STATE OF MICHIGAN

COURT OF APPEALS

MELEAH KAYE MASON BHAGAT, Plaintiff-Appellee,	UNPUBLISHED January 16, 2001
v	No. 218352 Lenawee Circuit Court
HEEMANSHU M. BHAGAT, Defendant-Appellant.	LC No. 97-018805-DM

Before: Markey, P.J., and Whitbeck and J. L. Martlew*, JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court order that increased his child support obligation from $44 a week to $295 a week. We reverse and remand. We decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

Defendant was the vice-president and dean for student affairs at Adrian College for approximately three years, earning an annual salary of $57,100. He worked under a year-to-year, at-will contract. In March 1997, defendant had a violent dispute with plaintiff, his wife, resulting in domestic abuse charges against him. After the incident was publicized locally, Adrian College placed defendant on paid administrative leave until his contract expired on June 30, 1997, at which time it did not rehire him. Because of the negative publicity surrounding the domestic abuse case, defendant was apparently given the choice of being fired or resigning; he chose the latter. Defendant ultimately pleaded nolo contendere to a disorderly conduct charge with the matter being "deferred" so that no conviction was entered.

After defendant's contract with Adrian College was not renewed in July 1997, he obtained unemployment benefits of $300 per week for a period of about three months. The parties' divorce judgment, entered on March 6, 1998, required defendant to pay $44 per week in child support for the parties' two very young children. This support obligation was based on the amount of defendant's unemployment benefits.

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant began searching for new employment shortly after Adrian College placed him on administrative leave. By early November 1998, he had circulated about thirty résumés and job applications for positions at colleges in near where he lived, but later sought employment in other areas of the country. The applications were rejected for the most part because defendant only had a master's degree, not a doctoral degree. Defendant evidently believed that he was overqualified for some lower paying jobs that he could obtain, but was under-qualified for jobs in the same salary range as his former job with Adrian College. For instance, defendant said that he was offered an educational position with an annual salary of $36,000, but that when he balked at the salary, the offer was withdrawn. At the time of the hearing in this case in November 1998, defendant was still being considered for two academic positions, one at Columbia University that would pay $45,000 a year, and one at Georgetown University for an unstated salary. Defendant stated that he did not wish to take a position as far away from the children as California, but if he did, the pay would likely be about $90,000 a year.

During his tenure at Adrian College, defendant had taken courses at another university toward his Ph.D. When he was unable to find a new job after he left Adrian College, and after having been advised by some potential employers that he needed a Ph.D., defendant enrolled in August 1997 in the University of Toledo to obtain his Ph.D. His employment at the University of Toledo as a doctoral assistant, which was renewed for the 1998/1999 academic year, paid about $9,800 for the nine-month school year as well as his tuition. Defendant was also able to secure employment over the summer months, which paid about $1,000. Defendant anticipated that he would be able to complete his degree by May 2000 if he went to school full-time. However, he preferred to find new employment and then take classes toward his Ph.D., as he had done when he worked for Adrian College.

In the summer of 1998, the Friend of the Court (FOC) decided to reconsider defendant's support obligation, apparently because defendant had contacted the FOC to report that his income would be reduced during the summer months. The FOC sent defendant forms for modification of child support, which he filled out and returned. In the meantime, plaintiff filed a petition to increase defendant's child support. An FOC referee heard plaintiff's petition, finding that plaintiff had moved to Illinois and obtained a job paying $490 a week, but that she had to pay $231 a week for child care. The referee also found that defendant was earning $249 a week at the University of Toledo, and stated:

> Father has a Master's Degree and can certainly find work somewhere. The children cannot wait while he goes to school and earns a small income. The referee shall impute Defendant's income at 75% of his former salary which results in a weekly income of $822.00.

Based on the imputed income, defendant was ordered to pay $295 a week for the two children.

Defendant objected. The trial court held a hearing on November 3, 1998, at which time defendant explained his efforts to obtain a new job and his willingness to leave the Ph.D. program as soon as he could find one. There was also mention of the job that paid $36,000 a year, which defendant had declined. The trial court stated that defendant did not have the "luxury" of not providing child support while he went to school "for an extended period of years," and that defendant had taken more than 1½ years to find a job, turning down a job with an

annual salary of $37,100. The trial court found that the income imputed by the FOC referee, about $42,000 per year, was "exceedingly reasonable . . . very possibly should be higher." The trial court ordered child support of $295 a week based on imputed income of $822 per week. In this appeal, we must determine whether the trial court, in adopting the hearing referee's findings and conclusions, erred in imputing this income to defendant.

II. The Michigan Child Support Formula And Abuse Of Discretion

A. Standard Of Review

A trial court has the discretion to modify a child support order as long as the trial court abides by the statutory framework set forth in MCL 552.17; MSA 25.97 when exercising this discretion.[1] Thus, we review a trial court's decision to modify a child support order for an abuse of this discretion.[2]

B. The Formula

When acting on a parent's petition, a trial court may modify a child support order "as the circumstances of the parents, and the benefit of the children require."[3] A trial court must apply the Michigan Child Support Formula to determine the amount of support a parent must pay.[4] A court may deviate from the support levels established by the child support formula.[5] However, to do so, the trial court must determine the amount of support that would be ordered under the formula, explain how the actual amount of support ordered deviates from the formula, state how much other property or support ordered in lieu of child support would be worth (if applicable), and clarify why applying the formula "would be unjust or inappropriate in the case."[6]

Deviations from the Michigan Child Support Formula, even upward deviations, can be justifiable because the amount of support awarded under the formula is "based upon the needs of the child and the actual resources of each parent."[7] "Actual resources" has been interpreted to include a parent's unexercised ability to pay support, thereby allowing for income to be imputed to that parent.[8] Additionally, the Michigan Child Support Formula Manual (2000), Part II, § I, permits imputation of income if an FOC investigation reveals "voluntary reduction of income or where there is voluntary unexercised ability to earn." In such a case, the FOC

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[1] *Burba v Burba (After Remand)*, 461 Mich 637, 647; 610 NW2d 873 (2000).

[2] *Id*.

[3] MCL 552.17(1); MSA 25.97(1).

[4] *Ghidotti v Barber*, 459 Mich 189, 200; 586 NW2d 883 (1998).

[5] MCL 552.17(2); MSA 25.97(2).

[6] MCL 552.17(2)(a) – (d); MSA 25.97(2)(a) – (d); see also MCL 722.717(3); MSA 25.497(3).

[7] MCL 552.519(3)(a)(vi); MSA 25.176(19)(3)(a)(vi).

[8] *Ghidotti*, *supra* at 198, citing *Rohloff v Rohloff*, 161 Mich App 766; 411 NW2d 484 (1987) and *Heilman v Heilman*, 95 Mich App 728; 291 NW2d 183 (1980).

> shall make two recommendations: one is based on actual income and the other is based on actual plus imputed income. The recommendation should also take into account the possible inclusion of a child care recommendation where imputation would make that issue relevant. The recommendation shall include the basis for imputation and the basis of the amount imputed.[9]

The manual further provides a list of eight factors[10] to be considered in determining whether a party has unexercised ability to earn, which are closely related to the factors previously outlined in case law.[11] When the FOC referee's findings and conclusions regarding imputed income are reviewed de novo by the trial court, it must also make specific findings pursuant to relevant criteria.[12] As the Supreme Court has explained:

> The requirement that the trial court evaluate criteria such as those listed in *Sword* [*v Sword*, 399 Mich 367, 378-379; 249 NW2d 88 (1976),] is essential to ensure that any imputation of income is based on an actual ability and likelihood of earning the imputed income. Any other rule would be pure speculation and a clear violation of the requirement that child support be based upon the actual resources of the parents. MCL 552.519(3)(a)(vi); MSA 25.176(19)(3)(a)(vi). Moreover, the manual requires that the decision to impute income be based on the evaluation of 'among other equitable factors,' [a list of] . . . eight factors . . . . [13]

C. The FOC Referee's And The Trial Court's Decisions

In this case, reviewing the record convinces us that both the FOC referee and the trial court failed to follow the statutorily-mandated procedure for modifying a child support order. Neither the referee nor the trial court articulated findings on the relevant factors set forth in the applicable statutes and case law. Further, they failed to state the amount of support that would be awarded under the formula without imputing unearned income to defendant's actual income, the first step of the four-step analysis outlined in MCL 552.17(2); MSA 25.97(2). Thus, we are

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[9] Michigan Child Support Formula Manual (2000), Part II, § I.

[10] "1. Prior employment experience; 2. Educational level; 3. Physical and mental disabilities; 4. The presence of children of the marriage in the party's home and its impact on the earnings of the parties; 5. Availability of employment in the local geographical area; 6. The prevailing wage rates in the local geographical area; 7. Special skills and training; 8. Whether there is any evidence that the party in question is able to earn the imputed income." Michigan Child Support Formula Manual (2000), Part II, § I at 8.

[11] See *Sword v Sword*, 399 Mich 367, 378-379; 249 NW2d 88 (1976) (employment history, education, skills, availability of work, diligence looking for work, ability to work, personal history including means of support and marital status, assets, efforts to modify the decree as excessive, change in location).

[12] *Ghidotti*, *supra* at 198, citing *Sword*, *supra*.

[13] *Ghidotti*, *supra* at 199; see also *Burba*, *supra* at 644 (explaining importance of the trial court's articulation of the relevant criteria).

compelled to conclude that the trial court's findings and conclusion regarding imputed income are arbitrary and speculative.[14]

Accordingly, we remand this matter to the trial court for further proceedings consistent with the applicable statutes and case law. On remand, the trial court shall consider anew the petition for modification of defendant's child support obligation, including the possibility of referring the matter for another FOC investigation, especially if (but not only if) defendant has earned his doctorate and found a new job by that time. We do not rule out the possibility that, when conducting the proper analysis, the trial court will determine that defendant has voluntarily refused to exercise his capacity to earn more, meriting a deviation from the support formula. Because we decide this appeal on procedural grounds that are dispositive, we need not reach defendant's substantive arguments concerning whether the factors the trial court concluded merited modification of the support order and imputing income to him for the purpose of calculating support were proper.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ William C. Whitbeck
/s/ Jeffrey L. Martlew

[14] *Burba*, *supra* at 644.