

STATE OF MICHIGAN
COURT OF APPEALS

GRACE BRAUSER,

Plaintiff-Appellee,

v

CRAIG SCHUBINER,

Defendant-Appellant.

UNPUBLISHED

March 4, 2014

No. 310964

Oakland Circuit Court

LC No. 2010-769676-DP

Before: HOEKSTRA, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's opinion and order regarding child support, custody, and parenting time of the parties' minor child. Because we conclude that the trial court failed to accurately calculate defendant's income and failed to follow the requirements for deviation from the Michigan Child Support Formula ("MCSF"), we vacate the judgment's award of child support and remand for recalculation of the award consistent with this opinion.

On appeal, defendant argues that the trial court clearly erred when it determined his income for the purpose of calculating his child support obligation under the MCSF. Defendant points to several alleged errors. Specifically, defendant maintains that the trial court relied on erroneous calculations that overstated his income and included assets that he did not actually own and savings that no longer existed. Defendant also maintains that the trial court should not have used his voluntary withdrawal of funds from his investment accounts as income because those funds were needed to keep his business afloat, and it was inappropriate for the trial court to find that his decision to invest in these business assets was imprudent. Finally, defendant also maintains that the trial court improperly considered withdrawals from his savings account used to meet his ongoing living and business expenses as part of his income. In his reply brief, defendant also argues that the trial court failed to properly follow the statutory procedure for deviation from the MCSF.

Child-support orders are reviewed for an abuse of discretion, factual findings underlying the trial court's decisions are reviewed for clear error, and whether the trial court properly applied the MCSF is a question of law that is reviewed de novo. *Clarke v Clarke*, 297 Mich App 172, 178-179; 823 NW2d 318 (2012). "This Court also reviews de novo the proper interpretation of the MCSF and the applicable statutes." *Borowsky v Borowsky*, 273 Mich App 666, 672; 733 NW2d 71 (2007). "Where the MCSF commits a matter to the discretion of the

trial court, this Court will review the trial court's exercise of discretion for abuse" of such discretion. *Id.* "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Jilek v Stockson*, 297 Mich App 663, 665; 825 NW2d 358 (2012). "A trial court abuses its discretion when it relies on a legally improper reason for departing from the MCSF in establishing a parent's child support obligation." *Ewald v Ewald*, 292 Mich App 706, 715; 810 NW2d 396 (2011). "Clear error exists only when the appellate court is left with the definite and firm conviction that a mistake has been made." *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 471; 719 NW2d 19 (2006).

Generally, both parents have an obligation to provide their minor child with support, and a trial court may enforce that right by ordering parents to pay child support. MCL 722.3; *In re Beck*, 488 Mich 6, 12; 793 NW2d 562 (2010). "However, once a trial court decides to order the payment of child support, the court must 'order child support in an amount determined by application of the child support formula . . .'" *Borowsky*, 273 Mich App at 673, quoting MCL 552.605(2).

"The first step in determining the parents' support obligation under the MCSF is to determine each parent's net income in order to 'establish, as accurately as possible, the monies available to support the children.'" *Borowsky*, 273 Mich App at 673, quoting 2004 MCSF 2.01(A).¹ "Net income," which means "all income minus the deductions and adjustments permitted by" the MCSF, "will not be the same as that person's take home pay, net taxable income, or similar terms that describe income for other purposes." 2008 MCSF 2.01(A). See also *Borowsky*, 273 Mich App at 673-674.

With respect to the MCSF definition of "income," the 2008 manual provides, in part:

(C) Income includes, but is not limited to, the following:

* * *

(2) Earnings generated from a business, partnership, contract, self-employment, or other similar arrangement, or from rentals.

(a) Income (or losses) from a corporation should be carefully examined to determine the extent to which they were historically passed on to the parent or used merely as a tax strategy.

* * *

¹ 2004 MCSF 2.01(A) is substantially similar to 2008 MCSF 2.01(B), which provides: "The objective of determining net income is to establish, as accurately as possible, how much money a parent should have available for support. All relevant aspects of a parent's financial status are open for consideration when determining support." While the trial court calculated support in 2012, the 2008 Michigan Child Support Formula Manual was effective from October 1, 2008 to December 31, 2012.

(6) Capital gains to the extent that they result from recurring transactions; or if the capital gains are attributable to a single event or year, or when cash may not be immediately available to the parent, consider them to the extent they can be used to represent income over several years.

(D) Income also includes the market value of perquisites (perks) received as goods, services, or other noncash benefit for which the parent did not pay, if they reduce personal expenses, and have significant value or are received regularly.

(1) Common forms of perquisites (perks) or goods and services received in-kind include, but are not limited to: housing, meals, or room and board, personal use of a company business vehicle or mileage reimbursement, including use between home and primary worksite, and other goods or services. [2008 MCSF 2.01.]²

“The objective of determining net income is to establish, as accurately as possible, how much money a parent should have available for support. All relevant aspects of a parent’s financial status are open for consideration when determining support.” 2008 MCSF 2.01(B). See also *Borowsky*, 273 Mich App at 673. “A trial court is not limited to considering only a parent’s actual income when assessing that parent’s ability to pay support. Rather, the trial court may consider the parent’s voluntarily unexercised earning ability, and the parent’s assets” *Reed v Reed*, 265 Mich App 131, 163; 693 NW2d 825 (2005) (internal citations omitted).

First, we reject defendant’s claims that the trial court relied on erroneous calculations that overstated his income. Defendant’s argument is premised on a claim that the testimony of the financial expert appointed by the trial court was not credible, and that the testimony of his own financial expert should have been relied on. However, the trial court heard testimony from defendant’s expert as well as an agreed upon court-appointed expert. The trial court noted the discrepancies between the two expert’s calculations and specifically found that the court-appointed expert’s testimony was more credible. Because the facts, as found by the trial court, are supported by testimony that the trial court found to be credible, we cannot find that the trial court clearly erred. *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011) (“We defer to the trial court’s credibility determinations given its superior position to make these judgments.”).

Defendant also argues that the trial court erred by relying on assets that he did not actually own and savings that no longer existed. The trial court stated in its opinion that defendant possessed substantial assets, including three homes and three different accounts containing stocks and money, referred to as “Hedge, Hedge 2, and Value Brothers.” On appeal, defendant argues that the evidence demonstrated that the one home he actually owned was listed for sale, and that he had no ownership interest in the other two homes and was obligated to pay rent. He also argues that his testimony demonstrated that he does not own any stock interests

² We note that in the current MCSF manual, the definition of income remains the same. 2013 MCSF 2.01.

and his three accounts were essentially depleted. We agree with defendant that the trial court's findings were not supported by the record.

During the evidentiary hearing, defendant testified that the Hedge accounts had about \$1,500 between them, and that the Value Brothers account contained about \$25,000, and that those three accounts represented his entire personal savings. However, the testimony makes clear that in previous years these accounts held substantially more money, and it is true that a trial court may consider a parent's earning potential when determining income. *Reed*, 265 Mich App at 163. In its opinion, the trial court did not assign monetary amounts to the accounts held by defendant; rather, it simply stated that these three primary accounts constituted some of defendant's "substantial assets." Thus, the trial court's opinion appears to overstate defendant's actual assets. Moreover, if the trial court was imputing income to defendant on the basis of any unexercised earning ability, its opinion did not adequately explain that finding.³

Further, defendant clearly testified that he only owns one of the three homes listed by the trial court. No evidence to refute defendant's claim that he has no ownership interest in two of the three homes was submitted. While the trial court did acknowledge in its opinion that one of defendant's homes, the only one that he actually owns, was listed for sale,⁴ its opinion stated that "defendant possesses substantial assets," which "include a total of three homes." The finding that defendant actually possesses three homes is clearly erroneous.⁵ Thus, on remand, the trial court should reconsider the assets defendant actually controls and assess his income and possible unexercised earning potential in light of the testimony presented during the evidentiary hearing.

Next, defendant argues that the trial court inappropriately considered his voluntary withdrawal of funds from his savings account as income because those funds were used to meet his ongoing living and business expenses. We agree. In *Borowsky*, 273 Mich App at 677, 681, this Court held that withdrawal of funds from savings to pay current living expenses cannot be treated as income under the MCSF. Thus, the trial court was not permitted to treat defendant's savings account withdrawals used for living expenses as income. Accordingly, we must vacate the trial court's award and remand for recalculation of defendant's income under the MCSF.

³ Indeed, the trial court referenced a development project that was in the works, but did not specifically explain whether it was imputing income on that basis or on any other basis.

⁴ Gains from the sale of property must be included as income for purposes of calculating child support. *Borowsky*, 273 Mich App at 680-681. A one-time sale that creates a "distorted impression" of a party's income may render any award unjust or inappropriate and warrant deviation from the formula. *Id.* at 681 n 8.

⁵ We recognize that there was some evidence to suggest that the other two homes were owned by companies controlled by defendant's mother and that defendant was not actually obligated to pay rent; however, the trial court would have to more clearly explain what it means by its finding that defendant "possesses" three homes. Moreover, defendant testified that he was obligated to pay rent for one of the homes he did not own.

Similarly, defendant also argues that the trial court's characterization of withdrawals from his investment accounts in order to keep his business afloat as income was also erroneous. While, *Borowsky* does not address whether savings used to maintain a business constitutes a living expense, we conclude the reasoning in *Borowsky* regarding withdrawals from a savings account to fund living expenses applies to withdrawals used to maintain a business. *Borowsky* held that savings account withdrawals used for living expenses cannot be considered income under the MCSF because the MCSF does not recognize those withdrawals as income. *Id.* at 681. Similarly, the MCSF does not recognize withdrawals from investment accounts used to maintain business assets as income. Accordingly, to the extent that the trial court considered these withdrawals to be income, it erred.

However, we note that this Court in *Borowsky* recognized that the trial court could deviate from the MCSF if it found that the parent's substantial financial resources, though not properly treated as income under the formula, rendered application of the MCSF unjust or inappropriate. *Id.* at 682. Accordingly, the trial court in this case could determine that deviation from the MCSF is necessary. Indeed, we recognize that while it is not clear from the opinion, it is possible that the trial court intended to deviate from the MCSF.⁶

Calculation of a child support obligation must be made in strict compliance with the requirements of the MCSF unless the trial court "determines from the facts of the case that application of the child support formula would be unjust or inappropriate." MCL 552.605(2); *Borowsky*, 273 Mich App at 673. If a trial court determines that deviation from the formula is warranted, it is required to set forth in writing or on the record the following factors set forth by MCL 522.605(2):

- (a) The child support amount determined by application of the child support formula.
- (b) How the child support order deviates from the child support formula.
- (c) The value of property or other support awarded instead of the payment of child support, if applicable.
- (d) The reasons why application of the child support formula would be unjust or inappropriate in the case.

Compliance with the statutory procedure for deviation is mandatory, and failure to specifically make a record regarding these statutory factors constitutes error requiring reversal. *Burba v Burba*, 461 Mich 637, 644-646; 610 NW2d 873 (2000).

⁶ While the trial court did not explicitly state that it was deviating from the MCSF, it did cite MCL 552.605(2), and later, it stated that utilizing an income of zero for defendant would be unjust or inappropriate.

Again, we note that it is not clear whether the trial court intended to deviate from the MCSF. Nevertheless, even if the trial court intentionally deviated from the MCSF upon a finding that its application would be unjust or inappropriate, the trial court failed to comply with MCL 522.605(2). The trial court did not specifically calculate defendant's income under the MCSF or explain how exactly its order deviates from the MCSF. Further, the trial court did not explain the reasons for its deviation other than its brief statement, "in light of defendant father's substantial assets, it would be inappropriate and unjust to utilize zero (\$0.00) for his income to calculate child support." Thus, it is necessary to remand this case for recalculation of defendant's income, either under the MCSF or under a deviation that complies with MCL 522.605(2) and the MCSF. *Borowsky*, 273 Mich App at 682 (holding that the trial court's failure to comply with the requirements for deviation from the MCSF required remand for recalculation "in conformity with the provisions of the MCSF.").

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

/s/ Joel P. Hoekstra
/s/ Michael J. Riordan