

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

TARA F. ALLISON,

Appellant,

v.

STUART F. ALLISON,

Appellee.

No. 2D21-3677

June 21, 2023

Appeal from the Circuit Court for Hillsborough County; G. Gregory Green, Judge.

Samuel Alexander of Alexander Appellate Law, P.A., DeLand, for Appellant.

Blair H. Chan, III, Tampa, for Appellee.

KHOUZAM, Judge.

The Former Wife, Tara F. Allison, timely appeals an order denying her exceptions to a general magistrate's report and recommendation in this postdissolution modification proceeding against the Former Husband, Stuart F. Allison. The order adopts the magistrate's recommendation to impute income to the Former Wife for purposes of child support on the basis that she is voluntarily underemployed.

On appeal, the Former Wife frames four issues, all of which challenge the imputation of income in different ways. We agree with the claims framed in Issues II and III in the briefing to the extent that the burden of proof was effectively placed upon the Former Wife below, instead of on the Former Husband as required by law. We accordingly reverse on this basis and reject without comment the remaining claims.

BACKGROUND

After marrying in 2003, the parties divorced in 2014. The final judgment of dissolution adopted the parties' marital settlement agreement and parenting plan, under which the Former Wife had majority timesharing and home schooled the parties' two minor children.

In 2019, the Former Husband petitioned to modify timesharing and child support. He sought equal timesharing and imputation of income to the Former Wife, asserting that she was voluntarily underemployed and that modification of timesharing would allow her to work more at her current position, thereby generating more income. The Former Wife counterpetitioned, opposing the requests and seeking her own relief.

Following hearings in 2020, a magistrate recommended modifying timesharing to be more even, ending the Former Wife's home-schooling of the children, and imputing income to the Former Wife. After the Former Wife filed exceptions to the recommendation, the trial court largely adopted the report but granted her exception "on the limited issue of Former Wife's imputed income." Concluding that the magistrate's findings were insufficient to support the imputation of income, the trial court remanded "to readdress this finding of fact and conclusion of law."

In opening statement at the first hearing before the magistrate on remand, the Former Wife's counsel asserted her position that the Former Husband could not meet his burden to impute income to the Former

Wife. Her counsel then asked who should proceed with evidence first, stating that the Former Wife had no position on the order of presentation.

The Former Husband's counsel asserted that the Former Wife should proceed first because "this is their exception. They're asking the court to, you know, change the prior ruling, so *I think it is their burden of proof.*" The magistrate responded "*Okay*" and directed the Former Wife to proceed first with questioning.

Evidence Below

The Former Wife testified that she works as a flight attendant, as she had throughout the marriage. Historically, she had worked only about fifteen to twenty-five hours per month, due not only to her majority timesharing and home-schooling the children but also to several atypical restrictions on her work scheduling. But she testified that even under the new, more even timesharing schedule and scheduling limitations, she could not regularly work more without missing overnights with the children.

Under her employer's procedures, the Former Wife makes bids for scheduling slots a month in advance. The bids are thereafter awarded by her employer in its discretion based on various factors including seniority, supply, and demand. Scheduling is further complicated by a twelve-hour period of ineligibility following each flight assignment. When the Former Wife is not awarded her requested timeslots, she trades shifts with coworkers as necessary to maintain her timesharing schedule.

For nearly all of her two-decade career as a flight attendant, including the present, the Former Wife has been based out of the same New Jersey airport. That airport is a busy international hub with many flight assignments, granting her the best flexibility in scheduling to allow

her to meet her irregular timesharing obligations. But because she is only paid for hours worked on a scheduled leg, each paid shift is surrounded by two half-day unpaid commutes to and from New Jersey.

Acknowledging that this commute materially limits her working hours and shift availability, the Former Wife discussed the feasibility of seeking a transfer to a base in Florida. At the time, all bases had been closed to transfers for the entire year due to various complications arising from the COVID-19 pandemic. Further, the Former Wife testified that even had transfers been available, there had not been any openings for her particular position at any bases in Florida for over a year. Moreover, despite her relative seniority, the Florida bases had significantly more senior flight attendants whom she—if transferred—would be bidding against for scheduling slots, thereby "risk[ing] losing control of [her] schedule."

Ultimately, the Former Wife had not requested a transfer to a Florida base and did not plan to do so. She testified that, given these obstacles to transfer and the unlikelihood that scheduling would be any better even if transferred, her best opportunity to meet the timesharing schedule was to remain with the larger, busier New Jersey hub.

The Former Husband did not dispute any of this testimony about transferring bases or offer contrary evidence. Instead, he expressly disclaimed knowledge of any actions she had taken regarding a transfer.

The Former Wife also testified that she had entered into a "line share" program that limited her monthly work hours. She explained that a "furlough mitigation partnership" had been "offered during the pandemic as the alternative to furlough." Under that program, rather than being suspended without pay, employees could elect to split their hours with another employee and thereby continue to earn some income.

The Former Wife had joined the line share program because "it was the only choice other than furlough at the time." That program was canceled but later reinstated as an annual program "in anticipation of another furlough" when congressional relief to airlines was scheduled to expire. She had entered into the new program because it maximized her scheduling flexibility, thereby allowing her to meet the timesharing schedule. She testified that absent the program, her schedule would preclude her from exercising timesharing under the existing plan.

The annual line share program lasts for twelve months. The only relevant grounds identified for exiting it are receiving a "hardship release" or a transfer to another base. The record does not reflect what constitutes a hardship or how an employee can obtain such a release.¹

Again, the Former Husband did not refute any of this testimony about the line share program. Instead, he expressly agreed that the program allows more flexibility in scheduling, among other benefits.

The Former Wife also testified that she lives with her mother, who has helped with childcare in the past when she and the Former Husband were unavailable. But she testified that the maternal grandmother had developed a blood disorder requiring intermittent hospitalization and care that would interfere with her availability to regularly help take care of the parties' children, particularly given the Former Wife's commute.

Once again, the Former Husband did not dispute this testimony or offer any contrary evidence. He said that the grandmother had helped with exchanges of the children and had watched them in the past, but he did not provide any quantification or context.

¹ A document addressing the line share program was entered into evidence, but it was not read into the record or otherwise included in the record on appeal.

Ruling

The magistrate recommended imputing \$4,631 in monthly income to the Former Wife, representing a full-time schedule at her current position and pay rate. It found that she had "voluntarily . . . cut her work hours in half" by entering the line share program. It found the Former Wife had "provided no evidence" that she had attempted to find alternative employment. The magistrate found: "There was no evidence presented that she desires to work over one 5-hour shift per week."

Although the magistrate acknowledged the Former Wife's testimony that "she cannot be transferred to" a Florida base, it rejected the testimony on the express basis that "there was no evidence presented that she has even attempted such a transfer." It found that she "showed no effort whatsoever to be based other than in New Jersey."

In so finding, the magistrate did not address the Former Wife's un rebutted testimony about the circumstances precluding her from transferring, or the worse scheduling circumstances if she nonetheless somehow accomplished such a transfer. The magistrate also did not address any of the Former Wife's un rebutted testimony about the circumstances under which she entered the line sharing program, or its fixed twelve-month duration absent a transfer or hardship release.

With respect to the maternal grandmother, the magistrate found that the Former Wife had provided "no reason why she cannot leave her children with her mother (with whom she resides) to work more hours." It found the Former Wife "voluntarily elected NOT to . . . have her mother care for the children, . . . which would allow her to work more hours."

Despite acknowledging the maternal grandmother's health issues, the magistrate found the Former Wife gave "no indication that her mother is not able to care for the children while the Former Wife worked."

Rather, the magistrate credited the Former Husband's testimony that "he has picked up the children from the Former Wife's mother when the Former Wife was not present" as establishing that the grandmother "is capable of caring for the children in the Former Wife's absence."

After the Former Wife's exceptions to these recommendations were denied, the trial court adopted the magistrate's new report and recommendation in full. This appeal followed.

ANALYSIS

Viewed in context, the magistrate's findings and analysis make clear that the burden was placed upon the Former Wife below to *avoid* imputation of income. Indeed, that is precisely what the Former Husband's counsel had proposed. Because Florida law places the burden of proof squarely upon the party requesting imputation, we reverse this determination made under an incorrect legal standard.

"This court reviews de novo the trial court's review of a magistrate's report and recommendations." *P.D.V-G. v. B.A.V-G.*, 320 So. 3d 885, 888 (Fla. 2d DCA 2021) (citing *In re Drummond*, 69 So. 3d 1054, 1057 (Fla. 2d DCA 2011)). "[T]he trial court's review of the general magistrate's recommendations is limited to determining whether the general magistrate's findings of fact are supported by competent substantial evidence, and whether the general magistrate either made clearly erroneous legal conclusions or misconceived the legal effect of the evidence." *Herce v. Maines*, 317 So. 3d 1211, 1215 (Fla. 2d DCA 2021) (alteration in original) (quoting *S.V. v. Dep't of Child. & Fams.*, 178 So. 3d 421, 423 (Fla. 3d DCA 2015)).

Section 61.30, Florida Statutes (2021), governs determining income for purposes of child support. Under subsection (2)(b), "[i]mputing income is a two-step 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)).

Florida law is well settled that the burden of proof rests with the party asserting underemployment and seeking imputation. *Id.* (citing *Torres v. Torres*, 98 So. 3d 1171, 1172 (Fla. 2d DCA 2011)). "The decision to impute income and the determination of the amount of income to be imputed must be based on competent, substantial evidence presented at an evidentiary hearing." *Id.* (quoting *Roth v. Roth*, 973 So. 2d 580, 590 (Fla. 2d DCA 2008)).

Employment Schedule

In accepting the magistrate's findings, the court effectively required the Former Wife to prove that she had tried to transfer to a Florida base but failed. Over and over again, the recommended order points to evidence the Former Wife failed to offer, rather than any relevant and persuasive evidence the Former Husband did adduce. But given the Former Wife's un rebutted testimony that a base transfer was unavailable—making any such attempt futile—the court erred by imputing income on the express basis that she failed to prove that she had sought such a transfer.

There was no evidence presented by either party that the Former Wife could have transferred, or how such a transfer might be achieved. To the contrary, the Former Wife was unequivocal that no such transfers were available, and the Former Husband simply testified he was not aware of any actions she had taken with respect to seeking a transfer.

Nonetheless, the court accepted the magistrate's finding rejecting the Former Wife's testimony that "she cannot be transferred to" a Florida

base because "there was no evidence presented that she has even attempted such a transfer" and because the Former Wife "showed no effort whatsoever to be based other than in New Jersey." The order nowhere reconciles these findings with the Former Wife's un rebutted testimony that she did in fact investigate such a transfer but learned none was available and, further, that in context transferring would not fix the scheduling problems at issue. It also fails to address the Former Wife's un rebutted testimony about the fixed duration of the line share program or the dilemma she faced in entering it.

It is clear that the magistrate did not give much weight to the Former Wife's testimony about the restrictions on her schedule or the inability to resolve them by transferring to a Florida base. But even so, the Former Husband offered no opposing evidence to rebut the Former Wife's considerable substantive testimony in this regard. To the extent the trial court accepted the finding that the Former Wife was voluntarily underemployed because she failed to prove that she could not relocate or pick up additional shifts, the court erred. *See Cash*, 122 So. 3d at 434.

Childcare from Maternal Grandmother

In addition, the court erred in adopting the magistrate's finding of underemployment on the basis that the maternal grandmother would be able to take care of the children if the Former Wife worked full time. Similar to the prior issue, the court improperly placed the burden on the Former Wife to prove that the maternal grandmother was *not* available.

In finding that the maternal grandmother "is capable of caring for the children in the Former Wife's absence," the magistrate expressly reasoned that the Former Wife had provided "no reason why she cannot leave her children with her mother" and gave "no indication that her mother is not able to care for the children while the Former Wife worked."

The only evidentiary basis identified for the finding was the Former Husband's testimony that "he has picked up the children from the Former Wife's mother when the Former Wife was not present."

But the mere fact that the maternal grandmother has helped in limited, unquantified ways in the past is not competent, substantial evidence to support the conclusion that she would regularly be available to care for the children if the Former Wife began working full time. At most, the evidence supported that she had helped from time to time, without any quantification or material context.

For whatever reason, at the hearings below the Former Husband did not materially explore the issue of the grandmother's availability. But because the Former Husband bore the burden to establish underemployment, the trial court reversibly erred to the extent it accepted the magistrate's imputation of income on the basis that the Former Wife failed to prove the negative of her mother's unavailability.

Accordingly, we reverse the order denying the Former Wife's exceptions and remand for further proceedings consistent with this opinion. Having already held two full proceedings on the Former Husband's request to impute income, on remand the court shall accept the Former Wife's un rebutted testimony on these issues and shall consider the admitted evidence under the appropriate burden of proof.

Reversed and remanded.

KELLY and SMITH, JJ., Concur.

Opinion subject to revision prior to official publication.