

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

ROBIN A. BAILEY

Appellee

v.

JERMAINE L. SHELTON

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 666 MDA 2012

Appeal from the Order Entered March 16, 2012
In the Court of Common Pleas of Dauphin County
Civil Division at No(s): 01806-DR-01
664103740

BEFORE: BOWES, J., OLSON, J., and WECHT, J.

MEMORANDUM BY WECHT, J.:

FILED MAY 03, 2013

Jermaine L. Shelton ("Father"), *pro se*, appeals from a March 16, 2012 child support order. After careful review, we reverse.

The trial court summarized the case history as follows:

The parties are parents of one daughter, currently ten years old. [Robin A. Bailey ("Mother")] filed an initial support complaint in 2001 and an order was entered directing [F]ather to pay \$51 per week child support. That order was suspended upon [M]other's request effective June 2003. Thereafter, [F]ather paid no court-ordered support for his daughter between June 2003 and October 2011; during this time, he paid an arrears only order. On October 11, 2011, [M]other filed a complaint seeking to reinstate child support. On November 30, 2011, following a conference in the Dauphin County Domestic Relations Section, [the trial court] issued an order as recommended by the conference officer, directing that [F]ather pay \$50 per month child support and \$10 per month on arrears (effective October 11, 2011). In recommending the order, the conference officer calculated support under the Support Guidelines using each

party's actual income, a \$905 monthly gross for [F]ather and a \$1,440 monthly gross for [M]other.

Father filed a timely request seeking *de novo* review. The *de novo* hearing was held before [the trial court] on March 16, 2012. Father testified at the hearing that the sole reason he sought the *de novo* hearing was because of [M]other's alleged failure to let him see their daughter and that it had been his understanding that the Domestic Relations Section office conference, at which [M]other had not appeared, had been scheduled to resolve custody issues. [The trial court] informed him that he was incorrect and that custody was not an issue properly resolved in a support proceeding. [The trial court] thus directed him how to proceed on the custody issue. Nevertheless, upon determining that he was not working, [the trial court] assigned him an appropriate earning capacity and thus increased [F]ather's support obligation to \$410 per month plus \$5 on arrears. This support obligation was derived from the Support Guidelines and was based upon [M]other having a current monthly net income of \$2,600 and [F]ather a monthly net earning capacity of \$2,100.

Trial Court Opinion ("T.C.O."), 6/15/2012, at 1-2 (citations to notes of testimony omitted).

On April 2, 2012, Father filed a notice of appeal. The trial court ordered Father to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Father timely complied.

We review a child support order for a clear abuse of discretion. ***Isralsky v. Isralsky***, 824 A.2d 1178, 1186 (Pa. Super. 2003). Such an abuse of discretion is shown by a misapplication of law or an unreasonable exercise of judgment. ***Id.***

We first note that Father's brief does not comply with our rules outlining the requirements for appellate briefs.¹ The brief does not include a Statement of Questions Involved (pursuant to Pa.R.A.P. 2116), nor a Summary of Argument (pursuant to Pa.R.A.P. 2118). However, while Father's argument contains a dearth of citations to authority, we are able to discern that he takes issue with the earning capacity assigned to him by the trial court at the *de novo* hearing. Thus, we will address his arguments on this issue. **See generally *Com. v. Lyons***, 833 A.2d 245, 252 (Pa. Super. 2003) (reaching merits of issues that could be discerned in non-compliant brief).

Father argues that he has never made more than \$10 per hour. Because Father was still attending school and had not completed a degree, he maintains that his education does not provide him any advantage in the workplace. Father also asserts that his criminal record prevents him from obtaining employment and that he has not had a job since 2009. Finally, Father argues that the trial court erred when it only considered his education in determining his earning capacity.

The trial court found that Father's actual income was not commensurate with his earning capacity. As such, the court assigned Father an earning capacity, instead of using his actual income, in order to determine a child support obligation. The trial court stated that it assigned a

¹ Mother did not file an appellee's brief.

\$15 per hour earning capacity based upon Father's educational background. Because Father did not present evidence at the hearing about his prior income level and criminal record, the trial court did not consider those factors. T.C.O. at 3-4.

At issue is the determination of Father's earning capacity. Rule 1910.16-2 provides as follows:

Earning Capacity. If the trier of fact determines that a party to a support action has willfully failed to obtain or maintain appropriate employment, the trier of fact may impute to that party an income equal to the party's earning capacity. Age, education, training, health, work experience, earnings history and child care responsibilities are factors which shall be considered in determining earning capacity. In order for an earning capacity to be assessed, the trier of fact must state the reasons for the assessment in writing or on the record. Generally, the trier of fact should not impute an earning capacity that is greater than the amount the party would earn from one full-time position. Determination of what constitutes a reasonable work regimen depends upon all relevant circumstances including the choice of jobs available within a particular occupation, working hours, working conditions and whether a party has exerted substantial good faith efforts to find employment.

Pa.R.C.P. No. 1910.16-2(d)(4). "However, [a] person's earning capacity is defined not as an amount which the person could theoretically earn, but as that amount which the person could realistically earn under the circumstances, considering his or her age, health, mental and physical condition and training." ***Haselrig v. Haselrig***, 840 A.2d 338, 340 (Pa. Super. 2003) (quoting ***Strawn v. Strawn***, 664 A.2d 129, 132 (Pa. Super. 1995)).

Haselrig is instructive. Although that case dealt with spousal support and whether earning capacity should be based upon more than one full-time job, the case dealt squarely with the adequacy of the court's inquiry into the earning capacity factors. In that case, the hearing officer made no inquiry into earning capacity and instead relied upon prior W-2 forms in order to determine income for support. **Haselrig**, 840 A.2d at 340. We held that Pennsylvania law required the trial court to conduct a full inquiry before determining a party's earning capacity. **Id.** at 341. Further, we held that, if a party's attorney failed to make an adequate inquiry, the hearing officer or trial court should question the party regarding the earning capacity factors. **Id.**

In this case, neither party was represented. A member of the domestic relations staff testified to the parties' incomes. Notes of Testimony ("N.T."), 3/16/2012, at 1-2. The trial court then questioned Father. Father testified that he was attending community college and was not working at the time. N.T. at 3-4. The court then determined that Father should be held to a higher earning capacity, stating:

THE COURT: So because you have three years of college you should be earning at least \$15 an hour. So why aren't you working?

[FATHER]: Because I study. I make sure that my grades are intact because I go to school full time.

THE COURT: Well, I know but you still have to work.

[FATHER]: I do. I mean, I don't work right now but that does not hamper me taking care of my daughter in any way, shape or form.

THE COURT: Okay. He should be at [\$]15 an hour. That is his earning capacity. Babysitters in the summer who take care of people over the summer make \$15 an hour in high school. So you with three years of college are certainly capable of earning \$15 an hour somewhere.

N.T. at 4-5. There was no additional testimony regarding any of the factors the court was required to consider in determining Father's earning capacity.

A full inquiry is required before ascertaining a party's earning capacity. If the party or counsel does not conduct an adequate inquiry, the court or hearing officer has the responsibility to do so. ***See Haselrig, supra.*** Here, the trial court asked only about Father's educational background. While Father did not raise his criminal background or work history, it was incumbent upon the trial court to ask the questions necessary to understand the factors and circumstances that contribute to the determination of Father's earning capacity. Because an adequate inquiry was not made, the trial court abused its discretion in setting an earning capacity for Father. We must reverse the support order and remand for a hearing to allow for a full and proper inquiry into Father's earning capacity.²

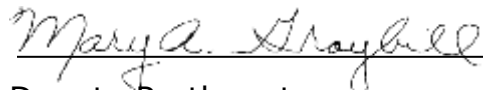
² We recognize that Father filed a petition to modify his support on May 4, 2012. That petition resulted in a modified order dated June 18, 2012. However, because the support order at issue in this case was effective until the new order's retroactive date, the order on appeal was used to calculate Father's arrears. Therefore, even though Father's current order will remain
(Footnote Continued Next Page)

Father also argues that the trial court erred in ordering child support because Father and Mother share custody, because Father provided support prior to the order, and because Mother did not prove that she requires assistance to support the child.

Because we are remanding the case, we need not address these arguments. We note only that Father may present evidence regarding these issues at the hearing on remand.

Order reversed. Case remanded for a new hearing. Jurisdiction relinquished.

Judgment Entered.


Deputy Prothonotary

Date: 5/3/2013

(Footnote Continued) _____

in effect regardless of our ruling in this case, the appeal is not moot because it will determine Father's arrears.