

ARKANSAS COURT OF APPEALSDIVISION I
No. CA12-977CAROLYN (LONG) COWELL
APPELLANT

V.

EDWARD J. LONG
APPELLEE

Opinion Delivered May 8, 2013

APPEAL FROM THE CLAY
COUNTY CIRCUIT COURT,
EASTERN DISTRICT
[No. DR-11-92]HONORABLE DAVID RAY
GOODSON, JUDGE

AFFIRMED

LARRY D. VAUGHT, Judge

In this appeal, appellant Carolyn (Long) Cowell challenges the order entered by the Clay County Circuit Court (1) granting her motion to modify child support and increasing appellee Edward Long's child-support payments \$60 per month, effective prospectively, and (2) granting Edward's motion to modify visitation. She contends that the trial court clearly erred in relying on Edward's tax return to determine his income. She also argues that the trial court abused its discretion in failing to award the child-support increase retroactively.¹ We affirm.

The parties, who have one minor child, were divorced by decree filed on August 23, 2011. The decree incorporated by reference a property-settlement agreement wherein the parties agreed to joint custody of the child, with Carolyn having primary physical custody.

¹Carolyn does not challenge the modification-of-visitation finding.

The agreement also included a provision whereby Edward agreed to pay Carolyn monthly child support in the amount of \$300.

On March 23, 2012, Carolyn filed a motion to modify child support. Her motion stated that “there had been a material change in circumstances. . . . [T]here exists an inconsistency between the current child support, and the amount of support [that] results from the application of the family-support chart to [Edward’s] net income.” Carolyn alleged that Edward should be paying “a substantial amount more under the guidelines.”

A hearing was held July 18, 2012. On the issue of child support, Edward introduced his tax record and his affidavit of financial means. He testified that his 2011 tax return reflected an adjusted gross income of \$18,492. He said that his monthly expenses were approximately \$4000, which totaled approximately \$48,000 in yearly expenses. He added that some of his expenses were business related. Carolyn offered no testimony on the child-support issue.

At the conclusion of the hearing, the trial court found that Carolyn established a material and significant change in circumstances with regard to Edward’s income and increased his monthly child-support payments \$60 for a total monthly payment of \$360, effective August 1, 2012. In making that finding, the trial court relied on the 2011 tax return that demonstrated a monthly income of \$1541. The trial court entered its order formalizing these findings on August 15, 2012, and Carolyn filed a timely appeal.

Our standard of review for an appeal from a child-support order is de novo, and we will not reverse a finding of fact by the trial court unless it is clearly erroneous. *John v. Bolinder*, 2013 Ark. App. 224, at 4. In reviewing a trial 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. *Id.*

In determining an appropriate amount of child support, courts are to refer to the family-support chart contained in our Administrative Order Number 10, which provides a means of calculating child support based on the payor's net income. Ark. Code Ann. § 9-12-312(a)(2) (Repl. 2009). Income is defined as "any form of payment, periodic or otherwise, due to an individual, regardless of source, including wages, salaries, commissions, bonuses, workers' compensation, disability, payments pursuant to a pension or retirement program, and interest less proper deductions[.]" Ark. Sup. Ct. Admin. Order No. 10(II)(a). It is well established that this definition of income is broadly construed, intended to encompass the widest range of potential income sources. *John*, 2013 Ark. App. 224, at 5.

Carolyn's first point on appeal is that the trial court clearly erred in relying on Edward's tax record in order to determine his income. Carolyn maintains that the trial court should have relied on Edward's affidavit of financial means, which was better evidence of his actual spending habits and style of living. Our supreme court in *Tucker v. Office of Child Support Enforcement*, clarified when the trial court should proceed with the income-tax method of calculation and when it should use a net-worth approach:

Pursuant to Administrative Order No. 10, Section III(c), for self-employed payors, the circuit court should first consider the last two years' federal and state income tax returns and the quarterly estimates for the current year. A self-employed payor's income should include contributions made to retirement plans, alimony paid, and self-employed insurance paid. *Id.* Depreciation should be allowed only to the extent that it reflects actual decrease in value of an asset. *Id.*

If the circuit court determines that the tax returns are unreliable, then it shall make specific findings explaining the basis of its determination. The circuit court shall

then proceed using the net-worth method. The circuit court shall establish a beginning net worth at the start of the relevant period and an ending net worth at the end of the period, considering living expenses and allowable deductions for the same period. *See Holland [v. United States]*, 348 U.S. [121,] 125 [(1954)]. Additionally, the circuit court shall consider the following factors: (1) the impact of inflation or deflation on the payor's net worth; (2) liquidity of the payor's assets; (3) the payor's cash flow; (4) the payor's current and long-term financial obligations; (5) the payor's lifestyle; and (6) any other relevant factors. After determining the payor's disposable income, the circuit court shall calculate child support in accordance with the child-support guidelines.

368 Ark. 481, 489–90, 247 S.W.3d 485, 492 (2007).

We hold that the trial court followed the procedure set forth in *Tucker* and did not clearly err in determining Edward's income. The trial court first considered Edward's tax record, and found, based on that record, that his monthly income was \$1541. The trial court found that the corresponding amount of chart child support was \$360, which was an increase of \$60 per month. The trial court also found that the \$60 increase was a twenty-percent increase from the original amount of child support that Edward agreed to pay, which constituted a material change of circumstances sufficient to support the modification. Ark. Code Ann. § 9-14-107(a)(1) (Repl. 2009).² Despite acknowledging the disparity between the income stated in Edward's tax record³ and the expenses listed in his affidavit of financial

²Ark. Code Ann. § 9-14-107(a)(1) provides that “[a] change in gross income of the payor in an amount equal to or more than twenty percent (20%) or more than one hundred dollars (\$100) per month shall constitute a material change of circumstances sufficient to petition the court for modification of child support according to the family support chart after appropriate deductions.”

³Edward's adjusted gross income for 2011 was \$18,492.

means,⁴ along with the low rate of return between his gross business receipts and his income,⁵ the trial court nevertheless relied on the tax record to determine Edward's income. Because the trial court relied on the tax record, there was no need for it to consider Carolyn's preferred method for determining Edward's income—the net-worth approach. There is no clear error here.⁶

Carolyn insists that the trial court erred because it did not find Edward's tax record unreliable and inconsistent with his affidavit and his testimony. The trial court reviewed all the evidence in the record, which included Edward's tax return, his affidavit, and his testimony.⁷ In *Tucker*, our supreme court held that inconsistencies arising from a comparison of tax returns and witness testimony are matters for the trial court to resolve. 368 Ark. at 487, 247 S.W.3d at 490. Further, it is well settled that we give due deference to the trial court's superior position to determine the credibility of the witnesses and the weight to be given to

⁴Edward's affidavit of financial means listed monthly expenses of \$3780.

⁵Edward's gross business receipts in 2011 were \$113,133.

⁶We note that the facts in the cases cited by Carolyn for support of her argument—that the trial court should have utilized the net-worth approach to determine Edward's income—are distinguishable from the facts in the case at bar, and therefore, inapplicable. In *Tucker*, our supreme court affirmed the trial court's finding that the tax records were unreliable, which led to the court's application of the net-worth approach for determining income. 368 Ark. at 484, 247 S.W.3d at 488. In the case at bar, the trial court did not find Edward's tax record unreliable. In *Norman v. Alexander*, 2011 Ark. App. 327, no tax records were introduced into evidence; therefore, the income-tax method for determining income was not available.

⁷We note that Carolyn did not offer any documentary or testimonial evidence to refute Edward's tax record or testimony.

their testimony. *Id.* at 487–88, 247 S.W.3d at 490. Therefore, we cannot say that the trial court’s reliance on the tax record was clearly erroneous.

Carolyn’s second point on appeal concerns the effective date of the child-support increase. The trial court’s order awarded Carolyn the \$60 increase effective August 1, 2012. She contends that the trial court abused its discretion in not awarding the increase retroactively. For support, she relies on Arkansas Code Annotated section 9-14-107(d) (Repl. 2009), which provides that “[a]ny modification of a child support order that is based on a change in gross income of the noncustodial parent shall be effective as of the date of filing a motion for increase or decrease in child support unless otherwise ordered by the court.” She argues that the trial court “simply picked a date out of thin air,” when it made the award effective on August 1, 2012, and that if the trial court is not going to award the increase retroactively, as required by the statute, the court should be required to give a reason for doing so.

The trial court’s decision regarding the effective date of modified child support is reviewed for abuse of discretion. *Tucker*, 368 Ark. at 490, 247 S.W.3d at 492. In the case at bar, the trial court awarded the child-support increase prospectively, and it did not give any reasoning for doing so. The statute does not require a trial court to make findings if it makes the award prospective. Further, the statute states that the award shall be retroactive “unless otherwise ordered by the court.” Here, the trial court “otherwise ordered” the child support to be paid prospectively, which is permitted by the statute. Accordingly, we hold that the trial court did not abuse its discretion on this point.

Affirmed.

GLADWIN, C.J., and PITTMAN, J., agree.

Hoskins & Harris, P.A., by: *James W. Harris*, for appellant.

Bristow & Richardson, PLLC, by: *Melissa B. Richardson*, for appellee.