S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

AMY LYNN HECKERT,

Plaintiff-Appellee,

v

RICHARD JASON SCHWARK,

Defendant-Appellant.

UNPUBLISHED
March 22, 2005

No. 251696
Calhoun Circuit Court
LC No. 02-001590-DP

Before: Murray, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment awarding child support to plaintiff for the parties' child. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court ordered defendant to pay $336 per month in child support and $288 per month in childcare. This was based on application of the Michigan Child Support Formula to defendant's imputed income of $421.53 per week, as adjusted for another child for whom defendant had custody. Defendant argues that it was error to impute income to him.

Defendant first argues that the trial court erred in relying on the recommendation of the Friend of the Court ("FOC") investigator that income should be imputed to defendant based on a $12 per hour wage. Defendant claims that the judge could not rely on the recommendation over his objection. Defendant cites 10 Michigan Pleading & Practice (2d ed) § 70:315.05 for the proposition that an FOC recommendation cannot be the sole basis for a *modification* to a support order, and if there is not consensus, an evidentiary hearing must be held. Here, modification was not at issue, as this was the original support order. Moreover, an evidentiary hearing was held.

Next, defendant cites cases holding that an FOC *report* cannot be admitted into evidence over a party's objection. However, the cases hold that a judge may review a report but must base a decision on properly received evidence, *McCarthy v McCarthy*, 74 Mich App 105, 109; 253 NW2d 672 (1977), and that the facts in the report may not be given evidentiary weight but the report may be used as an evaluative aid. See *Pellar v Pellar*, 178 Mich App 29, 32; 443 NW2d 427 (1989). Here, the report was not received into evidence. Rather, the investigator testified directly about how she ascertained that the $12 per hour rate would be a more accurate estimate of defendant's hourly income than the amount reported by defendant. Furthermore, the trial court did not rely solely on this evidence in arriving at the $12 per hour figure. The trial court

first found that it should impute as much income to defendant as his laborers earn. Defendant testified that he operated a roofing business and that "if you break it down weekly, [his employees] were making eight to nine dollars per hour," but that he paid them $20 per square, which would take 1½ to 2 hours to install. Since this suggested an average of $10 to $15 per hour, the court found that this evidence was consistent with the estimate of $12 per hour. This estimate was based on the most credible information available in light of defendant's obstinate refusal to report his actual income and his other efforts to thwart an accurate estimate. Under these circumstances, the trial court did not clearly err when it imputed the additional income to defendant. *Kosch v Kosch*, 233 Mich App 346, 350; 592 NW2d 434 (1999).

Defendant next argues that the trial court erred in concluding that he had the ability to earn the imputed income. He takes issue with the determinations, or lack thereof, regarding factors (1), (3), (5), (6) and (8) of § 2.10(E) of the Michigan Child Support Formula Manual, which governs the imputation of income.

Regarding factors (1) (prior employment experience) and (6) (prevailing wage rates in the area), defendant asserts that his prior employment history, particularly his past earnings, should have been based on his tax returns. However, the trial court concluded that the adjusted gross income, as reflected on the returns, was underreported. In light of defendant's statements during cross-examination, this determination was not clearly erroneous. For example, the 2001 return indicated that he paid $4,271 for advertising and yet his net income was allegedly only $7,555. Also, defendant's business had over $50,000 in purchases. Defendant attributed these to materials and supplies, but there was another category covering materials and supplies. Therefore, the trial court did not clearly err when it imputed income to defendant based on the credible evidence rather than on defendant's self-serving statements.

Regarding factor (3) (physical disabilities) and factor (8) (defendant's ability to earn imputed income), defendant asserts that his alleged scoliosis, bad back, and bad knee should have been taken into account. He acknowledges that these ailments were supported only by his testimony, but notes that his testimony was uncontradicted except for the investigator's belief that neither party had a physical ailment that would prevent them from working. The trial court noted that there were no substantiating medical proofs and found that defendant had the ability to work. We leave credibility determinations for the trier of fact, even when the evidence is uncontradicted. *Rogers v Detroit*, 340 Mich 291, 297; 65 NW2d 848 (1954). Regarding factor (5) (availability of employment in the area), defendant asserts that no evidence was presented to show that roofing work was locally available. However, the trial court reasonably inferred that work was available from the fact that defendant employed eight roofers in his business. Therefore, the trial court did not clearly err when it imputed income to defendant after weighing these factors.

Affirmed.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Peter D. O'Connell