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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1139

Filed: 7 May 2019

Orange County, No. 17 CVD 1633

ORANGE COUNTY, ex rel., JUSTINEA LACY, Plaintiff,

v.

AITOR CANUP, Defendant.

Appeal by plaintiff from order entered 26 June 2018 by Judge Samantha Cabe in Orange County District Court. Heard in the Court of Appeals 9 April 2019.

Leigh Peek for plaintiff-appellant.

No brief for defendant-appellee.

TYSON, Judge.

Orange County Child Support Services ("the Agency") appeals on behalf of Justinea Lacy ("Mother") from a child support order of the trial court. We affirm in part, reverse in part, and remand.

I. Background

Mother and Aitor Canup ("Father") were never married, but engaged in a sexual relationship that resulted in the birth of a minor child, referred to as "H.L."

Father is now married and he and his wife are parents of four other children, who all reside at home with them in Orange County. Mother and H.L. reside together in Florida.

H.L. was born in September 2015. At the time of H.L.'s birth, Father signed an affidavit of parentage and acknowledged that he was H.L.'s natural father. Father never paid any expenses or provided support for H.L.

On 5 December 2018, the Agency, on Mother's behalf, filed an application, summons, and order to show cause for Father to show cause why the trial court "should not enter an order for [child] support."

On 6 February 2018, Father filed a motion to set aside his acknowledgment of paternity of H.L. and for paternity testing. The trial court granted Father's motion for paternity testing. The paternity test results indicated a 99.9% probability that Father is the biological father of H.L, and Father "cannot be excluded as the biological father of [H.L.]"

On 11 May 2018, the Agency filed a motion to establish retroactive child support and also requested the trial court establish current support and medical insurance for H.L. That same day, Father filed a motion requesting the trial court to deviate from the North Carolina Child Support Guidelines. The matter was heard on 18 May 2018.

The trial court entered a child support order, which denied Father's motion to deviate from the Child Support Guidelines and awarded retroactive and prospective support pursuant to the Guidelines. The trial court found, in relevant part:

> 10. [Father] is the father of the minor child [H.L.]
>
> . . . .
>
> 15. That [Mother] is not employed, has no other children, and is at home with the child who is the subject of this action who is under the age of three. Income is not imputed to [Mother].
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> 16. [Mother] has received financial assistance from her grandparents since the birth of the child. This has included paying her rent in North Carolina, which was $700.00 per month and providing a home in Florida where she resides and does not pay rent or mortgage payments, and providing her with money off and on each month to pay for bills and necessities for [Mother] and the minor child.
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> . . . .
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> 18. For November and December of 2017, [Mother] and the minor child resided in Orange County, North Carolina, as they had since the minor child's birth. [Mother] and the minor child moved to Sarasota, Florida in January of 2018 to reside in [Mother's] grandparents home where the grandparents are not currently residing as her grandfather is in Alabama for medical treatment. [Mother's] grandparents have two other residences in the State of Florida and [Mother] testified that the grandparents were not currently in the State of Florida. [Mother] does not pay rent in Florida, she does receive money for her bills and necessities from her grandparents, and she has sold property and used those funds deposited in her account to pay for bills and necessities, most notably the sale of a 4-wheeler in January of 2018 for $1600.00 [*sic*].

19. The Court averaged the deposits into [Mother's] Wells Fargo account, and determined that [Mother's] actual income is $2070.00 [*sic*] per month, and that the value of staying in her grandparent's home in Florida without paying rent is $700.00 per month, such that [Mother's] actual income for the purpose of application of the North Carolina Child Support Guidelines is $2770.00 [*sic*].

20. [Father] is employed with the Town of Chapel Hill, and has been during all times relevant to this action, and his total monthly gross income in 2018 is $4198.00 [*sic*], and this is the income which shall be used for [Father] for the purpose of application of the North Carolina Child Support Guidelines.

. . .

22. [Father] provided to the court an affidavit of financial standing detailing his household income and expenses. Based upon the affidavit and the testimony, the court finds that [Father's] monthly expenses exceed his income, even with his wife's contribution of at least $1500.00 [*sic*] per month, as indicated on the affidavit setting forth the Defendant's expenses.

23. The Court finds that the voluntary contributions of [Father's] wife to [Father's] expenses are different from the voluntary contributions of [Mother's] grandparents to the expenses of [Mother] and the minor child . . . and shall not be included in [Father's] total gross income for the purpose of calculating the child support obligation of the minor child[.]

24. That [Father] does have health and dental insurance available to him through his employment at a reasonable cost. This is a family plan, which he is currently paying for on behalf of his wife and their four children, as his coverage is free. Adding the minor child . . . to the plan will not increase his cost.

25. Defendant should add the minor child . . . to his health insurance and dental insurance coverage. He will provide [Mother] with the appropriate insurance card to use in Florida. [Father] will receive a credit on the guidelines worksheet in the amount of $111.00 per month for the cost of [H.L.'s] insurance, i.e. the total cost of the monthly insurance is $665.00, and [H.L.'s] one-sixth portion is $111.00.

. . . .

28. For 2015, for October through December, [Mother's] income is $2070.00 [*sic*] on the Worksheet A, [Father's] income is $2879.37 [*sic*] on the Worksheet A, and the recommended monthly guideline obligation is $310.25 per month.

29. For 2016, for January through December, [Mother's] income is $2070.00 [*sic*], [Father's] income is $3045.19 [*sic*], and the recommended monthly guideline obligation is $327.45 per month.

30. For 2017, [Mother's] income is $2070.00 [*sic*] per month, [Father's] income is $3284.51 [*sic*] per month, and the recommended guideline obligation is $352.45 per month.

31. For 2018, beginning in January, this Court finds that [Mother's] actual monthly income is $2770.00 [*sic*], that [Father's] actual monthly income is [$]4048.00 [*sic*], and that the recommended guideline obligation is [$]341.00 per month.

. . . .

34. [Father's] retroactive support obligation shall be $10,794.55 for the months from October 2015 through May of 2018, and shall be repaid at the rate of $34.00 per month effective 6/1/2018 in addition to his current support of $341.00, for a total monthly payment to [Mother] effective

6/1/2018 of $375.00 per month.

The Agency, on Mother's behalf, filed timely notice of appeal of the trial court's child support order.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2017).

III. Issues

The Agency argues the trial court: (1) abused its discretion by averaging the amounts of non-recurring deposits into Mother's bank account and imputing income to her of the value of residing rent-free at her grandparent's home in Florida in calculating her current income; and (2) abused its discretion by allowing Father a credit for health insurance payments paid for H.L.

IV. 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." *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002). When this Court reviews for an abuse of discretion,

> the trial court's ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. The trial court must, however, make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law.

Spicer v. Spicer, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005) (citations omitted).

V. Analysis

A. *Non-recurring Deposits*

The Agency first argues the trial court abused its discretion by averaging non-recurring deposits into Mother's bank account to determine her current income. We disagree.

Under the Child Support Guidelines, "Income" is defined as:

> a parent's actual gross income *from any source*, including but not limited to income from employment or self-employment (salaries, wages, commissions, bonuses, dividends, severance pay, etc. . . . *gifts*, prizes and alimony *or maintenance received from persons other than the parties* to the instant action. *When income is received on an irregular, non-recurring, or one-time basis, the court may average or prorate the income over a specified period of time* or require an obligor to pay as child support a percentage of his or her non-recurring income that is equivalent to the percentage of his or her recurring income paid for child support.

N. C. Child Support Guidelines, 2019 Ann. R. N.C. 53 ("2015 Guidelines") (emphasis supplied).

The Agency asserts:

> [Mother's] income was based upon deposits to a bank account which, in part, included funds from the sale of personal property. Non-recurring deposits made prior to the date of the hearing are simply non-recurring income which can be averaged or prorated by the Judge to

> determine current income. With no evidence that [Mother] had any other personal property to sell, or that [Mother] had any actual expectation of any non-recurring deposits at the time of the hearing, the averaging of these deposits to determine current income is an abuse of discretion.

The Agency fails to cite any authority, and we have found none, to support its contention that the trial court was required to have evidence of Mother possessing other personal property or an actual expectation of other future non-recurring deposits at the time of the child support hearing. *See* N.C. R. App. P. 28(b)(6) ("The body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies."). The Agency has failed to cite any authority to support a conclusion the trial court abused its discretion provided for by the Guidelines for averaging "irregular, non-recurring, or one-time" income. 2015 Guidelines at 53. The Agency has abandoned this issue.

B. *Imputation of Income*

The Agency argues the trial court abused its discretion by purportedly imputing income of $700.00 per month to Mother for the value of her staying at her grandparent's home in Florida rent-free.

The Child Support Guidelines provide, in relevant part:

> If the court finds that the parent's voluntary unemployment or underemployment is the result of the parent's bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation, child support may be calculated based on the parent's potential, rather than actual, income.

2015 Guidelines at 53.

No indication in the record or the trial court's order tends to show the trial court imputed $700.00 per month to Mother based upon her potential income. In finding of fact 19, the trial court found, in relevant part: "the value of staying in her grandparent's home in Florida without paying rent is $700.00 per month[.]"

As indicated in the Child Support Guidelines quoted above, "income" includes "gifts . . . or maintenance received from persons other than the parties to the instant action." *Id.* at 53.

"[C]ost-free housing is a form of financial support that may be considered in determining the proper amount of child support to be paid." *Spicer*, 168 N.C. App. at 288, 607 S.E.2d at 682. In *Spicer,* this Court held that a father's rent-free housing he had received from his parents was not imputed income, but a form of gross income consisting of "maintenance received from persons other than the parties to the instant action" under the Child Support Guidelines. *Id.* at 287, 607 S.E.2d at 682 (citing N. C. Child Support Guidelines, 2005 Ann. R. N.C. 48).

The trial court did not impute income to Mother. The trial court considered the evidence of Mother's rent payments received from her grandparents when she was living in North Carolina, and determined that amount was a reasonable value to assign to the rent-free housing she and H.L. receive from her grandparents in Florida. *See id.* The Agency has failed to show this finding was an abuse of discretion to

reverse the trial court's order. The Agency's argument is overruled.

C. *Health Insurance*

The Agency next argues the trial court abused its discretion by allowing Father a credit against his gross income for providing health insurance coverage for H.L. We disagree.

The trial court found, in relevant part:

> 24. That [Father] does have health and dental insurance available to him through his employment at a reasonable cost. This is a family plan, which he is currently paying for on behalf of his wife and their four children, as *his* coverage is free. *Adding the minor child . . . to the plan will not increase his cost.*
>
> 25. [Father] should add the minor child . . . to his health insurance and dental insurance coverage. He will provide [Mother] with the appropriate insurance card to use in Florida. [*Father*] *will receive a credit on the guidelines worksheet in the amount of $111.00 per month for the cost of* [*H.L.'s*] *insurance*, i.e. the total cost of the monthly insurance is $665.00, and [H.L.'s] one-sixth portion is $111.00. [Emphasis supplied].

The Child Support Guidelines provide the standard regarding health insurance, and state, in relevant part:

> The amount that is or will be paid by a parent . . . for health (medical, or medical and dental) insurance for the children for whom support is being determined is added to the basic child support obligation and prorated between the parents based on their respective incomes. Payments that are made by a parent's . . . employer for health insurance and are not deducted from the parent's . . . wages are not included. *When a child for whom support is being*

> *determined is covered by a family policy, only the health insurance premium actually attributable to that child is added. If this amount is not available or cannot be verified, the total cost of the premium is divided by the total number of persons covered by the policy and then multiplied by the number of covered children for whom support is being determined.*

2015 Guidelines at 54 (emphasis supplied).

The health insurance premium cost "actually attributable" to covering solely H.L. is unavailable. Father has a family medical insurance policy covering his wife and children that does not itemize the premium attributable to each covered family member. *See id.* The trial court's finding of fact 25 shows the trial court initially followed the procedure specified by the Guidelines, took the total monthly cost for the family policy, $665.00, and divided it by the six people that would be covered by the policy: Father's wife, four other children, and H.L. The trial court then multiplied $111.00, one-sixth of the monthly premium, by the "number of covered children for whom support is being determined," which is one for H.L. *Id.*

However, once the trial court calculated the cost for Father to provide health insurance coverage for H.L., it failed to follow the Guidelines and "prorate[] [this amount] between the parents based on their respective incomes." *Id.* The trial court instead reduced Father's income by the entire $111.00 cost attributable to providing health insurance coverage for H.L.

The trial court found that Mother's actual monthly income is $2,770.00 and

Father's actual monthly income is $4,048.00. The total combined monthly income of Mother and Father is $6,818.00. Father's percentage of the combined monthly income is 59.4% and Mother's percentage is 40.6%. When the $111.00 cost attributable to Father covering H.L. is prorated between Mother and Father's income, as required by the Guidelines, the amount allocable to Father is $65.34 and the amount allocable to Mother is $44.66, per month. *See id.*

Based upon the trial court's failure to fully follow the procedure specified in the Guidelines for prorating "[t]he amount that . . . will be paid by a parent" for health insurance "between the parents based on their respective incomes," finding of fact 25 must be reversed and the matter remanded to the trial court for recalculation of Father's child support obligation. *See id.*

VI. Conclusion

The Agency has failed to show the trial court abused its discretion by averaging the amounts of non-recurring deposits into Mother's bank account. The Agency also failed to show the trial court abused its discretion by calculating Mother's income based upon the value of rent-free housing she received from her grandparents, as allowed by the Guidelines. Those portions of the trial court's order are affirmed.

The trial court correctly determined the portion of Father's health insurance premium attributable to H.L., but abused its discretion by failing to follow the procedure specified by the Child Support Guidelines for prorating the cost of health

insurance provided by Father for H.L. This portion of the trial court's order is reversed and the matter remanded for findings and the recalculation of Father's support obligation as consistent with this opinion. *It is so ordered.*

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Chief Judge McGEE and Judge BERGER concur.

Report per Rule 30(e).