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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000460-ME

RICHARD GEORGE PANGALLO APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE LISA O. BUSHELMAN, JUDGE
ACTION NO. 13-CI-01179

JENNIFER LYNN PANGALLO APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND NICKELL, JUDGES.

NICKELL, JUDGE: Richard Pangallo challenges an order entered by the Kenton Circuit Court, Family Division, requiring him to pay $810.40 in monthly child support for his two minor daughters.[1] He argues imposing the obligation was arbitrary because he and his former wife, Jennifer Lynn Pangallo, with whom he

[1] The children will be referenced by initials only.

shares joint legal custody, earn virtually the same income, share nearly equal physical custody of their two young girls, and, in a Property Settlement Agreement (PSA) executed in 2014, agreed neither of them would pay child support, opting instead to split child-related expenses evenly, but readily acknowledging Richard would owe $1,013 per month under the guidelines.[2] The trial court denied Richard's motion to alter, amend or vacate its original order, explaining it imposed child support because Richard had *not* been paying his half of the girls' expenses as he had agreed to do when he signed the PSA and therefore, it was just and appropriate to reinstitute child support to require Richard to pay $810.40 in monthly child support. Having considered the briefs, the law and the record, we affirm the trial court's decision to set aside that portion of the PSA in which the parties agreed neither would pay child support. However, we must reverse and remand to the trial court for an explanation of how and why it determined deviation from the guidelines was just and appropriate, as required by KRS 403.211(2).

FACTS

Richard met Jennifer when he was a college freshman and she was a high school junior; they married in 1994. Four children were born to their union, two boys who are now adults, and two girls born in 2002 and 2003.

In May 2013, Richard and Jennifer separated. On June 3, 2013, Richard petitioned for dissolution—the third time he or Jennifer had filed for

[2] Kentucky Revised Statutes (KRS) 403.212.

divorce. On January 21, 2014, Richard and Jennifer executed the PSA. An agreed order was entered on January 29, 2014, granting a decree of dissolution and incorporating the PSA.

In 2014, Richard earned $98,000 as a Systems Architect with the E.W. Scripps Company. By coaching girls' softball at a local high school, he earned another $2,600. In 2015, he earned an additional $600 as a wedding DJ. Jennifer works at Proctor and Gamble as a Global eContent Solution Expert. She earns $100,000 annually.

Under the PSA, Richard and Jennifer share joint custody of their two daughters. Initially, the girls spent more time with Jennifer because they were uncomfortable being alone with Richard. As time progressed, the girls were entrusted to Richard for longer periods. According to Jennifer, Richard's mother provided most of the child care during Richard's parenting time. Richard insists the parties were working toward equal parenting time, a topic he says was to be mediated in May 2014. Jennifer agrees mediation was to occur, but argues it was to be a general review to determine how the children were adjusting. She also wanted to discuss Richard's non-payment of child-related expenses since March 2014, his violation of court orders, visitation and other child-related issues. When mediation finally occurred in September 2014, no resolution was reached prompting Richard to ask the court to increase his parenting time from his usual Wednesday overnight and every other weekend visits.

Of particular interest to this appeal is language in the fourteen-page PSA pertaining to child support, health insurance and medical expenses. That language reads:

> Per the Kentucky Child Support Guidelines child support with consideration of income from each parent's primary employment, child support calculates to be $1,013 per month. See attached child support worksheet. "B". Beginning April 1, 2014, with knowledge of the child support guidelines, based on the current terms and conditions of this agreement including timeshare and the direct payment of child related expenses as outlined below, the parties agree to deviate [sic] the child support guidelines and Husband shall pay $0 per month to Wife in child support. Effective April 1, 2014, the parties shall begin the division of child related expenses detailed herein.
>
> As long as health insurance is reasonably available through her current employer and the children qualify for coverage per Kentucky law, Wife will provide health insurance for the two minor children [S.P.] and [K.P.] as well as the two adult children [R.T.P.] and [V.P.] and Rick and Jennifer shall equally divide the cost of said premiums. Rick shall reimburse Jennifer monthly for this cost. "Extraordinary medical expenses" includes, but is not limited to, the costs that are reasonably necessary for medical, surgical, dental, orthodontic, optometric, nursing, and hospital services; for professional counseling or psychiatric therapy for diagnosed medical disorders; and for drugs and medical supplies, appliances, laboratory, diagnostic, and therapeutic services.
>
> Each party shall pay their own reasonable and necessary child care costs incurred due to employment, job search, or education leading to employment. Each shall pay their own expenses for the children's basic needs while in their care including food, and clothing. Jennifer has provided cell phones for the children and will carry this service at this time. Future cell phone contracts for the children may be determined between the parties. Jennifer shall

> continue to pay the children's tuition, lunch fees and other school related expenses through the end of 2013-14 school. Beginning the 2014-15 school year, the children's lunch fees and other school related expenses will be equally divided. Jennifer has paid for [S.P.'s] current orthodontist contract. Rick shall pay all costs associated with [K.P.'s] orthodontic care.
>
> With the exception of orthodontics which is outlined above, the parties shall equally divide any extraordinary health care related expenses incurred on behalf of the minor children. "Extraordinary medical expenses" includes, but is not limited to, the costs that are reasonably necessary for medical, surgical, dental, orthodontic, optometric, nursing, and hospital services; for professional counseling or psychiatric therapy for diagnosed medical disorders; and for drugs and medical supplies, appliances, laboratory, diagnostic, and therapeutic services. Each parent who pays a health related bill that was not covered by insurance or a child related expense and desires to be reimbursed will make a written request within 30 days through My Family Wizard to the other party with a copy of the bill and allow up to thirty (30) days for reimbursement from the other party.
>
> All other child related expenses shall be equally divided by Rick and Jennifer. Each parent who pays an extraordinary child related expense and desires to be reimbursed will make a written request within 30 days through My Family Wizard to the other party with a copy of the bill and allow up to thirty (30) days for reimbursement from the other parent.

Despite the parties agreeing to evenly share child-related expenses, Jennifer had difficulty obtaining reimbursement from Richard. Beginning in September, she texted Richard monthly about the mounting unpaid expenses. As early as October 31, 2014, she moved for reinstatement of child support, asking that Richard be ordered to pay $1,013 each month—the amount calculated in the detailed PSA. In

the same motion, Jennifer asked that: Richard's parenting time be reduced; Richard be held in contempt; Richard be required to serve the 180 days previously levied on a finding of contempt but conditionally discharged for a period of two years; and, Richard be ordered to pay Jennifer $1,500 in attorney fees—$750 for responding to Richard's frivolous motion to increase his parenting time and another $750 for filing the motion to hold him in contempt.

Following hearings on three separate days,[3] the court entered an order on September 9, 2015, finding: equal parenting time was in the best interest of both girls; visitation with Richard would not endanger the girls; and, Richard had paid Jennifer all expenses incurred through February 23, 2015.[4] The court further found KRS 403.211(2) authorizes deviation from the guidelines when just or appropriate, and gave the following explanation of why deviation was proper:

> Due to the Court's finding that [Richard] has not paid an equal share of expenses for the children, the Court finds [Richard] shall be responsible for child support to [Jennifer]. The Court finds [Richard] has provided some payment for expenses for the children, but not an equal amount as [Jennifer]. The Court shall Court shall [sic]

[3] The order states hearings occurred on January 29, 2015; February 26, 2015; and June 19, 2015. Richard designated hearings occurring on January 29, 2015; October 6, 2015; February 2, 2016; and February 26, 2015, to be included in the record. The certified record contains only two hearings, one recorded on January 29, 2015, and another recorded on February 26, 2015. A clerk's note states no hearing occurred on October 6, 2015, and whether a hearing occurred on February 2, 2016, is questionable.

At the hearing on February 26, 2015, Richard asked that the girls testify in support of his request for shared parenting time. According to the order entered on March 4, 2016, the girls did testify, but their testimony is not included in the appellate record.

[4] During the hearing on February 26, 2015, Richard was ordered to pay $1,409.26 for medical and child-related expenses by June 1, 2015. This amount covered expenses incurred through February 23, 2015. The bills paid were not itemized. Richard complied with the order.

> deviate from the child support guidelines and find that [Richard] shall be required to pay $810.40 per month for child support to [Jennifer].

The court continued, "[b]ecause the parties have not been able to successfully split the expenses for the children equally, [Richard] shall be responsible to pay [Jennifer] child support in the amount of $810.40 per month." Additionally, the court increased Richard's parenting time from overnight on Wednesdays and alternate weekends, to overnight on Wednesdays *and Thursdays*, plus alternate weekends. Thus, he received additional parenting time and was ordered to pay a set amount of monthly child support in lieu of paying half of each child-related expense.

On September 21, 2015, Richard moved to alter, amend or vacate[5] the order reinstating child support, claiming the amount ordered was arbitrary, unreasonable, unfair and unsupported. He specifically argued,

> [t]he only reason given by the Court for the modification was that Rick Pangallo had not previously paid his equal share of the children's expenses as ordered. However, that finding is not supported by the record. Rick Pangallo may have been behind in some payments but those payments had not been presented by Jennifer Pangallo in accordance with the 30/30 rule ordered by the Court.

Richard relied heavily on *Plattner v. Plattner,* 228 S.W.3d 577 (Ky. App. 2007) (child support award reversed where parents evenly shared legal and physical

[5] Richard originally asserted two arguments. First, child support could not be modified because there had been no "material change" as required by KRS 403.213(2). Second, the amount ordered was "arbitrary, unreasonable, unfair, and unsupported." Counsel withdrew the first argument three days later.

custody, earned similar income, and each maintained own home for children), and *Dudgeon v. Dudgeon,* 318 S.W.3d 106, 107 (Ky. App. 2010) (application of guidelines unjust where parents' income, parenting time and payment of expenses nearly equal), arguing he and Jennifer have the same income, nearly the same parenting time, and contribute equally to the girls' expenses. From his point of view, requiring either parent to pay child support was arbitrary.

Not unexpectedly, Jennifer took a contrary position, writing:

> [a]s of the date this Response is being completed, [Jennifer] verifies that [Richard] continues to disregard the Courts [sic] Orders by 1) refusing to pay the amount of child support ordered; 2) habitually and consistently reducing payments in his sole discretion for items he claims to have paid for (e.g. $150 fee for [K.P.'s] select softball that [Richard] signed her up for); 3) Refusal to pay his half of private school tuition (1st payment was due in July) his 50% share; (1st payment was due in July or balance in full August); 4) Continued refusal to pay dental and eye insurance premiums, or use In Network Dental providers.

She argued the trial court exercised its discretion to reinstate child support because Jennifer was paying more of the girls' expenses and the parties could not "successfully split the expenses for the children equally." Jennifer maintained the court's explanation for deviating from the guidelines satisfied KRS 403.211(2), and emphasized the only reason child support ceased under the PSA as of April 1, 2014, was because she and Richard had agreed they would evenly split child-related expenses—an agreement Richard had breached repeatedly. In asking the trial court to deny the motion to vacate, Jennifer cited *Downey v. Rogers,* 847

S.W.2d 63, 63-64 (Ky. App. 1993) (award of child support proper where parents shared legal custody and nearly equal physical custody because father had agreed to pay portion of child support obligation to former wife), and *Dudgeon*.

Four months after filing the motion to vacate, Richard filed a brief in support of the motion to vacate in which he expanded his arguments to allege: it was inconsistent for the trial court to find he had fully reimbursed Jennifer but was still not paying his full share;[6] there was no proof Richard had not paid his full half of the children's expenses; Jennifer had failed to timely submit bills for reimbursement pursuant to the trial court's 30/30 rule; it was arbitrary for the trial court to use child support as a punitive measure—a remedy for contempt; the trial court did not make findings of fact to justify deviating from the guidelines; the trial court did not explain how it calculated the monthly child support award to be $810.40; and, the PSA terms should control.

In her subsequent response to Richard's brief in support of the motion to vacate, Jennifer argued the court's factual findings were both adequate and consistent, the court had merely fashioned a remedy to redress Richard's ongoing breach of the PSA, and, a trial court is not required to justify the amount of child support it orders—only its reason for deviating from the guidelines.

On February 2, 2016, Jennifer moved the trial court to hold Richard in contempt for a myriad of reasons: failing to pay tuition; refusing to reimburse

[6] The trial court's actual ruling was as of June 1, 2015, Richard was current on reimbursing Jennifer for expenses incurred through February 23, 2015.

medical expenses incurred by Jennifer, but deducting from his child support obligation the co-pays and medical expenses he had incurred; changing the girls' dentist without Jennifer's knowledge or consent; for a second time, signing up K.P. for a new softball team without Jennifer's knowledge or consent and then deducting the fee from his December child support payment even though Jennifer had stated she would not pay for the sport; inconsistently communicating with Jennifer; refusing to timely return the children to Jennifer on her parenting days; and, refusing to offer Jennifer the right of first refusal to have the girls when he travels.

When Richard responded in writing, he labeled the contempt motion "vindictive, frivolous, and a form of Harassment." He argued he is no longer required to pay tuition because he now pays child support, on which he is current. He also claimed he was current on all medical expenses; the children requested a new dentist to which Jennifer consented; and, because Jennifer refuses to pay half of his co-pays, his only means of recouping that money is to deduct it from his child support obligation. He claims everyone, including Jennifer, agreed K.P. would play on select softball teams, but since Jennifer refuses to reimburse him for fees associated with the sport, his only alternative is to deduct Jennifer's share from his child support payments. He also claimed he had twelve months of e-mails documenting his communications with Jennifer, and requested $1,000 in attorney's fees for defending against the motion.

On March 4, 2016, the trial court found Richard in contempt for violating the terms of joint legal custody and failing to communicate with Jennifer. He was ordered to serve two weekends in jail, perform 100 hours of community service, and pay Jennifer $1,000 for her attorney fees.

Also on March 4, 2016, the court entered a separate order denying Richard's motion to alter, amend or vacate reinstatement of monthly child support. The court clarified it "did not order [Richard] to pay half of the children's expenses in addition to the child support amount." The court went on to find Richard knew the terms of the PSA he and Jennifer had executed; knew he would be equally liable with Jennifer for all child-related expenses not specifically detailed in the PSA; and knew the children had been incurring similar expenses since October 2014, but Richard:

> had not made any attempt to reimburse [Jennifer] at the time of the hearing on February 26, 2015. Because [Jennifer] had already paid the expenses in full, the children were not required to sacrifice for their needs. Due to [Richard's] refusal to abide by the [PSA], the Court was obligated to address the issues of non-compliance with the agreement and order that [Richard] reimburse [Jennifer] for all unpaid expenses and health insurance premiums.

As the trial court had stated during the hearing on February 26, 2015, Richard was receiving the benefit of an interest-free loan by Jennifer paying expenses for the girls and then seeking reimbursement which Richard did not timely pay. The court explained in its written order,

> 4. The Court did find that [Richard] had split some costs equally with [Jennifer], but was not adhering to the agreement put in place by the parties in lieu of child support. The Court finds that [Richard] is inconsistent in paying his half of the children's expenses and has reimbursed [Jennifer] for all expenses owed to her in regards to the children only after the Court ordered them to be paid.
>
> 5. The Court recognizes that pursuant to KRS 403.180 the terms of the separation agreement regarding child support are not binding to the Court. However, both parents owe a duty and obligation of support to the minor children and because [Richard] has been inconsistent in fulfilling his obligation for the children's expenses, the Court finds it appropriate to require that [Richard] pay child support.
>
> 6. Pursuant to KRS 403.211(2), the Court may deviate from the child support guidelines where their application would be unjust or inappropriate. Due to the Court's finding that [Richard] has not paid an equal share of expenses for the children pursuant to the [PSA], [Richard] shall be responsible for child support to [Jennifer] to ensure that the child's [sic] expenses are being provided.

In denying the motion to vacate, the court recognized two of the three factors discussed in *Dudgeon*—equal income and equal timesharing—were present, but the third factor—payment of nearly equal amounts of child-related expenses—was missing because of Richard's "delinquent payment of his portion of the children's expenses." Richard now appeals the order requiring him to pay monthly child support.

ANALYSIS

We begin with housekeeping matters. First, Richard is non-compliant with CR[7] 76.12(4)(c)(v). He has failed to begin the argument portion of his brief with "a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." This requirement is not hollow.

> Compliance with this rule permits a meaningful and efficient review by directing the reviewing court to the most important aspects of the appeal: what facts are important and where they can be found in the record; what legal reasoning supports the argument and where it can be found in jurisprudence; and where in the record the preceding court had an opportunity to correct its own error before the reviewing court considers the error itself.

Hallis v. Hallis, 328 S.W.3d 694, 696-97 (Ky. App. 2010). The statement of preservation—or lack thereof—"has a bearing on whether we employ the recognized standard of review, or in the case of an unpreserved error, whether palpable error review is being requested and may be granted." *Oakley v. Oakley*, 391 S.W.3d 377, 380 (Ky. App. 2012).

Rather than following the rule, Richard immediately launched into his single argument—that the trial court's award of child support was arbitrary and unsupported by the record—giving no explanation of whether, how or where he preserved the issue for our review. We have three options for handling a non-compliant brief—review the case despite the deficiency; strike the brief or its

[7] Kentucky Rules of Civil Procedure.

deficient portions, CR 76.12(8)(a); or conduct a limited review for manifest injustice under *Elwell v. Stone,* 799 S.W.2d 46, 47 (Ky. App. 1990). *Hallis,* at 696; *J.M. v. Commonwealth, Cabinet For Health & Family Servs.*, 325 S.W.3d 901, 902 (Ky. App. 2010). Because children's lives are at stake, we impose a less severe sanction and review the claim for manifest injustice only.

Second, since Richard has failed to tell us *where* he preserved his claim, there is a concomitant question of *whether* he preserved the claim. While it is not our duty to search the record for proof of preservation, *Robbins v. Robbins*, 849 S.W.2d 571, 572 (Ky. App. 1993), we have already mentioned Richard moved the trial court to vacate that portion of its order reinstating child support. Of importance to us is the brief in support of the motion to vacate filed some four months later in which Richard argued the trial court made no findings in support of its deviation from child support guidelines. In light of the motion and it supporting brief, non-preservation is not an issue.

Third, Richard attempts to advance claims on appeal that were not argued to the trial court. On appeal to us, he claims his motion to vacate was denied due to stale proof and lack of a hearing, but these flaws were not alleged in the trial court. Furthermore, he has cited no rule, case or statute requiring a trial court to *sua sponte* convene a hearing to determine whether a litigant is in compliance with its orders. Compliance is a reasonable expectation. The trial court relied on the proof before it. If more recent information was available and Richard wanted the court to consider it—for example, he claims Jennifer did not

timely submit bills for reimbursement—he should have requested a hearing and developed the desired proof. He did neither. A court does not practice a case for a litigant; that is the responsibility of the party. Absent a request to put on current proof at a hearing—which has not been cited to us—we have no basis upon which to declare error by the trial court.

> Since this is an appellate court, our function is to review possible errors made by the trial court. If such court has had no opportunity to rule on a question, there is no alleged error before us to review.

Commonwealth, Dep't of Highways v. Williams, 317 S.W.2d 482, 484 (Ky. 1958). Additionally, we will not allow Richard "to feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled by Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010).

Fourth, in asserting he is current in reimbursing Jennifer for his share of child-related expenses, Richard claims "[t]here is no documentary evidence in the record to support [Jennifer's] assertion that she continued to have difficulty obtaining reimbursement for the children's expenses after February 26, 2015[.]" However, on the same page he writes,

> the only evidence or testimony of any kind that could possibly support the lower court's position that [Richard] was delinquent at the time of the June 19, 2015 hearing was the following finding: "At the hearing on June 19, 2015 [Jennifer] stated that [Richard] had reimbursed her for all of the 2014 expenses he owed her *but she continued to have difficulty obtaining reimbursement for the children's expenses."*

(Emphasis in original). The quoted passage reveals a hearing occurred on June 19, 2015—a hearing, coincidentally, not designated for inclusion in the appellate record. As the appellant, providing a complete record for our review was Richard's responsibility.

> It has long been held that, when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court.

Commonwealth v. Thompson, 697 S.W.2d 143, 145 (Ky. 1985). In the absence of the June 19, 2015 hearing, we assume it supports the trial court's ruling that Jennifer testified she encountered difficulty receiving reimbursement from him. Despite the four significant shortcomings we have identified, we now review Richard's actual claim—that the amount of child support ordered is arbitrary, unreasonable, unfair and unsupported—for manifest injustice.

While Richard and Jennifer agree on very little, they do agree trial courts have discretion to establish, modify and enforce child support obligations—within reason. *Plattner,* 228 S.W.3d at 579. Richard claims reversal is necessary because the trial court's decision is arbitrary and contains no findings of fact explaining why deviation from the guidelines was just and appropriate. We agree.

KRS 403.211 directs in relevant part:

> (2) At the time of initial establishment of a child support order, whether temporary or permanent, or in any proceeding to modify a support order, the child support guidelines in KRS 403.212 shall serve as a rebuttable presumption for the establishment or modification of the

> amount of child support. *Courts may deviate from the guidelines where their application would be unjust or inappropriate. Any deviation shall be accompanied by a written finding or specific finding on the record by the court, specifying the reason for the deviation.*
>
> (3) A *written finding or specific finding on the record* that the application of the guidelines would be unjust or inappropriate in a particular case shall be *sufficient to rebut the presumption* and allow for an appropriate adjustment of the guideline award *if based upon one (1) or more of the following criteria:*
>
> (a) A child's extraordinary medical or dental needs;
>
> (b) A child's extraordinary educational, job training, or special needs;
>
> (c) Either parent's own extraordinary needs, such as medical expenses;
>
> (d) The independent financial resources, if any, of the child or children;
>
> (e) Combined monthly adjusted parental gross income in excess of the Kentucky child support guidelines;
>
> (f) The parents of the child, having demonstrated knowledge of the amount of child support established by the Kentucky child support guidelines, have agreed to child support different from the guideline amount. However, no such agreement shall be the basis of any deviation if public assistance is being paid on behalf of a child under the provisions of Part D of Title IV of the Federal Social Security Act; and
>
> (g) Any similar factor of an extraordinary nature specifically identified by the court which would make application of the guidelines inappropriate.

(Emphasis added) (footnote omitted). In the order entered September 9, 2015, the trial court stated it was deviating from the guidelines because while the parties—

with full awareness of the guidelines—had agreed in the PSA to equally share expenses generated by their two daughters, that portion of the agreement had proved unworkable, with Jennifer shouldering more of the financial burden and having to seek a court order to secure reimbursement. In the order entered on March 4, 2016—denying the motion to vacate—the court acknowledged Richard had split "some" expenses, but was "inconsistent in paying his half of the children's expenses" and made reimbursement "only after the Court ordered them to be paid." The court stated ordering child support was appropriate "because [Richard] has been inconsistent in fulfilling his obligation for the children's expenses[.]" The court then found only two of the three *Dudgeon* factors—nearly equal income and physical custody—were present, justifying deviation from the guidelines and making an award of child support appropriate. In other words, the court explained why it was deviating *from the PSA* (in which Richard and Jennifer agreed each would pay $0 in child support), but made no findings of fact showing deviation *from the guidelines* was just or appropriate. We may leave the trial court's decision intact only if it "comports with the guidelines, or any deviation is adequately justified in writing . . . ." *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001). This decision does neither and, therefore, cannot stand.

Pursuant to KRS 403.180, parties may execute a written PSA addressing maintenance, property distribution, custody, support and visitation. However, terms pertaining to custody, support and visitation are not binding on the trial court. Thus, the trial court was authorized to set aside that portion of the PSA

in which Richard and Jennifer agreed to deviate from the PSA on the matter of child support. *Tilley v. Tilley*, 947 S.W.2d 63, 65 (Ky. App. 1997). However, deviating from a PSA is wholly separate from deviating from the child support guidelines, an item mentioned in the trial court's order but not explained.

Under KRS 403.211(2), written findings explaining a trial court's decision to deviate from the guidelines are a statutory mandate; none of which were made in this case. Saying Richard did not timely reimburse Jennifer explains only why their agreement for neither to pay child support was unworkable. It explains nothing about why the guidelines should not be applied in the wake of a failed attempt. Therefore, allowing the trial court's 2016 order to stand would constitute manifest injustice. Thus, we must reverse and remand for further proceedings consistent with this Opinion, specifically, entry of written findings of fact explaining why deviation from the guidelines is just and appropriate.

KRS 403.211(3) identifies seven criteria "sufficient to rebut the presumption" the guidelines should be applied. One criterion is both parents, with knowledge of the guidelines, agreed to a different amount of child support. While this was a relevant factor in accepting the PSA in 2014 and incorporating it into the divorce decree, it was not a relevant factor on which to base a modification in 2016, especially since the trial court's reason for making a change was the deviation stated in the PSA—that neither parent pay any amount—did not work. To deviate from the guidelines—which the trial court clearly did in this case—the trial court must explain its application of one of the seven criteria and support that

application with written findings of fact. "[G]enerally, as long as the trial court gives due consideration to the parties' financial circumstances and the child's needs, and either conforms to the statutory prescriptions or adequately justifies deviating therefrom, this Court will not disturb its rulings." *Van Meter v. Smith*, 14 S.W.3d 569, 572 (Ky. App. 2000). Due to distinguishing facts, *Dudgeon,* which Richard asks us to apply, is not an obstacle to the trial court reinstating child support, so long as the resulting order satisfies KRS 403.211.

Therefore, we AFFIRM the decision to reinstate child support, but REVERSE and REMAND the case to the trial court for an explanation of its deviation from the guidelines. Additionally, since the trial court must review this case again, we urge clarification of the status of tuition. In the contempt motion filed on February 2, 2016, and amended on March 2, 2016, Jennifer claims Richard is not paying his half of tuition. In his response filed February 9, 2016, Richard argues he does not owe separate tuition because he now pays child support and is current on that obligation. In a response filed April 6, 2016, Richard softened his position, stating he had not paid tuition because it would be a financial hardship to pay both his half of tuition and child support. Although not requested by either party, if child support is ordered on remand, whether tuition is to be paid separately should be clarified.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Fortner
Covington, Kentucky

BRIEF FOR APPELLEE:

Holly A. Daugherty
Dawn M. Gentry
Erlanger, Kentucky