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S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

CHEYENNE ROYAL URKA, Plaintiff-Appellee, v CARY LEE URKA, Defendant-Appellant.	UNPUBLISHED April 23, 2019 No. 343302 Manistee Circuit Court Family Division LC No. 16-015953-DM

Before: BECKERING, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

Defendant, Cary Lee Urka, appeals by right his judgment of divorce, which granted plaintiff, Cheyenne Royal Urka, physical custody of the parties' children, granted the parties joint legal custody, and ordered defendant to pay $1,445 a month in child support on the basis of an imputed annual income of $66,000. We affirm.

I. FACTUAL BACKGROUND

The parties to this case were initially self-represented. Prior to retention of counsel, they participated in mediation. Both parties signed the mediation agreement. In 2016 shortly after institution of divorce proceedings, the Manistee County Friend of the Court recommended that defendant be imputed a full-time income at minimum wage for work at his family farm, Urka Farms. Defendant admitted at all times during these proceedings that he had worked full-time at the farm since 1991. The amount of temporary child support was the subject of several hearings in 2016. However, in all proceedings prior to the December 2016, the calculations for imputed income to the defendant used minimum wage as the basis.

On July 8 2016, a hearing was held on a motion to enter a Consent Judgment of Divorce. However, defendant repudiated that proposed judgment asserting that the child custody, parenting and support within that proposed judgment was not in the children's best interests, nor in accordance with his ability to pay. Plaintiff retained counsel who appeared at a January 2017 settlement conference. Defendant was self-represented at that conference. The trial judge declined to rule on the enforcement of the mediation agreement and continued efforts to achieve

a settlement. Defendant retained counsel and settlement efforts continued until May 2017 where the court confirmed that the unresolved issues related only to the minor children.

Unable to reach an agreement, the parties began a trial on August 9, 2017. During the four days of trial, the court heard testimony from the parties, Detective Christopher Piskor and Dr. Dennis Chitwood. However, during the fourth day of the parties' custody trial, they reached an agreement regarding custody and parenting time that was placed on the record. The issue of support remained in dispute with the defendant asserting that the amount was both speculative and beyond his ability to pay. The court again referred the case to the Friend of the Court for a recommendation of child support. This time the Friend of the Court recommended that the defendant's imputed full time employment be calculated based upon the Bureau of Labor Statistics Occupational Handbook farm manager income of $66,000. The defendant objected to that recommendation. The trial court subsequently held a hearing regarding defendant's objections to child support, at which it considered the trial testimony as well as new testimony by defendant and his mother, Joy Urka.[1] Joy testified that she and defendant's father jointly owned the farm, which did not pay immediate family members. Joy testified that if the farm were to hire someone to replace defendant, it could afford to pay only $10 an hour. She also acknowledged that she did not know what the income of the farm was.

During the trial and hearing, defendant repeatedly described himself as a manager who ran the farm's daily operations and maintenance. Defendant stated that the farm took care of his needs, including his electricity, water, food, and clothing for the children, as a benefit for his labor. Plaintiff also testified that she received $1,200 a month to benefit the children while she lived at the farm. Defendant agreed that plaintiff received an "allowance" from his parents, though he testified that the amount was $1,000 a month, which was provided on a limited basis. At trial, defendant testified that the $1,200 a month was not available for the purposes of calculating child support "[b]ecause I haven't taken it," further explaining that he had refused to take the money.

Friend of the Court worker Rachel Wittlieff testified at the hearing on objections that she used the Bureau of Labor Statistics Occupational Handbook to "determine the wage of a farm manager in the State of Michigan." The Occupational Handbook gave a range of $65,000 to $75,000 for farm managers. Wittlieff believed defendant's testimony was consistent with the definition of farm manager, which was a person who "operate[s] establishments that produce crops, livestock and/or dairy products." Ultimately, the trial court imputed $66,000 a year of income to defendant as a farm manager.

II. CHILD SUPPORT

Defendant argues that there was no basis to impute income of $66,000 a year to him as a farm manager. We disagree.

This Court reviews de novo the interpretation and application of the Michigan Child Support Formula (MCSF). *Borowsky v Borowsky*, 273 Mich App 666, 672; 733 NW2d 71

[1] To avoid confusion, Joy Urka will be referred to as "Joy."

(2007). This Court reviews for clear error the trial court's findings of fact in determining the amount of support owed. *Id.* The trial court clearly errs if, after reviewing its decision, this Court is definitely and firmly convinced that the trial court made a mistake. *Carlson v Carlson*, 293 Mich App 203, 205; 809 NW2d 612 (2011). This Court reviews for an abuse of discretion the trial court's discretionary rulings, including its decision to impute income to a party. *Id.* The trial court abuses its discretion when its outcome falls outside the range of reasonable and principled outcomes. *Id.*

The MCSF provides that the trial court may impute income to a parent who has reduced or waived his or her income. 2017 MCSF 2.01(G)(1). When imputing income, the trial court must consider the relevant factors to determine whether a parent has the actual ability and reasonable likelihood to earn the potential income, including: (1) prior employment experience; (2) education level and special skills or training; (3) physical and mental disabilities; (4) availability for work; (5) availability of opportunities to work in the local area; (6) the prevailing wage and hours available in the local area; (7) the party's diligence in seeking employment; (8) evidence the parent is able to earn the imputed income; (9) personal history, including his or her criminal record; (10) the presence of the parties' children in the home; and (11) whether there has been a significant reduction of income before the complaint or motion for modification. 2017 MCSF 2.01(G)(2)(a) to (k).

The trial court did not clearly err by finding that defendant was a farm manager with specialized training in working on farm equipment and vehicles. In this case, Wittlieff testified that the agricultural manual stated that a farm manager "operate[s] establishments that produce crops, livestock and/or dairy products." Defendant testified at various points that he was a farm manager or a general manager. Defendant stated that his work included running daily operations, scheduling workers as a shared responsibility with the rest of his family, offering an opinion regarding hiring and firing, and ensuring the crops were planted on time. He also performed maintenance, was the farm mechanic, and worked on the farm's utilities. While defendant did testify that he swept floors, brought in firewood, drove his parents, and retrieved food for them, that was by no means his only testimony.

We are not definitely and firmly convinced that the trial court made a mistake when it found that defendant was a farm manager. Additionally, we reject defendant's assertion that the trial court did not consider his disabilities. The trial court specifically considered defendant's testimony about his back and hand conditions that he gave at the aborted trial, but found that they did not prevent him from functioning in his capacity on the farm.

We also find no error in the trial court's determination that defendant had the ability to earn $66,000 a year. When imputing income, the trial court must determine "that the parent has an actual ability and likelihood of earning the imputed income." *Stallworth v Stallworth*, 275 Mich App 282, 285; 738 NW2d 264 (2007). However, it can be difficult to determine the income of self-employed individuals and business owners. 2017 MCSF 2.01(E)(1). "Due to the control that business owners or executives exercise over the form and manner of their compensation, a parent, or a parent with the cooperation of a business owner or executive, may be able to arrange compensation to reduce the amount visible to others looking for common forms of income." 2017 MCSF 2.01(E)(1)(c). The trial court should include as income in-kind income and perquisites, including gifts and personal use of business property, and reduced or

deferred income, including any unnecessary reductions in salary. MCSF 2.01(D), (E)(4)(b) and (d).

In this case, defendant was an executive of Urka Farms who had control over the form and manner of his compensation. He specifically testified that he refused monetary compensation from the farm. Defendant had extensive in-kind income. Defendant stated that he did not draw a paycheck, and he had not done so for years. However, he testified that he received housing, food, and clothing for the children as a benefit for the labor he provided on the farm. His parents paid defendant's gas and electric bills. The gasoline in defendant's car was paid for by a business credit card or his mother's personal credit card. He had a business credit card in his name.

Defendant also effectively reduced his compensation as a result of the complaint for divorce. There was evidence that the plaintiff had been the recipient of regular payments from farm operations that were intended to provide for the minor children. Those payments constitute some evidence of monies available to the defendant from farm income for the benefit of his children. We recognize that there was conflicting evidence regarding how much of an "allowance" plaintiff received and how often she received it while living on the farm. Plaintiff testified the amount was a monthly payment of $1,200, while Joy claimed the payments were of short duration and $1,000. This Court defers to the trial court's findings of credibility and will not substitute its judgment for that of the trial court. MCR 2.613(C); *Woodington v Shokoohi*, 288 Mich App 352, 358; 792 NW2d 63 (2010). The trial court was entitled to consider this amount when determining defendant's income.

Wittlieff testified that the Occupational Handbook gave a range of $65,000 to $75,000 for a farm manager in the State of Michigan. Joy testified that the farm could only afford to pay someone $10 an hour to replace defendant. Defendant testified that a replacement worker would cost $20/hour. The general laborer at the farm, whose duties were directed by the defendant was paid $12/hour. Additionally, while Wittlieff testified that she had not determined whether other work was available in the area, this was not a relevant factor in this case. The question was not whether defendant would be able to find employment at a different farm, or what the farm would be willing to pay an outside worker—the question was how to value the compensation that defendant received for his work on the farm.[2] For the same reason, the trial court did not err by disregarding defendant's and Joy's testimonies about how much money would be available to hire an outside worker. An outside worker would not receive the extensive in-kind benefits defendant was receiving from the farm.

The trial court ultimately found that defendant had the ability to earn $66,000 a year as a farm manager who was actively involved in mechanics and who had experience maintaining utilities. Because defendant received extensive alternative compensation for his work on the farm, and the average wage for a farm manager is $65,000 to $75,000, we are not definitely and

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[2] Notably, both defendant and Joy testified that they did not know the farm's yearly income. Joy testified that defendant's father would know this information. While defendant listed his father as a potential witness, defendant never called his father to establish the farm's yearly income.

firmly convinced that the trial court made a mistake when it found that defendant had the ability to earn an income of $66,000 a year.

III. CUSTODY AND PARENTING TIME

Defendant also argues that the trial court should have granted reconsideration on defendant's motion for custody and parenting time because he was forced into the agreement by his trial counsel. We reject this argument.

This Court reviews the trial court's decision concerning a motion for reconsideration for an abuse of discretion. *Yoost v Caspari*, 295 Mich App 209, 219; 813 NW2d 783 (2012). The trial court abuses its discretion when its outcome falls outside the range of reasonable and principled outcomes. *Carlson*, 293 Mich App 203 at 205. When moving the trial court for reconsideration, "[t]he moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." MCR 2.119(F)(3).

In his motion for reconsideration, defendant argued that he was pressured into settling his custody case. However, when entering the agreement, defendant explicitly agreed he was satisfied with the advice of his counsel:

> THE COURT. And you're satisfied with the advice given to you by MS. PAINE?
>
> MR. URKA. Correct.

Defendant also repeatedly denied that he wished to represent himself, and one of these instances took place at the child support hearing, which was notably after the hearing at which defendant asserted he was pressured into a custody agreement by counsel. The trial court's decision to deny reconsideration did not fall outside the range of reasonable and principled outcomes.

IV. THE VIDEOTAPE

During the trial a certain videotape was played. The tape was of the defendant espousing his beliefs concerning the genesis of the divorce proceedings and the attenuation of his relationship with his children. Trial counsel objected to the videotape based upon chain of evidence, authenticity, attorney-client privilege and relevance. On appeal, the principal objection is work-product privilege. The issues of child custody, and parenting time were the subject of an agreement placed on the record. For this reason, any error regarding the admission of a videotape at the divorce trial is harmless. We have reviewed the videotape, and it contains no evidence pertinent to child support. This Court will not modify a decision of the trial court on the basis of a harmless error. MCR 2.613(A).[3]

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[3] Regardless, defendant's assertions of attorney-client privilege and work-product doctrine are entirely without merit where the videotape depicts defendant repeatedly referring to someone off-camera. The attorney-client privilege is waived when a confidential communication is

Affirmed.

/s/ Jane M. Beckering
/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens

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intentionally disclosed to a third party. *Leibel v Gen Motors Corp*, 250 Mich App 229, 242; 646 NW2d 179 (2002). Similarly, the work-product privilege is waived when the work product is voluntarily disclosed to a third party. *D'Alessandro Contracting Group, LLC v Wright*, 308 Mich App 71, 81; 862 NW2d 466 (2014). Defendant's statements on the videotape were knowingly exposed to the person whom defendant repeatedly asked to turn the recorder off.