

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

NO. 2014-CA-001602-ME

TONY HALL

APPELLANT

v. APPEAL FROM SCOTT CIRCUIT COURT  
HONORABLE TAMRA GORMLEY, JUDGE  
ACTION NO. 10-CI-00325

ALICIA HALL

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND J. LAMBERT,  
JUDGES.

J. LAMBERT, JUDGE: Tony Hall appeals from the Scott Circuit Court's order modifying timesharing, requiring him to pay child support, and ordering him to pay delinquent child support and past-due temporary maintenance. After careful review, we affirm.

The parties were married in 1994, and Alicia filed a petition for dissolution on April 6, 2010. The parties had three children born during the marriage. At the time of the divorce, Alicia was a science teacher, and Tony was a health educator with a company called Wedco.

Initially, Alicia filed temporary motions in October 2010, asking the court to award child support, order mediation, for exclusive use and occupancy of the marital residence, and for each party to contribute to marital expenses during the pendency of the divorce action. A motion hour was scheduled with regard to Alicia's motions, but Tony did not appear, and the trial court granted the motions by order entered October 27, 2010. That order awarded temporary maintenance in the amount of \$702.00 per month and temporary child support in the amount of \$99.67 to be paid by Tony to Alicia.

Claiming he did not receive notice of the temporary motions, Tony filed a motion to alter, amend, or vacate the court's October 27, 2010, order. The parties appeared on December 8, 2010, but the trial court passed Tony's motion to December 15, 2010, because mediation was scheduled for the following day, December 9, 2010.

At that mediation, the parties entered into an agreement that set forth the parties' desires regarding joint custody, health insurance, child care costs, tax exemption credits, use of the marital residence, division of outstanding medical bills, division of marital vehicles, division of personal property, and an agreement with regard to attorneys' fees for any future breaches of the agreement. The parties

agreed to have equal timesharing with the children, and no child support was ordered to be paid by either Alicia or Tony, as both parties had essentially equal incomes. No future maintenance was ordered at that time. While the parties addressed future maintenance and child support awards in the mediation agreement, no mention of the prior temporary maintenance or temporary child support ordered by the trial court on October 27, 2010, was made. Neither party attended the December 15, 2010, motion hour scheduled to address Tony's motion to alter, amend, or vacate the trial court's October 27, 2010, order.

In July 2011, Alicia filed a motion asking the trial court to order Tony to comply with the mediated agreement regarding payments on the delinquent mortgage on the marital residence. Alicia also requested that the trial court set child support according to the Kentucky child support guidelines and that the court require Tony to reimburse her for expenses she incurred caring for the children during Tony's timesharing. Alicia asked the court to prevent Tony from using her bank account. The record reflects that on the trial court's July 20, 2011, handwritten order, the trial court noted that the parties were going to supplement the record with current income information; that the parties had agreed to recalculate child support; and that Tony had agreed to pay for reasonable costs of food for the children while Alicia was watching them during his timesharing.

Alicia filed the supplemental information as ordered by the trial court on August 5, 2011. Tony did not file the supplemental information, and Alicia filed a motion to compel on October 27, 2011, and amended that motion with a

request for a formal modification of timesharing based upon the fact that the parties had not been exercising the equal timesharing arrangement they had previously agreed upon. Tony did not file a response.

On November 9, 2011, the trial court heard Alicia's motions and entered another hand-written order, which is reflected in the record. The trial court noted that Alicia was to provide a list of meals and expenses for the week prior and that Tony would reimburse her. The trial court indicated that Alicia could include Tony's additional income up to the amount of the mortgage and could recalculate child support. The court also ordered Tony to contact the mortgage company and inquire about a loan modification pending the sale of the house. The court also ordered Tony to provide proof of his extra income within seven days.

The record reflects that on March 23, 2012, Alicia filed a child support worksheet indicating that Tony's child support obligation should be \$402.39 per month. In June 2012, Alicia filed more motions, asking that Tony be required to show cause as to why he should not be held in contempt for failing to pay the temporary child support and maintenance that had been ordered by the court on October 27, 2010. She also asked the court to order child support according to the child support guideline worksheet and asked that the timesharing be formally modified because the parties had not followed their original equal timesharing agreement. The trial court passed all the issues and scheduled a final hearing for December 14, 2012.

At the hearing, Alicia testified that she was caring for the children after school on Tony's weeks, and that during the summer, she would care for them approximately eight hours a day. Alicia testified that during the summer months, the children were with her every day and all but the ten nights that they were with Tony each month. Alicia testified that her 2011 income was \$46,509.00, as reflected by her 2011 tax return, which was introduced into evidence. Alicia testified that they had cross-referenced insurance because they were both Kentucky state employees. Alicia's intention was that she would provide insurance for the children after the divorce was finalized because she was worried that Tony would not make the insurance premium payments and the insurance would lapse. She testified about several instances where Tony failed to pay bills throughout the marriage and insurances and other expenses lapsed. Alicia testified about the temporary maintenance and child support the trial court ordered Tony to pay in December 2010. Finally, Alicia testified about retirement accounts that are not relevant to the instant appeal.

Tony testified that he felt like the timesharing arrangement was working well. He stated that there were times that they each had to be flexible, but that it was generally working well. Tony also testified that he agreed to pay Alicia \$25.00 each day that she watched them during the summer during his timesharing, and he denied missing any of these payments. Tony testified about his retirement accounts. With regard to his income, Tony testified that his income in 2011 totaled

\$51,373.00 according to his tax returns. He testified that not all of this income was from Wedco, a portion of it was earned from doing landscaping work on the side.

The trial court bifurcated the action and entered a decree of dissolution. The court ordered the parties to file some additional supplemental information and submit proposed findings of fact and conclusions of law, which the court took under submission.

The trial court ultimately entered its final findings of fact and conclusions of law on August 29, 2014. The trial court made the finding that based upon Alicia's parenting journal and Tony's testimony, the parties did not have equal timesharing and that Alicia had the kids almost daily and cared for them during summer break. The trial court also found Alicia's testimony regarding Tony's unwillingness to care for the children and co-parent to be compelling. Based on this, the trial court concluded that co-parenting was not reasonable. The trial court concluded that joint custody was still warranted, but that equal timesharing was not in the best interest of the children pursuant to Kentucky Revised Statutes (KRS) 403.270. The trial court then set forth a timesharing schedule and ordered Tony to pay child support in the amount of \$402.39 per month, which was retroactive to the date Alicia made the initial support request to the court in November 2011. Based upon Alicia's testimony and Tony's confirmation that he did not pay any temporary child support, the trial court ordered that Tony pay \$199.34 in past child support, which amounted to two months of temporary child support in the amount of \$99.67. Regarding

maintenance, the trial court concluded that on October 27, 2010, it had ordered Tony to pay temporary maintenance in the amount of \$702.00 for two months. Accordingly, the trial court concluded that Tony owed Alicia \$1404.00 in delinquent temporary maintenance and ordered him to pay this amount. The trial court also addressed retirement benefits and medical costs, which are not relevant to this appeal. Tony now appeals the trial court's August 29, 2014, order.

Tony argues that the trial court's award of child support is arbitrary and is not supported by the record. Tony further orders that the trial court should have enforced the mediated agreement and contends the trial court erred when it awarded back maintenance. Alicia argues that it was within the trial court's discretion to order child support, as the parties' financial situations have changed. Further, she argues that the trial court appropriately ordered back maintenance and back child support.

Awards of maintenance and child support are within the sound discretion of the trial court. *See Brenzel v. Brenzel*, 244 S.W.3d 121, 126 (Ky. App. 2008). *See also Browning v. Browning*, 551 S.W.2d 823, 825 (Ky. App. 1977). We will not disturb a trial court's findings with regard to either maintenance or child support absent an abuse of that discretion.

Tony argues that the trial court was required to consider the factors in KRS 403.210 to determine whether child support was reasonable, and he contends that the trial court failed to consider these factors. Further, he argues that because the parties originally agreed to equal timesharing and no child support, the trial

court abused its discretion when it later established child support. Alicia argues that she established with her supporting documentation and child support worksheets that child support was warranted in the amount the trial court ordered.

We disagree with Tony's arguments. The record reflects that the trial court considered the parties' financial resources, determined that Tony's income had increased and that Alicia had the children more often than originally contemplated, and it established child support accordingly. Tony contends that the trial court failed to consider his changed circumstances but makes no mention of what those changed circumstances entail. Further, the record is replete with examples of Tony's failure to provide documentation as ordered by the court. Finally, Tony himself testified that he does not have the children half of the time, as was contemplated in the original agreement. While Tony cites numerous cases that address equal timesharing and child support, the fact is that the parties' circumstances changed and they did not share the children equally. We find no abuse of discretion by the trial court in changing the timesharing arrangement based on the parties' habits and establishing child support.

Tony next contends that the trial court should have relied on the mediated agreement because it was not unconscionable. Tony argues that Alicia never filed a motion arguing that the mediated agreement was unconscionable or that she did not fully agree to its terms. He cites to the unpublished case of *Barnett v. Barnett*, 2014 WL 7232735 (Ky. Ct. App. Dec. 19, 2014), for the proposition



that courts are able to treat mediation agreements similarly to separation agreements.

Alicia responds that the trial court was within its discretion to modify child support pursuant to her July 2011 motion based upon the fact that Tony makes more money than he initially disclosed. She contends that under KRS 403.213, the trial court is permitted to consider the evidence it considered in deviating from the parties original mediated agreement.

As stated above, we agree with Alicia that the trial court was well within its discretion to determine that an agreement that contemplated equal incomes and equal parenting time was not reasonable based upon Tony's increased income and Alicia having the children well more than half the time. We find no error in this regard.

Next, Tony argues that the trial court improperly ordered him to pay back maintenance. In support of this, Tony argues that the initial award of maintenance was in error, as the parties had relatively equal incomes at the time of separation and shared the marital residence and the debt associated with it. He argues that the trial court did not consider KRS 403.200(1) (a) and that Alicia could not demonstrate a lack of sufficient property to provide for her reasonable needs and maintain the standard of living enjoyed during the marriage.

Alicia points out that Tony never appeared at the initial hearing on the motion for temporary maintenance, and that the day both parties were present, the trial court passed the motion because mediation was set for the following day.

Alicia contends that Tony did not attend the next motion hour before the trial court, nor did he file any responses to her various motions and memoranda in the ensuing years. Alicia contends he cannot now argue that the trial court abused its discretion by ordering back maintenance. The record reflects Alicia's depiction of the timeline of events, and the mediation agreement does not mention past due maintenance or child support.

We agree that Tony failed to raise this issue adequately before the trial court and cannot now argue an abuse of discretion before this Court, as we are a court of review. *See Caslin v. Gen. Elec. Co.*, 608 S.W.2d 69, 70 (Ky. Ct. App. 1980) ("It is elementary that a reviewing court will not consider for the first time an issue not raised in the trial court."). The trial court's award of temporary maintenance for two months in the initial stages of the divorce proceeding was never appropriately challenged at the trial level, nor was it unreasonable. Again, we find no error by the trial court in upholding its previous order, and its ruling is supported by substantial evidence of record.

For the foregoing reasons, the order of the Scott Circuit Court is affirmed.

CLAYTON, JUDGE, CONCURS.

KRAMER, CHIEF JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Ann D'Ambruoso  
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