NO. COA01-494

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

WANDA TUTTLE BAXLEY,
Plaintiff

v. Davidson County
No. 96 CVD 471

DAVID F. BAXLEY,
Defendant

Appeal by defendant from order entered 1 March 2001 by Judge Mark S. Culler in Davidson County District Court. Heard in the Court of Appeals 15 April 2002.

William M. Speaks, Jr. for plaintiff-appellee.

Theodore M. Molitoris and Michelle D. Reingold for defendant-appellant.

EAGLES, Chief Judge.

David Baxley ("defendant") appeals from the trial court's order awarding custody and child support to Wanda Baxley ("plaintiff"). On appeal, defendant argues that the trial court abused its discretion in calculating his prospective and "retroactive" child support obligations. After careful consideration of the record and briefs, we reverse and remand.

Plaintiff and defendant were married on 6 February 1982. During the marriage, two children were born: David, born on 11

March 1983, and Megan, born on 16 April 1989. The parties separated in May 1993 and subsequently divorced. Following the date of separation, the parties shared custody of the children, and the children lived with each parent on alternate weeks. In late 1996, David began living solely with plaintiff.

On 12 March 1996, plaintiff filed a complaint seeking primary custody of the children and child support. Subsequently, defendant filed his answer and asserted a counterclaim seeking joint custody. A hearing was held during the 27 February 2001 session of Davidson County District Court. By order entered 1 March 2001, the trial court awarded sole custody of David to plaintiff, joint custody of Megan to both parents, and prospective and "retroactive" child support payments from defendant to plaintiff. Defendant appeals.

At the outset, we note that "[a]bsent a clear abuse of discretion, a judge's determination of what is a proper amount of [child] support will not be disturbed on appeal." *Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 868 (1985). The trial court's order for support will not be disturbed "if there is competent evidence to support it, even if there is conflicting evidence." *Evans v. Craddock*, 61 N.C. App. 438, 440-41, 300 S.E.2d 908, 910 (1983).

Here, the record reflects that in 1992 defendant earned $43,000.00 a year prior to being terminated from his job at Flow Motors; that defendant voluntarily refused a management position with Flow Motors; that defendant started his own automobile repair business in approximately 1992; that defendant testified at the

hearing that his income has increased every year since approximately 1992; and that defendant testified that he made only $990.00 a month in 1999. Based on the evidence, the trial court found and concluded that

> defendant decided of his own volition to become self-employed and at all relevant times was capable of earning $35,000.00 per year or $2916.00 per month.
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> . . . .
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> Defendant has voluntarily depressed his income by voluntarily refusing to accept employment with income above the income he is now reporting to the IRS and is, in fact, capable of earning $35,000.00 per year.

The trial court then used the imputed salary, $35,000.00 a year or $2,916.00 a month, to calculate defendant's prospective and "retroactive" child support obligations.

"It is well established that child support obligations are ordinarily determined by a party's actual income at the time the order is made or modified." *Ellis v. Ellis*, 126 N.C. App. 362, 364, 485 S.E.2d 82, 83 (1997). "Additionally, a party's capacity to earn income may become the basis of an award if it is found that the party deliberately depressed its income or otherwise acted in deliberate disregard of the obligation to provide reasonable support for the child." *Askew v. Askew*, 119 N.C. App. 242, 244-45, 458 S.E.2d 217, 219 (1995). "Before the earnings capacity rule is imposed, it must be shown that [the party's] actions which reduced [its] income were not taken in good faith." *Id.* at 245, 458 S.E.2d at 219. In other words, "[w]hen calculating the child support

obligation owed by a parent, a showing of bad faith income depression by the parent is a mandatory prerequisite for imputing income to that parent." *Sharpe v. Nobles*, 127 N.C. App. 705, 706, 493 S.E.2d 288, 289 (1997).

Defendant contends that the trial court erred in not making an explicit finding of bad faith income depression prior to utilizing the earning capacity rule. We agree. In *Kowalick v. Kowalick*, 129 N.C. App. 781, 788, 501 S.E.2d 671, 676 (1998), this Court held that before considering a party's earning capacity, the trial court *must* make a finding that the party deliberately depressed its income in bad faith or otherwise disregarded its child support obligation. Here, the trial court did not make the required finding.

Additionally, the trial court erred by basing its order on its "notion of some unspecified sum that it thought" defendant should be able to earn. *See Whitley v. Whitley*, 46 N.C. App. 810, 812, 266 S.E.2d 23, 24 (1980). Here, the trial court found and concluded that defendant was capable of earning $35,000.00 per year or $2,916.00 per month. While the evidence reflects that defendant made $43,000.00 a year in 1992 and that he voluntarily refused a management position with Flow Motors, there is no competent evidence in the record supporting the $35,000.00 yearly salary imputed to defendant. Accordingly, we conclude that the trial court abused its discretion in imputing $35,000.00 a year to defendant. Because the trial court did not find that defendant acted in bad faith and the court used the $35,000.00 a year imputed

salary to calculate defendant's prospective child support obligation, we reverse and remand for redetermination.

Likewise, we remand for redetermination of defendant's "retroactive" child support obligation. Retroactive child support is an amount of child support, not based on the presumptive Guidelines, awarded prior to the date a party files a complaint. *See State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 647-48, 507 S.E.2d 591, 595 (1998). Retroactive child support "is calculated by considering reasonably necessary expenditures made on behalf of the child by the party seeking support, and the defendant's ability to pay during the period in the past for which retroactive support is sought." *Id.* at 648, 507 S.E.2d at 595. Here, child support was not awarded prior to the date that plaintiff filed her complaint. Thus, we conclude that the trial court erred in classifying defendant's support obligation due from June 1996 (the date the matter was originally calendared for hearing) to February 2001 (actual date of hearing) as "retroactive."

"Child support awarded . . . from the time a party files a complaint for child support to the date of trial is not 'retroactive child support,' but is in the nature of prospective child support representing that period from the time a complaint seeking child support is filed to the date of trial." *Taylor v. Taylor*, 118 N.C. App. 356, 361, 455 S.E.2d 442, 446 (1995), *rev'd on other grounds*, 343 N.C. 50, 468 S.E.2d 33 (1996). Because the trial court used defendant's alleged imputed salary to calculate

his "retroactive" support obligation, we reverse and remand for redetermination of defendant's prospective obligation due from the date that plaintiff filed her complaint to the date of the hearing, March 1996 to February 2001.

We note that as part of its support award the trial court also ordered defendant to pay plaintiff "$1480.00 for defendant's pro rata share of braces for David." Here, there is no evidence in the record as to plaintiff's actual expenditures ("[$]4,000 something"), defendant's actual contribution ("I want to say $500"), or whether the braces were pre- or post-filing of plaintiff's complaint. In light of this absence of evidence, we reverse and remand.

In sum, we conclude that the trial court erred and abused its discretion by using imputed income figures to calculate defendant's child support obligation without first finding that defendant acted in bad faith and in imputing $35,000.00 a year to defendant in the absence of any competent evidence supporting that amount. Hence, we reverse and remand for redetermination of defendant's child support obligations.

Reversed and remanded.

Judges HUDSON and BRYANT concur.

Report per Rule 30(e).