DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

JERRA N. GILLESPIE,

Appellant,

v.

JASON MINNING,

Appellee.

No. 2D20-3430

November 3, 2021

Appeal from the Circuit Court for Collier County; Elizabeth V. Krier, Judge.

Michael M. Shemkus of Long, Murphy & Zung, P.A., Naples, for Appellant.

No appearance for Appellee.

SLEET, Judge.

Jerra Gillespie, the Former Wife, challenges the trial court's order establishing child support, in which the court ordered the Former Wife to pay Jason Minning, the Former Husband, $702.90

per month. Because there was no competent substantial evidence to support the imputation of a $78,000 yearly salary to the Former Wife, we reverse the portion of the order relating to the Former Wife's imputed income. We find no merit in the Former Wife's remaining arguments on appeal and affirm the order in all other respects.

On June 22, 2018, the eight-year marriage between the Former Wife and the Former Husband was dissolved. In the final judgment, the trial court incorporated a marital settlement agreement in which the parties agreed to a parenting plan for their one minor child. They also agreed that neither party had an obligation to the other for child support. At the time, the Former Wife was teaching gifted children at a private school in Marco Island and was earning $78,000 a year.

In September 2018, the Former Wife filed a petition to permit relocation with her minor child to Missouri and to establish a long-distance parenting plan. In late May 2019, the Former Wife moved to Fairgrove, Missouri, and obtained a full-time teaching position earning $57,600 a year. On June 26, 2019, the trial court denied the Former Wife's petition for relocation.

Four months later, on October 10, 2019, the Former Wife filed a petition for modification of the parenting plan to establish timesharing between her and the Former Husband as she lived in Missouri and he lived in Florida. She did not seek child support in that petition. In the Former Husband's counterpetition, he sought the bulk of parenting time and the establishment of child support. On November 26, 2019, the Former Wife filed an amended petition for modification of the parenting plan but did not seek child support. Through court-ordered mediation, the parties came to an agreement as to the parenting schedule and the only unresolved issue that remained was the establishment of child support and other related expenses.

On June 10, 2020, the trial court conducted a hearing on the petitions. Initially, at the outset of the hearing, the Former Husband requested that the trial court impute a $57,600 annual income to the Former Wife based upon her full-time teaching job in Missouri. The trial court advised both parties that it had the authority to impute a $78,000 annual income to the Former Wife because she voluntarily terminated her employment at the private school in Marco Island and moved to Missouri. Later, at the close

of the evidence, the Former Husband requested the imputation of a $78,000 annual income.

At the hearing, the Former Wife conceded that the termination of her Florida teaching position and her move to Missouri were voluntary; however, she objected to the imputation of the Florida salary and argued that the Former Husband had the burden of proving the Former Wife's employment potential and probable earnings based upon her work history, occupational qualifications, and prevailing earnings level in her community in Fairgrove, Missouri. The trial court rejected the Former Wife's argument and imputed a $78,000 annual income to her based upon (1) the June 2019 order denying her petition to relocate which mentioned that she earned $78,000 at the private school in Marco Island[1] and (2) the Former Husband's testimony that she was making that salary before she moved to Missouri. This was error.

[1] The June 2019 order did not adjudicate the imputation of a salary to the Former Wife. Rather, the focus of the order was whether relocation was in the best interest of the child. It mentioned only once that the Former Wife "resigned her position as a teacher at a charter school in Marco Island where she earned as much as $78,000.00 annual salary."

"A trial court's imputation of income must be supported by competent, substantial evidence." *Tutt v. Hudson*, 299 So. 3d 568, 570 (Fla. 2d DCA 2020) (citing *Schlagel v. Schlagel*, 973 So. 2d 672, 675 (Fla. 2d DCA 2008)). The process of imputing income involves a two-step statutory analysis: "(1) the determination of whether the parent's underemployment was voluntary, and (2) if so, the calculation of imputed income." *Cash v. Cash*, 122 So. 3d 430, 434 (Fla. 2d DCA 2013) (quoting *Bator v. Osborne*, 983 So. 2d 1198, 1200 (Fla. 2d DCA 2008)); *see also* § 61.30(2)(b), Fla. Stat. (2020). Section 61.30(2)(b) provides that "[i]n the event of such voluntary unemployment or underemployment, 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." (Emphasis added.) The spouse asserting that income should be imputed to the underemployed spouse bears the burden of proof. *See Cash*, 122 So. 3d at 434 ("The former husband had the burden of proof as the party asserting that the former wife was voluntarily unemployed and that income should be imputed to her.").

Here, the Former Wife moved from Florida where her annual salary was $78,000 to Missouri where she made approximately $57,600 annually. Because she concedes that her present underemployment is voluntary, our focus shifts to the second step and determining whether the trial court's calculation of the Former Wife's imputed income complied with section 61.30(2)(b). We conclude that it did not.

While a spouse's work history is important and should be considered when determining an amount to impute, because the Former Wife relocated from Florida to Missouri the relevant job market was Fairgrove, Missouri, and the trial court's inquiry should have focused on that community. *See Williams v. Gonzalez*, 294 So. 3d 941, 944 (Fla. 4th DCA 2020) (reversing the imputation of income that was based on prior Florida wages rather than North Carolina wages, where the spouse was living and working at the time of trial); *Rabbath v. Farid*, 4 So. 3d 778, 784 (Fla. 1st DCA 2009) (reversing the imputation of income based on a past, foreign job because "[n]o evidence was presented regarding the *current, prevailing earnings level* and the potential source(s) or amount of income *in the pertinent community*" (emphasis added)).

At the time of the hearing, the Former Wife had lived and taught in school in Missouri for over a year. The only evidence of earning potential introduced by the Former Husband was his testimony that the Former Wife earned $78,000 a year at the private school in Marco Island until May 2019. He did not submit any other admissible evidence of her earning potential, probable earnings, and prevailing earnings that established she could earn $78,000 in the Fairgrove community.

The Former Wife testified that her position at the private school in Marco Island was immediately filled after her departure and that she had no intentions of moving back to Florida. When her annual contract for the full-time teaching position in Missouri had not been renewed, she searched online for jobs in local counties and called local school superintendents to find a comparable position. Ultimately, she was able to find a permanent substitute teacher position at a much lower salary.

We conclude that there was no competent substantial evidence to support the trial court's imputation of the $78,000 annual salary to the Former Wife. It was required to make statutory findings in compliance with section 61.30(2)(b) and to place the burden on the

Former Husband to prove that the Former Wife could earn $78,000 in Fairgrove, Missouri. However, the trial court did not require the Former Husband to produce any evidence other than his bare assertion that she used to make that salary in Florida more than a year prior to the hearing. The trial court had no legal basis to rely solely upon a passing mention of the Former Wife's salary in the June 2019 order denying the Former Wife's petition for relocation.

Accordingly, we reverse the order establishing child support as it relates to the amount of income imputed to the Former Wife and the amount of the Former Wife's child support obligation calculated pursuant to the imputed income amount. On remand, the trial court is directed to hold an evidentiary hearing to determine the Former Wife's earning potential in Fairgrove, Missouri, establish a level of imputed income supported by competent substantial evidence, and adjust the child support award as necessary. *See Thompson v. Malicki*, 169 So. 3d 271, 273 (Fla. 2d DCA 2015). We affirm in all other respects.

Affirmed in part, reversed in part, and remanded.

KELLY and LABRIT, JJ., Concur.

Opinion subject to revision prior to official publication.