Third District Court of Appeal
State of Florida

Opinion filed August 5, 2020.
Not final until disposition of timely filed motion for rehearing.

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No. 3D18-1546
Lower Tribunal No. 15-60-M

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Carole Lynn Waldera,
Appellant,

vs.

Christopher B. Waldera,
Appellee.

An Appeal from the Circuit Court for Monroe County, Mark H. Jones, Judge.

Paul Morris; Stok Kon + Braverman and Alan Jay Braverman (Fort Lauderdale), for appellant.

Birnbaum, Lippman & Gregoire, PLLC and Nancy W. Gregoire (Fort Lauderdale), for appellee.

Before SCALES, HENDON and LOBREE, JJ.

LOBREE, J.

Carole Lynn Waldera (the "former wife") appeals from a final judgment of dissolution of marriage from Christopher Waldera (the "former husband"). She

challenges the trial court's calculation of the former husband's income, as well as her imputed income, as unsupported by competent, substantial evidence. We agree and reverse.[1]

Facts and Procedural Background

The parties married in 1999. At the time, the former wife had a bachelor's degree in accounting and worked full time as a bookkeeper at the former husband's law firm, where he worked as an attorney. Three years later, as a result of their only child's birth, they agreed that she would stop full time work and focus on raising and homeschooling the child, which she has done to this day. She continued to work part time at the law firm until 2011. Since then, she has only worked as bookkeeper sporadically for some private clients a few hours per week. The former husband has continued to work as an attorney to this day. In 2015, however, the marriage became irretrievably broken and dissolution proceedings were initiated below.

At trial, in 2017, the court was presented with the former husband and wife's testimony, along with their respective expert witnesses, financial affidavits, and other supporting documentation regarding their assets and liabilities. The trial court

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[1] Because we find error in these income determinations, we decline to reach the remaining issues raised on appeal. See Segall v. Segall, 708 So. 2d 983, 989 (Fla. 4th DCA 1998) ("[W]here, as here, the results of an appeal materially change the parties' ability to pay, the issue of attorney's fees must be revisited upon remand."); Freilich v. Freilich, 897 So. 2d 537, 544 (Fla. 5th DCA 2005) ("In the event a different amount of . . . income is ordered by the court, reconsideration of the amount awarded for alimony and child support may be required.").

asked the parties to submit post trial memoranda on key legal issues and relied on them in reaching its conclusions. A few months later, in early 2018, the lower court rendered its judgment, granting only $1,083 per month in durational alimony to the former wife until their child came of age, as well as denying her request for attorney's fees.

In calculating the alimony and child support awards, the trial court relied on its determination of the former husband's income, as well on its imputation of income to the former wife. As to the former husband's income, the order provides: "The Court accepts the Husband's analysis and numbers as to his income." The court found "that the Husband's net income is $4,592.46 per month for the complete year of 2016 as pursuant to analysis by . . . the Husband's forensic accountant."

As to the former wife's income, the order observed: "The Court finds that the Wife's gross income is $3,250," explained as "20 hours imputed income at $25 per hour times 4.333 weeks per month equaling $2,166 per month in imputed income, plus $1,083 per month in durational alimony." It concluded that her "net income is thus $2,786.54 per month (net) inclusive of the alimony set forth herein." Separately, the court found that, given "her abilities and the market, and her available time, that 20 hours a week at a rate of $25.00 an hour is proper to impute that amount of income," the imputed income being "$2,166 per month (20 times $25 dollars per hour times 4.333 weeks per month)." The former wife unsuccessfully

moved for rehearing, arguing in pertinent part that she was entitled to a higher amount of alimony, since the evidence at trial did not support the court's finding of such a low income for the former husband or its imputation of income to her.

Standards of Review

"A trial court's determination of a party's income for purposes of establishing support obligations must be supported by competent substantial evidence." Sallaberry v. Sallaberry, 27 So. 3d 234, 236 (Fla. 4th DCA 2010). "However, a trial court's legal conclusions . . . are reviewed de novo for clear error." Valladares v. Junco-Valladares, 30 So. 3d 519, 523 (Fla. 3d DCA 2010). Additionally, whereas the trial court's decision to impute income is reviewed for abuse of discretion, Cura v. Cura, 45 Fla. L. Weekly D47, 2020 WL 20625, at *2 (Fla. 3d DCA Jan. 2, 2020), "[t]he framework the court uses to determine whether imputation is necessary and, if so, how to calculate an amount is an issue of law we review de novo." Lafferty v. Lafferty, 134 So.3d 1142, 1144 (Fla. 2d DCA 2014).

The Former Husband's Income

The former wife primarily argues that the trial court erred in finding the former husband's current net income to be only $4,592.46 per month, since it reached that conclusion by relying *solely* on his income for the year 2016. In determining alimony, the lower court was required to make findings on "[a]ll sources of income available to either party." § 61.08(2)(i), Fla. Stat. (2016). "Income" is

defined as “any form of payment to an individual, regardless of source,” including “wages, salary, commissions and bonuses,” and “compensation as an independent contractor.” § 61.046(8), Fla. Stat. (2016). Courts must consider “all relevant economic factors,” including “[a]ll sources of income,” “‘net worth, past earnings, and the value of the parties’ capital assets.’” Vega v. Vega, 877 So. 2d 882, 883 (Fla. 3d DCA 2004).

Here, the trial court was presented with unrebutted documentary evidence and witness testimony of the former husband’s income from 2009 through 2016. At trial, the Husband’s income tax returns for 2009-16 showed net annual incomes ranging from a lowest of $97,021 (2010) to a highest of $227,748 (2016). The net monthly income for these years appears to range between $9,426 and $18,979. The trial court, however, seized only upon the year 2016, during which the former husband’s gross income was $268,755. Reasoning that almost $200,000 of that income came from awards in cases arising from an oil spill and were, thereby, non-recurring and to be excluded from consideration, it “accept[ed] the husband’s analysis and numbers” as shown in his exhibit summary, which alleged an annual net income of $55,109.46 (and a monthly net income of $4,595.46). The court’s sole reliance on the year 2016, however, was error.

“The Florida Supreme Court and other district courts have suggested that a presumption arises from a spouse’s historical earnings that supports a finding the

spouse can continue to earn the same amount, absent evidence to the contrary." Mata v. Mata, 185 So. 3d 1271, 1272-3 (Fla. 3d DCA 2016). See Garfield v. Garfield, 58 So. 2d 166, 167-68 (Fla. 1952) (observing that historical ability to earn $350 net per week, "will be presumed to continue unless the contrary is shown," and holding that, if appellant's "ability to earn that amount of money had changed . . . he was called upon to make an explanation or an answer" and "failed to do so"); Lascaibar v. Lascaibar, 658 So. 2d 170, 171 (Fla. 3d DCA 1995) (holding that "the *amount* attributed [to the former husband], $50,000.00 per annum, was far less than the sum indisputably shown to have been earned by the husband during the course of the marriage").

By the trial court's and the parties' own admission, the former husband's income in 2016 was anomalous. The only explanation for the change or purported loss of ability to continue earning historical amounts of annual income was that a significant portion of 2016 income came from a non-recurring source. Even if this was the proper characterization of such income, it failed to rebut the presumption of continued ability to earn. Compare Mata v. Mata, 185 So. 3d 1271, 1272-73 (Fla. 3d DCA 2016), with LaSala v. LaSala, 806 So. 2d 602, 604 (Fla. 4th DCA 2002). If a court's determination of income is erroneous where "there was no evidence that the husband's income in 1997, which was substantially greater than his average income for the preceding three years, would continue," Lauro v. Lauro, 757 So. 2d

523, 526 (Fla. 4th DCA 2000), a determination is conversely erroneous where, as here, there is no evidence that the former husband's most recent and anomalous income either would continue, represented his current reality, or sufficiently rebutted the presumption of his continued ability to earn what he had historically earned.

The former wife contends that the trial court erred by failing to *average* the income from immediately preceding years. "Averaging income for purposes of assessing alimony and child support has been employed in determining the awards." Peetluk v. Huffstetler, 840 So. 2d 1175, 1177 (Fla. 5th DCA 2003) (reversing average income only because it failed to "realistically represent [former husband's] annual income"). Averaging can be required in some circumstances. See Dep't of Revenue ex rel. Shirer v. Shirer, 197 So. 3d 1260, 1264 (Fla. 2d DCA 2016) (reversing determination that relied solely on three quarters from one year, whereas "when we average the Father's prior five years of earnings . . . we calculate that his average monthly gross income is [different]."); Shudlick v. Shudlick, 618 So. 2d 740, 741 (Fla. 4th DCA 1993) (affirming award because "there is evidence to support . . . that the husband's average annual income is at least $90,000 . . . [and] [t]his evidence appears to be ignored by the former husband in his contentions about support and alimony."); Lanzetta v. Lanzetta, 563 So. 2d 101, 102 (Fla. 3d DCA 1990) (reversing alimony award allocating only $18,000 per year to wife where husband's average income in the prior three years had been $196,000).

However, because "[p]ast average income, unless it reflects current reality, simply is meaningless in determining a present ability to pay," Woodard v. Woodard, 634 So. 2d 782, 783 (Fla. 5th DCA 1994), it cannot be said that, here, the trial court could *only* have meaningfully considered past earnings by averaging them. We, therefore, decline to express any view of whether the trial court should have averaged the former husband's past earnings. Instead, we simply hold that, since the former husband's historical annual income gave rise to the presumption that he could continue to earn an amount higher than what was ultimately determined by the court, and no explanation or competent, substantial evidence sufficiently rebutted that inference, the trial court necessarily abused its discretion in making a contrary finding. On remand, it is within the lower court's discretion to give the former husband's past earnings the proper consideration they deserve.

The Former Wife's Imputed Income

The former wife primarily argues that the trial court erred by choosing to impute her the specific amount of a net $2,786.54 monthly income. We agree.

In order to properly impute income, trial courts "must find that the parent owing a duty of support has the actual ability to earn more than he or she is currently earning, and that he or she is deliberately refusing to work at that higher capacity to avoid support obligations." Seilkop v. Seilkop, 575 So. 2d 269, 270 (Fla. 3d DCA 1991). The order imputing income because of the former wife's "abilities and the

market, and her available time" failed to specifically find that she was refusing—or failing to make best efforts to—earn more. However, the trial court's oral findings were that she was voluntarily underemployed, so we need to determine whether the record supports this. See Meighen v. Meighen, 813 So. 2d 173, 175-76 (Fla. 2d DCA 2002). Such a finding could only be supported by competent, substantial evidence concerning the former wife's employment potential and probable earnings, based on her work history, qualifications, and currently prevailing wages. Schram v. Schram, 932 So. 2d 245, 250 (Fla. 4th DCA 2005).

The former wife produced evidence that her average net income was $213 per month as a sporadically self-employed bookkeeper. Her financial affidavit reported monthly expenses upwards of approximately $9,000.00. She testified that she homeschooled the child full time, and that her available hours for work that was not performed remotely, or part time were very limited. She also testified that the child's homeschooling was successful and needed to continue, as had been the agreement of the parties years before. Among other things, she testified that she spent seven to ten hours per day homeschooling the child, which included sports and extra-curricular activities.

The former husband's expert forensic accountant proposed an imputed gross income of $3,250 per month, for a net of $2,786.54. This was based on his opinion that the range of pay for services provided by bookkeepers in Marathon and the

Middle Keys was between $17.50 and $30 per hour, and that such services were "very much in demand." He further testified that the former wife was "able to earn . . . between [$]45,000 to [$]52,000 annually, and that would contemplate an hourly rate of [$]22.50 to $26 per hour," based on her reported eighteen years of experience in bookkeeping. The former husband testified that no need existed for the continued homeschooling of the child, which he characterized as "unschooling," and that, even if continued, the former wife did not require full time dedication to it and had at least twenty to thirty hours per week available for work.

On cross-examination, however, the former husband's expert admitted that he never met with the former wife nor evaluated her skills; that he did not even know her age; that his opinion on the availability of work was based on the assumption that the former wife's skills were proficient; that he did not know the precise work history of the former wife, including how long ago she had stopped working for the former husband; that he did not know what her income had ever been while working as a bookkeeper; that he only knew of three businesses, including his own, that were hiring bookkeepers, but could not speculate on who else might be hiring or would recruit the former wife; that he did not rely on any methodology to frame his opinion other than his own office's internal standards in determining employee compensation; that he was not a vocational expert; and that he did not know whether the former wife homeschooled the child on a full time basis, or what hours she had

available for work. The former husband, moreover, did not dispute that the parties had an agreement early on to homeschool the child and require the former wife to work less or cease working altogether. He did, however, characterize her decision to continue homeschooling after the marriage soured as "unilateral."

The record makes clear that the former wife's testimony regarding her time available for work and the need to homeschool the child full time were unrebutted. While the hourly pay rate imputed was not unprecedented in the former wife's work history for the past five years, the amount of available time and ultimate month net income clearly were. See § 61.30(2)(b), Fla. Stat. (2016) ("[I]ncome may not be imputed based upon . . . records that are more than 5 years old."); Brennan v. Brennan, 184 So. 3d 583, 590 (Fla. 4th DCA 2016) ("However, it is error for the trial court to impute income to a spouse in an amount higher than the spouse has ever historically earned, absent special circumstances."); Bacon v. Bacon, 819 So. 2d 950, 953 (Fla. 4 DCA 2002) (reversing imputation of income in part because the court merely "assumed that [the wife] must and could become employed immediately."); Morin v. Morin, 923 So. 2d 582, 583-84 (Fla. 5th DCA 2006) (noting that, "it was error for the trial court to impute income to the former husband at a level greater than which the former husband ever earned during the marriage, absent special circumstances, none of which were shown here.").

Moreover, the former husband's expert did not sufficiently discharge his burden of proving that the former wife had the ability to earn more, let alone the specific income imputed. Cf. Andrews v. Andrews, 867 So. 2d 476, 478 (Fla. 5th DCA 2004) ("David failed to establish by testimony or evidence a range of salaries being paid for current and available employment opportunities in the Jacksonville area for which Rebecca was qualified."), and Hinton v. Smith, 725 So. 2d 1154, 1157 (Fla. 2d DCA 1998) (observing that, "[n]either does expert testimony establishing the prevailing earnings level for holders of a particular degree constitute evidence sufficient to impute that amount of income," finding that "testimony by the former husband's expert that the former wife should be able to earn $25 to $150 per hour was insufficient to establish the actual ability of the former wife to find employment earning that amount."), with Middleton v. Middleton, 79 So. 3d 836, 837 (Fla. 5th DCA 2012) (reversing on different grounds, but noting that, "[t]he husband's expert, Claire Hibbard, identified current open job positions with several companies," and "when speaking to prospective employers, she outlined the wife's last date of work, her education, her work history, and her physical restrictions."), and Berger v. Berger, 201 So. 3d 819, 820 (Fla. 4th DCA 2016) (noting that, "[t]he husband's vocational expert interviewed the wife to determine her employment possibilities," and only "[a]fter reviewing current area job postings, the husband's expert concluded that the wife could earn $8 to $10 per hour ($16,640 to $20,800

per year) in retail sales or clerical support positions."), and Marshall-Beasley v. Beasly, 77 So. 3d 751, 756 (Fla. 4th DCA 2011) (affirming imputation of income only because husband's vocational expert testified as to wife's qualifications, median income for the jobs she qualified, and "local advertisements for employment for which [she] qualified.").

The finding that the former wife had twenty hours of available time to work per week rested on nothing but the trial judge's suspicion that the child's homeschooling was unnecessary. The former husband opposed the child's testimony being taken, convincing the court below that it was cumulative and redundant. In agreeing with the former husband, the trial judge tellingly commented that it did not doubt what the former wife did, or the time she spent, where it concerned the child's homeschooling, but questioned instead its necessity. However, "[g]reat deference should be accorded the joint decision of the parties that the wife should stay home to care for the children," especially where "a course of conduct" has taken place and "notwithstanding any personal feelings the trial court or this court may have concerning the ultimate wisdom of that decision." Zeigler v. Zeigler, 635 So. 2d 50, 54 (Fla. 1st DCA 1994).

The trial court's finding that homeschooling was unnecessary and that, accordingly, the former wife had at least twenty hours of available time to work per week was unsupported by competent, substantial evidence. Unrebutted evidence

was presented that an agreement had existed between the parties to homeschool the child full time, a course of conduct of over a decade transpired, and the only relevant testimony on the need and adequacy of the conduct admittedly came from the former wife. See Meighen v. Meighen, 813 So. 2d 173, 176 (Fla. 2d DCA 2002) (holding that, "[g]iven the wife's unrefuted testimony that it is necessary for her to stay at home and the parties' agreement that she would be a stay-at-home mother," the lower court "had no factual basis from which to conclude anything except that it was necessary for the wife to stay at home at last until the youngest child reaches majority."); Bender v. Bender, 363 So. 2d 844, 845-46 (Fla. 1st DCA 1978) (observing that, "[i]t was decided by both parties, in better times, that the wife should be a full time mother," and that "[b]y the time the youngest child reaches an age at which the respondent wife might attempt to return to the job market, be it secretarial or as an actress, she will be close to fifty years old, a time in one's life when it is difficult to enter any job market," such that "[i]t is too much to expect her to be a full time mother and at the same time keep her secretarial and acting skills, whatever they may be, competitive with others."); Young v. Taubman, 855 So. 2d 184, 186 (Fla. 4th DCA 2003) (reversing lower court's failure to impute income to former wife only because, "the trial court never made any finding that it was necessary for the former wife to stay home with the child," and alternatively holding that, "even if the court had determined that the former wife could not work full-time due to the

child's modeling/acting career, certainly she could work more . . . since the record established that the child was attending school.").

Conclusion

Because the trial court abused its discretion in miscalculating the former husband's income and imputing the former wife's income, we vacate the judgment and remand for a new determination of the husband's income and further proceedings in conformity with this opinion. On remand, the lower court may receive new evidence on the husband's income, as well as on the former wife's imputed income. Begisu v. Bengisu, 12 So. 3d 283, 286 (Fla. 4th DCA 2009) ("Whether additional . . . evidence is required . . . we leave for the trial court to determine."); McDuffie, 155 So. 3d at 1237 ("[T]he circuit court may take further evidence on the amount of income to impute.").[2]

Reversed and remanded with instructions.

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[2] As observed in Dep't of Revenue ex rel. Shirer v. Shirer, 197 So. 3d 1260, 1265 (Fla. 2d DCA 2016) (reversing imputation of income), on remand, "the trial court should be mindful that the statutory scheme . . . allows the trial court to decline to impute income if a parent's history of unemployment or underemployment is the result of 'physical or mental incapacity or other circumstances over which the parent has no control.'" We also note that, here, "[t]his may be such a case, although we express no opinion on the issue." Id.