ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION III

CA07-930

May 7, 2008

MICHAEL BRUCE JOHNSTON
APPELLANT

v.

LESLIE McNEER JOHNSTON
APPELLEE

AN APPEAL FROM POPE COUNTY CIRCUIT COURT
[No. E 2001-501]

HONORABLE GORDON W. McCAIN, JR.
JUDGE

AFFIRMED ON DIRECT APPEAL;
AFFIRMED ON CROSS-APPEAL

Both parties have appealed in this case involving a post-decree modification increasing Michael Johnston's (appellant) child-support obligation. Appellant raises five points on appeal, contending that the circuit court erred (1) in not making additional findings of fact and conclusions of law; (2) in increasing his child-support obligation retroactively to a time before Leslie Johnston (appellee) filed her petition seeking modification; (3) in refusing to refund appellant's overpayment; (4) in refusing to consider appellant's additional expenditures for the children that were part of the parties' settlement agreement; and (5) in not deviating from the child-support chart. Appellee cross-appeals, asserting that the circuit court erred in not considering appellant's capital gains for child-support purposes. We affirm on appeal and cross-appeal, holding (1) that the circuit court did not abuse its discretion when it denied appellant's request for specific findings regarding the actual needs of the children for child support, and (2) that the circuit court also did not err when it denied appellee's contention that appellant's capital gains should be included in calculating the child support owed.

Background

The parties were divorced by a decree entered on September 12, 2001. The decree approved and incorporated the parties' property-settlement agreement (PSA or agreement). In the PSA, appellee was awarded custody of the parties' two children and appellant agreed to pay $3,500 per month in child support. This sum was recognized to be in excess of the amount called for by application of the child-support guidelines. The agreement also provided that appellant, a dentist, would annually report his income to appellee and, if his income increased by 10%, appellee could seek a modification of his child-support obligation based on the applicable percentage (21%) in accordance with the child-support guidelines.

Appellant stopped paying the additional support in January 2005. On September 16, 2005, appellant filed a motion alleging that he had received increased income for the years 2002, 2003, and 2004 and paid 21% of his gross income as additional child support. He averred that the increased income was based, in part, on money he had received in error from his dental practice and had to repay. The motion alleged that, as a result, he had overpaid his child-support obligation by $71,900 and sought repayment. Appellant later amended the motion to allege that one of the children had reached majority and sought a reduction in his child-support obligation on that basis.[1] Other than the allegations concerning the provision calling for appellant to pay 21% of his increased income as support and that one child had attained majority, appellee denied the material allegations of appellant's petition.

On September 22, 2006, appellee filed a petition alleging that appellant had ceased paying the 21% on the increase in his income in January 2005 and that she had justifiably relied on the parties' PSA that appellant would pay 21% of his increased income as child support. Appellee sought an increase in support from January 2005 forward. Appellant denied the material allegations of the petition and affirmatively alleged that any sum in excess of

[1]He also sought enforcement of provisions of the PSA relating to expenses for the children's vehicles. There is no issue in this appeal concerning these provisions.

$1,000 per month was not reasonably necessary for the support of the parties' one remaining minor child.

Evidence at Trial

The parties' accountants collaborated to prepare exhibits concerning appellant's income for the years 2002 through trial in October 2006. Based on the joint exhibits, appellant's income increased from $151,000 at the time of the divorce to approximately $400,000 in 2005.

According to the testimony of Butch Rose, appellant's accountant, appellant was overpaid a total of $200,000 in the years 2002, 2003, and 2004. Rose testified that if appellant's income for the years 2003 through 2004 was adjusted to deduct the amount he was overpaid, appellant had overpaid his child support by $64,992.16. His calculations as to appellant's income for those same years, without adjustment except for the amount he actually repaid beginning in July 2005, showed that appellant had overpaid his support obligation by $82,278.10.

Appellant's support obligation for the year 2006 was calculated based on 2005 data. It also reflected that one of the children reached majority in May 2006. Those calculations showed that if appellant's income was not adjusted for the overpayment, he underpaid his child support by $42,521.99. If the calculation reflected that appellant made the repayments, he underpaid his support obligation by $37,301.68. Rose explained that, based on the exhibits, appellee was seeking $102,000 in additional support if appellant's income did not include the amount he was overpaid and $125,000 if the amount appellant was overpaid was included. Rose also testified that appellant sold an interest in his dental practice for a gross sum of $225,000 and a profit of $184,000. He said that this capital gain was not reflected in appellant's tax return because he had capital losses in prior years that offset the gain.

Appellee testified that she had both a bachelor's and master's degrees in nursing but had not worked as a nurse since 1991. She testified that she was employed as a fund-raiser with the American Cancer Society, earning an annual salary of $34,000. She also testified extensively about her affidavit of financial means showing the monthly expenses for her and the two children, even though the oldest child had turned eighteen and was in college. According to her testimony and affidavit, appellee's average monthly expenses are $9,417.04, which includes the mortgage payment of $1,554.23 made by appellant. Appellee also testified that the payments for her children's vehicles are included in her expenses even though the payments are made from the Johnston Family Limited Partnership and she does not have any out-of-pocket expense. Appellee and appellant equally divide the payments out of the partnership. She also testified that she needs an additional $14,612 per year ($1,218 per month) to make ends meet. She also said that she received appellant's income tax information and consulted with her accountant and that they determined that the amount paid by appellant was very close to the actual amount he should have paid so that appellee did not file a petition to modify.

Appellant testified that he spends approximately $2,800 per month on the children, which includes the mortgage payment of $1,554.23. He said that he purchases food for the younger child when the child is with him and provides health insurance and prescription medications, half of the car payments for both children, and an allowance for oil and gasoline for the younger child's vehicle. After an objection as to relevance, appellant proffered that he spends approximately $1,300 per month for the younger son. Of that sum, approximately $600 is vehicle-related; $100 is for health insurance; and the rest is spent for food, clothing, and various fees for the child's activities. On cross-examination, appellant said that he made payments on additional income he received without realizing that he was paying 21% of his gross income instead of his net income. He also said that he never compensated appellee for

additional income he received in his Russellville office. He also acknowledged that he was seeking a reduction in support even though his income had increased from $151,000 per year at the time of the divorce to over $400,000 per year.

The Circuit Court's Decision

The circuit court announced its decision in a letter opinion dated April 27, 2007. In that opinion, the court found that the PSA was clear and unambiguous as to appellant's child-support obligation. The court found that appellant's action in voluntarily paying 21% of his increased income as child support was relied upon by appellee in that she did not pursue a modification through the court. The court denied appellant's request for repayment or credit for sums over $3,500 per month, as well as appellee's request that the increase be made retroactive to the date of the divorce decree. The court found that the motion filed by appellant in September 2005 was a "proper motion" for retroactive modification of support. The court denied appellant's request for a deviation from the child-support chart, as well as appellee's request that appellant's income be increased as a result of a capital gain from the sale of his interest in the dental practice.

Appellant filed a motion for findings of fact relative to the actual reasonable needs of the children as of the date appellant filed his initial petition and the date the older child reached majority. Appellee objected, stating that such a finding is not required by the child-support guidelines. The circuit court denied the motion, stating that the court began its analysis with the chart and found nothing that gave it pause in applying the chart amount.

On June 21, 2007, the court entered its order. For the period of September 16, 2005, until May 31, 2006, appellant's child-support obligation was increased to $8,371.42 per month. Beginning June 1, 2006, appellant's support obligation was set at $5,979.58 per month as a result of one child reaching majority. Appellee was awarded a judgment for child-support arrearage in the sum of $71,162.07. The court denied appellant's motion for additional

findings. Appellant filed a timely notice of appeal on June 28, 2007. Appellee's notice of cross-appeal followed on July 5, 2007.

Standard of Review

Child-support cases are reviewed de novo on the record. *Cole v. Cole*, 89 Ark. App. 134, 201 S.W.3d 21 (2005). As a rule, when the amount of child support is at issue, the appellate court will not reverse the circuit court absent an abuse of discretion. *Id.* It is the ultimate task of the circuit court to determine the expendable income of a child-support payor. *Id.* This income may differ from income for tax purposes. *Id.*

Direct Appeal

Appellant first argues that the circuit court erred in failing to make findings of fact as to the reasonable needs of the children. The circuit court did not err.

Arkansas Code Annotated section 9-12-312(a)(2) (Repl. 2008) mandates the use of the child-support guidelines in determining the amount of child support. The guidelines, issued as Supreme Court Administrative Order No. 10, set forth relevant factors to be considered in setting support, as well as other factors to be considered in deciding whether to deviate from the amount determined by applying the chart. These factors include, among others, food; shelter and utilities; clothing; medical and dental expenses; educational expenses; transportation expenses; and the accustomed standard of living. Administrative Order No. 10, section V.

Section 9-12-312 and Administrative Order No. 10 create a rebuttable presumption that the amount of child support calculated pursuant to the guidelines is the amount to be awarded. Thus, the statute and guidelines demonstrate that the reasonable needs of the children are met when the court awards the amount of support called for by application of the guidelines. Here, after reviewing "a large amount of testimony, notes, and evidence," the circuit court awarded the amount of support called for by application of the guidelines and

found no basis for a deviation. This adequately explained the basis for the denial of appellant's request for findings. A party is not entitled to a direct answer on every specific requested finding if the circuit court's findings adequately address the issues. *See Lawson v. Sipple*, 319 Ark. 543, 893 S.W.2d 757 (1995).

Appellant's second point is that the circuit court erred in retroactively modifying his child-support obligation prior to the date appellee filed her petition seeking the modification. Under Ark. Code Ann. §§ 9-12-314(c) and 9-14-234(c) (Repl. 2008) the circuit court cannot modify an order for support prior to the filing of a petition for modification. However, the statutes do not specify which party must file such a petition. Here, a petition was filed, by appellant, on September 16, 2005. That petition did not request an express modification of appellant's child support obligation, only that he be credited with the amount that he overpaid his child support obligation. In *Shipp v. Shipp*, 94 Ark. App. 351, 230 S.W.3d 305 (2006), we held that a "proper motion" under sections 9-12-314(c) and 9-14-234(c) is one that necessarily involves a determination of the amount of child support. Appellant's petition necessarily involved a child support determination because one cannot calculate the amount of an overpayment without first determining the amount of child support owed. Therefore, the circuit court did not err in making the modification retroactive to September 16, 2005, the date of appellant's petition.

In appellant's related third point, he contends that he was entitled to a refund of the overpayment. He argues that, as a matter of law, the circuit court was without authority to modify his support obligation prior to the time appellee filed her petition and, therefore, he is entitled to a refund of the amount he overpaid. Appellant is incorrect in his argument because it is well settled that a circuit court is not required to give credit for voluntary expenditures by a parent that are above the child-support amount. *Brown v. Brown*, 76 Ark. App. 494, 68 S.W.3d 316 (2002). This rule has been stated in terms such that, as a matter of

law, appellant is not entitled to credit against child-support arrearages for voluntary expenditures. *Glover v. Glover*, 268 Ark. 506, 598 S.W.2d 736 (1980); *Stuart v. Stuart*, 46 Ark. App. 259, 878 S.W.2d 785 (1994). This is so because the custodial parent relies on proper compliance with the decree in making arrangements for the child's care. *Glover*, *supra*.

Here, the circuit court made a finding that subsequent to the execution of the PSA, the parties agreed that appellant would voluntarily increase the amount of his child-support payments and appellee relied upon their agreement. Appellant did not challenge these findings in his argument until his reply brief, after appellee had raised the issue of equitable estoppel in her brief. This case shows the wisdom of such a rule, because to allow for refunds or credit for voluntary overpayments would amount to condonation of the unilateral modification of court orders and interference with the custodial parent's right to decide how support money should be spent.

Finally, appellant argues that the circuit court erred in not deviating from the amount of support called for by application of the child-support chart after considering his other expenses that benefit the children. The amount of child support lies within the discretion of the circuit court, and the court's findings will not be disturbed on appeal, absent a showing of an abuse of discretion. *Smith v. Smith*, 341 Ark. 590, 19 S.W.3d 590 (2000). The courts begin with a presumption that the chart amount is reasonable. *Id*. A circuit court may deviate from the chart amount if it exceeds or fails to meet the needs of the children. *Williams v. Williams*, 82 Ark. App. 294, 108 S.W.3d 629 (2003).

Appellant is seeking a downward deviation from the amount called for by the child-support chart because, according to appellant, that amount exceeds the needs for the one minor child and because he spends additional sums, some mandated by the parties' settlement agreement, for the benefit of the children. This court has previously rejected the argument that a noncustodial parent is entitled to a downward deviation from the amount provided by

the child-support chart on the ground that the amount exceeds a child's actual needs. *Lee v. Lee*, 95 Ark. App. 69, 233 S.W.3d 698 (2006); *Ceola v. Burnham*, 84 Ark. App. 269, 139 S.W.3d 150 (2003). We see no reason to deviate from that position now.

One of the factors that appellant wanted the circuit court to consider was that he was paying for health insurance for both children. However, that expense is addressed by the child-support guidelines, which directs that payments made for medical insurance be deducted from the obligor's income prior to the calculation of the child-support obligation. To deduct the amount paid for medical insurance from appellant's income prior to the calculation of his support obligation and then to consider that same expense in determining whether to deviate from the amount of support called for by application of the child-support chart would allow appellant to benefit twice from the same expense. Therefore, the circuit court did not err in not considering the amount of the medical insurance for the one minor child.

Another factor to be considered when deviating from the child support called for by the chart is the maintenance of life insurance for the children's benefit. Here, appellant testified that he maintained two policies totaling $1.5 million. Such a factor is discretionary with the circuit court. *See Johnson v. Cotton-Johnson*, 88 Ark. App. 67, 194 S.W.3d 806 (2004). Further, the parties' agreement allowed appellant to cancel any or all of the life insurance policies anytime after October 2007.

It is also discretionary for the court to consider the provision of vehicles for the two children and the fact that they are being paid for by appellant's dental practice or family partnership. The fact that appellant agreed in the PSA to share in the expense of providing his children with vehicles does not automatically entitle him to a deviation in the amount of his child-support obligation merely because he can agree to pay more child support than

called for by application of the guidelines. *See Riegler v. Riegler*, 243 Ark. 113, 419 S.W.2d 311 (1967) (holding based on law prior to enactment of guidelines).

Appellant also cites as a factor to be considered the fact that he has made the children the beneficiaries of his estate. However, the children would be the beneficiaries of his estate under the laws of intestate succession. It makes no sense to treat appellant's conduct consistent with the law of intestate succession as a basis for reducing the amount of child support payable to his minor child.

Appellant cites to *Smith*, *supra*, and several cases from other states for the proposition that the purpose of child support is not for the custodial parent or the child to accumulate capital. However, there is nothing to indicate that appellee is using the child support to accumulate capital for herself or the minor child. Further, unlike in some other states, Arkansas's child-support guidelines and chart do not include a cap on the amount of child support to be paid.

Cross-appeal

In her sole point on cross-appeal, appellee argues that the circuit court erred in not considering appellant's capital gain from the sale of an interest in his dental practice as income for child-support purposes. There was testimony that appellant sold a one-third interest in his practice for a gross sum of $225,000, resulting in a profit of $184,000. This sum was not reflected on appellant's tax return because he had capital loss carry-overs from prior years to offset the gain.

The child-support guidelines are broad enough to include capital gain as "income" for purposes of determining appellant's income in order to set his child-support obligation. *White*

v. White, 95 Ark. App. 274, 236 S.W.3d 540 (2006). The "income" used to set child support may be different from the "income" for income tax purposes. *Id*.

The circuit court found that the request to include the capital gain in appellant's income was "unsupported by the evidence." We agree. All that we know is that appellant sold a one-third interest in his dental practice for a profit of $184,000. We do not know the amount of his capital loss carryover or what the value of that same one-third interest was at the time of the parties' divorce. Without this information, we cannot determine the amount of the gain or how much of the gain resulted after the divorce. It was appellee's burden to provide this information if she wanted the circuit court to consider the gain as income for purposes of appellant's support obligation.

Affirmed on appeal and on cross-appeal.

GLADWIN and BAKER, JJ., agree.