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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA11-144

ANGELICA C. STEVENSON
APPELLANT

V.

JOSHUA D. STEVENSON
APPELLEE

Opinion Delivered SEPTEMBER 21, 2011

APPEAL FROM THE LONOKE COUNTY CIRCUIT COURT, [NO. DR10-193]

HONORABLE SANDEE HUCKABEE, JUDGE

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

RAYMOND R. ABRAMSON, Judge

The parties, Angelica and Joshua Stevenson, were divorced on April 5, 2010. In the divorce decree, the trial court granted the parties joint custody of their daughter, with Mrs. Stevenson having primary care and control over the child and Mr. Stevenson being awarded substantial visitation, including four weeks in the summer. It is undisputed that, at the time the decree was entered, both parties believed that they would be transferred to Germany as part of their duties with the United States Air Force. However, Mr. Stevenson's request for a transfer to Germany was subsequently withdrawn.

The decree further ordered Mr. Stevenson to pay $350 per month in child support and half of the transportation costs associated with visitation. This amount was agreed to by the parties, but was, in fact, a deviation from the Arkansas Child Support Guidelines, given Mr. Stevenson's net income of $3200 per month. Despite this deviation, the decree did not

provide any reason for the deviation other than stating it was by agreement of the parties. The decree also did not provide for an abatement of child support for any of the periods of visitation in excess of fourteen days.

On June 21, 2010, Mr. Stevenson filed an emergency petition with the court, alleging that (1) after the divorce Ms. Stevenson had moved to Texas with their daughter without informing him; (2) he was informed he would have to travel to Texas to exercise his visitation; (3) he would not be allowed to exercise his scheduled June 11, 2010 visitation; (4) Ms. Stevenson was planning to leave their daughter with her parents while she was in Germany; and (5) she did not intend to allow summer visitation. Mr. Stevenson sought an order of the court (1) requiring the parties to meet halfway to exchange the child for visitation; (2) giving him first option for custody of the child during Ms. Stevenson's deployment in Germany; (3) abating his child support during summer visitation; and (4) ordering Ms. Stevenson to pay child support.

Ms. Stevenson answered the petition and filed a counterpetition, alleging that Mr. Stevenson violated the divorce decree by willfully refusing to pay child support and failing to return the child's passport. She requested that the trial court review the child-support determination and enter a more specific visitation schedule. Both parties requested that the other be held in contempt.

After a hearing on July 26, 2010, the trial court entered an order denying the parties' motions for contempt. The order set forth a more specific visitation schedule and allocated the related travel expenditures. Finally, while keeping the existing child-support amount

originally agreed to by the parties, the court allowed abatement of child support under certain circumstances. The court, once again, did not specify the reasons for the departure from the child-support guidelines, other than to state that it was upholding the amount agreed to by the parties in the original decree.

Ms. Stevenson appeals this order, arguing that the trial court erred in (1) refusing to follow the child-support guidelines without making express findings to support its deviation and (2) failing to find Mr. Stevenson in contempt for his willful refusal to pay child support as ordered.

We first address the child-support issue. Our standard of review for an appeal from a child-support order has been set out frequently: we review equity cases *de novo* on the record, and we will not reverse a finding of fact by the circuit court unless it is clearly erroneous. Ark. R. Civ. P. 52(a); *McWhorter v. McWhorter*, 346 Ark. 475, 58 S.W.3d 840 (2001); *Myrick v. Myrick*, 339 Ark. 1, 2 S.W.3d 60 (1999). In reviewing a circuit court's findings, we give due deference to that court's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *McWhorter*, *supra*; *Hunt v. Hunt*, 341 Ark. 173, 15 S.W.3d 334 (2000). As a rule, when the amount of child support is at issue, we will not reverse the circuit court absent an abuse of discretion. *Kelly v. Kelly*, 341 Ark. 596, 19 S.W.3d 1 (2000); *Scroggins v. Scroggins*, 302 Ark. 362, 790 S.W.2d 157 (1990). However, a circuit court's conclusion of law is given no deference on appeal. *Kelly*, *supra*; *City of Lowell v. M & N Mobile Home Park, Inc.*, 323 Ark. 332, 916 S.W.2d 95 (1996).

The general rule is that the court cannot modify the parties' contract that is incorporated into the decree. *Alfano v. Alfano*, 77 Ark. App. 62, 72 S.W.3d 104 (2002) (citing *Warren v. Kordsmeier*, 56 Ark. App. 52, 938 S.W.2d 237 (1997)). However, we have recognized an exception to this rule in child-custody and support matters and have held that provisions in such independent contracts are not binding. *Id.* The trial court always retains jurisdiction over child support as a matter of public policy, and no matter what an independent contract states, either party has the right to request modification of a child-support award. *Id.*

This case is factually similar to the *Alfano* case. In *Alfano*, the child-support issue, like the one here, began with an agreement by the parties that was incorporated into the original divorce decree. Like here, one of the parties requested modification, but the trial court set child support based upon the parties' initial agreement. We reversed, holding that the trial court erred in failing to follow the procedures set forth in Administrative Order No. 10 and the statutory requirements of Arkansas Code Annotated section 9-12-312 by relying solely on the agreement of the parties in setting the amount and in failing to make specific written findings as to why the presumptive amount under the child-support guidelines was inappropriate or unjust. Because the trial court did not strictly adhere to the requirements of the statute and Administrative Order No. 10, we held that a reversal was mandated.

Mr. Stevenson argues that no such findings were required because there was no evidence of a material change of circumstances to warrant modification in the first place. It is true that a party seeking modification of a child-support obligation has the burden of

showing a change in circumstances sufficient to warrant the modification, *Weir v. Phillips*, 75 Ark. App. 208, 55 S.W.3d 804 (2001), and that there is a presumption that the trial court correctly fixed the proper amount in the original divorce decree. *Ross v. Ross*, 29 Ark. App. 64, 776 S.W.2d 834 (1989). However, as we held in the *Alfano* case, a material change of circumstances is found to exist when there is an inconsistency between the existing support award and the amount of support that results from application of the family-support chart, and no reasons are given to rebut the presumption that the guideline amount was correct. Ark. Code Ann. § 9-14-107(c) (Repl. 2009); *see also Alfano*, *supra*; *Tucker v. Tucker*, 74 Ark. App. 316, 49 S.W.3d 145 (2001). Here, the existing support award was $350, while the presumptive amount from the chart was $542; however, the decree provided no reason why the presumptive amount was inappropriate or unjust. As stated in *Alfano*, "[a]lthough there are numerous reasons why parties would enter into such agreements, counsel for such parties should consider setting out in the support order reasons for the variance that would constitute a 'rebuttal' of the chart and obtaining the approval of the trial court before entering into such agreements in the future." *Alfano*, 77 Ark. App. at 70, 72 S.W.3d at 109. Otherwise, the parties can not guarantee any security in these types of agreements.

Here, the record before us contains no specific written findings about the presumptive amount under the child-support guidelines based upon Mr. Stevenson's income or why the presumptive amount was unjust or inappropriate. Because the support award did not follow the chart, our law required those findings. *Alfano*, 77 Ark. App. at 68–70, 72 S.W.3d at 108–09. We therefore reverse and remand for the circuit court to either set child support in

accordance with the guidelines or make additional findings as to why a deviation is appropriate.

Ms. Stevenson next argues that the trial court erred in refusing to find her ex-husband in contempt for his refusal to pay child support. Here, the trial court denied her motion for contempt, finding that there was no evidence that Mr. Stevenson willfully failed to follow the orders of the court. We review a trial court's refusal to punish an alleged contemnor using an abuse-of-discretion standard. *Page v. Anderson*, 85 Ark. App. 538, 157 S.W.3d 575 (2004). An abuse of discretion occurs when discretion is applied thoughtlessly, without due consideration, or improvidently. *Oldham v. Morgan*, 372 Ark. 159, 271 S.W.3d 507 (2008); *Chiodini v. Lock*, 2010 Ark. App. 340, ___ S.W.3d ___. While there was evidence that Mr. Stevenson had not paid all the child support ordered, he testified that, for one of the months he did not pay, the parties were still living together and, for the other, the child was living with him. That left the only unexplained nonpayment as the one-half payment not paid in June. The trial court heard the arguments and explanations of the parties and, with respect to their competing motions for contempt, found that neither side had acted willfully. We cannot say that the trial court, under these circumstances, acted thoughtlessly, improvidently, or without due consideration. There was no abuse of discretion, and, accordingly, we affirm.

Reversed and remanded in part; affirmed in part.

GLOVER and MARTIN, JJ., agree.