

Third District Court of Appeal

State of Florida

Opinion filed July 29, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1947
Lower Tribunal No. 06-3500

Franklin D. Gore,
Appellant,

vs.

Shasta Denise Smith,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Marcia del Rey,
Judge.

Swickle & Associates, PLLC, and Adam B. Swickle (Fort Lauderdale), for
appellant.

Hinshaw & Culbertson LLP, and Elizabeth S. Baker, for appellee.

Before SCALES, HENDON, and LOBREE, JJ.

HENDON, J.

Franklin D. Gore (“Father”) appeals from an order that (1) grants Shasta

Dennis Smith's ("Mother") petition for an upward modification of child support, requiring the Father to pay the modified child support amount until June 2020, and (2) requires the Father to pay \$32,000 to the Mother's forensic accountant. We affirm, in part, and reverse, in part, and remand with directions to enter an amended order consistent with this opinion.

FACTS

In 2006, the Father filed a Petition to Establish Paternity, Child Custody, and Child Support against the Mother, relating to the minor child, F.D.G., Jr. ("F.D.G."). In September 2007, a final judgment was entered adopting the parties' settlement agreement, as reflected in the settlement transcript. In February 2008, the parties entered into a mediated settlement agreement. Pursuant to the mediated settlement agreement, the Father, who is a professional football player in the NFL, agreed, in part, to pay \$4000 per month directly to the Mother and to pay other amounts directly to creditors or providers, such as the Mother's mortgage, F.D.G.'s private school tuition, the Mother's car expenses, Florida Prepaid College expenses, and much more, totaling over \$8000 per month. Neither the 2007 final judgment nor the 2008 mediated settlement agreement reflects the Father's income.

In October 2014, the Mother filed a Supplemental Petition for Upward Modification of Child Support and Related Expenses, which was later amended. In the amended petition, the Mother alleged that the Father has consistently paid his

child support obligations, but there has been a permanent, unforeseen and substantial change in circumstances since the time when the parties entered into the mediated settlement agreement in 2008. Specifically, in 2008, the Father was in his rookie year of his NFL career, and since then, his income has substantially increased and he has acquired considerable assets. In addition, since 2008, F.D.G. has had a significant, permanent, and involuntary change in circumstances because, as he has grown, he has had an increased need for food, clothing, entertainment, enrichment activities, transportation, electronic equipment, etc. Further, the Mother asserted that her income has not increased; her income has not kept up with inflation; she no longer has her own vehicle because the engine “blew up”; the Mother’s house needs a new roof; and F.D.G. is entitled to a “good future child support” based on the Father’s great wealth.

The parties submitted financial affidavits. During discovery, the Father submitted documents regarding his finances, such as tax returns, NFL contracts, and much more.

In July 2019, the Father filed a motion in limine to exclude the testimony of the Mother’s forensic accountant, Phil Schechter, C.P.A., who would be testifying as to the Father’s alleged substantial change in income since 2008, and other matters. The trial court denied the motion in limine.

On June 13, 2019, the trial court conducted a hearing on the Mother’s petition

for an upward modification of child support. Prior to calling the Mother's forensic accountant, the Father renewed his motion in limine, which the trial court denied. The forensic accountant brought a binder with him containing the parties' financial documents, a Consumer Price Index ("CPI") chart, child support guideline worksheets for 2014 to 2019, and other documents. He testified that the Father's income was \$6,989,000 in 2014; \$5,436,000 in 2015; \$5,445,000 in 2016; and \$3,757,000 in 2017. He estimated that the Father's income would be \$1,220,000 in 2018, and \$2,000,000 in 2019 based on an NFL contract with another team.

In order to determine the Father's income for 2008, which was when the mediated settlement agreement was entered into, the forensic accountant "utilized the child support to work backwards to determine what the guidelines would look like," explaining that he has used this method in many other cases, and that the other trial courts have accepted this method. The forensic accountant further explained that in the 2008 mediated settlement agreement, the total amount that the Father agreed to pay was \$12,144.50 per month, which included the \$4000 he paid directly to the Mother and the payments made directly to creditors or providers on behalf of the Mother or F.D.G. Of that amount, the base statutory child support amount was \$9,757 because amounts paid by the Father for school tuition, lunch money, speech therapy, summer camp, and extracurricular activities were not included in the base statutory child support amount. The forensic accountant took the \$9,757 base

statutory child support amount, and he worked backwards to arrive at the Father's income in 2008, which he determined was \$3,336,400 per year or \$278,000 per month. In making this determination, the forensic accountant did not have the Father's 2008 tax returns, W-2s, or 2008 NFL contract. He opined that the increase in the Father's income since 2008 was substantial.

The forensic accountant then testified as to the child support guidelines for 2014 to the date of hearing, considering the Father's income as calculated pursuant to section 61.30 of the Florida Statutes, and imputing minimum wage to the Mother. The forensic accountant calculated the total amount of child support due from the Father for that time period and reduced that amount by every penny the Father has either paid directly to the Mother or to creditors or providers on behalf of the Mother during that same time period. He determined that there was a total child support shortage of \$135,824, and that the Mother was entitled to statutory interest in the amount of \$21,477 as of May 10, 2019. The forensic accountant testified that the child support going forward should be \$5,396 per month. The parties' counsels and the trial court then addressed the limited overnight stays that F.D.G. has with his Father, and the Mother's counsel requested that the trial court add 5% to the \$5,396 figure, which would bring the monthly child support up to \$5,666 per month.¹ The

¹ The limited overnight stays was due to the Father's NFL schedule. The Father has primarily played for NFL teams outside of Florida.

forensic accountant also addressed the CPI between 2008 and 2019, and that there has been a 21% reduction in spending power.

The forensic accountant testified that the Mother spent a total of \$50,040 for his services, and he has already been paid \$18,611.50, plus he is owed an additional two hours for his testimony at the hearing (\$400 per hour), leaving a balance of \$32,229. However, he believes that he can obtain a discount from his prior firm, “which would be about \$3200,” “moving the bill down to \$29,000,” and if his prior firm does not agree to the discount, it would be his problem, not his client’s problem.

The Mother also testified. She testified that she has held various jobs, and since 2008, her annual income has always been below minimum wage. Further, her purchasing power has diminished, and she finds it more difficult to meet her financial expenses. In addition, when the mediated settlement agreement was entered into in 2008, F.D.G. was six years old, and at the time of the hearing, he was seventeen years old. F.D.G.’s expenses, such as food, clothing, etc., have substantially increased, and groceries are more expensive than they were in 2008. As to transportation, the Mother has not had a car since 2011, and she now pays for a rental car from time to time, and she also pays for F.D.G.’s Uber expenses, which are significant. Moreover, the Father lent her the money to repair her roof, and she repays him \$200 per month from her child support payment, leaving \$3800 per month in child support. In addition, the Father no longer pays for private school

tuition because F.D.G. wanted to attend a public high school to play football. The Mother testified, however, on cross-examination that F.D.G.'s needs have always been met.

The Mother also presented the testimony of Matthew Cassano, the Father's certified financial advisor since 2005. He testified that the Father's net worth was zero in 2005, whereas his net worth at the time of the hearing was \$17 million, and the Father obtains \$500,000 per year from his investments. The Father's agent testified that the Father's income in 2008, excluding nonrecurring bonus income, was \$400,000, and the Father's income in 2014, excluding nonrecurring bonus income, was over \$6,000,000. On cross-examination, the financial advisor testified that the Father contributes to F.D.G.'s 529 plan, which has a balance of over \$91,000.

The Father called as a witness his sports agent, Jason Rosenhaus, who is also an attorney and Certified Public Accountant. He began to represent the Father in 2006 when the Father was already in his rookie year. In 2007, Mr. Rosenhaus negotiated a four-year extension for the Father. The Father was paid nonrecurring option and signing bonuses, totaling \$10.6 million, plus a \$435,000 salary and a workout bonus of \$100,000. In 2008, the Father was paid \$2.562 million plus a \$100,000 workout bonus. In 2014, he was paid a total of \$6.45 million.

At the conclusion of the hearing, the trial court deferred ruling, and the parties

submitted proposed orders. In September 2019, the trial court entered an order granting the Mother's petition for upward modification of child support, finding that there has been a substantial change in circumstances. The trial court made three separate findings of a substantial change in circumstances based on the Mother's forensic accountant's testimony, the Father's financial planner's testimony, and the Father's agent's testimony, with each finding not being dependent on the other two findings of a substantial change in circumstances. The trial court found that the Father has had a significant increase in his ability to pay, and F.D.G.'s needs have significantly increased. The trial court adopted the forensic accountant's chart, and awarded \$135,824 to the Mother for the shortfall in child support starting in 2014, plus interest on the past due amount in the amount of \$21,477, for a total of \$164,282. The trial court ordered that going forward, the Father was to directly pay the Mother \$5,665.80 per month in child support (which included the additional 5% increase) until June 2020, with the Father continuing to make other payments on behalf of the Mother directly to creditors or providers. The trial court also ordered the Father to pay the forensic accountant's fees of \$32,000. Finally, the trial court awarded attorney's fees and costs to the Mother. The Father's appeal followed.

ANALYSIS

I. Motion in Limine to Exclude Forensic Accountant's Testimony

The Father contends that the trial court abused its discretion by denying his

motion to exclude the forensic accountant's testimony, arguing that the testimony must be excluded because the method he utilized to ascertain the Father's 2008 income was not in compliance with section 61.30 of the Florida Statutes. We disagree.

The purpose for ascertaining the Father's 2008 income was to determine whether there had been a substantial change in circumstances, specifically a substantial increase in the Father's income between 2008 (the date the parties entered into the mediated settlement agreement) and 2014 (when the Mother petitioned for an upward modification of child support). In the order granting the Mother's petition for modification, the trial court made three separate findings of a substantial change in circumstances based on the Mother's forensic accountant's testimony, the Father's financial planner's testimony, and the Father's agent's testimony. Any of these three findings would support the trial court's determination that the Mother established that there has been a substantial change in circumstances.

As to the forensic accountant's testimony, the gist of the Father's argument is that because the forensic accountant did not utilize section 61.30 to determine the Father's 2008 income, but instead used the method described above, the forensic accountant's testimony should have been excluded. We disagree.

The forensic accountant was not determining the Father's 2008 income for the purpose of awarding child support for 2008. Instead, he was determining the

Father's 2008 income to solely address the issue of whether there has been a substantial change of circumstances between 2008 and 2014. Moreover, in addressing the amounts due in child support for years 2014 to 2019, the forensic accountant did utilize the method set forth in section 61.30 to determine the Father's income. Thus, the trial court did not abuse its discretion by denying the motion in limine and admitting the forensic accountant's testimony.

II. Upward Modification of Child Support

The Father argues that the trial court abused its discretion by granting the Mother's petition for an upward modification of child support. See Brown v. Brown, 180 So. 3d 1070, 1073 (Fla. 1st DCA 2015) (holding that a trial court's ruling on a petition to modify child support is reviewed for an abuse of discretion). As the mother met her burden of proof, we disagree.

In seeking an upward modification of child support, the Mother was required to establish that a substantial change in circumstances occurred. Clark v. Render, 530 So. 2d 437, 438-39 (Fla. 3d DCA 1988) (holding that an upward modification of child support "is permitted not only where there is a substantial change in the circumstances of the parties but also where an increase in support is necessary in 'the best interest of the child' ") (quoting Wood v. Wood, 272 So. 2d 14 (Fla. 3d DCA 1973)); see also § 61.13(1)(a)2., Fla. Stat. (2019) (stating, in part, that the court initially requiring a parent to make child support payments may modify the amount

of child support if it is “in the best interests of the child” or “if there is a substantial change in the circumstances of the parties”). Here, the Mother met her burden. The evidence showed that the Father’s income had substantially increased from 2008 (when the parties entered into the mediated settlement agreement) and 2014 (when the Mother petitioned for an upward modification), which would warrant the granting of the Mother’s petition for an upward modification of child support. See Miller v. Schou, 616 So. 2d 436, 438 (Fla. 1993) (holding that “an increase in ability to pay is itself sufficient to warrant an increase in child support”); Knapp v. Knapp, 778 So. 2d 475, 477 (Fla. 3d DCA 2001) (“An increase in the ability to pay may be sufficient to increase child support payments.”). Moreover, the Mother also established that there has been a substantial increase in the F.D.G.’s expenses—increased money spent on food, use of Uber, more expensive clothing, etc. Accordingly, the trial court did not abuse its discretion by granting the Mother’s petition for an upward modification of child support.

III. Award of Child Support through June 2020

The trial court’s order reflects that the Father is required to pay the modified child support amount through June 2020. After the trial court’s order was entered, the parties agreed that the Father must only pay child support until the date of F.D.G.’s birthday in 2020. Therefore, on remand, the trial court is directed to enter an amended order reflecting the parties’ post-judgment agreement that child support

terminated on F.D.G.'s birthday in 2020.

IV. Award to Mother's Forensic Accountant

The Father contends that the trial court erred by awarding \$32,000 to the forensic accountant, and that the award should be reduced to \$29,000. We agree.

At the hearing, the forensic accountant testified that his former accounting firm would most likely accept a reduced fee, leaving a balance of \$29,000, and if they did not, he would take responsibility for the bill. Thus, as argued by the Father, the portion of the trial court's order awarding the forensic accountant \$32,000 is reversed, and on remand, we direct the trial court to enter an amended order reflecting that the Father is to pay the forensic accountant \$29,000 instead of \$32,229.

CONCLUSION

Based on the above analysis, we affirm the portion of the order under review granting the Mother's petition for an upward modification of child support, and reverse the portion of the order requiring the Father to pay \$32,000 to the Mother's forensic accountant, and remand with directions. On remand, the trial court is directed to enter an amended order reflecting that the Father's child support obligation terminates on F.D.G.'s birthday in 2020, and that the Father must pay the forensic accountant \$29,000, instead of \$32,000.

Affirmed, in part; reversed, in part, and remanded with directions.