

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

PATRICIA H. DISANTI,

Appellee

v.

ROBERT R. DISANTI,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1636 WDA 2012

Appeal from the Order entered September 12, 2012,
in the Court of Common Pleas of Allegheny County,
Family Division, at No(s): FD 99-002811-005.

BEFORE: FORD ELLIOTT, P.J.E., ALLEN, and COLVILLE,* JJ.

MEMORANDUM BY ALLEN, J.:

FILED OCTOBER 15, 2013

Robert R. DiSanti ("Father") appeals *pro se* from the order denying his exceptions to the hearing officer's recommendation and ordering him to pay \$1,011.00 per month for the support of two children. We affirm.

The trial court summarized the pertinent facts and extensive procedural history as follows:

The marriage of [Mother] and Father produced two children, [J.D.] (d.o.b. 3/31/1999) and [R.D.] (d.o.b. 12/6/2001). This is the fourth appeal that Father has filed concerning the child support order. The current case was commenced when Mother sought to modify the previous child support order, where Father was paying \$567 per month. The basis for Mother's modification was a change in custody, specifically Father's reduction in custody time from shared physical custody to limited supervised visitation. The prior order of \$567 per month was based on Father's income from a number of sources, including

*Retired Senior Judge assigned to the Superior Court.

non-salary business income and an annuity. The non-salary business income has been a consistently contested issue in Father's appeals, however the Superior Court has repeatedly affirmed my findings that Father does indeed have unreported income from his business.

This complex matter was scheduled for a modification hearing before Hearing Officer Patricia Miller. The hearing spanned two days, and during the hearing, both Mother and Father testified to their current financial situations. Father again maintained at the hearing that he does not have any unreported income. Father's salary from his business, Total Home Maintenance, is \$24,000. Father also has an annuity which pays him \$15,000 per year without tax consequences. Father was also attributed \$5,645 per year in non-salary business income, as well as \$1,999 per month in rental income, \$3,335 in depreciation, and \$173 in interest. These figures added together, and after the appropriate taxes, left Father with \$3,916 in monthly net income. [Hearing Officer Miller] also added \$500 per month in unreported income for a total net monthly income of \$4,416[.]

Mother testified that she earns \$2,088 per pay (biweekly) in her current position as a full-time registered nurse. Mother also testified that she incurred significant childcare expenses while caring for her two sons. Mother also provides medical, vision, and dental insurance for the children. [Hearing Officer Miller] found that Mother's net monthly income is \$4,112[.]

Following the hearing, Hearing Officer Miller issued a recommendation modifying upward Father's support payments to \$1,011 per month retroactive to March 22, 2011. Father was also to pay 52% of Mother's childcare costs and extracurricular activities.

[Previously,] Father filed exceptions to the February 19, 2009 recommendation, and following oral argument, I issued an order dismissing Father's exceptions. A main point of review in my dismissal of Father's exceptions was a finding that the record and my previous methodology with respect to Father's unreported income supported a finding far in excess of \$500 per month. Thus, Father would have owed *more* in support. However, because

Mother did not file exceptions, I found that [Hearing Officer Miller's] attributing \$500 per month in unreported income to Father to be a reasonable amount.

Trial Court Opinion, 2/1/13, at 1-3 (footnotes omitted). The trial court entered its order on September 12, 2012 and this timely appeal followed.

Both Father and the trial court have complied with Pa.R.A.P. 1925.

Father raises the following issues on appeal:

1[.] Did the trial court commit an abuse of discretion and/or error of law by determining Father's [monthly] income to be \$4416 and Mother's [monthly] income to be \$4112?

2. Did the trial court commit an abuse of discretion and/or commit an error of law by determining that the Guideline basic child support obligation in this matter is \$1834 per month?

3. Did the trial court commit an abuse of discretion and/or commit an error of law in determining Father's proportionate share of monthly support obligation to be \$1011?

4. Did the trial court commit an abuse of discretion and/or error of law in failing to deviate downwards from any recommended guideline amount?

5. Did the trial court commit an abuse of discretion and/or error of law in determining the recommended obligation be retroactive to March 22, 2011?

6. Did the trial court commit an abuse of discretion and/or error of law in determining that the arrears shall be set at \$9004.93 as of June 7, 2012?

7. Did the trial court commit an abuse of discretion and/or error of law in determining Father to be responsible for 52% of unreimbursed medical expenses, extracurricular activities and childcare cost and that the cost be reimbursed within 60 days of receipt of proof of same?

Father's Brief at 1-2.

Our standard of review is well settled:

When evaluating a support order, this Court may only reverse the trial court's determination where the order cannot be sustained on any valid ground. We will not interfere with the broad discretion afforded the trial court absent an abuse of discretion or insufficient evidence to sustain the support order. An abuse of discretion is not merely an error of judgment; if, in reaching a conclusion, the court overrides or misapplies the law, or the judgment exercised is shown by the record to be either manifestly unreasonable or the product of partiality, prejudice, bias or ill will, discretion has been abused. In addition, we note that the duty to support one's child is absolute, and the purpose of child support is to promote the child's best interests.

Sirio v. Sirio, 951 A.2d 1188, 1192-93 (Pa. Super. 2008) (citation omitted).

Before addressing Father's claims, the trial court provided a history of Father's prior appeals and the issues he raised therein. The trial court then stated the following regarding Father's issues raised in this appeal:

Once again Father is appealing a determination of his income. At oral argument [on his exceptions], the only argument presented as to why Father's income was incorrect was the inclusion of \$500 per month in unreported income. Father had argued that this arbitrary figure was unreasonable, and not supported by the evidence. Following a review of Father's exceptions, I did agree with Father to a certain extent that this \$500 [figure] was not supported by the evidence; however I found the \$500 to be a reasonable figure, a *very* reasonable figure for Father. At the 2011-2012 modification hearing (the hearing was held on December 9, 2011 and April 17, 2012) before Hearing Officer Miller, [she] determined that Father earned \$5,645 in *reported* non-salary business income. This figure, divided by 12 months, was added to Father's net monthly income.

[Hearing Officer Miller] did not follow the methodology of the case though when applying Father's unreported income. Had Hearing Officer Miller used the same proportional increase of Father's [un]reported non-salary business income as used in the case previously, Father's total [unreported] non-salary business income would have been \$24,048 per year. Specifically, Father's unreported income would be \$1,533 per month. Instead, [Hearing Officer Miller] attributed Father with \$500 per month in unreported income. The \$500 per month brought Father's net monthly income to a total of \$3,916 per month. Compared to income findings in 2005 (Father was found to earn \$3,995 per month) and 2009 (Father was found to have a net monthly income of \$4[,]924.33), Hearing Officer Miller's income finding for Father is his lowest in almost a decade.

The record in this case supports a finding of far more than \$500 per month in unreported income. At the modification hearing, Father presented no credible evidence as to why his business transactions are now more trustworthy as compared to previous hearings. On cross examination, Father confirmed that he had made significant deposits into his checking account through April 2012, despite testifying that he had not taken a salaried paycheck since December 2011. The most recent Superior Court opinion on this issue contained this language, "Our review of the record supports the trial court's finding that there was no evidence to indicate that this source of income had diminished or disappeared". **See Disanti**, 1227 WDA 2009. Upon review of the record, the same reasoning is plainly evident once again. Father is claiming that he has no income, yet that conclusion is not supported by the evidence. Due to Father's lack of credibility, [Hearing Officer Miller] included unreported income, however, her methodology veered from using that of the case to using an arbitrary figure of \$500. However, because Mother did not file exceptions I found it to be unreasonable to increase Father's unreported income. For these reasons, Father's arguments of error with regard to his income are without merit.

Father's additional matters on appeal were largely credibility decisions made by [Hearing Officer Miller]. Father objects to Mother's net monthly income, and

instead argues that a "compensation package" be included as income available for support. Mother's income findings were a relative straight-forward process for [Hearing Officer Miller], as Mother is a full-time nurse and provided W-2 statements as well as the relevant tax returns. Mother was assessed earnings available for support of \$4,112 per month. At the December 9, 2011 hearing, counsel for Father tried to elicit on cross-examination testimony regarding a "compensation" package which [Mother] was alleged to receive. However, upon a review of the record, [Hearing Officer Miller] correctly calculated Mother's income by using her W-2's, her gross income of \$2,088 per pay period, and her net monthly income of \$4,112 per month. It appears from the transcript that counsel for Father was arguing, and now Father is arguing on appeal, that Mother's medical insurance benefits should be included in her net monthly income. As stated in ***Mascaro v. Mascaro***, any medical insurance benefit paid by the employer is not to be included as income available for support. 803 A.2d 1186, 1195 (Pa. 2002). As such, Father's allegations of error regarding Mother's income are without merit.

Father's additional arguments in his [Pa.R.A.P.] 1925(b) statement are also without merit and not supported by the extensive record in this case. Father states that it was erroneous for [Hearing Officer Miller] not to implement a downward deviation for Father's support. In the past Father had been receiving the shared custody deviation, but due to the change in custody [(Mother now having primary physical custody of the children)], that deviation no longer applied. At the modification hearing, Mother sought an upward deviation of the support award due to the lack of time Father spends with the children, and presumably as a result the lack of expenses during what would be his custody periods with the children. [Hearing Officer Miller] declined Mother's request, stating that clearly Father wants to see his children, so the penalty of an upward deviation would not be warranted. I chose not to disturb the decision of [Hearing Officer Miller] not to upwardly deviate Father's award, but I find nothing in the record to support a downward deviation [as argued by Father]. Father also objects to paying 52% of the extracurricular costs, childcare, and unreimbursed medical

expenses. Because I find [Hearing Officer Miller's] income calculations to be supported by the record, Father should properly pay 52% of these expenses.

Trial Court Opinion, 2/1/13, at 5-8 (footnote omitted).

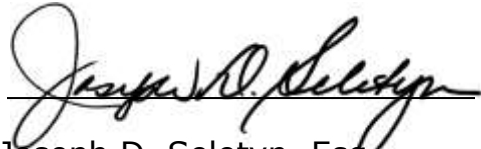
Our review of the notes of testimony from the latest modification hearing, as well as the entire record in this case, including Father's prior appeals, supports the trial court's conclusions. Although Father raises seven issues on appeal, they are all interrelated and dependent upon his testimony that he does not have additional income that is unreported on his tax returns. This testimony has been previously discredited by the trial court and affirmed on appeal. During the course of his prior appeals, Father has litigated similar claims that he says should lower his child support obligation. Of course, issues of credibility which are supported by the record cannot be disturbed on appeal. **See Doherty v. Doherty**, 859 A.2d 811, 812 (Pa. Super. 2004) (explaining that matters of credibility are solely within the province of the trial court as fact finder).

Moreover, "[w]hen determining income available for child support, the court must consider all forms of income." **Berry v. Berry**, 898 A.2d 1100, 1104 (Pa. Super. 2006) (citation omitted). In determining a parent's ability to provide support, the focus is on earning capacity rather than on a parent's actual earnings. **Reinert v. Reinert**, 926 A.2d 539 (Pa. Super. 2007). Although Father asserts that his claims regarding his income are supported by his tax returns, the taxable income listed on Father's income tax return need not be blindly accepted at face value. **See Darby v. Darby**, 686 A.2d

1346, 1349 (Pa. Super. 1996) (explaining that “taxable income is not the same as net income used to determine support obligations”). The trial court in this case has repeatedly discredited Father’s tax returns as indicative of Father’s actual earnings available for support.¹

Motion denied. Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 10/15/2013

¹ Father has filed a motion to supplement the record with a copy of the trial court’s latest custody determination and a copy of his 2012 tax return. Because Father improperly seeks to augment the record on appeal, we deny his motion. **See generally**, Pa.R.A.P. 1926.