

STATE OF MICHIGAN
COURT OF APPEALS

NIKIYA NICOLE LEWIS,

Plaintiff-Appellee,

v

DESHAUN ABRAHAM FOSTER,

Defendant-Appellant.

UNPUBLISHED

November 17, 2005

No. 255035

Kent Circuit Court

LC No. 2003-004659-DP

Before: Murphy, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Defendant appeals as of right a child support order requiring him to pay child support based on an imputed earning ability. We reverse and remand for further proceedings.

Defendant and plaintiff are the parents of a child (DOB 10-20-02). After defendant failed to appear at a settlement conference, plaintiff and the prosecutor's office moved for entry of a judgment of paternity and to impose child support obligations. Because defendant had not contacted the court or plaintiff, the proposed order sought to impute net earnings to defendant in the amount of \$1,489.71 per month, or approximately \$11 per hour. Defendant was not present at the subsequent hearing, ostensibly because he received conflicting information about its location. The prosecutor stated that defendant contacted her after he missed the settlement conference; however, he failed to provide any financial information to her. The referee entered the order of paternity and set support in the amount requested.

Defendant objected to the order, claiming he was currently unemployed and that his previous employment had paid only \$8 per hour. He offered to provide pay stubs of his previous employment, but did not do so. At a hearing, the prosecutor stated that, despite repeated requests, defendant had not furnished her with financial information, and that therefore she had imputed defendant's income based upon plaintiff's income. Upon further objection by defendant and a statement that he had never earned the imputed amount, the trial court found that imputation was proper without further findings. The trial court limited the length of the award amount to four months, however, so defendant would have the opportunity to present a proper objection to the imputation of income in the future.

We review a trial court's award of child support for abuse of discretion. *Burba v Burba*, 461 Mich 637, 647; 610 NW2d 873 (2000), and its findings of fact for clear error. *Kosch v Kosch*, 233 Mich App 346, 350; 592 NW2d 434 (1999).

As noted by our Supreme Court in *Ghidotti v Barber*, 459 Mich 189, 198; 586 NW2d 883 (1998), statutes require that “the child support formula ‘shall be based upon the needs of the child and the actual resources of each parent.’” *Id.*, citing MCL 552.519(3)(a)(vi). In applying this requirement, definition of “actual resources” has been expanded to encompass a parent’s unexercised ability to pay child support. *Ghidotti, supra*.

The imputation of income to a parent having an unexercised ability to pay must be done pursuant to certain guidelines. The trial court must make findings on various factors, including but not limited to the individual’s work history, health, level of education, skills, capacity to work, available employment opportunities, and consistency or diligence of effort in seeking employment. *Ghidotti, supra* at 198-199. “The requirement that the trial court evaluate criteria such as those listed in *Sword* [*v Sword*, 399 Mich 367; 249 NW2d 88 (1976), overruled in part on other grounds in *Mead v Batchlor*, 435 Mich 480, 506; 460 NW2d 493 (1990)] 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.” *Ghidotti, supra* at 199. The Michigan Child Support Manual also contains criteria upon which an imputation of income must be based. 2003 MCSF 2.10(F).

The trial court failed to consider all the required factors before it ordered the imputation of income to defendant. Instead, the trial court accepted the prosecutor’s largely unsubstantiated estimate. We question this estimate. A review of the limited evidence available shows that defendant has had limited employment experience and that he does not have a high school diploma, although he possesses a G.E.D. There was no evidence presented regarding the availability of employment in the local area or the prevailing wage rates. In addition, no evidence showed that defendant possesses special skills and training, or that he would be able to earn the imputed income of approximately twice the minimum wage.

The record indicates that defendant is currently challenging the imputation amount for future support payments. Because the trial court failed to provide adequate factual support for its earlier imputation decision, we reverse and remand with instructions that the trial court make the findings required by the Michigan Child Support Formula Manual and apply these findings to the extent appropriate to both defendant’s past due support and his future obligations.

Reversed and remanded. Defendant may tax costs. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Patrick M. Meter