STATE OF MICHIGAN

COURT OF APPEALS

JOEL C. HENRY, Plaintiff-Appellee,	UNPUBLISHED July 17, 2012
v	No. 298896 Ingham Circuit Court
JOY L. FRANCIS, f/k/a JOY L. HENRY, Defendant-Appellant.	LC No. 06-002156-DZ

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

PER CURIAM.

Defendant appeals by leave granted a child support order requiring defendant to pay child support. The issue in this case involves the trial court's determination that defendant had an unexercised ability to earn income. We reverse and remand.

When plaintiff and defendant divorced in 2007, defendant was ordered to pay child support for her five minor children. However, child support was suspended for three years to offset the spousal support defendant would receive.[1] According to the judgment of divorce, the Friend of the Court was to make "a full investigation and recommendation as to the amount of child support" at that time. It did not. A hearing was held before a referee, and the case then went before the trial court on defendant's objection to the referee's recommendation. The trial court found that "the circumstances today for the Defendant are nearly identical to the circumstances that existed at the time the Judgment of Divorce was entered," and so, "there has been no change in circumstances warranting any change in the amount of income previously imputed to Defendant at the time the Judgment of Divorce was entered." On that basis, the court found that defendant had an unexercised ability to earn and imputed income of $12,500 to her, which represents $250 per week for 50 weeks."

[1] At that time, the trial court adopted a hearing referee's determination that defendant had a voluntary unexercised ability to earn and that income as a part-time piano teacher should be imputed to defendant in determining child support. The referee concluded that defendant had potential income of $250 per week teaching piano lessons for 10 hours per week.

Child support orders are generally reviewed for an abuse of discretion. *Holmes v Holmes*, 281 Mich App 575, 586; 760 NW2d 300 (2008). A trial court's decision to impute income on the basis of an unexercised ability to earn is within the court's discretion. *Stallworth v Stallworth*, 275 Mich App 282, 286-287; 738 NW2d 264 (2007). However, the trial court's factual findings underlying its determination of a child support award are reviewed for clear error. *Id*. at 284.

In Michigan, children have the right to receive financial support from their parents. *Borowsky v Borowsky*, 273 Mich App 666, 672; 733 NW2d 71 (2007). A court can enforce this right by ordering a noncustodial parent to pay child support. *Id*. When establishing the amount owed, a court must follow the child support formula developed by the Friend of the Court unless the result would be unjust or inappropriate. MCL 552.605(2); *Peterson v Peterson*, 272 Mich App 511, 518-519; 727 NW2d 393 (2006). The first step in establishing child support is to determine each parent's net income. 2008 MCSF 2.01(A); *Borowsky*, 273 Mich App at 673. "When a parent is voluntarily unemployed or underemployed, or has an unexercised ability to earn, income includes the *potential* income that parent could earn, subject to that parents' actual ability." 2008 MCSF 2.01(G) (emphasis in original).

When determining whether a parent has the actual ability to earn potential income, the following factors are to be considered:

> (a) Prior employment experience and history, includes reasons for any termination or changes in employment.
>
> (b) Education level and any special skills or training.
>
> (c) Physical and mental disabilities that may affect a parent's ability to obtain or maintain gainful employment.
>
> (d) Availability for work (exclude periods when a parent could not work or seek work, e.g., hospitalization, incarceration, debilitating illness, etc.).
>
> (e) Availability of opportunities to work in the local geographical area.
>
> (f) The prevailing wage rates in the local geographical area.
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> (g) Diligence exercised in seeking appropriate employment.
>
> (h) Evidence that the parent in question is able to earn the imputed income.
>
> (i) Personal history, including present marital status and present means of support.
>
> (j) The presence of the parties' children in the parent's home and its impact on that parent's earnings.
>
> (k) Whether there has been a significant reduction in income compared to the period that preceded the filing of the initial complaint or the motion for modification. [2008 MCSF 2.01(G)(2); see also *Ghidotti v Barber*, 459 Mich 189, 199; 586 NW2d 883 (1998).]

A trial court must make specific findings regarding these criteria "to ensure that any imputation of income is based on the actual ability and likelihood of earning the imputed income. Any other rule would be pure speculation and a clear violation of the requirement that child support be based upon actual resources of the parents." *Id*. at 199.

Defendant does not offer any reason why the trial court's findings regarding factors (a), (b), and (j) were clearly erroneous. She holds a Bachelor's degree in Piano Pedagogy from Michigan State University. Defendant last worked in 1995, but her previous employment history includes giving piano lessons and working at the MSU bookstore and the MSU Community Music School. Defendant does not have custody of the children, so they have no impact on her ability to earn income.

Instead, the greatest causes for concern are the factors that are affected by defendant's mental health. In regard to factor (c), which is addressed to defendant's "physical and mental disabilities that may affect [her] ability to obtain or maintain gainful employment," the trial court relied on the fact that defendant "claims to be mentally well but also seeks to use mental illness as a reason not to work," and that "Defendant has consistently denied having those mental health issues." However, the psychologist who examined defendant found that defendant suffers from delusions and does not "sufficiently integrate fundamental aspects of objective reality." He noted defendant's "categorical lack of recognition and denial of the existence of her serious psychological and behavioral problems," and said her "entrenched defensive position and/or inability to understand that she has serious problems, degrades an already guarded prognosis, based on her extensive identified psychological problems, to a prognosis that is unavoidably very poor." These findings by the psychologist led the referee to conclude that defendant is a "completely unreliable perceiver and historian of events." So, defendant's self-assessment is really of no practical value in determining whether her mental health affects her ability to find or keep employment.

The trial court also relied on the fact that defendant "failed to provide any documentation from any mental health professional that she is unable to work due to her mental health status." Although defendant had no note from a doctor expressly saying she could not work due to her mental illness, as one might have, for instance, when trying to collect workers' compensation benefits, the child support guidelines do not require such a document. Factor (c) simply calls for an assessment of defendant's mental disabilities that may affect her ability to get and keep a job. The information necessary to make that assessment is available in the record and, in particular, in the comments of the psychologist. Along with noting defendant's "bizarre" behavior, inability to sufficiently integrate fundamental aspects of objective reality, impaired adaptive interpersonal functioning, and "chronic severe difficulties with perceptual accuracy, reasoning, and social judgment, he specifically found that defendant's "patterns of psychological and behavioral functioning" lead to "clinically significant impairment in social, *occupational*, and other important areas of functioning." [Emphasis added.]

Furthermore, while the trial court's statement that "It should be noted that many people with mental illnesses continue to work and lead normal and fulfilling lives when their conditions are appropriately addressed" may be true as a general proposition, the question is not whether "many people with mental illnesses" have the ability to work; rather, it is whether *this* defendant with mental illnesses has the ability to work. The psychologist noted defendant's "delusional

disorder" and her "chronic severe difficulties with perceptual accuracy, reasoning and social judgment." He said defendant is "is unable to form and maintain an integrated, adequately reality based, and independent point of view," and described her as a "pervasively psychologically disordered and effectively helpless woman." He opined that there was no basis for "even cautious optimism, that Ms. Henry will be capable of better reality testing, reasoning, and judgment, in the future." The referee found "overwhelming evidence that Defendant is severely mentally ill and that [the psychologist's] assessment appears to be the most comprehensive, and accurate, evaluation of that illness available." The trial court adopted the referee's findings. The trial court clearly erred when it found that factor (c) was neutral.

The psychologist's testimony also is relevant to factor (d), "Availability for work (exclude periods when a parent could not work or seek work, e.g., hospitalization, incarceration, debilitating illness, etc.)," about which the trial court said,

> She testified that she cannot ethically give lessons to children because she has been deemed severely mentally ill and is a danger to her own children. The court is unaware of any medical or professional restrictions precluding Defendant from giving piano lessons or performing other kinds of work.

That last sentence seems to be a reiteration that defendant had no specific documentation from a doctor saying she was unable to work and so, the analysis regarding factor (c) applies here as well. The proper inquiry should have been whether defendant *can* work. Further, in the first sentence of the quoted passage, the court slightly mischaracterized defendant's testimony. She did not say she could not ethically give lessons to children because of her mental illness. She said she was ethically obligated to tell the parents of any potential piano student about her mental illness and that she was deemed a danger to her own children. Defendant's assessment of her ethical obligation is correct and it is likely that if she revealed the extent and severity of her mental illness, the chance of a parent entrusting their child to defendant for instruction approaches nil. Indeed, from the psychologist' description, defendant's mental illness may be apparent even if she did not expressly disclose it herself. Thus, the trial court clearly erred when it found that this factor favored potential income.

There was no evidence presented regarding factor (e), "Availability of opportunities to work in the local geographical area." Neither party presented any evidence that there was or was not any significant opportunity for piano teaching available. In *Ghidotti*, 459 Mich at 198-199, the Court noted that in *Sword v Sword*, 399 Mich 367, 378-379; 249 NW2d 88 (1976), the Court suggested several factors to be used in determining a parent's ability to pay child support. Those factors were very similar to those now listed in 2008 MCSF 2.01(G)(2), and included "available work opportunities." In reference to the imputation of income for child support purposes, the *Ghidotti* Court said,

> The requirement that the trial court evaluate criteria such as those listed in *Sword* is essential to ensure that any imputation of income is based on an actual ability and likelihood of earning the imputed income. Any other rule would be pure speculation and a clear violation of the requirement that child support be based upon the actual resources of the parents. [*Ghidotti*, 459 Mich at 199.]

In light of that pronouncement, factor (e) is a particularly significant one because it directly relates to the "actual ability and likelihood of earning the imputed income." That is, if there are no available opportunities for work, many of the other factors, such as a parent's prior employment experience, educational level or special skills, do not really matter as far as the "actual ability and likelihood of earning the imputed income." So, the trial court erred in finding factor (e) to be neutral.

Regarding factor (f), "The prevailing wage rates in the local geographical area," the trial court conceded that there was no testimony regarding prevailing wages for piano teachers in the Grand Rapids area, but relied on the $20-$30/hour rate found by the referee and adopted by the court in 2007. The referee did make that finding relative to this particular factor. Although there was no evidence as to the current rates, there was also no evidence that the rates had changed significantly in the two year period since the 2007 finding. The trial court did not clearly err in its finding on this factor.

Factor (g) considers "diligence exercised in seeking appropriate employment." The circuit court found the following:

> Defendant testified that she is not familiar with Michigan Works. She has never gone to any State agency to seek assistance in obtaining employment. When asked why she has not sought employment in the last two years, Defendant responded that she has been giving herself full time to this case. She has not exercised parenting time since May 2009 but she has been examining records in this case. It is clear Defendant has no intention of working. This factor favors potential income.

It is undisputed that defendant admitted she is unfamiliar with Michigan Works and has not made any attempt to secure employment. Defendant argues that the circuit court ignored the potential risk she poses to children. However, this factor only considers whether she has attempted to find employment. She has made no attempts. While whether someone with significant mental illness should be faulted for not attempting to find employment presents an interesting question, the circuit court's finding is not clearly erroneous.

"Evidence that the parent in question is able to earn the imputed income" is considered in factor (h). The circuit court made the following finding:

> Defendant's previous work history indicates that she is capable of teaching piano or working in a retail position despite any possible mental illnesses. This factor favors potential income.

The trial court's finding that defendant could teach piano lessons for 10 hours per week appears to be based largely on the fact that she did so some 15 years ago. It is not clear from the record presented just when defendant's mental illness began or how it progressed, so it is also not clear just what degree of mental illness she had when she gave lessons in 1995. The little that the record does contain is the psychologist saying, "This form of dysfunction is understood to be of long duration, with onset traced back to at least adolescence or early adulthood." This statement addresses onset, but not progression or severity. Defendant was married and raised five children for 15 years before she was involuntarily committed in 2006, and there is no evidence in the

record presented of any diagnosis of severe mental illness before 2006. In her 2007 report, the referee stated,

> The evidence demonstrates that Defendant mother was the primary hand's on [sic] parent for these five minor children, being the stay at home parent for all of them since birth. She home schooled the children . . . . it also appears likely that *as Defendant's mental health issues increased*, that she was most effective in her care and home schooling with the younger children before they reached an age to become aware of unusual behaviors. [Emphasis added.]

Thus, for at least some of the period since 1995, defendant's mental illness did not preclude her from schooling her children and presumably would have allowed her to also teach piano had she so desired. However, the finding that "Defendant's mental health issues increased," indicated that the mental health issues are presently more severe than they were. So, we conclude that the mere fact that defendant taught piano lessons some 15 years ago says little about her ability to do so now.

Factor (i) evaluates the "personal history, including present marital status and present means of support." The circuit court found:

> Defendant currently lives with her parents. They have provided for her daily needs including food, clothing, shelter, and transportation since 2006. This factor favors potential income.

It is undisputed that defendant lives with her parents and is entirely dependent on her family for financial support. However, the issue hinges on whether this is because she simply chooses not to work or her mental illness disrupts her ability to work. Based on the psychologist's assessment, the latter is more likely the case. He specifically noted:

> In addition, clinical observation of [defendant] and her accounts of current and past events suggest the operation of Personality Disorder. Personality Disorder is defined as an-enduring pattern of inner experience and behavior that deviates markedly from the expectations of an individual's culture. [Defendant's] ways of perceiving and interpreting self, other people, and events, are ideographic and self-centered. She lacks substantial appreciation for the impact of her behavior on others, particularly her children. [Defendant's] capacity for adaptive interpersonal functioning is impaired, as is her emotional responsivity. These patterns of psychological and behavioral functioning are understood to be inflexible and pervasive across a broad range of personal and social situations, leading to clinically significant impairment in social, *occupational*, and other important areas of functioning.

Defendant could potentially be dependent on government aid if she did not receive support from her parents. If she was, it would be improper to impute potential income to her. *Ghidotti*, 459 Mich at 204. The trial court committed clear error by not considering the impact of defendant's mental illness on this factor.

"Whether there has been a significant reduction in income compared to the period that preceded the filing of the initial complaint or the motion for modification" is considered in the

final factor. 2008 MCSF 2.01(G)(2)(k). The trial court found that this factor favored potential income because, "There has not been a reduction in Defendant's income since the Judgment of Divorce was entered."

It is undisputed that defendant has not worked since 1995. This Court has long grappled with how a noncustodial parent's voluntary reduction in income should affect child support. *Rohloff v Rohloff*, 161 Mich App 766, 769-770; 411 NW2d 484, lv den 429 Mich 869 (1987). Some courts have required the reduction to have been made in "bad faith," i.e. an attempt to avoid paying child support, before unearned income will be imputed to the parent. *Id*. at 770-775. However, it is not an abuse of discretion for a circuit court to objectively consider this factor and assess potential income, even if the reduction was made for laudable reasons. *Id*. at 775-776. Although it is unclear how a court should handle income that has remained constant, we cannot conclude that it was an abuse of discretion to objectively conclude that this factor favored potential income.

In sum, we conclude that the trial court's findings regarding factors (c), (d), (e), (h), and (i) were clearly erroneous. On remand, the circuit court is to reconsider the factors set forth in MCSF 2.01(G)(2) in light of its own previous findings regarding defendant's mental illness without requiring proof that defendant cannot work. It must find that she *can* work before income can be imputed to her.

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

/s/ Jane M. Beckering
/s/ E. Thomas Fitzgerald
/s/ Cynthia Diane Stephens