly income was $1160.54. The Department found that the wife's monthly share of child support was $1598.96 and that the wife owed eleven months' worth of retroactive support for a total of $16,388.56 ($319.79 per month). The wife was ordered to pay $1918.75 per month in child support.

On September 21, 2017, the wife filed a motion to adjust temporary child support based on alleged inaccuracies in the final administrative support order and changes in temporary time-sharing and income. The wife asked the circuit court to retroactively modify the child support to the date of the filing of the petition for

dissolution of marriage, June 2, 2016. She claimed that the final administrative support order did not consider her correct income, her payments for the cost of health insurance, the husband's earning ability, and the time-sharing schedule being exercised by the parties. She also asserted that child support should be recalculated to include time-sharing overnights with the minor children.

On April 11, 2018, the wife filed a motion to modify the temporary emergency order regarding time-sharing. The order established that the wife would have time-sharing every other weekend from 6:00 p.m. on Friday until 6:00 p.m. on Tuesday beginning on July 14, 2017. In the motion, the wife asked the circuit court to enter an order granting equal time-sharing. On June 13, 2018, the circuit court entered an order on the wife's motion regarding temporary time-sharing and child support (the June Order) and made the following relevant findings:

> 3. The Court further finds that temporary child support shall be recalculated based upon the changes in the overnights time-sharing schedule. The parties shall each submit proposed temporary child support calculations using Wife's testimony at the final hearing regarding her income and her financial affidavit. . . . [The wife] offered proof that [the husband] was offered employment paying $15.00 per hour. [The husband] testified he declined the offer because the job would have required him to work the night shift and he could not do that as the only parent in the home with three minor children. For purposes of temporary child support, income is computed [sic] to Father at $15.00 per hour for a 40-hour work week.
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> 4. [The husband] offered proof that the current support arrearage under the Administrative Final Judgment is $20,452.93. Changes to support awarded in the administrative proceeding, if any changes are required by a change in overnights, shall have a prospective application only.
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> 5. [The wife] argues the Court has authority to retroactively change the administrative support order. [The husband] argues this Court lacks jurisdiction to retroactively

> change the administrative support award. The Court reserves ruling on this issue and shall address it at a subsequent hearing.

(Emphasis added.) The circuit court subsequently entered the following order on September 21, 2018 (the September Order):

> 1. The Court finds that temporary child support shall be calculated from the court's previous order of June 13, 2018.
> 2. That temporary support is owed by the Mother to the Father in the sum of $877.00 per month, and that said amount is to be calculated from the Final Hearing on April 20, 2017.
> 3. That the temporary child support shall be paid by Income Withholding Order and that counsel for the Mother will prepare an Amended Income Withholding Order to the Mother's employer.
> 4. That the Clerk of the Circuit Court will adjust the child support to reflect $877.00 per month beginning April 20, 2017, and that any arrearage beginning April 20, 2017 at the prior temporary child support amount shall be adjusted.

This appeal followed.

Section 409.2563 provides an administrative "procedure for establishing child support obligations . . . when there is no court order of support." § 409.2563(2)(a).

> A circuit court . . . may enter an order prospectively changing the support obligations established in an administrative support order, in which case the administrative support order is superseded and the court's order shall govern future proceedings in the case. Any unpaid support owed under the superseded administrative support order may not be retroactively modified by the circuit court, except as provided by s. 61.14(1)(a) . . . . In all cases in which an administrative support order is superseded, the court shall determine the amount of any unpaid support owed under the administrative support order and shall include the amount as arrearage in its superseding order.

§ 409.2563(10)(c) (emphasis added); see also Dep't of Revenue ex rel. Lienhart v. Secor, 146 So. 3d 1250, 1252 (Fla. 2d DCA 2014) ("It is well established that a circuit court lacks jurisdiction to vacate or retroactively affect an administrative child support order entered pursuant to section 409.2563 administrative proceedings. However, a circuit court does have the power to issue a superseding order changing support obligations prospectively." (citations omitted)). Section 61.14(1)(a), Florida Statutes (2016), provides in part the following:

> Except as otherwise provided in s. 61.30(11)(c), the court may modify an order of support, maintenance, or alimony by increasing or decreasing the support, maintenance, or alimony retroactively to the date of the filing of the action or supplemental action for modification as equity requires, giving due regard to the changed circumstances or the financial ability of the parties or the child.

(Emphasis added.)

Here, in the September Order, the circuit court erred by retroactively modifying the wife's child support payments from the $1918.75 per month set forth in the final administrative support order to $877.00 per month beginning April 20, 2017, which was the date of the final hearing in the dissolution proceeding. The circuit court also erred by retroactively modifying the wife's arrearages established under the final administrative support order beginning April 20, 2017.

Section 61.14(11) allows a trial court to modify a temporary support order without a showing of a substantial change in circumstances. See § 61.14(11)(a) ("A court may, upon good cause shown, and without a showing of a substantial change of circumstances, modify . . . a temporary support order before or upon entering a final order in a proceeding."). And that section allows such modification to be retroactive to

dates prior to the date of the request for modification. § 61.14(11)(b) (providing that the modification of a "temporary support order may be retroactive to the date of the initial entry of the temporary support order" or "the date of filing of the initial petition for dissolution of marriage" among other dates); see Haritos v. Haritos, 193 So. 3d 1050, 1053 (Fla. 2d DCA 2016) (noting that temporary support orders are modified pursuant to section 61.14(11)(a) while final support orders are modified pursuant to section 61.14(1)(a)).

However, an administrative support order is by definition a final order that may only be retroactively modified as provided by section 61.14(1)(a). See § 409.2563(1)(a) (defining an administrative support order as "a final order . . . establishing or modifying the obligation of a parent to contribute to the support and maintenance of his or her child or children"), (10)(c) ("Any unpaid support owed under the superseded administrative support order may not be retroactively modified by the circuit court, except as provided by s. 61.14(1)(a).").

Section 61.14(1)(a) does not allow retroactive modification of a support order prior to the date the modification was sought. § 61.14(1)(a) (allowing modification retroactive only "to the date of the filing of the action or supplemental action for modification"); see also Webber v. Webber, 56 So. 3d 822, 823 (Fla. 2d DCA 2011) (holding that section 61.14(1)(a) prohibited a trial court's postdissolution modification order from imposing "a retroactive child support obligation . . . prior to the filing of a petition seeking a modification"); Bachman v. McLinn, 197 So. 3d 123, 124 (Fla. 2d DCA 2016) (reversing a trial court's amended supplemental judgment that modified a child support obligation to a date prior to the filing of the supplemental petition for

modification); Ivanovich v. Valladarez, 190 So. 3d 1144, 1147 (Fla. 2d DCA 2016) (reversing a postdissolution order because the trial court erred in ordering child support to be retroactive to a date prior to the filing of the petition seeking a modification).

The circuit court was without authority to retroactively modify any unpaid support owed under the final administrative support order except as provided by section 61.14(1)(a). However, the circuit court made no reference in the September Order to section 61.14(1)(a), which allows for retroactive modification supported by a change in circumstances. The September Order did state that "child support shall be calculated from the" June Order, in which the circuit court had found that "child support shall be recalculated based upon the changes in the overnights time-sharing schedule." However, the circuit court also stated in the June Order that "[c]hanges to support awarded in the administrative proceeding, if any changes are required by a change in overnights, shall have a prospective application only." These statements suggest that the trial court may not have been relying on section 61.14(1)(a) to justify retroactive modification in the September Order. Even assuming there is a basis under section 61.14(1)(a) to retroactively modify the child support, the child support award should not have been retroactively modified earlier than September 21, 2017, the date of the wife's motion for modification.

Additionally, in the June Order, the circuit court imputed income to the husband but did not make specific findings regarding the wife's income. The circuit court also failed to make such findings in its subsequent September Order to justify its modification of the wife's support obligation. "It is well-settled that a trial court errs by failing to make findings of fact regarding the parties' incomes when determining child

support." Ivanovich, 190 So. 3d at 1147 (quoting Wilcox v. Munoz, 35 So. 3d 136, 139 (Fla. 2d DCA 2010)). "Specific 'findings regarding the parties' incomes are necessary for a determination of whether the support ordered departed from the guidelines and, if so, whether that departure was justified.' " Id. The lack of findings regarding the wife's income prevents this court from determining whether the circuit court erred in its modification of the wife's support obligation.

Thus, we reverse and remand for the circuit court to properly consider the statutory criteria under section 61.14(1)(a) to determine whether a retroactive modification of the wife's child support obligation is warranted and to make the requisite findings of fact. In the event the circuit court does not find that section 61.14(1)(a) supports retroactive modification, the circuit court may only enter an order prospectively changing the wife's support obligations established in the final administrative support order. See Dep't of Revenue ex rel. Chamberlain v. Manasala, 982 So. 2d 1257, 1259 (Fla. 1st DCA 2008). And in the event the circuit court finds that section 61.14(1)(a) supports retroactive modification, the circuit court must make the child support award retroactive to the date of the wife's motion for modification.

Next, in determining a parent's income for the purpose of determining a parent's child support obligation, "income can be imputed to an unemployed parent 'if such unemployment . . . is found by the court to be voluntary on that parent's part.' " Dep't of Revenue v. Llamas, 196 So. 3d 1267, 1268 (Fla. 1st DCA 2016) (quoting § 61.30(2)(b)). "In determining how much income to impute to a voluntarily unemployed parent, 'the employment potential and probable earnings level of the parent shall be determined based upon his or her recent work history, occupational qualifications, and

prevailing earnings level in the community if such information is available.' " Id. "A court may impute income to a party who has no income or is earning less than is available to him based upon a showing that the party has the capability to earn more by the use of his best efforts." Koeppel v. Holyszko, 643 So. 2d 72, 75 (Fla. 2d DCA 1994).

The issue of imputation of income is reviewed for an abuse of discretion. See Heard v. Perales, 247 So. 3d 533, 534 (Fla. 4th DCA 2018). A trial court's imputation of income will be affirmed if supported by competent, substantial evidence. Hudson-McCann v. McCann, 50 So. 3d 735, 737 (Fla. 5th DCA 2010). Here, the husband argues that the circuit court abused its discretion by imputing income to him and by failing to deduct anticipated child care expenses from his imputed income.

Prior to moving to Florida, the husband worked for the same employer for sixteen years and made $70,000 in the last year. The parties agreed that the husband would move to Florida, where the wife accepted a job offer and the husband was to be a stay-at-home father. Since the parties separated, the husband has remained unemployed. The husband testified that he applied for approximately thirty jobs in Florida. He received a job offer to work as a cable technician but did not take the job because the work hours were until 9:00 p.m. He also testified that he received a job offer to make $15 per hour as a forklift operator. He claimed that he turned down that job because the hours "were 3:00 to 11:00, but they really wanted [me] to work 3:00 [p.m.] to 3:00 [a.m.]."

Although the circuit court did not expressly state whether the husband was voluntarily or involuntarily unemployed, the circuit court found that the evidence

presented was sufficient to impute income to him. The court's finding implicitly encompasses a finding that the husband was voluntarily unemployed. Cf. Cash v. Cash, 122 So. 3d 430, 434 (Fla. 2d DCA 2013) (concluding that the trial court's finding that the evidence was insufficient to impute income "implicitly encompass[ed] a finding that the former wife was involuntarily unemployed"). This finding is supported by competent, substantial evidence.

The husband testified that he rejected two job offers. And there was evidence that the husband had the present ability to earn the $15 per hour imputed to him because he could have received that income had he accepted the offer to work as a forklift operator. Cf. Iglesias v. Iglesias, 711 So. 2d 1316, 1317 (Fla. 2d DCA 1998) (holding that the trial court erred in imputing income to the husband at $20 per hour for forty hours a week based on employment ads reflecting job offers for roofers as "[t]here is nothing to indicate that any of these jobs are available to the husband, and if so, at what rate of pay").

The husband also argues that the circuit court abused its discretion in failing to deduct anticipated child care expenses from his imputed income pursuant to section 61.30(7). However, contrary to the husband's assertion, child care expenses under section 61.30(7) are not deducted from a parent's income; they are deducted from a parent's child support obligation. Section 61.30(7) provides the following:

> Child care costs incurred due to employment, job search, or education calculated to result in employment or to enhance income of current employment of either parent shall be added to the basic obligation. After the child care costs are added, any moneys prepaid by a parent for child care costs for the child or children of this action shall be deducted from that parent's child support obligation for that child or those children.

The statute does not contemplate such deductions for anticipated child care expenses, only prepaid child care expenses, evidence of which the husband failed to introduce.

We affirm the order with respect to the husband's imputation of income. However, we reverse the order retroactively modifying the wife's child support obligation and arrearages and remand for reconsideration consistent with the foregoing.

Affirmed in part, reversed in part, and remanded.

SILBERMAN and LaROSE, JJ., Concur.