

STATE OF MICHIGAN
COURT OF APPEALS

SHEILA HARVEY,

Plaintiff-Appellee,

v

HARRY HARVEY,

Defendant-Appellant.

UNPUBLISHED

November 17, 2009

No. 285523

Oakland Circuit Court

LC No. 2000-632479-DM

Before: Shapiro, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right from a circuit court order terminating de novo hearing proceedings in this divorce action. We reverse and remand for additional proceedings consistent with this opinion.

The parties were married in 1991 and have two children. Plaintiff is a lawyer and defendant is retired from the military. Plaintiff filed for divorce in 2000. In September 2000, while the divorce action was pending, plaintiff was in a serious vehicular accident and sustained a closed head injury. The divorce judgment was entered in October 2001, but did not resolve child custody or support, so the matter was referred to the Friend of the Court (FOC).

This is the parties' third appearance before this Court. Plaintiff initially appealed an order granting defendant sole legal and physical custody of the children. This Court reversed and remanded and our Supreme Court affirmed. *Harvey v Harvey*, 257 Mich App 278; 668 NW2d 187 (2003), aff'd 470 Mich 186 (2004). After remand, defendant appealed and plaintiff cross-appealed the trial court's award of joint custody. This Court affirmed. *Harvey v Harvey*, unpublished opinion per curiam of the Court of Appeals, issued June 14, 2005 (Docket No. 258938). The trial court then referred the case to the FOC for an investigation and recommendation on child support. On the same date, the trial court entered an order requiring defendant to pay \$750 to plaintiff in monthly child support pending the FOC's investigation and recommendation.

Given the various changes in child custody and the fact that only temporary child support orders had ever been issued, the FOC referee indicated that it was going to determine child support going back to the October 2001 date of the divorce judgment. The referee requested tax returns from both parties dating back to 2001. Plaintiff's counsel represented that plaintiff "has no tax returns for 2002 and 2003 because she had no income to report because she was not

working.” The referee stated that counsel was to “gather up all prior tax returns, all of her income statements, whatever else she has to show her income through that period of time.” Plaintiff submitted “Addendum #1” which indicated that her annual gross income was \$19,356 and “Addendum #2” which indicated that she had no income for tax years 2002 and 2003. Plaintiff did disclose that she had received a cash settlement of \$60,000 to \$70,000 stemming from her injuries in the automobile accident.

A proposed child support order was filed on January 18, 2006 recommending defendant pay \$969 in monthly support. On February 2, 2006, defendant filed various objections to the recommendation, which the trial court considered and denied on March 10, 2006. On March 22, 2006, defendant filed a renewed motion objection objecting to the recommendation. The trial court ordered defendant to obtain a copy of the FOC hearing transcripts and directed the parties to appear for closing arguments on defendant’s objections. The trial court specifically prohibited the parties from introducing new evidence absent a showing that the evidence was unavailable at the FOC hearing.

Over a year later, on April 4, 2007, defendant filed a motion requesting a full evidentiary hearing, and indicated that a limited hearing was currently scheduled for April 12, 2007 pursuant to the trial court’s March 30, 2006 order. Defendant argued that he was unable to secure a transcript of the FOC hearing and claimed that the FOC was unable to produce the full record, including an affidavit from the FOC referee that he was unable to locate the audiotape of the proceeding. Defendant requested that the parties be permitted to present evidence not presented at the hearing. Plaintiff requested an adjournment if the trial court was inclined to grant the request and otherwise opposed the motion.

The trial court held an evidentiary hearing on April 12, 2007 and September 28, 2007. At the hearing, plaintiff admitted that the FOC referee asked her to provide income information and that she submitted the two addendums in response. She maintained that she had no income to report for 2002 or 2003 because she did not work during those two years. She testified that she received uninsured motorist benefits and that she previously received monthly checks from defendant’s insurance company, but she did not characterize the checks as wage-loss benefits.

Following the hearing, the trial court scheduled a November 28, 2007 hearing to address the issue of the wage-loss benefits. The record indicates that no such hearing took place, but that the parties appeared before the court at a March 31, 2008 hearing to address the issue. At that hearing, defendant argued that plaintiff failed to report her wage-loss benefits as income during the FOC hearing and that those funds constituted income to be considered when determining child support. He indicated that he did not receive a full statement until six months after the FOC hearing and that plaintiff received over \$140,000 in wage-loss benefits. Plaintiff argued that the trial court lacked jurisdiction because defendant did not raise the objection within 21 days of the referees recommendation and that the information was available to defendant at the time of the FOC hearing because defendant was the owner and insured of the vehicle. The trial court concluded it had no jurisdiction.

On April 14, 2008, defendant filed a motion to retroactively modify and hold plaintiff in contempt for failure to disclose her wage-loss benefits as income. The trial court again concluded that it had no subject-matter jurisdiction and that, even if the objections had been timely raised, the information was readily available to defendant at the time of the FOC hearing.

Defendant filed another motion to retroactively modify and hold plaintiff in contempt, which the trial court deemed a motion for reconsideration. The trial court noted that defendant claimed to have discovered the evidence six months after the referee issued its recommendation, but failed to file a motion regarding the evidence at the time he sought a full evidentiary hearing. The trial court believed that defendant has held the information in his back pocket, awaiting the trial court's determination of the other objections and held:

Although this Court does not condone misleading and/or fraudulent behavior, it also can not [sic] condone piece-meal litigation where parties attempt to reserve issues so that they can try to take multiple bites from the proverbial apple.

Defendant now appeals.

This Court reviews a trial court's determination regarding the modification of child support for an abuse of discretion. *Burba v Burba (After Remand)*, 461 Mich 637, 647; 610 NW2d 873 (2000). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). In addition, we review de novo whether the trial court acted properly within the child support guidelines, as well as questions involving statutory interpretation. *Malone v Malone*, 279 Mich App 280, 284; 761 NW2d 102 (2008).

Defendant argues that the trial court erred by failing to apply MCL 552.603b. This issue involves the interpretation of that statute. The primary goal of statutory interpretation is to give effect to the Legislature's intent. *Id.* at 285. "When the Legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself, and judicial construction is not permitted." *Koontz v Ameritech Services, Inc.*, 466 Mich 304, 312; 645 NW2d 34 (2002). "Courts must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory." *Id.*

Regarding the retroactive modification of child support orders, MCL 552.603(2) provides:

Except as otherwise provided in this section, a support order that is part of a judgment or is an order in a domestic relations matter is a judgment on and after the date the support amount is due as prescribed in section 5c, with the full force, effect, and attributes of a judgment of this state, and is not, on and after the date it is due, subject to retroactive modification. Retroactive modification of a support payment due under a support order is permissible with respect to a period during which there is pending a petition for modification, but only from the date that notice of the petition was given to the payer or recipient of support.

This statute prohibits the retroactive modification of child support orders except as provided in MCL 552.603. *Malone, supra* at 286. MCL 552.603b provides an exception to the general prohibition on the retroactive modification of child support orders:

If an individual who is required by the court to report his or her income to the court or the office of the friend of the court knowingly and intentionally fails

to report, refuses to report, or knowingly misrepresents that income, after notice and an opportunity for a hearing, the court may retroactively correct the amount of support.

The statutory text is unambiguous and specifically allows a court to retroactively modify child support in the limited circumstances provided.

Defendant contends that MCL 552.603b required the trial court to conduct an inquiry regarding whether plaintiff violated the statute by knowingly and intentionally failing to report, refusing to report, or knowingly misrepresenting income. We agree.

The trial court refused to allow defendant to present evidence regarding plaintiff's wage-loss benefits, stating in part that it lacked subject-matter jurisdiction to address the matter under MCL 552.507(4), which states:

The court shall hold a de novo hearing on any matter that has been the subject of a referee hearing, upon the written request of either party or upon motion of the court. The request of a party shall be made within 21 days after the recommendation of the referee is made available to that party.

The trial court determined that it lacked subject-matter jurisdiction to address this issue because defendant failed to raise the issue within 21 days following the referee's recommendation. The trial court's determination is erroneous. Although defendant did not raise this issue within 21 days as provided in the statute, MCL 552.603b specifically provides that a court may retroactively modify child support "after notice and an opportunity for a hearing." Thus, despite that defendant failed to raise the issue within the time provided for a de novo hearing under MCL 552.507(4), MCL 552.603b permitted the court to hold a hearing to address the issue. We note that defendant was not even aware of plaintiff's failure to report her income within the 21-day time period provided in MCL 552.507(4) to request a de novo hearing. Therefore, the trial court had subject-matter jurisdiction to address the issue pursuant to MCL 552.603b.

The trial court also refused to allow defendant to present evidence of plaintiff's wage-loss benefits because the evidence was readily available to defendant had he sought the information at the time of the FOC hearing. Defendant admitted that he owned and insured the vehicle that plaintiff was driving at the time of the accident, but denied knowing about the wage-loss benefits paid to plaintiff at the time of the FOC hearing. Defendant's testimony and a statement of benefits paid with respect to the accident indicate that defendant was not aware of the wage-loss benefits until May 19, 2006, approximately four months after the referee's recommendation. The statement of benefits was generated pursuant to defendant's request at that time. Thus, the trial court is correct that the information was readily available to defendant at the time of the FOC hearing had he sought it.

However, there is no indication that defendant had any reason at the time of the FOC hearing to request the information. It is possible that defendant had concerns but failed to investigate, but it is equally possible that defendant did not obtain knowledge that there may have been wage-loss benefits until shortly before he requested the information. We conclude that, because there is no record evidence that defendant knew about or believed that there were

wage-loss benefits, the information was not available to defendant at the time of the FOC hearing.

We admit to having some confusion as to why defendant waited to raise the issue of the wage-loss payments until September 28, 2007 when he obtained the information in May 2006. However, we find no bar to defendant's claim simply because he did not file his motion to retroactively modify child support under MCL 552.603b until April 14, 2008, nearly two years after he became aware of plaintiff's collection of wage-loss benefits. MCL 552.603b places no time limit on when a party may bring forth an allegation of knowing and intentional misrepresentation of income.

Plaintiff was required to report her wage-loss benefits as income under § 2.01(F)(32) of the 2004 Michigan Child Support Formula Manual and the record shows that plaintiff failed to do so. We believe that once defendant brought this evidence to the trial court's attention, the trial court was obligated to hold an evidentiary hearing and determine whether plaintiff's failure to disclose the wage-loss benefits was a knowing and intentional refusal to report or a knowing misrepresentation of her income. MCL 552.603b. Accordingly, we remand this case to the trial court to hold an evidentiary hearing regarding plaintiff's actions.

We note that, if the trial court concludes that plaintiff's failure to disclose falls under the statute, the retroactive modification of child support is not mandatory, but remains within the discretion of the trial court. Further, the trial court may consider the reason behind any delay by defendant in bringing the information to the court's attention when deciding whether to make any modification. However, once allegations of fraud are brought to the attention of the court, it has an obligation to investigate them with an evidentiary hearing.

Defendant also argues that the trial court abused its discretion by failing to sanction plaintiff for failing to accurately report her income as the Friend of the Court referee directed. We disagree. Here, there is no evidence that plaintiff's actions were misconduct that required sanction. However, if, after the evidentiary hearing, the trial court determines that plaintiff's actions meet the requirements of MCL 552.603b, the trial court shall reconsider defendant's request for sanctions.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Defendant is entitled to costs. MCR 7.219(F).

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Jane M. Beckering