

NO. COA14-775

NORTH CAROLINA COURT OF APPEALS

Filed: 17 March 2015

HARNETT COUNTY obo Chelle B. De la
Rosa,
Plaintiffs,

v.

Harnett County
No. 10 CVD 2326

Patricio A. De la Rosa,
Defendant.

Appeal by defendant from order entered 28 February 2014 by
Judge Mary H. Wells in District Court, Harnett County. Heard in
the Court of Appeals 18 November 2014.

No plaintiff-appellee brief filed.

Elizabeth Myrick Boone, for defendant-appellant.

STROUD, Judge.

Patricio De la Rosa appeals order awarding child support
arrears to mother Chelle De la Rosa. For the following reasons,
we reverse.

I. Background

On 13 December 2011, father Patricio De la Rosa ("Father")
filed a complaint for custody and child support, divorce from bed
and board, and equitable distribution. On 13 April 2011, mother
Chelle De la Rosa ("Mother") answered the complaint and

counterclaimed for custody and child support, divorce from bed and board, equitable distribution, and alimony and post-separation support. On 26 September 2011, the trial court entered an order granting the parties "joint legal custody with [Mother] having primary physical custody and [Father] having secondary custody in the form of visitation" and requiring Father to pay Mother

\$1,878.00 per month as temporary child support beginning August 1, 2011, and [Father] shall establish an allotment or other direct pay to ensure this payment is made. Once begun, he shall take no steps to modify it without a court order. In the event the employment status of either party changes, either party may motion the court to modify the same.

The 2011 order also provided that "[t]his is a temporary, non-prejudicial order that does not preclude either party from presenting any evidence they now could, or hereinafter acquire at any further hearings in this matter."

On 31 August 2012, Father filed a motion to modify child support, which was still \$1,878.00 per month. In his motion Father alleged "a substantial change of material circumstances affecting the welfare of the minor children[,] " including his discharge from the United States Army on 19 June 2012, his subsequent lack of employment, and his travel expenses to visit the children. Mother filed no response to Father's motion, but on 23 October 2012, Harnett County Child Support Services ("Harnett County") filed a

motion to intervene as defendant in this case, a motion to redirect child support payments to the North Carolina Child Support Centralized Collections, a motion to sever the issue of child support from the other issues in the case, and a motion to establish arrears and set up a payment plan for the arrears.

On 13 March 2013, the trial court entered an "ORDER TO INTERVENE AND REDIRECT PAYMENTS" which granted all of Harnett County's motions and also addressed Father's motion to modify child support.¹ As to the motion to modify, the trial court found:

There has been a change of circumstances since the entry of the Order referred to above which materially affects the welfare of the minor children to wit: [Father] is currently unemployed having been discharged from the US Army without benefits and his motion to modify should be allowed.

The trial court ordered Father to pay \$222 a month in child support beginning that month as "a temporary, non[-]prejudicial amount" and stated that retroactive child support would be determined "at a later date."² [H]owever[,] it is admitted that there is an

¹ While Father was initially the plaintiff in this action, upon the entry of the 2013 order and thereafter, he is listed as the defendant. The plaintiff from the 2013 order and thereafter is Harnett County on behalf of Chelle De la Rosa.

² The 2013 order appears to be signed at the bottom by plaintiff, defendant, and defendant's attorney, indicating it was entered by consent. An employee for Harnett County also testified at the later 23 September 2013 review hearing that the amount of \$222.00

arrearage amount and that the [Father] shall begin payments on this amount, the amount total to be determined" but that payment should currently be "100.00 per month, until paid in full." The trial court then set a review hearing for 24 June 2013 and decreed that "[t]his is a temporary, non-prejudicial order[.]"

On 23 September 2013, the trial court held a review hearing. At the beginning of the hearing, Harnett County's attorney noted that there were issues of "ongoing support and that of arrears."

On 28 February 2014, the trial court entered an order finding:

1. This is an action on . . . [Harnett County]'s Motion to Add Pay Frequency on Arrears.
2. There is an ongoing support order requiring [Father] to pay \$222.00 per month for child support.
3. [Mother] and [Father] are physically and mentally capable of earning an income.
4. [Mother] is voluntarily unemployed.
5. [Mother] was voluntarily unemployed during the summer of 2013.
6. [Father]'s last known employment was as a Major in the U.S. Military where he earned approximately \$6000.00 per month.
7. [Father] has not served in the U.S. military since June 19, 2012.
8. No evidence or testimony regarding

per month in child support was entered into by consent.

[Father]'s separation from the military was presented.

9. [Father] secured a \$250,000.00 line of credit to purchase an ice cream franchise during the summer of 2013.

10. [Father] has used \$30,000.00 from the line of credit to purchase the ice cream franchise.

11. [Father] failed to provide any documentation detailing the terms of the line of credit; amounts withdrawn; or balance remaining under [Father]'s control.

12. [Father] failed to provide any documentation detailing his business plan for the ice cream franchise.

13. [Father] failed to provide suitable documentation of past or current income.

14. [Father] failed to provide his most recent tax return.

15. The ice cream franchise is not open. [Father] is not earning an income from the franchise as of this date.

16. [Father] did not consider his ability to meet his child support obligation when he chose to increase his debt by securing the \$250,000.00 line of credit.

17. [Father] [has] shown no intention of obtaining gainful employment pending the anticipated income from the ice cream franchise, even though he will be unable to support himself or his children in his current situation.

18. [Father]'s minimal monthly income expenses are:

rent -	\$1200.00
lights/utilities	\$ 120.00
internet	\$ 50.00
motorcycle	\$ 236.00
water -	\$ 80.00
cell phone	\$ 50.00
cable	\$ 50.00
Ford Expedition	\$ 600.00

19. [Father]'s disposable income is unknown.

20. [Father]'s actions to substantially increase his debt and his failure to show any attempt to immediately earn an income is willful and shows a deliberate disregard of his responsibility to support his children.

21. [Father]'s probable earning level equals the amount of [sic] which he is actually living, based on the amount [Father] spends monthly on expenses.

22. [Father]'s child support obligation is to be calculated pursuant to the North Carolina Child Support Guidelines with [Father] earning \$2,436.00 per month.

23. That pursuant to the North Carolina Guidelines, [Father]'s child support obligation is \$774.00 per month.

24. That [Father] did not make child support payments to [Mother] from July, 2012 through December, 2012.

25. That for the months of January and February, 2013, [Father] did not make payments.

26. That from March until February, 2014, [Father] paid support to [Mother] in the sum of \$222.00 per month.

27. That the parties previously agreed in the

order dated 3/11, 2013, that the issue of arrears would be addressed[.]

2[8].[Father] has the ability to comply with the orders of this court.

The trial court then ordered:

1. Arrears as of the date of February, 2014, are 7,728.00 owed to the [Mother]. The [Father] failed to make any payments for six months in 2012.
2. The [Father] shall pay \$77.00 towards the arrears beginning 3/1, 2013.
3. This cause is retained for further orders of this court.

Father appeals the 2014 order.

II. Jurisdiction to Consider Appeal

Father's notice of appeal states, "The [Father] was never served with a copy of this order and no Certificate of Service is attached to this order." The record includes a certificate of service both for Father's notice of appeal and the proposed record, and this verifies that Harnett County was made aware of Father's assertion regarding a lack of service. Neither Harnett County nor Mother sought to amend or add to the record on appeal nor have they in any way challenged Father's proposed record, so it now serves as the record on appeal. See N.C.R. App. P. 11(b) ("If all appellees within the times allowed them either serve notices of approval or fail to serve either notices of approval or objections,

amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.") Based upon the record, no certificate of service for the order was filed, and therefore Father's time for appeal was tolled. See *Rice v. Coholan*, 205 N.C. App. 103, 110-11, 695 S.E.2d 484, 489-90 (2010) ("Because there was no certificate of service filed, the time for filing the notice of appeal was tolled. Thus, Father's notice of appeal filed in Mecklenburg County on 17 September 2008 was timely. Our Court, therefore, has jurisdiction to hear this appeal.") Accordingly, we have jurisdiction to consider Father's appeal.

II. Standard of Review

Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion. Under this standard of review, the trial court's ruling will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. In a case for child support, the trial court must make specific findings and conclusions. The purpose of this requirement is to allow a reviewing court to determine from the record whether a judgment, and the legal conclusions which underlie it, represent a correct application of the law.

Loosvelt v. Brown, ___ N.C. App. ___, ___, 760 S.E.2d 351, 354-55 (2014) (citation and brackets omitted).

III. Findings of Fact

Father challenges over half of the findings of fact on appeal. Rather than addressing each challenged finding of fact separately we will consider the contested findings of fact within each of the other arguments raised by Father. Before we can consider the findings of fact, we must first determine exactly what issues were before the trial court and what issues the order addressed. Despite the fact that Father called his 31 August 2012 motion a "MOTION TO MODIFY CHILD SUPPORT" and alleged a substantial change of circumstances, the prior 2011 order, purported to be temporary and non-prejudicial and as such Father would not need to demonstrate a substantial change of circumstances in order to modify the 2011 order. *See LaValley v. LaValley*, 151 N.C. App. 290, 292, 564 S.E.2d 913, 914-15 (2002) ("If a child custody order is final, a party moving for its modification must first show a substantial change of circumstances. If a child custody order is temporary in nature and the matter is again set for hearing, the trial court is to determine custody using the best interests of the child test without requiring either party to show a substantial change of circumstances." (citation and footnote omitted)).

However, in *LaValley*, this Court clarified:

In this case, the Order was entered without prejudice to either party. It did not set any date for a court hearing on the custody issue, and the matter was not set before the trial court until almost two years later when the Motion was filed. The inclusion of the language without prejudice is sufficient to support a determination the Order was temporary. It was, however, converted into a final order when neither party requested the calendaring of the matter for a hearing within a reasonable time after the entry of the Order.

Accordingly, the trial court, in determining the issue of custody, was required to review the Motion under a substantial change of circumstances test.

151 N.C. App. at 292-93, 564 S.E.2d at 915 (quotation marks, brackets, and footnotes omitted). Though *LaValley* was addressing child custody, we find its logic instructive. See *id.*

Here, as in *LaValley*, although the 2011 order was entered without prejudice it did not set a future hearing date to determine permanent child support. See *id.* at 293, 564 S.E.2d at 915. While in *LaValley* "almost two years" went by before a motion was filed regarding child support, *id.*, here, Father filed his motion within approximately eleven months of the entry of the 2011 order. Our Court pointed out in *LaValley*, "[w]hether a request for the calendaring of the matter is done within a reasonable period of time must be addressed on a case-by-case basis. In this case, we simply hold that twenty-three months is not reasonable." *Id.* at

293 n.6, 564 S.E.2d at 915 n.6. In this case, although not even a year had passed, Father himself treated the temporary 2011 order as a permanent order by filing a motion alleging "a substantial change of circumstances" and requesting modification of child support based upon these circumstances. Thereafter, in its 2013 consent order, the parties and trial court also treated the 2011 order as a permanent order by stating that Father's "motion to modify should be allowed" because "[t]here has been a substantial change of circumstances[;]" this standard is required to modify permanent, not temporary, support orders. See *id.* at 292, 564 S.E.2d at 915. No party suggested at the hearing that the prior orders were temporary and non-prejudicial nor has Father argued before this Court that the trial court should have considered his motion as an initial determination of permanent child support. Thus, in considering this on a "case-by-case basis[,]" *id.* at 293 n.6, 564 S.E.2d at 915 n.6, here, as no review hearing was set in the 2011 order *and* all of the parties and the trial court treated the 2011 order as a permanent order for child support, we conclude that the 2011 order was indeed a permanent child support order, so the burden of proof to show a substantial change in circumstances would be on Father for his motion to modify a permanent child support order. See *id.* at 292, 564 S.E.2d at 915;

see generally *Banks v. Shepard*, 230 N.C. 86, 91, 52 S.E.2d 215, 218 (1949) ("Burden of proof means the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a cause." (citation and quotation marks omitted)).

Our Courts have recognized that child support modification is "a two-step process." *McGee v. McGee*, 118 N.C. App. 19, 26, 453 S.E.2d 531, 536, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 189 (1995). "The court must first determine a substantial change of circumstances has taken place; only then does it proceed to apply the Guidelines to calculate the applicable amount of support." *Id.* at 26-27, 453 S.E.2d at 536. The trial court took the first step, determination of a substantial change of circumstances, in the 2013 consent order. Accordingly, the only issues left for the trial court to determine in the 2014 order being appealed were the amount of the modification and arrears. As to the modification, the burden of proof was upon Father as the movant on the motion to modify, and as to the establishment of arrears, the burden of proof was upon Harnett County, as the movant on the motion to establish arrears. See generally *Banks*, 230 N.C. at 91, 52 S.E.2d at 218.

IV. Imputing Income

Father contends that "the trial court erred in imputing income to . . . [him] and in calculating his child support obligation under the guidelines using this imputed income amount." Father argues that

in order to impute income, the trial court must make findings of fact that the parent is voluntarily unemployed or underemployed and that such voluntarily [(sic)] unemployment or underemployment is the result of the parents bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation. No such findings were made in this action[.]

(Citation and quotation marks omitted.)

As a general rule, "a party's ability to pay child support is determined by that party's actual income at the time the award is made." *Respass v. Respass*, ___ N.C. App. ___, ___, 754 S.E.2d 691, 704 (2014). But child support may be based upon earning capacity

where the party deliberately acted in disregard of his obligation to provide support. Before earning capacity may be used as the basis of an award, there must be a showing that the actions reducing the party's income were taken in bad faith to avoid family responsibilities. This showing may be met by a sufficient degree of indifference to the needs of a parent's children.

Id. (citation, quotation marks, ellipses, and brackets omitted).

Before the trial court may impute income, it "must find a deliberate depression of income or other bad faith[.]" *Ludlam v. Miller*, ___ N.C. App. ___, ___, 739 S.E.2d 555, 560 (2013) (citations and quotation marks omitted). The Child Support Guidelines do not allow the trial court to choose "a method of imputing income based upon the degree of bad faith found by the trial court[;]" that is, the court may not impute a higher income based on a "higher degree of bad faith[.]" *Id.* If the trial court determines that a party has deliberately depressed income or otherwise acted in bad faith, it may then decide how to impute income, but the imputed income still must be based upon

the parent's employment potential and probable earnings level based on the parent's recent work history, occupational qualifications and prevailing job opportunities and earning levels in the community. If the parent has no recent work history or vocational training, potential income should not be less than the minimum hourly wage for a 40-hour work week.

Id. (quoting N.C. Child Support Guidelines effective at the time of this case).

Here, the trial court found that "[Father]'s actions to substantially increase his debt and his failure to show any attempt to immediately earn an income is willful and shows a deliberate

disregard of his responsibility to support his children." Father testified that he had opened a \$250,000 line of credit and already used \$30,000 of it to buy an ice cream franchise; thus, there was evidence that Father "substantially increase[d] his debt[.]" Furthermore, Father testified that his previous attempts to find employment had been unsuccessful and that he had stopped searching for employment, which is evidence of "willful[ness]" or voluntariness and a "failure to show any attempt to *immediately* earn an income[.]" (Emphasis added.) Although a full reading of the transcript might support a determination that Father was in the process of opening his ice cream franchise in a timely manner in order to earn income, we cannot say, given Father's increased debt and lack of effort recently to earn an income, that the trial court abused its discretion in finding that Father "show[ed] a deliberate disregard of his responsibility to support his children." The trial court's "deliberate disregard" finding of fact supports the trial court's determination to impute income. *See id.* We now turn to the trial court's method of imputation of income to Father.

Imputed income should be determined based upon "the parent's employment potential and probable earnings level based on the parent's recent work history, occupational qualifications and

prevailing job opportunities and earning levels in the community[,]” *id.*, but here the trial court instead based it upon “the amount of [(sic)] which he is actually living, based on the amount Father spends monthly on expenses.” The evidence showed that Father’s parents were paying his living expenses. While in some cases monthly expenditures may be a reasonable way to assist the trial court in determining an imputed income amount, in this case, Father was not paying those expenses. Father’s reliance upon his parents for his own support may be further evidence of his bad faith in failing to find employment, but it does not provide any information about *Father’s* earning capacity. Father may have a much greater or lesser capacity to earn income than what his parents are willing or able to pay. In relying solely upon the Father’s parents’ expenditures for Father’s living expenses to impute income, the trial court abused its discretion in the manner in which it imputed income to Father.

In some cases, we may remand a case to the trial court to make additional findings of fact based upon the evidence presented, but here, the lack of findings is due to the lack of evidence itself. Father has not worked since 2012, and therefore he has no “work history” within approximately the past two years. *Id.* There was no evidence of Father’s “occupational qualifications[,]” *id.*,

other than that he had served in the military. There was no evidence about how his military service may have prepared him for any type of work outside of the military since there was no mention of what type of work he actually did. The record is also devoid of evidence regarding Father's education, work history prior to his military service or "prevailing job opportunities and earning levels in the community[.]" *Id.* On remand, the trial court would have no reasonable basis upon which to determine an imputed income amount because there was no evidence of Father's "recent work history, occupational qualifications [or] prevailing job opportunities and earning levels in the community." *Id.* We therefore reverse the trial court's imputation of income and the amount of child support set based upon the trial court's imputation of income.

V. Child Support Arrears

Father next contends that "the trial court erred in awarding retroactive child support arrears in that such award is not supported by the evidence, findings of fact or conclusions of law." The record and the full transcript of the hearing shows that there was no evidence presented to the trial court regarding arrears. One attorney made an introductory statement to the trial court mentioning arrears in a general sense but no evidence was presented

regarding any payments Father had made or how much child support would have been owed.³ We cannot determine how the arrears were calculated or from what date the trial court made the child support modification effective. Since the 2011 order had become a permanent order, Father filed his motion for modification on 31 August 2012, and the 2013 consent order determined that he was entitled to modification without determining the amount of ongoing support or arrears, it appears that the modification probably extended as far back as 1 September 2012, but neither the record, transcript, or brief sheds any light on the actual time period of the arrearage calculation. The findings of fact regarding arrears are not based upon any evidence and are therefore erroneous; thus, the trial court's determination of the arrears amount and payment schedule must be reversed.⁴

³ We realize that the 2013 consent order stated that the amount of arrears were to be determined at a later date, so there had likely been some discussion among the parties and trial court about amounts paid and perhaps some documentation of child support payments. But our record does not include any evidence regarding either parent's financial state, and if this information was known to the trial court, it was not mentioned or presented as evidence during the hearing by either testimony or documentary exhibit.

⁴ An additional problem is that the trial court determined that defendant's "child support obligation is \$774.00 per month[,] but the trial court did not decree that defendant pay any ongoing child support nor did the trial court set a date for payment of monthly child support. The decretal portion of the 2014 order states only that the arrears as of February 2014 were \$7,728.00 and that

VI. Conclusion

For the foregoing reasons, we reverse the order of the trial court.

REVERSED.

Judges CALABRIA and McCULLOUGH concur.

defendant "shall pay \$77.00 towards the arrears beginning 3/1, 2013." Thus, the 2014 order by its decree neither requires any payment of ongoing monthly child support nor monthly payments toward arrears. As we must reverse, we note these additional errors so that any future orders entered in this action may set out in detail an ongoing child support payment schedule and a payment schedule for the arrears.