

RENDERED: SEPTEMBER 4, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001558-ME

MARY E. HAZELWOOD

APPELLANT

v. APPEAL FROM HENDERSON FAMILY COURT
HONORABLE SHEILA N. FARRIS, JUDGE
ACTION NO. 03-CI-00823

BRADLEY K. HAZELWOOD

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: MOORE AND NICKELL, JUDGES; HARRIS,¹ SENIOR JUDGE.

HARRIS, SENIOR JUDGE: Mary Hazelwood² appeals from Henderson Family

Court orders³ concerning her motion for increase in child support. The issues

¹ Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

² We sometimes refer to the parties by their given names for the sake of clarity and with no disrespect intended.

³ In her notice of appeal, Mary identified three orders as those from which her appeal is taken. They are: 1) the order (entered June 1, 2007) changing Bradley's child support; 2) the order

before us are whether the trial court erred by failing to consider gifts and federal taxable income in its determination of Bradley Hazelwood's gross income for child support calculation purposes. After reviewing the record and briefs, we conclude that the trial court erred by failing to consider the alleged stock gifts to Bradley in its child support calculations. Thus, we will vacate the orders under review and remand this case to the trial court for further consideration of the child support issues.

The parties were divorced in 2004 by a decree which approved a child support agreement. Under the agreement, Bradley's child support obligation for the parties' two children was \$1,264.29 per month. In 2006, Mary filed a motion for increase in child support. The order ruling on that motion increased Bradley's monthly child support obligation to \$1,653.77 for the period April 28, 2006 (the date the motion was filed) until May 18, 2007 (the date the older child graduated high school). Effective May 18, 2007, the child support obligation (for one child) decreased to \$1,092.41 per month. After the trial court denied Mary's reconsideration motion, this appeal followed.

Bradley owns a 70% interest in Hazex Construction Company. He is also employed by Hazex. In addition to Hazex, Bradley is a member of two other closely held corporations, Braco, Inc. and H&M, LLC. In Mary's motion for child support modification, she argued that Bradley had a higher income than previously

(entered July 26, 2007) denying Mary's reconsideration motion; and 3) the order (entered July 24, 2008) requiring Bradley to reimburse Mary's legal fees. In her brief Mary makes no mention of the third order, so we treat her appeal from that order as abandoned.

reported in the divorce proceedings. Mary presented the testimony of Christy Dixon, CPA, who testified that Hazex generated income of \$422,857 in 2004 and \$36,491 in 2005. The average of these two years was \$229, 683. The trial court used this figure and multiplied it by Bradley's 70% interest. The result was then divided by the months of the year. The trial court thus determined that Bradley's income from Hazex totaled \$13,398 per month and used that number as Bradley's "monthly gross income" in its child support calculations.

Mary claims that the trial court did not impute enough income to Bradley because the trial court failed to consider gifts of stock as well as federal taxable income. The trial court stated in its order, "There is no evidence of income from other sources presented to this [c]ourt." However, our review of the record indicates otherwise.

Bradley testified that he annually receives \$22,000⁴ worth of stock from his parents. KRS 403.212(2)(b) includes gifts as gross income for child support purposes. The statute provides:

income from any source, except as excluded in this subsection, and includes but is not limited to income from salaries, wages, retirement and pension funds, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, Social Security benefits, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, Supplemental Security Income (SSI), gifts, prizes, and alimony or maintenance received. Specifically excluded are benefits received from means-

⁴ Bradley argues that his testimony was simply an estimate of the stock's value. On remand the parties will have the opportunity to adduce proof on the extent and value of gifts to Bradley.

tested public assistance programs, including but not limited to public assistance as defined under Title IV-A of the Federal Social Security Act, and food stamps.

\$22,000 worth of stock is a significant amount which must be considered as income in child support calculations. *Clary v. Clary*, 54 S.W.3d 568, 572-73 (Ky. App. 2001). The trial court's failure to consider the stock gifts to Bradley as income constitutes prejudicial error.

As noted above, Mary also argues that the trial court erred by failing to consider Bradley's federal taxable income in its analysis. We believe this is tantamount to asserting that the trial court's findings were not sufficiently specific, an argument which Kentucky Rules of Civil Procedure (CR) 52.04 precludes us from considering. However, since we are vacating and remanding for further determination of Bradley's child support obligation, it is likely that the trial court will have a further opportunity to consider all of the factors relevant to child support calculation, which may include the alleged federal taxable income. If so, the trial court is urged to render specific findings of fact which underlie its child support calculations.

Finally, Mary also claims that the trial court erred by failing to conduct a *Downing* hearing. In *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001), this Court held that "the trial court may use its judicial discretion to determine child support in circumstances where combined adjusted parental gross income exceeds the uppermost level of the guidelines table." Mary argues that the trial court erroneously failed to conduct such review because gross income was

miscalculated. We decline to instruct the trial court to conduct a *Downing* review. Instead, we merely remind the trial court to conduct such a review if it is necessary in light of Bradley's gross income recalculation.

Accordingly, we vacate the orders of the Henderson Family Court and remand this case with directions to conduct such further hearings as may be necessary in keeping with this opinion, to render specific findings of fact, and to recalculate Bradley's child support obligation in light of those findings.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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