IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1032

Filed: 7 July 2020

Cumberland County, No. 10 CVD 7116

BETH ISRAEL, Plaintiff-Appellee,

v.

STEPHEN ISRAEL, Defendant-Appellant.

Appeal by defendant-appellant from order entered 8 May 2019 by Judge Toni S. King in Cumberland County District Court. Heard in the Court of Appeals 12 May 2020.

Mark L. Hayes for defendant-appellant.

No brief was filed for the plaintiff-appellee.

BERGER, Judge.

On May 8, 2019, the trial court entered an order which modified a prior child support order. Stephen Israel ("Defendant") appeals, arguing that the trial court's order (1) was erroneously based on an incomplete income calculation for Beth Israel ("Plaintiff"), and (2) contained an improper finding of imputed income for Defendant. We disagree.

Factual and Procedural Background

Plaintiff and Defendant were married in 1988, and they separated in August 2010. The parties had six children born of the marriage. An order for child support was entered on September 4, 2013. At that time, Defendant was employed as an independent contractor earning approximately $1,040.00 per month. Defendant was also receiving approximately $250.00 in Veterans benefits per month.

In 2014, Defendant moved to Florida with his girlfriend and her father. Defendant's last child support payment was made in September 2016. On May 22, 2018, Defendant filed motions for contempt and modification of child custody and child support. On February 21, 2019, Plaintiff filed a motion for contempt. The trial court heard both motions on March 19, 2019. At the time of the hearing, Defendant had recently been hired at AutoZone. Defendant was earning $9.25 an hour but was limited to 20 hours of work per week.

At trial, Defendant testified that he had no savings and no assets other than two pieces of property with tax values of $4,200.00 and $22,000.00. Defendant also had physical limitations that required physical therapy sessions. Plaintiff testified that she was unemployed and receiving food stamps. She estimated her monthly income was $1,604.00: $1,100.00 from housing an international student and $504.00 in food stamps.

On May 8, 2019, the trial court issued an order modifying Defendant's child support payments to $814.00 per month with an additional $186.00 per month towards arrears. The trial court's order also held Defendant in contempt of court. The order included the following relevant findings of fact:

> 19. That while living in the New Orleans and Madaville areas, the Defendant was able to earn an income of at least three thousand dollars ($3,000.00) per month.
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> 20. In 2013, Defendant received VA benefits of approximately two hundred fifty dollars ($250.00) per month for carpel tunnel and a scalp skin disorder.
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> 21. In May of 2014, Defendant moved to Oscala, Florida with his girlfriend Elaine Major based upon Defendant's girlfriend having a better job opportunity.
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> 22. That the Defendant, in moving to Oscala, Florida, had no job leads and had not established himself in the area of home restoration or improvement in that area.
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> 23. That the Defendant does have the benefit and support of his girlfriend in the payment of all his living expenses, to include the travel and lodging that he may need.
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> 24. That the Defendant has deliberately and intentionally suppressed his income and is voluntarily suppressing his income in bad faith.
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> . . .
>
> 36. Defendant owns two real property lots with 2018 Cumberland County tax parcel number 0439-93-9286 with a tax value of twenty-two thousand dollars ($22,000.00) and tax parcel 0449-03-1238 with tax value of four thousand two hundred dollars ($4,200.00); that the

defendant has made some improvements and modifications to the property and would like to satisfy his child support with said lots.

. . .

48. Defendant has not made a child support payment since September of 2016 and is arrears of twenty-eight thousand eight hundred dollars ($28,800.00) in child support for October of 2016 through October of 2018 and four thousand seventy dollars ($4,070.00) in child support arrears for November of 2018 through March of 2019.

. . .

51. Defendant and his girlfriend Elaine Major share three (3) financial accounts with PNC bank during the pendency of this litigation.

52. That the checking account has cash and other deposits going into the accounts that the Defendant shares with his girlfriend.

. . .

55. Plaintiff receives five hundred four dollars ($504.00) in food stamp benefits and hosts an international student, for which she receives one thousand one-hundred dollars ($1,100.00) per month in compensation.

. . .

63. That the Defendant has violated the child support order willfully and without lawful excuse.

64. Plaintiff has the means and ability whereby to comply with the previous Order of the Court and presently has the means and ability with which to comply with said Order or is able to take reasonable measures that would enable her to comply with said Order, and that Plaintiff's

failure to abide by the terms of the Order as set forth above or to take reasonable measures to do so has been willful, and without legal justification or excuse.

65. Defendant has had the means and ability whereby to comply with the previous Child Support and Custody Order of the Court and presently has the means and ability with which to comply with said Order or is able to take reasonable measures that would enable him to comply with said Order, and that Defendant's failure to abide by the terms of the Order as set forth above or to take reasonable measures to do so has been willful, and without legal justification or excuse.

. . .

68. That a substantial change in circumstances exist that affects the welfare of the minor children and their best interest and that warrants a modification of the child support order and child custody order.

69. That after review of the medical records, the Defendant has not presented any credible evidence to show that he is unable to earn an income.

70. That the Plaintiff earns income of one thousand one-hundred dollars ($1,100.00) per month and Defendant should be imputed income of three thousand dollars ($3,000.00) per month.

. . .

72. The child support obligation worksheet has been prepared pursuant to N.C.G.S. §50-13.4(c) which is incorporated herein by reference. The presumptive guideline amount of child support pursuant to that statute for the non-custodial parent to pay is eight hundred fourteen dollars ($814.00) per month.

> 73. Both Plaintiff and Defendant are primarily liable for the support of the children and at the present time, with Plaintiff being the custodial parent, a fair and reasonable sum for Defendant to pay for the health, education and maintenance of the children, having due regard to the circumstances of the parties and the children as required by N.C.G.S. §50-13.4(b) and (c), is eight hundred fourteen dollars ($814.00) per month and Defendant has the means to pay said sum, or the ability to take reasonable measures that would enable him to pay said sum.
>
> 74. Child support arrears owed by Defendant to Plaintiff are thirty-two thousand eight hundred and seventy dollars ($32,870.00) as of the date of this hearing.
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> 75. Defendant has the ability to repay the child support arrears at the rate of one hundred eighty-six dollars ($186.00) per month.
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> 76. Defendant has the ability to pay one thousand dollars ($1,000.00) on March 25, 2019, to be applied towards his child support arrears.
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> 77. Defendant has the ability to pay one hundred eighty-six dollars ($186.00) per month to be applied towards the child support arrears.

In that same order, the trial court concluded as a matter of law that:

> 6. The sum of eight hundred fourteen dollars ($814.00) per month for the support and maintenance of the minor children meets their reasonable needs for health, education and maintenance, having due regard to the circumstances of the parties and the children as required by N.C.G.S. §50-13.4(b) and (c).
>
> 7. Defendant is liable for the support of the minor children and has the ability to provide the sum of eight hundred fourteen dollars ($814.00) per month for the support of said minor children, having due regard to the relative ability of the parties to provide support, and to the

> circumstances of the parties and the children as required by N.C.G.S. §50-13.4(b) and (c).

Defendant appeals, arguing that the trial court's child support order (1) was erroneously based on an incomplete income calculation for Plaintiff, and (2) contained an improper finding of imputed income for Defendant. We disagree.

Standard of Review

"Child support orders entered by a trial court are accorded substantial deference by appellate courts." *Loosvelt v. Brown*, 235 N.C. App. 88, 93, 760 S.E.2d 351, 354 (2014). A child support order is

> based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount. These conclusions must in turn be based on factual findings specific enough to indicate to the appellate court that the judge below took due regard of the particular estates, earnings, conditions, and accustomed standard of living of both the child and the parents. In reviewing child support orders, our review is limited to a determination whether the trial court abused its discretion. Under this standard of review, the trial court's ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. The trial court must, however, make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law.

Roberts v. McAllister, 174 N.C. App. 369, 374, 621 S.E.2d 191, 195 (2005) (*purgandum*). "A trial court's findings of fact are conclusive on appeal if the trial court sits as the trier of fact and they are supported by competent evidence, even if

there exists evidence that might sustain a finding to the contrary." *Schroader v. Schroader*, 120 N.C. App. 790, 796, 463 S.E.2d 790, 794 (1995).

Analysis

A. Income Calculation for Plaintiff

Defendant argues that the trial court erred when it calculated Plaintiff's income. Specifically, that the trial court excluded Plaintiff's "food stamp income," and that Plaintiff's actual income should have been $1,604.00 rather than $1,100.00.

The statute used in determining child support is N.C Gen. Stat. § 50-13.4(b) and (c), which provides:

> (b) In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child.
>
> . . .
>
> (c) Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case. Payments ordered for the support of a minor child shall be on a monthly basis, due and payable on the first day of each month. The requirement that orders be established on a monthly basis does not affect the availability of garnishment of disposable earnings based on an obligor's pay period.
>
> The court shall determine the amount of child support payments by applying the presumptive guidelines . . . .

N.C. Gen. Stat. § 50-13.4(b)-(c) (2019).

The North Carolina Child Support Guidelines (the "Guidelines") defines "gross income" as:

> income from any source, including but not limited to income from employment or self-employment (salaries, wages, commissions, bonuses, dividends, severance pay, etc.), ownership or operation of a business, partnership, or corporation, rental of property, retirement or pensions, interest, trusts, annuities, capital gains, Social Security benefits, workers compensation benefits, unemployment insurance benefits, disability pay and insurance benefits, gifts, prizes and alimony or maintenance received from persons other than the parties to the instant action.

North Carolina Child Support Guidelines, AOC-A-162, Rev. 3/20. "Specifically excluded from income are . . . Electronic Food and Nutrition Benefits," or more commonly known as "food stamps." *Id.*

On appeal, Defendant specifically challenges finding of fact 70, which states:

> 70. That the Plaintiff earns income of one thousand one-hundred dollars ($1,100.00) per month and Defendant should be imputed income of three thousand dollars ($3,000.00) per month.

Because food stamps are not income under the Guidelines, the trial court properly calculated Plaintiff's monthly income on the $1,100.00 from housing an international student. Therefore, the trial court did not abuse its discretion when it excluded Plaintiff's food stamps in calculating her income.

B. Imputed Income to Defendant

Defendant next argues that the trial court imputed income to him without a finding of bad faith. Defendant specifically argues that the trial court erred in making findings of fact 24, 70, and 73 as set forth above.

Generally, the trial court considers a parent's actual income when it establishes or modifies a child support obligation. *Kowalick v. Kowalick*, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998). However, the "trial court may . . . consider a [parent's] earning capacity if it finds that the [parent] was acting in bad faith by deliberately depressing her income or otherwise disregarding the obligation to pay child support." *Id.* at 787-88, 501 S.E.2d at 675-76 (citation and quotation marks omitted). To do so, the trial court must have sufficient evidence of the parent's proscribed intent. *Roberts*, 174 N.C. App. at 378, 621 S.E.2d at 198. "Intent being a mental attitude, it must ordinarily be proven, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be inferred." *Id.* at 378, 621 S.E.2d at 198.

On appeal, Defendant challenges finding of fact 24, which states:

> 24. That the Defendant has deliberately and intentionally suppressed his income and is voluntarily suppressing his income in bad faith.

There was evidence from which the trial court could reasonably find bad faith on the part of Defendant such that imputing income was not an abuse of discretion. Prior to moving to Florida, Defendant was self-employed earning roughly $3,000.00 per month through home restoration work. However, in 2014, Defendant voluntarily

moved to Florida to live with his girlfriend, failed to secure a job, and did not pursue self-employment. Defendant testified that he applied for work as a ranch hand, had several physical ailments, and fell off a roof while he was working in home restoration and home improvement. Following the accident, Defendant testified that he was unable to find work in home restoration or home improvement. Defendant was not licensed in Florida to work in home restoration; however, he was not otherwise prohibited from painting or working on certain projects valued at less than $1,000.00. The trial court found that Defendant's evidence of his inability to earn an income was not credible. "[I]t is within the trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial." *Walton v. Walton*, 263 N.C. App. 380, 388, 822 S.E.2d 780, 786 (2018) (citation and quotation marks omitted).

Although the trial court's finding of bad faith may not have been our decision given the evidence presented, "the trial judge is in the best position to make such a determination as he or she can detect tenors, tones and flavors that are lost in the bare printed record read months later by appellate judges." *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 903 (2008) (citation and quotation marks omitted).

Therefore, we decline to second guess the trial court's determination of credibility. Plaintiff presented sufficient evidence for the trial court to make a finding of bad faith, we cannot say that the trial court abused its discretion in finding that

Defendant "has deliberately and intentionally suppressed his income and is voluntarily suppressing his income in bad faith." *See Ludlam v. Miller*, 225 N.C. App. 350, 356, 739 S.E.2d 555, 559 (2013) ("Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." (citation and quotation marks omitted)).

Moreover, there is substantial evidence that demonstrates Defendant's voluntary *underemployment* was a result of bad faith. The Guidelines allow the trial court to impute income for "a parent's voluntary unemployment or underemployment" as a result of bad faith. North Carolina Child Support Guidelines, AOC-A-162, Rev. 3/20. Here, Defendant was earning approximately $3,000.00 per month before he voluntarily relocated to Florida. Once in Florida, Defendant did not have a job and did not secure a job until roughly two weeks before the hearing. Defendant now works for AutoZone and earns $9.25 an hour and is limited to 20 hours a week. There was sufficient evidence to support a finding that Defendant is voluntarily underemployed, and we cannot say that the trial court abused its discretion.

A trial court calculates a parent's imputed income "based on the parent's . . . employment potential and probable earnings level, based on the parent's recent work history." North Carolina Child Support Guidelines, AOC-A-162, Rev. 3/20. Here,

Defendant's employment potential is based on his previous work history as an independent contractor in home renovations, which had a probable earning level of $3,000.00 per month. His voluntary actions resulted in his underemployment, which allowed the trial court to impute income to Defendant based on his employment potential and probable earning level.

Therefore, the trial court did not abuse its discretion when it imputed income to Defendant in the amount of $3,000.00 per month.

Conclusion

For the foregoing reasons, we affirm the trial court's order.

AFFIRMED.

Judges BRYANT and MURPHY concur.

Report per Rule 30(e).