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SUPREME COURT OF ARKANSAS

No. CV-17-473

PARRISH A. DARE APPELLANT V. SCOTT A. FROST APPELLEE	Opinion Delivered: March 8, 2018 APPEAL FROM THE SALINE COUNTY CIRCUIT COURT [63DR-16-211] HONORABLE BOBBY D. MCCALLISTER, JUDGE AFFIRMED; COURT OF APPEALS OPINION VACATED.

ROBIN F. WYNNE, Associate Justice

Parrish Dare appeals from an order of the Saline County Circuit Court modifying the visitation awarded to appellee Scott Frost and denying her petition to modify the amount Frost pays in child support. She argues that the circuit court erred in finding that there had been a material change in circumstances that justified modifying Frost's visitation with the parties' child. She also argues that the trial court erred in deciding not to include the increase in the value of Frost's stock portfolio in the calculation of his child-support obligation and deciding not to impute additional income to Frost. We affirm.

While the parties lived in Virginia, they were involved in a relationship that produced one child, R.D. The parties were never married. A Virginia court ordered Frost to pay child support in the amount of $400 per month. The court awarded Frost "liberal visitation" and set a visitation schedule that alternated holidays and gave Frost two weeks

in the summer with R.D. After Dare relocated to Arkansas with the child, Frost typically kept the child for three to four weeks during the summer. Frost also began paying $425 per month in child support.

In 2015, Dare began asking Frost to pay additional child support; he declined. During this same period, Dare restricted Frost's visitation to that provided for in the Virginia court order. In February 2016, Frost petitioned to register the Virginia orders in the Saline County Circuit Court. He contemporaneously filed a motion for modification in which he alleged that there had been a change in Dare's "willingness to co-parent" that constituted a material change in circumstances justifying an award of additional visitation with R.D. Dare filed a counterclaim in which she requested a modification of Frost's child-support obligation to reflect his current income. The circuit court held hearings on the visitation and child-support issues. Regarding child support, Dare argued that the growth of Frost's stock portfolio should be considered in the calculation of his child-support obligation. Dare also contended that the trial court should impute Frost's income commensurate with his lifestyle. The circuit court subsequently entered an order in which it found that a material change in circumstances had occurred and modified Frost's visitation, increasing summer visitation to four weeks each summer and setting out a schedule for holiday visitation. The circuit court also found that there was insufficient evidence to impute income beyond that reported on his affidavit of financial means and ordered him to pay child support in the amount of $213.00 every two weeks based on his reported bi-weekly income of $1,174.46.

Dare appealed to our court of appeals, which affirmed on the finding of material change in circumstances and reversed and remanded on the issue of child support, with instructions for the circuit court to consider the gains in Frost's stock portfolio as income for child support purposes. *Dare v. Frost*, 2017 Ark. App. 325, 522 S.W.3d 146. The parties filed competing petitions for review with this court, with Dare seeking review of the portion of the circuit court order on the issue of visitation that was affirmed and Frost seeking review of the court of appeals' decision to reverse and remand on the issue of child support. Dare's petition was denied; Frost's was granted. Because, upon granting a petition for review, we consider the appeal as though it were initially filed with this court, *Powell v. Lane*, 375 Ark. 178, 181, 289 S.W.3d 440, 442, all issues raised in the appeal are currently before us.

Visitation

Dare's first argument on appeal is that the trial court erred in finding that Frost had proved a material change in circumstances sufficient to warrant a modification of the existing visitation order. In domestic relations cases, we review the evidence de novo and will not reverse the circuit court's findings unless they are clearly erroneous. *Brown v. Brown*, 2012 Ark. 89, 387 S.W.3d 159. We also give special deference to the circuit court's superior position in evaluating the witnesses, their testimony, and the child's best interest. *Id.* Because a circuit court maintains continuing jurisdiction over visitation, it may modify or vacate a prior visitation order when it becomes aware of a material change in circumstances since the previous order. *Id.* The party seeking modification has the

burden of demonstrating such a material change in circumstances. *Id.* Regarding visitation, the primary consideration is the best interest of the child. *Id.* Important factors for the court to consider in determining reasonable visitation are the wishes of the child, the capacity of the party desiring visitation to supervise and care for the child, problems of transportation and prior conduct in abusing visitation, the work schedule or stability of the parties, and the relationship with siblings and other relatives. *Id.* We have held that fixing visitation rights is a matter that lies within the sound discretion of the circuit court. *Id.*

In its order modifying visitation, the circuit court found that Dare had exposed R.D. to inappropriate circumstances and had been negative toward Frost to such a degree that it caused strain between R.D. and Frost. The testimony at the hearing on visitation was that at some point in 2011, the parties had agreed to modify the visitation schedule to allow Frost more time with R.D. during the summer. He was typically given three to four weeks instead of the two specified in the Virginia order. During his testimony, Frost read from an email sent to him by Dare in which she stated that if he did not pay more than was required by the child-support guidelines, she would not do anything outside of the visitation guidelines. Dare repeated that stance in her testimony. Frost testified that in 2015, he was informed that, instead of spending four weeks with him, R.D. would spend two weeks in Virginia and two weeks with a friend of Dare's in Texas. Frost also testified regarding a Thanksgiving visitation when Dare sent R.D. to his home with a mostly empty suitcase. Dare testified that this was intended as a message to Frost that he was not taking responsibility for R.D.'s care while she was with him. Frost further testified that Dare told

him that she allowed R.D. to read their correspondence regarding child support, which included statements by Dare that he was not doing enough for R.D. Frost stated that this resulted in different behavior toward him by R.D. Frost stated that he felt like Dare pushed him out and made R.D. feel like it was acceptable to minimize his part in her life.

The testimony at the hearing was sufficient to establish that the parties' ability to cooperate regarding R.D.'s visitation had deteriorated since the Virginia visitation order was entered. The parties had voluntarily modified the visitation order, presumably because this was in R.D.'s best interest. Dare unilaterally changed the visitation back to that specified in the Virginia order, and there was evidence from which the circuit court could reasonably conclude that this was done not because it was in R.D.'s best interest but because of issues Dare was having with Frost, specifically her unhappiness with the amount of child support he was paying. There was also testimony that Dare's actions, which included showing R.D. communications between the parties, affected the relationship between Frost and R.D. While Dare naturally seeks to counter this evidence, as stated above, we defer to the circuit court on issues regarding the credibility of the witnesses and the weight to be given to their testimony. *See Brown*, 2012 Ark. 89, 387 S.W.3d 159. Under these circumstances, we conclude that the change in the parties' interactions with each other constitute a material change in circumstances sufficient to warrant a modification of visitation.[1] We affirm the circuit court's order modifying the visitation schedule.

[1] We wish to stress that these circumstances are being applied to a modification of visitation, not a modification of custody.

Child Support

Dare next argues that the circuit court erred by not including the increase in value of Frost's stock portfolio in the calculation of his child-support obligation. Arkansas Supreme Court Administrative Order Number 10 defines "income" 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. It is the policy of the state to interpret "income" broadly for the benefit of the child. Ark. Sup. Ct. Admin. Order No. 10.

Frost testified that he had approximately $40,000 in stocks. He also testified that he does not receive any money from the stocks and that any increase stays in the portfolio. In its order, the circuit court denied Dare's request that the stock dividends be included as part of Frost's income, based on the court's conclusion that the growth of the portfolio should be counted as income for child support purposes only when the growth is "realized" by the owner. The order states that any disbursements from Frost's investment account are to be utilized in calculating his child support.

Dare contends that the circuit court's order permits Frost to take his income from his stocks and reinvest it instead of treating it as income. But it is not clear from the record that Frost has "income" from the portfolio. Frost testified that he does not see any money from his stock portfolio. While Dare suggests that the increase be treated as a bonus for purposes of determining child support, we cannot determine from this record

whether this is possible, as there is no evidence in the record to indicate what form the capital gains and dividends from the portfolio reflected on Frost's tax returns have taken, nor is there any indication as to whether they may be accessed and used by Frost in the same manner as a bonus check. The order requires Frost to treat funds he receives from the investment account as income in calculating child support, while not requiring him to treat an unrealized increase in his portfolio's value as income. This would require Frost to include cash dividends or realized gains he receives from his stocks in the amount of child support to be paid. On this record, we cannot conclude that the circuit court erred, as the record is insufficient to establish that the portfolio activity sought by Dare to be included in the child support calculation constitutes income as defined in Administrative Order Number 10.

Dare's final argument is that the trial court erred by declining to impute income to Frost based on his lifestyle. Administrative Order Number 10 states as follows regarding imputing income:

> If a payor is unemployed or working below full earning capacity, the court may consider the reasons therefor. If earnings are reduced as a matter of choice and not for reasonable cause, the court may attribute income to a payor up to his or her earning capacity, including consideration of the payor's life-style. Income of at least minimum wage shall be attributed to a payor ordered to pay child support.

Dare contends that Frost's reported income does not match up with his expenses. Based on this, she concludes that he must be shielding income. Frost testified that he is employed as a behavioral-specialist counselor earning $1071 semi-monthly, and his wife's employment and savings contribute toward paying their expenses. The record contains no

evidence to indicate that Frost is working below his full earning capacity. We hold that the circuit court did not err in declining to impute additional income to Frost.

Affirmed; court of appeals opinion vacated.

BAKER, GOODSON, and HART, JJ., concur in part and dissent in part.

KAREN R. BAKER, Justice, concurring in part and dissenting in part.

I concur with the majority's holding that the circuit court did not err in declining to impute additional income to Frost. However, because the circuit court erred in modifying visitation and failing to properly calculate child support in this matter, I dissent from the remainder of the majority's opinion. First, with regard to visitation, based on the record before the court, the circuit court clearly erred in modifying visitation. Courts impose a more stringent standard for modifications in visitation. *Brown v. Brown*, 2012 Ark. 89, 387 S.W.3d 159. The reasons for requiring these more stringent standards are to promote stability and continuity in the life of the child and to discourage the repeated litigation of the same issue. *Id.* Based on these more stringent standards, none of the changes alleged by Frost or upon which the circuit court based its ruling constitute a material change in circumstances. Here, the circuit court focused on the finding that Dare had "exposed the minor child to inappropriate circumstances and has been negative toward Frost sufficiently to cause strain between the minor child and Frost." However, the record does not support that Dare exposed the child to inappropriate circumstances. The record supports discord between the parties, but Frost has failed to demonstrate that a material change in circumstances occurred. "Petty complaints and parental gamesmanship may not rise to the

level of a material change in circumstances, especially if the child is left relatively unscathed. *Hart v. Hart*, 2013 Ark. App. 714, at 3, (citing *Dodd v. Gore*, 2013 Ark. App. 547; *Byrd v. Vanderpool*, 104 Ark. App. 239, 244, 290 S.W.3d 610, 613 (2009)). Moreover, a custodial parent's change in attitude is not necessarily sufficient to constitute a material change. For example, in *Stellpflug v. Stellpflug*, [the court of appeals] reversed the circuit court's modification of visitation because 'the only change that occurred in this case was appellee's attitude regarding summer visitation. 70 Ark. App. 88, 93, 14 S.W.3d 536, 539 (2000).'" *Geren Williams v. Geren*, 2015 Ark. App. 197, at 13, 458 S.W.3d 759, 767–68. Therefore, based on this record, the petty complaints and changes in attitude cannot support the circuit court's decision that a material change in circumstances occurred.

Further, Dare had the authority to deny Frost additional visitation with their child from the time the agreed order was entered in 2004 and the most recent order, which was entered in 2009. The fact that she began to exercise that authority is not a material change in circumstances. Dare should not be punished now for allowing Frost additional visitation from that which was provided for in the agreed order. Therefore, I would reverse and remand on this point.

Second, I also dissent from the majority's conclusion to affirm the circuit court's decision to not consider the capital gains or growth of Frost's stock portfolio in its calculation of child support or imputing his income. The majority states, "[O]n this record, we cannot conclude that the circuit court erred, as the record is insufficient to establish that the portfolio activity sought by Dare to be included in the child support

calculation constitutes income as defined in Administrative Order Number 10." I disagree with the majority's analysis. The record clearly supports that Frost's stock portfolio realized profits, and those profits should be included as income for child-support calculations.

As noted by the majority, child support is determined by the family support chart in Arkansas Supreme Court Administrative Order No. 10. Ark. Code Ann. § 9–12–312(a)(3)(A) (Repl. 2015). Administrative Order No. 10 provides:

> Section II. Definition of Income.
>
> a. Income means 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 for:
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> 1. Federal and state income tax;
>
> 2. Withholding for Social Security (FICA), Medicare, and railroad retirement;
>
> 3. Medical insurance paid for dependent children; and
>
> 4. Presently paid support for other dependents by court order, regardless of the date of entry of the order or orders.

Cases reflect that the definition of "income" is "intentionally broad and designed to encompass the widest range of sources consistent with this State's policy to interpret 'income' broadly for the benefit of the child." *Evans v. Tillery*, 361 Ark. 63, 204 S.W.3d 547 (2005); *Ford v. Ford*, 347 Ark. 485, 65 S.W.3d 432 (2002); *McWhorter v. McWhorter*, 346 Ark. 475, 58 S.W.3d 840 (2001); and *Davis v. Office of Child Support Enforcement*, 341 Ark. 349, 20 S.W.3d 273 (2000). Further, there is a rebuttable presumption that the amount of child support calculated pursuant to the chart is the appropriate amount. Ark.

Code Ann. § 9-12-312(3)(A) ("In determining a reasonable amount of child support, initially or upon review to be paid by the noncustodial parent, the court shall refer to the most recent revision of the family support chart; (B) It shall be a rebuttable presumption for the award of child support that the amount contained in the family support chart is the correct amount of child support to be awarded.").

In *McWhorter v. McWhorter*, 346 Ark. 475, 481–82, 58 S.W.3d 840, 844–45 (2001), we explained that Administrative Order No. 10

> sets forth the relevant factors to be considered by the court in determining the appropriate amount of child support. Those factors include: "12. Other income or assets available to support the child from whatever source." Administrative Orders of the Supreme Court, No. 10, § V. Our court of appeals has had occasion to interpret subsection a.12 on at least two occasions and to include as income certain funds not specifically listed in the definition of "income." *See Office of Child Support Enforcement v. Longnecker*, 67 Ark. App. 215, 997 S.W.2d 445 (1999) (money received from part-time work included as income for child-support purposes); *Belue v. Belue*, 38 Ark. App. 81, 828 S.W.2d 855 (1992) (VA benefits included as income for child-support calculations) . . . . There is no question then that both this court and
> our court of appeals have interpreted the term "income" broadly for purposes of arriving at proper child support.

Further, in *Helvering v. Bruun*, 309 U.S. 461, 469 (1940), the United States Supreme Court explained that

> while it is true that economic gain is not always taxable as income, it is settled that the realization of gain need not be in cash derived from the sale of an asset. Gain may occur as a result of exchange of property, payment of the taxpayer's indebtedness, relief from a liability, or other profit realized from the completion of a transaction. The fact that the gain is a portion of the value of property received by the taxpayer in the transaction does not negative its realization.

Here, the circuit court found that the stock portfolio was not income and explained that it should not have to "engage in the cumbersome annual review in the fluctuations in value of certain types of property" and that Frost's investment account was similar to a retirement account or ownership of real property, and the growth from that account should be used in the calculation of child support only when the "growth is actually 'realized' by the owner." In this case, the evidence established that Frost had approximately $40,000 invested in a stock portfolio at Wells Fargo. Frost's tax returns demonstrate that Frost had realized a profit of $5,470 from that portfolio in 2014, and $1,454 in 2015. Because Frost chose to reinvest the profits in other stock purchases and not access those funds does not extinguish Frost's tax liability on the profits, nor does it extinguish the fact that profits are income for purposes of child support. Accordingly, the profits should not be precluded from calculation of Frost's income for child-support purposes. Therefore, I would hold that the circuit court erred in its decision that the profits in the portfolio were not income for purposes of child support.

GOODSON and HART, JJ., join.

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