

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 1857

CORI COX NELSON

VERSUS

ROY ANDREW NELSON

Judgment Rendered: **AUG 10 2011**

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APPEALED FROM TWENTY-SECOND JUDICIAL DISTRICT COURT
PARISH OF ST. TAMMANY
THE STATE OF LOUISIANA
DOCKET NUMBER 2006-13478, DIVISION "L"

THE HONORABLE DAWN AMACKER, JUDGE

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

Handwritten signatures and initials in the left margin, including what appears to be 'Cox' and 'Nelson'.

McDONALD, J.

Roy Andrew Nelson and Cori Cox Nelson were married on April 21, 2001, and had one child, Presli, born on November 19, 2001. Mrs. Nelson filed a petition for divorce on August 9, 2006, and also prayed for child and spousal support. The Nelsons were divorced on May 14, 2007. Mr. Nelson had not worked full-time since 2002, but enjoyed substantial income as an 18.99 percent shareholder in a closely held family-owned company, the Elmer Candy Corporation (Elmer). Mrs. Nelson did not work after Presli was born.

On August 21, 2006, the parties signed a consent judgment providing that Mr. Nelson would pay Mrs. Nelson \$8,000 per month in interim child support and \$1,000 per month in interim spousal support. Further, the parties agreed to joint custody, with Mrs. Nelson as the domiciliary parent. The hearing on child support was repeatedly continued as a result of ongoing discovery disputes, and Mr. Nelson continued to pay the \$8,000 per month.

On October 2, 2008, pursuant to a consent judgment, attorney R. Scott Buhner was appointed as a Special Master to render an opinion on all issues pending in the case, including child support. On December 15, 2008 and January 16, 2009, the Special Master held hearings, at which time both parties and their accounting experts testified. On April 1, 2009, the Special Master issued a report containing his findings and recommendations. The report determined Mr. Nelson's income for child support purposes to be \$605,200 per year. The report recommended that child support, based on shared custody, be calculated using Worksheet B, and determined it should be set at \$3,600 per month, and further recommended that Mr. Nelson pay all private school tuition, registration and mandatory expenses, plus health insurance and all uncovered/unreimbursed medical expenses for Presli.

Mr. Nelson objected to specific portions of the Special Master's recommendations to the court, including the lack of retroactivity of the child support award, the calculation of Mr. Nelson's income regarding speculative capital gains, and the determination of Mr. Nelson's tax credits and corporate distributions.

A trial was held on August 11, 2009. Financial information from the latter part of the year 2008 and from the year 2009 regarding distributions to Mr. Nelson, which had not been available to the Special Master, was introduced into evidence. The trial court issued its reasons for judgment on October 15, 2009, but the judgment was not signed until April 13, 2010. The trial court determined that child support would not be retroactive to the date of filing and that Worksheet B would be used to calculate child support. The trial court agreed with many of the findings by the Special Master, but also determined that the Special Master had incorrectly imputed capital gains income to Mr. Nelson, which it found was purely speculative, and not appropriate under La. R.S. 9:315; determined that a potential GO-ZONE passive loss carry-forward Mr. Nelson could receive sometime in the future could not be imputed as income; and determined that only income which Mr. Nelson actually received as a minority shareholder in the corporation could be properly imputed as income.

Further, the trial court found that Mr. Nelson's gross annual income for child support purposes was set at \$325,798 per year for the year 2009 and forward; that Mrs. Nelson's income was not an issue since her voluntary unemployment status was not objected to by Mr. Nelson; that using Worksheet B, Mr. Nelson's child support was set at \$1,874 per month, retroactive to April 1, 2009; and that Mr. Nelson should pay 100 percent of Presli's tuition, registration, mandatory school expenses, health insurance, and medical expenses not covered by insurance.

Mrs. Nelson is appealing that judgment and makes three assignments of error:

1. It was manifestly erroneous and [an] abuse of discretion for the trial court to reduce that portion of appellee's income derived from investment tax credits and distributions from his family owned corporation from the more accurate figure of \$419,006.00 to \$278,274.00.

2. The trial court's judgment which completely excluded capital gains from appellee's income is in direct conflict with Louisiana law which mandates the inclusion of capital gains when determining a child support obligation.

3. The trial court's judgment which does not appear to have even considered the child's best interest, the disparity in the parties' incomes, or the obvious ability of the appellee to provide a much more lavish lifestyle than the appellant was clearly wrong.

THE STANDARD OF REVIEW

The standard of review in a child support case is manifest error. Generally, an appellate court will not disturb a child support order unless there is an abuse of discretion or manifest error. **State, Department of Social Services ex rel. D.F. v. L.T., Jr.**, 05-1965 (La. 7/6/06), 934 So.2d 687, 690.

ASSIGNMENT OF ERROR NO. 1

In this assignment of error, Mrs. Nelson asserts that the trial court erroneously analyzed Mr. Nelson's income with regard to investment tax credits and distributions from the family-owned business. Mrs. Nelson asserts that the Special Master's determinations regarding distributions by Elmer to the Whitney Bank account and the Special Master's recommendations regarding the investment tax credit were erroneously disregarded by the trial court. Further, she asserts that Mrs. Nelson's expert witness agreed with the Special Master's findings in that regard.

The trial court heard the testimony of Mrs. Nelson's expert witness, forensic accountant Mary Hammatt, and Mr. Nelson's expert witness, forensic accountant Gregory Verges, and chose to accept the testimony and calculations of Mr. Verges. After a thorough review of the case, we cannot say that the trial court manifestly erred or abused its discretion in this determination.

ASSIGNMENT OF ERROR NO. 2

In this assignment of error, Mrs. Nelson asserts that the trial court erroneously excluded capital gains from Mr. Nelson's income in conflict with Louisiana law. Louisiana Revised Statute 9:315(C)(3)(a) provides that the gross income of a party to be used for calculating the child support obligation includes capital gains.

Mr. Nelson opened stock market accounts with Charles Schwab and Merrill Lynch in the 1990's with money inherited from his parents. The trial court noted in its reasons for judgment that Mr. Nelson did realize significant capital gains on a yearly basis from 2004-2007, and that during those years he paid Mrs. Nelson \$8,000 per month in child support while paying the child's tuition and other expenses, during which time the parties had shared custody.

However, Mr. Nelson's expert witness, Mr. Verges, produced testimony and evidence confirming that Mr. Nelson had a net loss on investments in 2008 and 2009. Further, the trial court had access to the late 2008 and the 2009 figures for net loss, which the Special Master did not have. The Special Master's report, even without the later information, found that Mr. Nelson only realized \$14,281 in capital gains through October 31, 2008, and had little or no unrealized capital gains left in his investment accounts and would have no capital gains to report in the foreseeable future. The Special Master found that the current economic situation and depressed stock market had probably caused the elimination of Mr. Nelson's unrealized capital gains, and further, that market conditions were subject to changes and any projections regarding future capital gains would be purely speculative.

Based on the updated information, the trial court rejected the Special Master's addition of \$138,670 per year as average capital gains and found no

capital gains should be added to his gross income for purposes of setting child support.

After a thorough review, we find no manifest error or abuse of discretion by the trial court in this determination.

ASSIGNMENT OF ERROR NO. 3

In this assignment of error, Mrs. Nelson asserts that the trial court erred in failing to consider the best interest of the child, the disparity in the parties' incomes, and the obvious inability of Mrs. Nelson to provide a lifestyle for the child that is comparable to that of Mr. Nelson.

Mrs. Nelson argues that it is obvious that Mr. Nelson can enjoy a lavish lifestyle without having to work, while she cannot. She relies upon **Earle v. Earle**, 43,925 (La. App. 2 Cir. 12/3/08), 998 So.2d 828, 834, writ denied, 09-0117 (La. 2/13/09), 999 So.2d 1151, in arguing that the parent's ability to pay child support and the lifestyle that the child would have enjoyed if the parents had stayed together should be considered. She also cites **Harang v. Ponder**, 09-2182 (La. App. 1 Cir. 3/26/10), 36 So.3d 954, 965-967, writ denied, 10-0926 (La. 5/19/10), 36 So.3d 219, in her argument that the trial court should take into consideration that the child is entitled to the same standard of living that she would enjoy if living in the support payor's home if the payor's circumstances are sufficient to allow this, and that the trial court should strive to maintain the lifestyle of the child, when possible.

Louisiana Civil Code article 141 provides that in a proceeding for divorce or thereafter, the court may order either or both of the parents to provide an interim allowance or final support for a child based on the needs of the child and the ability of the parents to provide support. Louisiana Revised Statute 9:315.1A provides that the guidelines are to be used to establish or modify child support and that there shall be a rebuttable presumption that the amount of child support obtained by use

of the guidelines is the proper amount of child support. The trial court used the guidelines in setting child support.

The party urging a deviation bears the burden of proving the guideline amount is not in the best interest of the child or would be inequitable. **Guillot v. Munn**, 99-2132 (La. 3/24/00), 756 So.2d 290, 297.

In the cases cited by Ms. Nelson, the payors' income exceeded the highest amount reflected in the Louisiana Child Support guidelines at that time. Therefore, the trial court had the discretion to set the basic support obligation in accordance with the best interest of the child and the circumstances of each parent.

However, in this case, the Nelsons' combined gross income is below \$30,000 per month, which is the highest level in the child support guideline schedule. Thus, we find no manifest error or abuse of discretion in the trial court's determination to use the child support guideline schedule.

DECREE

For the foregoing reasons, the trial court judgment dated April 13, 2010, is affirmed. Costs of this appeal are assessed against Ms. Nelson.

AFFIRMED.