STATE OF MICHIGAN

COURT OF APPEALS

SUZANNE MARIE CHIPPS, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED February 23, 2010
v	No. 291755 Livingston Circuit Court
GREGORY BRADFORD CHIPPS, Defendant/Counter-Plaintiff-Appellant.	LC No. 08-040599-DM

Before: Donofrio, P.J., and Meter and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce entered by the trial court after a bench trial. Defendant takes issue with the trial court's custody decision, its property division, and its award of spousal support and child support. We affirm.

The parties married in June 2001 and had two children: Gage, born in November 2004, and Garrett, born in November 2005. The marriage was troubled from its early years, and the parties finally divorced in 2009. In an interim order, the court awarded temporary legal and physical custody of the two children to plaintiff. At the time of the proceedings, plaintiff was employed part-time as a nurse. Defendant, a computer software developer, had left his position with a consulting firm[1] to work full-time at his church. At the conclusion of the proceedings, the court again awarded plaintiff custody of the two children, with defendant awarded "reasonable parenting time." The court awarded plaintiff child support and two years of spousal support.

Defendant first argues that the trial court erred in failing to determine whether an established custodial environment existed. MCL 722.28 states:

> To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of

[1] Plaintiff had also worked part-time at Dykema Gossett as a consultant.

evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.

MCL 722.27(1)(c) states that a court, in considering a child-custody issue, may:

> Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age and, subject to section 5b of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605b, until the child reaches 19 years and 6 months of age. *The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child*. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. [Emphasis added.]

Defendant contends that the trial court failed to make a finding regarding the established custodial environment of the children.[2] However, we conclude that such a finding was implicit in the trial court's statements. The court, immediately before analyzing the child-custody best-interests factors, stated that "the prior custody order, a mere – mere existence, has not influenced my decision." It then went on to state that it would focus on the "best interest of the minor children." Given the trial court's statement that the interim order would not influence its decision, and given that the parties clearly had joint legal and physical custody before the interim order was entered, we find it implicit in the trial court's ruling that it found an established custodial environment with both parents. In *Overall v Overall*, 203 Mich App 450, 455; 512 NW2d 851 (1994), the Court stated:

> First, plaintiff argues that the trial court erred in failing to determine whether a custodial environment was created after the parties' separation and during the pendency of the divorce. We find this issue to be without merit because the trial court did address the issue of the existence of a custodial environment.
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> Whether a custodial environment exists is a question of fact, which the trial court must address before ruling on the child's best interests. . . . In the case at bar, the trial court based its finding that no custodial environment existed on the prior custody order and the stipulation of the parties that the shared custody

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[2] Plaintiff argues that the trial court did not need to make a finding regarding whether an established custodial environment existed because the interim custody order had previously granted plaintiff full legal and physical custody. This argument is without merit. The temporary order did not negate the need for finding whether an established custodial environment existed. See, e.g., *Bowers v Bowers*, 190 Mich App 51, 53; 475 NW2d 394 (1991).

> arrangement was not to create any custodial environment with either parent. Thus, contrary to plaintiff's contentions, the trial court made sufficient findings here.

We find the instant case to be somewhat similar to *Overall*. While there was no stipulation here regarding the implications of the interim order, the trial court explicitly stated that that order did not influence its decision. The implication is that the court was starting from the earlier point of reference, i.e., when both parties were sharing custody of the children, and that it was *not* finding an established custodial environment with plaintiff. We find no basis for reversal.

Defendant next takes issue with the trial court's findings on factor h of the child-custody best-interests factors. This factor concerns "[t]he home, school, and community record of the child." MCL 722.23(h). The court ruled in favor of plaintiff on this issue, indicating that defendant had shown some reluctance regarding sending Gage to preschool and indicating that plaintiff would be more apt to foster in the children an accommodation of other people's possibly different belief systems. We find no error with regard to the trial court's findings on this factor. Plaintiff testified that defendant was reluctant to allow Gage to attend preschool, expressing fear that "something would happen, and there would be like a lock down, where you wouldn't be able to go and retrieve your children from school." Plaintiff also testified that defendant told the children that "[Christmas] is a lie" and "mommy put those presents under the tree." Plaintiff testified that defendant would not let the children view carved pumpkins at Halloween and explained in front of the children why certain holiday traditions are "bad" and "evil." This evidence supported the trial court's findings regarding factor h. While the court may not have explicitly referred to a "record," the court was essentially taking into account the past "home, school, and community" life of the children and finding that plaintiff was the better-suited parent in this respect.

Defendant appears to be contending that the court was simply discriminating against defendant on the basis of religion, but this is inaccurate. By describing certain holiday traditions as "evil" and describing Christmas as "a lie," defendant was fostering a home and community atmosphere of intolerance, and the trial court correctly recognized this.

Defendant next takes issue with the trial court's findings concerning factor j. This factor concerns "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents." MCL 722.23(j). The court stated, in part:

> There I'm going to look at who can best cooperate with an appropriate parenting time schedule, who will actively encourage positive feelings for the other party, and who is least likely to disparage the other parent in the presence of the child are based [sic] upon past performance. And in that regard . . . I do find that this factor favors Mrs. Chipps. Although Mr. Chipps says that he wants his kids to be with their mother, that she's been a good mother, it concerns me with some of the things that the children come back with, and that are related to me here in court that I've previously noted. And to be able to seek – you're gonna have different beliefs. You've got different – different values. And you can still instruct your children regarding your beliefs and your faiths, but they need to understand and be tolerant for the beliefs of others. The problem is the difference in the belief

> system that the two of you have, and that's where the conflict comes in. And that's where you need to promote and encourage a close relationship with the – with the other parent.

Defendant contends that, in making this finding, the court was relying on hearsay statements of Gage. Defendant does not cite to the record in support of his argument or even indicate the content of the alleged hearsay statements. An appellant may not leave it up to this Court to unravel his arguments for him. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). At any rate, the court's finding was supported by the evidence. Plaintiff testified that, regarding her new boyfriend, the children "say Phil doesn't follow God; Phil's bad; daddy doesn't like him." Plaintiff testified that dealing with defendant was "very difficult." This evidence supported the trial court's finding that defendant was likely to be less effective than plaintiff in facilitating a relationship between the two parties. Indeed, that defendant would disparage plaintiff's boyfriend as "bad," apparently because he "doesn't follow God," tends to indicate that he would not be effective in attempting to have the children maintain a close and loving relationship with their mother as she builds her separate life. Moreover, the statements by the children did not constitute hearsay because they were not offered to prove the truth of the matter asserted. MRE 801(c).

Defendant next argues that the trial court erred in its spousal-support and child-support orders because it imputed an incorrect income to plaintiff. We review the decision to award spousal support for an abuse of discretion, although any factual findings are reviewed for clear error. *Gates v Gates*, 256 Mich App 420, 432; 664 NW2d 231 (2003). "The trial court's decision regarding spousal support must be affirmed unless we are firmly convinced that it was inequitable." *Id*. at 433. We also review child-support orders for an abuse of discretion. *Holmes v Holmes*, 281 Mich App 575, 586; 760 NW2d 300 (2008).

In considering spousal support, the trial court found that plaintiff earned $40,000 a year working part-time and that "she should be able to return to full-time employment within two years." It found that defendant "has an income of $113,000, $102,000 from ACS, $11,000 from Dykema." It stated:

> The present situation of Mrs. Chipps would call for some short term rehabilitative alimony in order to be able to obtain her recertification. There is health – there's a child care expense that's been factored into the support amount. And I have to be mindful that Mr. Chipps has voluntarily reduced his income, which if you were just on your own, if it was just you, it would be fine to pursue whatever you want to pursue, but there are two children here that have – have needs, and need the care, and need the ability for their parents to provide for them while – while they are your dependents.

The court awarded $159 a month in spousal support for two years, "or at such time as Mrs. Chipps otherwise cures and has full-time employment." The court stated, "I do look at it as more

or less tuition assistance for her to be able to complete that certification and go onto full-time employment."[3]

The court also based its child-support award on an income of $113,000 a year. Defendant contends that the trial court erred in finding that he had this income, because (1) he had changed professions and now earns $36,000 a year working for his church, and (2) his job with ACS was no longer available at the time of the bench trial, even if he had wanted it.

Defendant fully admits that he voluntarily changed jobs and took an accompanying pay reduction. The pertinent question is whether the trial court properly imputed the prior, higher income to him. In the child-support context, this Court has held:

> There is [a] line of cases which holds that a trial court is not limited to a parent's actual income in setting child support payments and may consider unexercised ability to earn. . . .
>
> We agree . . . that when a party voluntarily reduces or eliminates income, and the trial court concludes that the party has the ability to earn an income and pay child support, the court does not err in entering a support order based upon the unexercised ability to earn.
>
> While we fully support an individual's desire to improve circumstances, we cannot sanction doing so at the expense of the individual's minor children. [*Olson v Olson*, 189 Mich App 620, 622-623; 473 NW2d 772 (1991).]

In considering spousal support,

> [s]everal relevant factors should be considered by the court, including, but not limited to, the past relations and conduct of the parties, the length of the marriage, the ability of the parties to work, the ages of the parties, the needs of the parties, the health of the parties, and general principles of equity. [*Demman v Demman*, 195 Mich App 109, 110-111; 489 NW2d 161 (1992).]

Given that minor children were involved here and that plaintiff's eventual ability to obtain full-time employment would impact their financial resources, we find, as an initial matter, that the trial court was allowed to impute income to defendant for purposes of spousal support as well as for purposes of child support. Defendant's prior employment showed that he was capable of making a salary of the magnitude imputed by the court, and the court's spousal-support order sought to give plaintiff the ability to obtain a nursing recertification and thus obtain full-time employment.

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[3] Plaintiff testified that there was currently a hiring freeze at her place of employment; she also testified that she could work as a nurse practitioner if she obtained a new certification.

Moreover, on the record before us, we find no basis for reversal with regard to the amount of income imputed to defendant. Defendant emphasizes the case of *Ghidotti v Barber*, 459 Mich 189; 586 NW2d 883 (1998). In that case, the Court stated:

> [I]n allowing income imputation to a payer whom the court finds to have an unexercised ability to pay, this Court has required specific findings by the trial court. *Sword v Sword* [399 Mich 367; 249 NW2d 88 (1976), overruled in part on other grounds by *Mead v Batchlor*, 435 Mich 480; 460 NW2d 493 (1990)] (in determining a parent's ability to pay child support, the court must evaluate a number of factors, such as employment history, education and skills, available work opportunities, diligence in trying to find work, the defendant's personal history, assets, health and physical ability, and availability for work); *Rohloff* [*v Rohloff*, 161 Mich App 766; 411 NW2d 484 (1987)] (refers to *Sword* criteria for determination of ability to pay child support in voluntary reduction of income case). [*Ghidotti*, 459 Mich at 198-199.]

The Court emphasized that

> [t]he 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.]

Defendant contends that the trial court did not make the proper findings as required by *Ghidotti*. However, and significantly, it was simply *not disputed* at trial that defendant had the ability to make the income imputed to him. Indeed, he had done so in the recent past and freely admitted that he voluntarily took a pay reduction. On this record, we cannot find a basis for reversal. If defendant finds that, due to the economy or some other factor, he is unable to find employment at the level imputed by the trial court, he is of course free to petition for a modification in the support orders. See MCL 552.17 and MCL 552.28.[4]

Defendant next argues that the trial court erred in its division of the parties' 401(k) account. We review for clear error a trial court's factual findings in a divorce case. *Sparks v Sparks*, 440 Mich 141, 146; 485 NW2d 893 (1992).

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[4] To the extent defendant is arguing that he should be able to change careers and take a pre-divorce, voluntary reduction in pay without essentially being "penalized" for doing so (as discussed more thoroughly in Judge Murray's concurring opinion), this argument would best be made in the Supreme Court.

The parties had $74,000 in a 401(k) account, $14,000[5] of which was defendant's premarital property. Defendant "cashed out" the account, and, in doing so, subjected it to a 10% penalty. The court stated that defendant would be responsible for the penalty. It stated:

> So what I am going to do is I am going to adjust that $14,000, with a 10 percent penalty and other adjustments, down to a factor of $10,000. So, from the 401(k) Mr. Chipps would receive $10,000 from that; the balance would be equally divided.

Defendant's argument on appeal is hard to follow, but he appears to be arguing that the trial court somehow erred in making him pay a 10% penalty on the entire 401(k) amount. We find no clear error. The 10% penalty did in fact apply to the entire 401(k) amount, and the penalty would not have been applicable had defendant not unilaterally withdrawn the funds. Therefore, the trial court's findings were correct. Second, the court deducted only $4,000 from defendant's premarital share, and there is no evidence of "double-dipping" as argued in defendant's brief. Nor is there evidence that the trial court erroneously applied some type of equity-loss factor.[6]

Defendant lastly argues that the trial court erred in its property division because he in fact makes less money each year than plaintiff does. This argument is simply a reiteration of earlier arguments; plaintiff complains that the court should not have imputed an income to him that he was not currently earning. We have already addressed this argument and decline to readdress it.

Affirmed.

/s/ Patrick M. Meter

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[5] The court rounded the figure to $14,000, and defendant does not make an argument on appeal that this "rounding" must be corrected.

[6] The court mentioned the possibility of such a factor but did not state that it was applying one.

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Before: Donofrio, P.J., and Meter and Murray, JJ.

MURRAY, J. (*concurring*).

I concur in the majority opinion affirming the trial court's final judgment in this divorce action. I write separately merely to point out the perplexing situation resulting from application of Michigan imputation of income law in a case such as this.

The central question presented in both the spousal support and child support issues is whether the trial court abused its discretion in imputing to defendant income of $113,000 a year, when during the last part of the marriage and after the divorce he made $36,000 a year. Our Court has struggled with the standard to apply in determining this issue, in particular whether a finding of bad faith is necessary before a court can impute income for purposes of spousal support or child support. As explained by our Court in *Rohloff v Rohloff*, 161 Mich App 766, 769-776; 411 NW2d 484 (1987), earlier decisions from our Court had concluded that some evidence of bad faith or intent to avoid spousal support or child support obligations was *required* before imputation could occur. See, e.g., *Dunn v Dunn*, 105 Mich App 793, 798-799; 307 NW2d 424 (1981); *Rutledge v Rutledge*, 96 Mich App 621, 625; 293 NW2d 651 (1980); *Moncada v Moncada*, 81 Mich App 26, 27-31; 264 NW2d 104 (1978). However, after examining these and other decisions, the *Rohloff* Court concluded that although "a parties' motivation in voluntarily reducing his or her income is an appropriate factor for the trial court to consider in determining a parties' ability to pay, to the extent that *Moncada* and its progeny mandated the use of a 'bad faith test' as being dispositive, we must disagree with those cases." *Rohloff*, 161 Mich App at 775. Since *Rohloff*, most courts have stated that a trial court has discretion to impute income

whenever a parent voluntarily reduces or eliminates income or has the unexercised ability to earn, without mentioning the need for evidence of motive. *Stallworth v Stallworth*, 275 Mich App 282, 286-287; 738 NW2d 264 (2007); *Moore v Moore*, 242 Mich App 652, 655; 619 NW2d 723 (2000).[1] See, also, Michigan Child Support Formula Manual, § 2.01(G).

In our case, the parties married on June 9, 2001, and defendant was earning approximately $121,000 working a full-time position and a contract position. At the time of the marriage, defendant was a member of the Church of God, and after the marriage plaintiff became a member as well. Toward the end of this turbulent marriage, in approximately February 2008, defendant quit both of his jobs and took a position with the Church of God PKG, earning $36,000 per year. In this position, defendant traveled around the world proselytizing the church's views. Indeed, it was a result of defendant's choice to become employed by the Church of God PKG, as well as some of the effects emanating from the views held by members of that church, that led plaintiff to refile for divorce in March 2008. By the time the judgment of divorce was entered in April 2009, defendant had been working at the Church of God PKG for more than a year.

In light of these undisputed facts, there is no suggestion – nor is there any finding – that defendant had any improper motive when he left his higher paying positions to be employed by the Church of God PKG. In a case such as this, where a parent voluntarily reduces his or her income during the marriage, the critical factor in deciding imputation of income should be the parent's motivation. Courts must exercise caution before interfering with an employment choice made during a marriage that is based solely on how one wants to earn a living. As defendant points out in his brief, many persons – be it professionals, blue collar workers, etc. – make decisions during the course of their employment career that financially impact the family. Sometimes people decide to quit a position to make more money because either the family needs additional resources or the financial returns from employment are more significant to that individual. Other people, however, make the opposite decision. For example, many successful attorneys decide that public service is a more satisfactory position and therefore take the bench, where pay and benefits are most often much lower than what can be reaped in the private sector. See *Citizens Protecting Michigan's Constitution v Secretary of State*, unpublished order of the Court of Appeals, entered August 13, 2008 (Docket No. 286734) (Whitbeck, J. concurring). If that decision were made during the course of a marriage, one would hope that the family would adjust and continue forward on the revised family income. If a divorce eventually came down the road, it would be ludicrous to argue that income should be imputed to that individual merely because he could be making more money in a different position in the same profession.

It appears that is what has occurred here. There is no dispute regarding defendant's faith in the tenants of the Church of God PKG, and indeed his wife used to attend the Church of God. The evidence also squarely shows that defendant devoted much of his life to the teaching and

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[1] However, some post-*Rohloff* cases have still indicated that an "ability to pay alimony includes the unexercised ability to earn *if income is voluntarily reduced to avoid paying alimony*." *Knowles v Knowles*, 185 Mich App 497, 498; 462 NW2d 777 (1990), citing *Healy v Healy*, 175 Mich App 187; 437 NW2d 355 (1989) (emphasis added).

beliefs of the Church of God and Church of God PKG, and that his employment with that church was a natural and inevitable event given his devotion to that church. Although I do not doubt that the main breadwinner of any family has an obligation to earn sufficient funds to support his or her family, to say that defendant's action in this case was contrary to that proposition is not consistent with the evidence. However, because the more recent law as outlined above supports the trial court's decision, I join the majority opinion on this and all other issues.

/s/ Christopher M. Murray

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DONOFRIO, J. (concurring).

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I concur in the lead opinion and in the concurring opinion of Judge Murray. I further recommend review by the Michigan Supreme Court.

/s/ Pat M. Donofrio