# STATE OF MICHIGAN

# COURT OF APPEALS

AMBER LANE DAY,

Plaintiff-Appellee,

v

JOSHUA WILLIAM ALEXANDER,

Defendant-Appellant.

UNPUBLISHED
December 17, 2020

No. 351320
Kent Circuit Court
LC No. 04-008075-DS

Before: RONAYNE KRAUSE, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM.

In this dispute concerning child support and the imputation of income, defendant Joshua William Alexander appeals by delayed leave granted[1] the trial court's order increasing the amount of child support that Alexander pays to plaintiff Amber Day Lane. On appeal, Alexander argues that the trial court erred when it imputed income to him without sufficient factual findings on the applicable criteria. We agree and reverse and remand for further proceedings.

The parties have two children, and in 2012 an order was entered requiring Alexander to pay $460 in monthly child support. In 2018 and early 2019, there was a flurry of friend of the court (FOC) investigations, referee hearings and recommendations, objections to recommendations, and trial court filings and hearings all with respect to setting the proper amount of child support. Ultimately, the trial court ordered Alexander to pay $500 per month in child support, which the court based in part on imputing income to Alexander, who worked as a contractor installing carpets. In its ruling from the bench, the trial court stated that it was "imputing a normative hourly wage for a carpet layer believing that Mr. Alexander at least has the ability to earn that amount either through his own business or as an employee" and that "it is fair and reasonable [to do so] in light of the historical context of the case." The trial court never explicitly indicated the dollar amount that it was imputing to Alexander, but it appears that it may have been

[1] *Day v Alexander*, unpublished order of the Court of Appeals, entered November 20, 2019 (Docket No. 351320).

relying on the FOC's earlier determination that a carpet installer could make $12.08 an hour, although the evidentiary basis for this figure is unclear.

"Generally, child support orders, including orders modifying child support, are reviewed for an abuse of discretion." *Clarke v Clarke*, 297 Mich App 172, 178-179; 823 NW2d 318 (2012). This Court also reviews for an abuse of discretion a trial court's discretionary rulings that are allowed by statute or the Michigan Child Support Formula (MCSF), which would encompass a decision to impute income. *Berger v Berger*, 277 Mich App 700, 723; 747 NW2d 336 (2008). "However, whether the trial court properly applied the MCSF presents a question of law that we review de novo." *Clarke*, 297 Mich App at 179. "On the other hand, factual findings underlying the trial court's decisions are reviewed for clear error." *Id.*

"MCL 552.519(3)(a)(*vi*) grants the State Court Administrative Office Friend of the Court Bureau the authority to develop a formula for establishing and modifying child support obligations," and "[a] trial court must use the formula established by the Friend of the Court Bureau when determining child support, [unless] . . . the formula would be unjust or inappropriate based on the facts of the case." *Clarke*, 297 Mich App at 179. Under the MCSF, the objective in determining the income of a parent is to accurately establish the amount of money a parent has available for support. *Id.* The MCSF authorizes a court to exercise its discretion to impute income to a parent, which means treating a party as having income that the party does not actually receive, and which typically occurs when there is a voluntary reduction of income or a voluntary unexercised ability to earn income. *Berger*, 277 Mich App at 725.

"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 parent's actual ability." 2017 MCSF 2.01(G). "The amount of potential income imputed should be sufficient to bring that parent's income up to the level it would have been if the parent had not reduced or waived income." *Id.* at 2.01(G)(1). "The amount of potential income imputed (1) should not exceed the level it would have been if there was no reduction in income, (2) not be based on more than a 40 hour work week, and (3) not include potential overtime or shift premiums." *Id.* at 2.01(G)(1)(a). 2017 MCSF 2.01(G)(2) provides:

> Use relevant factors both to determine whether the parent in question has an actual ability to earn and a reasonable likelihood of earning the potential income. To figure the amount of potential income that parent could earn, consider the following when imputing an income:
>
> (a) Prior employment experience and history, including reasons for any termination or changes in employment.
>
> (b) Educational level and any special skills or training.
>
> (c) Physical and mental disabilities that may affect a parent's ability to work, or 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 and number of hours of available work in the local geographical area.

(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, present means of support, criminal record, ability to drive, and access to transportation, etc.

(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.

"These factors generally ensure that adequate fact-finding supports the conclusion that the parent to whom income is imputed has an actual ability and likelihood of earning the imputed income." *Berger*, 277 Mich App at 725-726; see also *Ghidotti v Barber*, 459 Mich 189, 199; 586 NW2d 883 (1998). Moreover, 2017 MCSF 2.01(G)(4) provides:

> Imputing an income to a parent to determine a support obligation by using any of the following violates case law and does not comply with this section. . . . .
>
> (a) Inferring based on generalized assumptions that parents should be earning an income based on a standardized calculation (such as minimum wage and full time employment, median income, etc.), rather than an individual's actual ability and likelihood.
>
> (b) Absent any information or indication concerning a parent's ability, assuming that an individual has an unexercised ability to earn an income.
>
> (c) Failing to articulate information about how each factor in §2.01(G)(2) applies to a parent having the actual ability and a reasonable likelihood of earning the imputed potential income, or failing to state that a specific factor does not apply.

In this case, the trial court failed to articulate information about how each factor in 2017 MCSF 2.01(G)(2) applied to Alexander for purposes of finding an actual ability and a reasonable likelihood of earning the imputed potential income, nor did the court state whether a specific factor did not apply. The trial court did not make findings under the imputation factors. In fact, the court did not even reference the factors. Instead, the trial court apparently inferred based on a generalized assumption that Alexander should be earning an income premised on a standardized calculation rather than on his actual ability and likelihood to earn the imputed amount. The trial court did not address and give a basis for rejecting the reasons Alexander proffered in regard to why his income had diminished so significantly. The trial court referred to the "historical context of the case" when it imputed income and modified child support. We, however, cannot ascertain

what the court meant by the reference, and it did not connect the reference to the imputation factors. There was a wholesale failure to comply with the MCSF, and the trial court did not indicate the evidentiary basis for the "normative hourly wage." Indeed, the court did not even expressly identify the dollar amount that constituted the purported "normative hourly wage." Under these circumstances, we are compelled to reverse the court's child support order and remand for compliance with the imputation provisions in the MCSF.

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction. We decline to tax costs under MCR 7.219.

/s/ Amy Ronayne Krause
/s/ Jane E. Markey
/s/ Stephen L. Borrello