RENDERED: AUGUST 21, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001384-ME

SCOTT J. FARLEY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DONNA L. DELAHANTY, JUDGE
ACTION NO. 12-CI-503561

CORTNEY J. FARLEY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KRAMER AND VANMETER, JUDGES.

KRAMER, JUDGE: Scott J. Farley ("Father") appeals the Jefferson Circuit Court's June 23, 2014 order increasing his child support payment to an amount consistent with our statutory child support guidelines. On appeal we construe Father's brief to raise three issues: first, that the trial court erred by supporting its decision to modify child support with the fact that parties were no longer incurring

the expense of private school tuition; second, that it erred by failing to reduce Father's child support in proportion to his parenting time; and third, that it erred by failing to consider Mother's 2014 year-to-date earnings and relying only on the parties' 2013 gross income as reported on their 2013 federal tax returns when determining the parties income for purposes of child support. After careful review of the record on appeal, we affirm the circuit court's order modifying child support.

FACTUAL AND PROCEDURAL BACKGROUND

The parties were married on February 4, 2005, in Jefferson County, Kentucky and had one child together, born in August 2006. During their marriage the parties resided in Mt. Washington, Bullitt County, Kentucky. The parties separated on May 15, 2011, and on June 10, 2011, filed a petition for dissolution in Bullitt Circuit Court. During the proceedings the marital residence was sold and both parties relocated to Jefferson County. On May 3, 2012, the trial court heard testimony related to allocation of marital debt, parenting time, child support and attorney's fees, and on May 22, 2012, entered its Decree of Dissolution of Marriage, incorporating its Findings of Fact and Conclusions of Law therein.

The trial court found that both parties desired to have an active and engaging relationship with their child and desired to keep a structured home life to accommodate the needs of their child. The trial court ordered joint custody and a shared parenting schedule, with Father exercising physical custody when he was not working. Further, the trial court found that Mother had a gross income of

$5,613 per month and that Father had a gross income of $7,354 per month, and ordered Father to pay Mother $164.78 per month in child support, reasoning that deviation from the child support guidelines was appropriate given the parties' equal parenting time.

Because both parties moved to Louisville during the pendency of the dissolution proceeding, after entry of the decree the Bullitt Circuit Court transferred venue to Jefferson County. Numerous post-judgment motions were filed by both parties. The parties mediated some of the issues and, as of August 2013, agreed to increase child support to $184.78 per month. On May 13, 2014, the trial court held a hearing to address the remaining issues, including Father's motion to enroll the minor child in the Bullitt County School system and Father's motion to modify child support.

Prior to the May 2014 hearing, the minor child attended St. Raphael, a parochial school in Jefferson County. Tuition was shared by both parties, but before the hearing they agreed that the tuition expense made continued enrollment at St. Raphael unfeasible. At the hearing Father testified that based upon a common understanding that private school tuition was unaffordable and dissatisfaction with Jefferson County Public Schools, Mother had agreed to allow the child to enroll in Bullitt County School system for the 2014-2015 school year. Father testified that he had purchased real estate in Bullitt County and began constructing a residence in reliance on Mother's statements. Mother denied agreeing to enroll the child in school in Bullitt County and testified that she desired

to enroll the child in the school closest to her residence in Jefferson County so the child could have stability with respect to home, school, family and friends. Mother also objected to the commute she would encounter on her days with the child and her belief that, in the case of an emergency, there would be no one near to retrieve the child from school. The trial court found that it was in the best interest of the parties' child to enroll in the Bullitt County School system and that Father acted in reliance on his belief that the parties had reached a meeting of the minds regarding enrolling the child in a Bullitt County school when he purchased real estate in Bullitt County.

In his motion to modify child support Father alleged that Mother experienced a continuing and substantial change in income. Mother agreed that the issue of child support should be revisited by the trial court at the May 2014 hearing. The trial court found that Mother's 2013 W-2 income was $31,750.05 and that she had income from a part-time job of approximately $650. It also found that Father's base salary was $72,000.00 and that his 2013 gross income was $95,985.75. Based on these findings the trial court calculated Father's support obligation at $761.00 per month pursuant to our statutory guidelines. KRS[1] 403.212.

On June 23, 2014, the trial court ordered the parties to enroll the child in the Bullitt County school system and awarded Mother child support of $761.00

[1] Kentucky Revised Statute (KRS).

per month. Father filed a motion to alter, amend or vacate pursuant to CR[2] 59.05, alleging that because the parties exercise nearly equal parenting time, the trial court erred by failing to deviate from the statutory guidelines and its child support order should be amended to reflect the parties' proportionate parenting time. Father attached to his motion a child support worksheet adopting the trial court's income determination. On July 24, 2014, the trial court found that it was under no obligation to deviate from the statutory guidelines and denied Father's CR 59.05 motion. Father appeals from the trial court's July 24, 2014 order.

STANDARD OF REVIEW

"As are most other aspects of domestic relations law, the establishment, modification, and enforcement of child support are prescribed in their general contours by statute and are largely left, within the statutory parameters, to the sound discretion of the trial court." *VanMeter v. Smith*, 14 S.W.3d 569, 572 (Ky. App. 2000) (citations omitted). However, the trial court's discretion is not unlimited. *Keplinger v. Keplinger*, 839 S.W.2d 566, 568 (Ky. App. 1992). If the trial court's conclusion was arbitrary, unreasonable, unfair, or unsupported by sound legal principles, it will be reversed on appeal. *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001) (citation omitted).

We review factual findings to insure they are not clearly erroneous. *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky. App. 2002). Factual findings are not clearly erroneous if they are supported by substantial evidence. *Black Motor Co.*

[2] Kentucky Rules of Civil Procedure (CR).

v. Greene, 385 S.W.2d 954, 956 (Ky. 1964). "The test for substantial evidence is whether when taken alone, or in light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable men." *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 852 (Ky. App. 1999). Finally, we review questions of law *de novo*. *Revenue Cabinet v. Comcast Cablevision of the South*, 147 S.W.3d 743, 747 (Ky. App. 2003).

ANALYSIS

On appeal Father first contends the trial court erred by supporting its decision to modify child support with the fact that parties were no longer incurring the expense of private school tuition; second, that it erred by failing to reduce Father's child support in proportion to his parenting time; and third, that it erred by failing to consider Mother's 2014 year-to-date earnings and by relying only on the parties' 2013 gross income as reported on their 2013 federal tax returns when determining the parties' income for purposes of child support. We disagree with Father's claims of error.

At the outset we note that a statement of preservation directing us to the portion of record where Appellant preserved his claims of error is required by Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v). Here, Father has failed to direct us to the portion of the record where his claims of error are preserved. Failure to include a statement of preservation permits us to strike the brief entirely, refuse to consider those claims that do not comply with the rule, or review the arguments under the standard of manifest injustice. *Elwell v. Stone*, 799 S.W.2d

46, 48 (Ky. App. 1990). Although compliance with CR 76.12 is not optional, we choose to ignore this defect and review Father's claims of error on the merits. *See Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010) (compliance with CR 76.12 is mandatory); *see also Baker v. Campbell County Bd. of Educ.*, 180 S.W.3d 479, 481–82 (Ky. App. 2005); *Cornette v. Holiday Inn Express*, 32 S.W.3d 106, 109 (Ky. App. 2000) (failure to cite to the record with regard to preservation of error ignored).

Similarly, we note that Father fails to cite any statute or common law in support of his arguments and simply makes bare factual allegations that he believes support his arguments on appeal. Although Father's brief does cite to the video record of the May 2014 hearing, Father failed to insure the video record was included with the record on appeal. It is the appellant's duty to ensure that we receive the complete record, and "[w]hen the record is incomplete, this Court must assume that the omitted record supports the trial court." *Chestnut v. Commonwealth*, 250 S.W.3d 288, 303 (Ky. 2008).

We now turn to Father's first claim of error, that the trial court abused its discretion by supporting its order modifying child support with the fact that the parties were no longer sending their child to private school. While parties are free to enter into an agreement regarding various issues, including child support, the trial court retains control of the award and is not bound by the parties' agreement or a prior order of support. KRS 403.180(2); *Tilley v. Tilley*, 947 S.W.2d 63, 65 (Ky. App. 1997). However once an award is made, a court may modify child

support "only upon a showing of a material change in circumstances that is substantial and continuing." KRS 403.213(1). The statute goes on to describe a "material change" as an "[a]pplication of the Kentucky child support guidelines to the circumstances of the parties at the time of filing of a motion or petition for modification of the child support order which results in equal to or greater than fifteen percent change in the amount of support due per month[.]" KRS 403.213(2). Thus, if application of the child support guidelines results in a change equal to or greater than fifteen percent of the current child support award, there is a rebuttable presumption of a material change in circumstances. *Tilley,* 947 S.W.2d at 65. If a material change in circumstances exists, the trial court is to consider our guidelines as set forth in KRS 403.210 *et. seq.*, any change in the finances of both parents, and the needs of the child. *Id.*

Here, the record indicates that application of the child support guidelines to the parties' respective incomes meets the fifteen percent threshold for modification pursuant to KRS 403.213(2). It is apparent from the record on appeal that when compared to her income in 2011, when child support was initially set, Mother's 2013 gross income had decreased over 50%. In contrast, Father's 2013 gross income had increased since 2011. While the record indicates an expanded disparity in the parties' incomes, Mother's role as the primary caretaker has remained the same.

Regardless, the trial court need not justify its application of the child support guidelines or its decision declining to deviate therefrom.[3] It is vested with considerable discretion and its decision will be reversed only if arbitrary, unreasonable, unfair, or unsupported by sound legal principals. Here, it is not. There is substantial evidence of record to support setting child support according to our guidelines.

As his second argument Father similarly asserts that the trial court's failure to reduce his child support in proportion to his parenting time was an abuse of discretion. But contrary to Father's assertion that the trial court *must* deviate from the child support guidelines when there is a shared parenting arrangement, Kentucky law holds that a trial court *may* deviate from the child support guidelines if the parents share equal parenting time. KRS 403.211(2) ("Courts may deviate from the guidelines where their application would be unjust or inappropriate.") Based on the financial circumstances of the parties and the educational and emotional health needs of the child, we cannot say that the trial court abused its discretion in declining to depart from the child support guidelines. *See Penner v. Penner*, 411 S.W.3d 775, 779 (Ky. App. 2013).

Finally, we turn Father's third argument, that the trial court erred by failing to consider Mother's 2014 year-to-date income and relying only on each party's 2013 income tax returns when computing gross income for purposes of

[3] By contrast, if a trial court deviates from the guidelines, the court must enter written findings justifying that decision. KRS 403.211(2)-(3); *Clary v Clary,* 54 S.W.3d 568, 570-71 (Ky. App. 2001).

child support. The trial court must utilize the correct figures as to the gross income of the parents so the child is not deprived of necessary support. *Schoenbachler v. Minyard*, 110 S.W.3d 776, 780 (Ky. 2013). Although Mother's current pay stub was admitted as evidence at the hearing, the record is devoid of evidence documenting Father's 2014 year-to-date income. The decision to rely on both parties' 2013 federal tax returns to determine gross income for purposes of child support, as opposed to relying on Father's 2013 tax return and Mother's 2014 year-to-date earnings, was well within the sound discretion of the trial court. Moreover, absent the video record of the hearing, we must assume that the omitted record supports the trial court. *Chestnut*, 250 S.W.3d at 303. Thus, we cannot say that the trial court's decision to calculate child support based on both parties' 2013 gross income as reported on their tax return was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

For the foregoing reasons we affirm the trial court's order modifying child support to an amount consistent with our statutory guidelines.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kimberly Withers Daleure
Louisville, Kentucky

BRIEF FOR APPELLEE:

Sarah A. Huyck
Justin R. Key
Louisville, Kentucky