

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001708-ME

SCOT D. BURRIS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE HUGH SMITH HAYNIE, JUDGE  
ACTION NO. 06-CI-503164

NICOLE NEUSER BURRIS

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON AND WINE, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Scot D. Burris appeals from an order of the Jefferson Circuit Court, Family Division regarding his motion to modify the child-support obligation of his ex-wife, Nicole Neuser Burris. At issue is whether the

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

family court correctly interpreted the parties' Marital Settlement Agreement and assessed their income in calculating Appellee's child-support obligation. After our review, we find no error and affirm.

In August 2007, the family court entered a Limited Decree of Divorce that dissolved the parties' marriage. In November 2007, the court designated Appellant as the primary residential custodian of the parties' three children. The court also entered a Temporary Order setting *pendente lite* child and spousal support. Pursuant to this order, Appellant was ordered to pay Appellee \$3,500 per month in temporary spousal support, while Appellee was ordered to pay Appellant \$523 per month in temporary child support. However, the Temporary Order then explicitly offset these two amounts and required Appellant to pay Appellee temporary maintenance in the reduced amount of \$3,000 per month in lieu of receiving child support from Appellee. In effect, then, Appellee's child-support obligation was met by her acceptance of a reduced amount of maintenance from Appellant.

The parties subsequently participated in mediation concerning all remaining issues – including those regarding maintenance and child support – and entered into a Marital Settlement Agreement. The family court then incorporated this Agreement into an Order that set forth the parties' agreed resolution as to all of those issues. Pursuant to the terms of the Agreement, Appellee was once again not required to pay child support to Appellant because of the manner in which the

parties settled the issue of spousal maintenance. Paragraph 5.1 of the Agreement reflects this compromise:

The parties acknowledge that they each owe an obligation of child support for their minor children pursuant to the Kentucky child support guidelines. In arriving at the negotiated and compromised sum of maintenance set out in this section, the parties have calculated, considered and settled Nicole's obligation to pay child support to Scot on behalf of the children and agree that Nicole shall not be obligated to pay child support to Scot at this time.

In arriving at this compromised settlement, the parties have considered Scot's current income, Nicole's current educational pursuit and her maintenance as established in this Agreement. Finally, the parties acknowledge their understanding that the issue of child support is always subject to modification by subsequent order of this Court or any court of competent jurisdiction.

Pursuant to Paragraph 6.1 of the Agreement, Appellant was required to pay Appellee maintenance in the amount of \$3,000 per month for sixty months commencing in November 2007. This was the same amount of monthly maintenance set forth in the family court's earlier Temporary Order. The Agreement further provided that this obligation was not subject to modification. However, the Agreement did not set forth what Appellee's child-support obligation otherwise would have been.

In December 2008, Appellant moved to modify the Order (and the Marital Settlement Agreement) so as to impose a child-support obligation upon Appellee. The premise of this motion was that the parties' incomes had changed

substantially so as to warrant a modification of their respective obligations. A hearing on the motion was held in May 2009.

At the hearing, Appellant testified that the parties had originally agreed not to impose a child-support obligation on Appellee because she was a student at Sullivan University at the time. However, in the interim, she had apparently withdrawn from school. Appellant also testified that his employment status had changed in January 2008 as a result of the merger of his employer (Insight) with Comcast. Appellant produced his year-end pay stub from Comcast for 2008 that verified income in the amount of \$175,903.70. He also testified that he had received a number of bonuses that year, including a one-time signing bonus plus bonuses relating to his job performance during 2007. He also produced his 2007 income tax returns, which reflected that his income for that year was \$274,652. Following the hearing, Appellant also produced his 2008 income-tax returns, which reflected that his personal gross income for that year was \$273,362.<sup>2</sup>

Appellee testified at the hearing that she was unemployed but that she had earned \$36,000 in 2008 (all attributable to spousal maintenance),<sup>3</sup> along with an additional \$50,000 to \$60,000 attributable to withdrawals from her 401K account and liquidation of other assets she had received in the divorce. Appellee's income-tax returns for 2008 reflected a total gross income of \$88,989. However, Appellant disputed this evidence regarding Appellee's income and asserted that

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<sup>2</sup> These returns, which Appellant filed jointly with his wife, actually show an income of \$411,692. The difference in the two amounts reflects the fact that Appellant's wife earned additional income beyond Appellant's contribution.

<sup>3</sup> Spousal maintenance payments received are considered income. KRS 403.212(2)(b).

she had instead earned \$172,753 in 2008 based upon his review of deposits Appellee had made into her various bank accounts.

In July 2009, the family court entered an Order adjudicating Appellant's motion for modification. Because the parties' Marital Settlement Agreement had failed to explicitly set forth what Appellee's child-support obligation would have been, the family court first sought to resolve that issue. The court ultimately determined that the parties had implicitly incorporated the *pendente lite* maintenance and child-support obligations set forth in the Temporary Order into the Agreement. As noted above, in that Temporary Order Appellant was ordered to pay Appellee \$3,500 per month in temporary spousal support, while Appellee was ordered to pay Appellant \$523 per month in temporary child support. The Temporary Order then offset these two figures by requiring Appellant to pay Appellee temporary maintenance in the reduced amount of \$3,000 per month in lieu of receiving child support from Appellee. The family court concluded that the parties had simply adopted the reasoning of the Temporary Order in settling the issues of maintenance and child support in their Agreement – as reflected by the requirement that Appellant continue to pay \$3,000 per month in maintenance. Thus, the question was whether Appellant was entitled to modification of Appellee's original support obligation of \$523 per month.

The trial court then determined the parties' income pursuant to the Kentucky Child Support Guidelines contained within KRS 403.212. Based on Appellant's 2008 income-tax returns, the trial court found that his gross income

was \$237,362, or \$19,780 per month, once his \$36,000 yearly maintenance obligation to Appellee was subtracted.<sup>4</sup> The court also determined that Appellee's income was \$88,989, or \$7,415 per month, based upon the gross income shown in her 2008 income-tax returns. Applying the Kentucky Child Support Guidelines to these figures yielded a new child-support obligation of \$653 per month for Appellee. Accordingly, the family court concluded that modification was merited since this amount exceeded 15% of the existing obligation. *See* KRS 403.213(2). The court then ordered Appellee to pay Appellant \$130 per month in child support (the difference between the \$653 recalculated support obligation and the \$523 offset obligation reflected in the Marital Settlement Agreement).

Appellant subsequently moved to alter, amend, or vacate the July 2009 Order on the grounds that the family court had misinterpreted the parties' Marital Settlement Agreement and had made erroneous findings of fact regarding the parties' incomes. The family court denied Appellant's motion. This appeal followed.

On appeal, Appellant first claims that the family court erroneously found that the parties intended to incorporate the provisions of the Temporary Order relating to the offsetting of Appellee's child-support obligation against Appellant's maintenance obligation into their Marital Settlement Agreement. As such, Appellant argues that the family court erred in continuing to offset the first \$523 of Appellee's child-support obligation and in requiring her to pay only \$130

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<sup>4</sup> A party paying maintenance is entitled to a deduction from his or her gross income in the amount of monthly maintenance paid. KRS 403.212(2)(g)(1).

per month in its order of modification. “The terms of a settlement agreement set forth in a decree of dissolution of marriage are enforceable as contract terms.”

*Money v. Money*, 297 S.W.3d 69, 71 (Ky. App. 2009); *see also* KRS 403.180(5).

“The construction and interpretation of a contract is a matter of law and is reviewed under the *de novo* standard.” *Money*, 297 S.W.3d at 71; *see also Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998).

We agree with the family court that the plain language of the Agreement compelled a finding that the parties intended to offset maintenance and child support consistently with the court’s Temporary Order and that such had to be taken into account in determining Appellee’s modified child-support obligation. As noted above, Paragraph 5.1 of the Agreement provided that “[i]n arriving at the negotiated and compromised sum of maintenance set out in this section, the parties have calculated, considered and settled Nicole’s obligation to pay child support to Scot on behalf of the children and agree that Nicole shall not be obligated to pay child support to Scot at this time.” This language clearly reflects that the parties had taken Appellee’s child-support obligation into account in determining Appellant’s maintenance obligation and had agreed that Appellee would not be required to pay child support. This very same intertwining of maintenance and child support was also present in the Temporary Order. Moreover, Paragraph 6.1 of the Agreement required Appellant to pay \$3,000 per month in spousal maintenance – the exact amount set forth in the Temporary Order after Appellee’s child-support obligation was offset. Consequently, in the absence of any provision

in the Agreement specifying the full and exact amount of child support actually owed by Appellee, we cannot say that the family court erred in interpreting the Agreement to implicitly include the terms of the court's Temporary Order relating to maintenance and child support. Indeed, the record compelled such an interpretation.

Appellant also offers a related argument that Appellee's child-support obligation was contingent on her continuing to attend school, but the record does not support this contention. While Paragraph 5.1 of the Agreement does provide that "[i]n arriving at this compromised settlement, the parties have considered Scot's current income, Nicole's current educational pursuit and her maintenance as established in this Agreement," nothing in that language suggests that a condition of the parties' child-support agreement was that Appellee continue to attend school. Instead, this passage merely sets forth the factors that the parties considered in reaching their agreement. Thus, this argument is also rejected.

Appellant next claims that the family court erred by using his 2007 income-tax returns instead of his 2008 gross income from Comcast in calculating his income for purposes of child support. Because this question involves the family court's findings of fact, we review those findings for clear error and must determine whether they are supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003); CR 52.01. "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the



evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men.” *Moore*, 110 S.W.3d at 354 (citations omitted). Mere doubt as to the correctness of a factual finding is not enough to merit reversal as long as the finding is supported by substantial evidence. *Id.* This is true “[r]egardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding.” *Id.*

The record shows that the family court did not rely upon Appellant’s 2007 income-tax returns in determining his income. Instead, the court’s findings clearly reflect that “[i]n setting child support, the Court used each party’s gross income as stated in his or her 2008 income taxes.” (Emphasis added). A review of Appellant’s income-tax returns for 2008 reflects – as found by the family court – that his personal gross income for that year was \$237,362 (\$19,780 per month) once his \$36,000 yearly maintenance obligation to Appellee was subtracted. Accordingly, the family court set Appellant’s income at this amount for purposes of setting child support. Since Appellant’s motion seeking modification of child support was filed on December 11, 2008, the family court’s use of Appellant’s 2008 income-tax returns in determining his gross income for purposes of calculating child support was entirely reasonable. *See* KRS 403.213(2). Thus, no clear error occurred in this respect.

Appellant also offers the related argument that the “best representation” of his income was actually set out in his year-end pay stub from Comcast for 2008, which reflected a gross income of \$175,903.70, and not his

income-tax returns for that year because he had received various bonuses from Comcast that would not be repeated. However, KRS 403.212(2)(b) defines “gross income” broadly to include “income from any source,” including “bonuses, gifts, severance pay, and prizes, that are typically singular, nonrecurring events.” *Clary v. Clary*, 54 S.W.3d 568, 573 (Ky. App. 2001). Thus, inclusion of those bonuses in Appellant’s calculated gross income was entirely appropriate. Indeed, we note that a considerable amount of *Appellee’s* calculated gross income for that same year was also derived from such “singular, nonrecurring events.”

Appellant next claims that the family court erred in determining Appellee’s income from her 2008 income-tax returns instead of from a number of exhibits submitted by Appellant concerning bank deposits made by Appellee. Based on her income-tax returns, the family court concluded that Appellee’s gross income for 2008 was \$88,989 (\$7,415 per month). Appellant challenges this determination, arguing that her income was actually \$172,753.62, but he provides no elaboration on this point beyond a general reference to the aforementioned exhibits. The family court correctly found that not all deposits equate as income. *See* KRS 403.212. The court further found that a number of the deposits into Appellee’s accounts represented returns of items on which she had spent money and loans from her parents that were subsequently repaid; thus, they were not gross income for purposes of calculating child support. *Cf. Stewart v. Burton*, 108 S.W.3d 647, 649-50 (Ky. App. 2003). Appellant has provided us with nothing of substance to suggest that these findings were clearly erroneous. Therefore, the

family court's use of Appellee's 2008 income-tax returns in calculating her gross income for purposes of child support was appropriate.

Appellant finally argues that the family court erred in its conclusions as to the correct amount of child support owed by Appellee. However, this argument is superfluous since it is based on Appellant's belief that the trial court made incorrect findings regarding the parties' respective incomes – a position which we have rejected.

For the foregoing reasons, the judgment of the Jefferson Circuit Court, Family Division is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

J. Russell Lloyd  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Sammy Deeb  
Louisville, Kentucky