

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

RITA M. ECKLE,

Appellee

v.

ROBERT L. ECKLE,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 943 WDA 2012

Appeal from the Order Entered May 16, 2012
In the Court of Common Pleas of Washington County
Domestic Relations at No(s): 103 DR 2001, Pacses No. 193103000

BEFORE: BOWES, LAZARUS, and COLVILLE,* JJ.

MEMORANDUM BY BOWES, J.:

FILED: May 23, 2013

Robert L. Eckle ("Father") appeals from the order entered May 16, 2012, modifying his child support obligation. After careful review, we affirm.

The facts relevant to our review are as follows. In June 2011, Father was paying child support of \$3,827 per month to Rita M. Eckle ("Mother") for their two sons, eighteen-year-old Jason, and sixteen-year-old Nicholas. On June 16, 2011, Father filed a petition to modify his support obligation, seeking a decrease due to Jason's emancipation. Two weeks later, Mother filed a petition to modify support upwards based on Father's increased income.

* Retired Senior Judge assigned to the Superior Court.

Father is a self-employed owner of several businesses that broker oil and gas. He is the sole shareholder of Appalachian Producer Services Corporation ("the Corporation"), a subchapter S corporation. The Corporation is a 51% owner of Appalachian Producer Services LLC ("the LLC"). As the managing partner of the LLC, Father received a salary of \$96,897, and the LLC paid him \$8,000 per month for consulting services rendered to that entity. In addition, Father received sizable distributions from the Corporation in 2009 and 2010. Father also had income from non-business-related interest and dividends.

On August 11, 2011, a domestic relations conference was held, but the parties were unable to reach an agreement as to support. A hearing was conducted before hearing officer M. Scot Curran on February 27, 2012, at which both parties were represented by counsel. Mr. Curran issued a recommendation that Father pay \$2,503.18 per month, provide medical insurance, and pay 93% of unreimbursed medical expenses that exceeded \$250 annually, for the support of Nicholas.

Mother filed timely exceptions to the hearing officer's recommendation, alleging that the master incorrectly calculated Father's monthly income and that the support recommendation should have been made retroactive to June 16, 2011, because Father did not report his increased income to the court. The court held that while the hearing officer had correctly used 2010 corporate and partnership tax documents, as well

as 2011 financial information to calculate Father's income, the hearing officer had not included the entire \$744,136 distribution Father received from the Corporation, but only the pass-through income. Thus, the court added back into Father's net disposable income the difference between the two figures, \$298,275, and recalculated Father's monthly income to be \$51,918.50 per month, resulting in \$4,316 in monthly child support. The court denied retroactive application of the support modification.

Father filed a notice of appeal to this Court on June 13, 2012, complied with the court's order to file a Pa.R.A.P. 1925(b) statement, and the trial court authored its Rule 1925(a) opinion. Father presents three issues for our review:

- I. Did the Lower Court improperly calculate [Father's] net income?
- II. Did the Lower Court err in failing to use [Father's] most recent (2011) income information for purposes of calculating support?
- III. Did the Lower Court err in overturning the Report and Recommendation of the Master?

Father's brief at 5.

Certain principles govern our review. A hearing officer's recommendation is advisory only. **Goodman v. Goodman**, 544 A.2d 1033 (Pa.Super. 1988). It remains the sole province of the trial court to determine the amount of support to award. In reviewing the order of the trial court,

Our standard of review in matters of support is whether the trial court abused its discretion. We may find an abuse of discretion only upon "proof of more than a mere error in judgment." Instead, such a finding requires clear and convincing evidence "that the law was misapplied or overridden, or that the judgment was manifestly unreasonable or based on bias, ill will, prejudice, or partiality." We are guided by the principle that a support award "must be fair, non-confiscatory and attendant to the circumstances of the parties."

Fennell v. Fennell, 753 A.2d 866, 868 (Pa.Super. 2000) (citations omitted).

Preliminarily, we note that while Father identifies three issues on appeal, his brief contains only one argument section. Furthermore, much of Father's argument is a litany of legal precepts generally applicable to the calculation of available income for support purposes when the obligor is self-employed, which Father neglects to apply to the facts before us. Moreover, Father does not develop or present any argument or cite to any authority in support of his contention that the trial court erred in using 2010 financial information. Hence, we find this issue waived.¹

The crux of Father's argument, however, is that the trial court erred in including the Corporation's 2010 distribution to him as available income in

¹ In its Rule 1925(a) opinion, the trial court concluded that since the hearing officer relied upon the 2010 financial information and Father did not file exceptions to the hearing officer's recommendation on that basis, the issue was waived. ***Benson v. Benson***, 515 A.2d 917 (Pa.Super. 1986). We decline to find waiver on that basis. Father did not file any exceptions to the hearing officer's recommendation presumably because he was willing to pay the recommended amount of support.

light of the hearing officer's finding that Father "testified truthfully and credibly as to his 2011 income and why no retained earnings were distributed to him in 2011." Appellant's brief at 14.

Initially, we must correct Father's characterization of the record. While the hearing officer "[g]enerally" found Father's testimony credible, he also found that Father "slightly overstat[ed]" the business decline in 2011. The hearing officer ultimately concluded that, "the information necessary to definitively state Father's 2011 income is unavailable." Report and Findings of Support Master, Hearing Officer, 3/1/12, at 3. Furthermore, contrary to Father's representation, the hearing officer did not make any specific findings as to the availability to Father of retained earnings or the likelihood of future distributions. *Id.*

Herein, the court faced the challenge of determining a self-employed party's income. For purposes of support, "income must reflect actual available financial resources and not the oft-time fictional financial picture" created by the application of federal tax laws. *Labar v. Labar*, 731 A.2d 1252, 1255 (Pa. 1999). The court looks at "cash flow" rather than federally taxed income. *Id.* All benefits flowing from corporate ownership must be considered in determining income available to calculate a child support obligation. *Heisey v. Heisey*, 633 A.2d 211, 212 (Pa.Super. 1993). Where self-employment is involved, a claim of reduced income is subjected to

“careful scrutiny.” *Id.* (citing ***Comm. ex. rel. Banks v. Banks***, 478 A.2d 1387 (Pa.Super. 1984)).

The task of determining Father’s income for purposes of support was complicated by the fact that Father had not prepared or filed his 2011 federal individual income tax return. Additionally, as of the date of the hearing, the 2011 tax returns of the LLC and the Corporation were not completed. Father testified that the 2011 returns would show losses due to increased competition from big companies. He also stated that neither the Corporation nor the LLC made any distributions to him in 2011. On cross-examination, however, Father acknowledged that he was the person who decided whether to make such distributions, and that the decision whether to withdraw sums from the capital accounts would not be made until the actual tax returns were filed. N.T. 2/27/12 at 61-2.

Father introduced the LLC’s 2009 and 2010 tax returns and schedules, the LLC’s 2011 monthly profit and loss statements, together with a year-to-date comparison of sales for 2009, 2010, and 2011. Exhibits K, H and I. Father’s 2010 K-1 from the LLC revealed that approximately \$1 million of the \$2.377 million capital account was distributed, 51% to the Corporation and 49% to Superior Appalachian Pipeline LLC. Additional sums in the capital account remained in that account, according to Father, throughout 2011. Father also offered the Corporation’s 2010 and 2009 Form 1120S tax returns and K-1s for several prior years. Exhibits F and G. The returns

indicated that the Corporation had other income from sales in addition to the income received from the LLC at the end of the year. *Id.* at 59. The Corporation's 2010 K-1 revealed a distribution to Father of \$744,136, \$446,351 of which was ordinary business income to him for tax purposes. Finally, Father offered Exhibit M, his support guidelines worksheet, which showed a total gross monthly income of \$34,917, a net monthly income of \$23,357. He testified that he believed this to be an accurate portrayal of his 2011 income, "although it looks a little high." *Id.* at 29.

Based on the evidence provided, the hearing officer calculated Father's gross monthly income to be \$40,000 per month, attributing \$20,531.39 to income from the LLC and the Corporation, exclusive of wages and consulting fees. After allowing for Father's expenses, the hearing officer arrived at a net monthly income figure for Father of \$27,062.50, and recommended that Father pay \$2,503.18 per month for the support of Nicholas. Mother filed exceptions; Father did not.

In ruling on Mother's exceptions, the trial court found that the hearing officer correctly used both 2010 and 2011 financial information. The trial court found that the only evidence of Father's 2011 business-related income came from Father's testimony, summaries, and "self-generated financial statements[,]"" none of which reflected any distributions to Father, "a key component" of Father's income in prior years. Trial Court 1925(b) Opinion, 7/24/12, at unnumbered 6. The court held that it was not obligated to use

the most recent income information if it believed it to be self-serving, incomplete, or an inaccurate picture of true cash flow, and observed that Father controlled 100% of the Corporation, including its information and cash flow, had “no incentive to provide any evidence of a year-end distribution[.]” *Id.* at n.4.

The trial court concluded, however, that the hearing officer should have included the entire \$744,136 distribution that Father received in 2010 from the Corporation, not just the portion taken as ordinary income. Consequently, the trial court added back into Father’s income for purposes of support the difference between the total distribution and the pass-through income, which translated to an additional \$24,856 in income per month.

Father insists that the inclusion of the 2010 distribution in his income effectively overruled the hearing officer’s credibility determination that Father’s businesses needed to retain additional earnings to survive. Father suggests that the trial court’s order places his business at risk “by imputing that the retained earnings” are available for child support when those funds are typically used for business purposes. Appellant’s brief at 14. He likens the instant situation to that in *Labar, supra*, where the wife sought to include in the husband’s disposable income one-half of the depreciation deduction his 50%-owned subchapter S corporation took in determining the amount of taxable income it passed through to its shareholders for tax purposes. She claimed that husband was using the corporation to shelter

income from his support calculation. The Supreme Court disagreed, holding that “the mere fact that [the corporation] took a depreciation deduction against gross income in calculating net taxable income to shareholders” did not establish that the husband was sheltering cash flow because depreciation did not generate cash flow. *Id.* at 1255. The Court found that the wife was necessarily arguing that all funds used for capital expenditures should have been distributed to shareholders instead, a position the Court called “absurd” in light of the fact that the corporation borrowed money to pay off a mortgage and an existing loan, and to purchase equipment necessary for the business. Hence, the funds used for capital expenditures did not consist of cash flows and were not available for distribution.

Labar is factually distinguishable from the instant case. Father’s corporations were not leveraged and the capital accounts reflected cash flow. Even so, the court considered only the Corporation’s actual distribution to Father in 2010, not the additional amounts in retained earnings. Mother urged the trial court to include as income to Father the year-end cash retained by both the LLC and the Corporation, arguing that it was cash available for distribution.² The court declined, finding these sums necessary

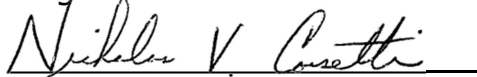
² At the end of 2010, after the distribution, the Corporation’s capital account in the LLC exceeded \$300,000. Exhibit F (2010 LLC 1065 Schedule K-1). The Corporation, after a \$744,136 distribution to Father, retained \$645,951 in its accumulated adjustments account. Exhibit F (2010 Corporation 1120S Schedule M-2).

for legitimate business purposes. **See** Order, 5/16/12, at 2. Furthermore, the court did not include the LLC's distribution as income available to Father as it went to the Corporation, not to Father.

On the record before us, we find no abuse of discretion in the trial court's inclusion of the Corporation's 2010 distribution to Father in its calculation of his income for purposes of child support.

Order affirmed.

Judgment Entered.

A handwritten signature in cursive script, reading "Nicholas V. Cussetti", is written over a horizontal line.

Deputy Prothonotary

Date: May 23, 2013