

RENDERED: AUGUST 16, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001474-ME

THERESA NORRIS

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
FAMILY DIVISION

v.

HONORABLE A. CHRISTINE WARD, JUDGE
ACTION NO. 06-CI-500014

MARK JAGER

APPELLEE

OPINION AFFIRMING

** ** * ** * **

BEFORE: GOODWINE, NICKELL, AND SPALDING, JUDGES.

GOODWINE, JUDGE: Mother appeals from an order of the Jefferson Circuit Court, Family Division denying her motion to increase Father’s child support obligation. After careful review, finding no error, we affirm.

Theresa Norris (“Mother”) and Mark Jager (“Father”) were never married, but they have one child in common. In the original trial court action, Father petitioned to be named father and to establish custody, parenting time, and

child support. Mother was granted sole custody of the child in 2007. Currently, Mother provides the primary residence, and Father has parenting time.

On August 22, 2017, Mother moved to increase Father's child support obligation, alleging she believed Father earned approximately \$100,000.00 per year based on his lifestyle. After allowing ample time for discovery, the trial court conducted a hearing on July 9, 2018 to address Mother's motions to modify child support, to hold Father in contempt, and for attorney's fees. Following the hearing, the trial court entered an order denying all three of Mother's motions.

Pertinent to Mother's appeal, Father "operates a business called 'Louisville Landscapes and Irrigation.' [Father] uses a single bank account for both his business and personal expenses." Mother argued Father earned approximately \$100,000.00 per year because he possessed multiple vehicles and a boat, which were indicative of his increased wealth. During the hearing, the trial court considered Father's tax returns, his bank account records, and his testimony. The trial court found Mother "failed to produce any specific proof demonstrating [Father] actually earns \$100,000.00 per year." Citing *Schoenbachler v. Minyard*, 110 S.W.3d 776 (Ky. 2003), the trial court opined that "while child support, as a general rule, shall be based on the parties' income, a trial court may consider income not susceptible to documentation if such income is *properly established by evidence.*" (emphasis added). The trial court concluded Mother "failed to meet

her burden to prove” that Father’s “lifestyle is indicative of high income.” This appeal followed.

At the outset, we must address Mother’s failure to comply with CR¹ 76.12(4)(c)(vii), which requires appellants to “place the judgment, opinion, or order under review immediately after the appendix list so that it is most readily available to the court.” Mother instead placed the order under review third in her appendix. Mother’s failure to comply with CR 76.12 hinders our ability to review its arguments. *See Hallis v. Hallis*, 328 S.W.3d 694, 695-97 (Ky. App. 2010). “Our options when an appellate advocate fails to abide by the rules are: (1) to ignore the deficiency and proceed with the review; (2) to strike the brief or its offending portions, CR 76.12(8)(a); or (3) to review the issues raised in the brief for manifest injustice only[.]” *Id.* at 696 (citation omitted). Because Mother’s argument clearly fails on the merits, we will ignore the deficiency and proceed with our review of her argument.

Modification of a child support obligation “is generally prescribed by statute and largely left, within the statutory parameters, to the sound discretion of the trial court.” *McKinney v. McKinney*, 257 S.W.3d 130, 133 (Ky. App. 2008). Because the trial court has such wide discretion to modify child support obligations, we review for abuse of discretion. “The test for abuse of discretion is

¹ Kentucky Rules of Civil Procedure.

whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000); *see also Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

On appeal, Mother argues the trial court abused its discretion in denying her request to increase Father’s child support obligation. Her argument contains three sub-arguments concerning documentation of Father’s income: (1) the trial court failed to distinguish the present facts from the facts in *Schoenbachler* and the trial court erred in solely relying on Father’s tax returns in concluding Father’s expenditures were ordinary and necessary business expenses; (2) the trial court failed to shift the burden to Father to prove his expenses were ordinary and necessary business expenses required to operate his business under KRS² 403.212(2)(c); and (3) the trial court erred in failing to grant Mother’s motion for a new trial under CR 59.01.

“[T]he child support guidelines in KRS 403.212 shall serve as a rebuttable presumption for the establishment or modification of the amount of child support.” KRS 403.211. “Under the Child Support Guidelines set forth at KRS 403.212, the amount of child support obligation is determined by the parents’

² Kentucky Revised Statutes.

gross income. ‘Gross income’ is defined as income ‘from any source’—including gifts.” *Schoenbachler*, 110 S.W.3d at 780 (quoting KRS 403.212(2)(b)). Because Father is self-employed, his “gross income” is calculated under KRS 403.212(2)(c), which provides:

For income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, “gross income” means gross receipts minus ordinary and necessary expenses required for self-employment or business operation. Straight-line depreciation, using Internal Revenue Service (IRS) guidelines, shall be the only allowable method of calculating depreciation expense in determining gross income. Specifically excluded from ordinary and necessary expenses for purposes of this guideline shall be investment tax credits or any other business expenses inappropriate for determining gross income for purposes of calculating child support. Income and expenses from self-employment or operation of a business shall be carefully reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support obligation. In most cases, this amount will differ from a determination of business income for tax purposes. Expense reimbursement or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business or personal use of business property or payments of expenses by a business, shall be counted as income if they are significant and reduce personal living expenses such as a company or business car, free housing, reimbursed meals, or club dues.

Additionally, for a trial court to impute income to a parent, his “income statements must be verified by *documentation* of current and past income.” *Id.* (citing KRS 403.212(2)(f)). “KRS 403.212(2)(f) imposes a

mandatory obligation on the parties to report and verify their income and earnings with documentation[.]” *Id.* at 785. However, “if a party fails to comply with this obligation, the burden remains on the opposing party to prove such income and earnings.” *Id.*

First, Mother argues the trial court failed to distinguish the facts at hand from the facts in *Schoenbachler* and erred in solely relying on Father’s tax return to prove that his expenditures were ordinary and necessary business expenses. In *Schoenbachler*, the appellee “presented the court with past and current income tax returns, which supported her statements that her income on paper was \$1,710.00 per month. No other documentation of her income was introduced by either party.” *Id.* at 780. There, although the appellee “admitted that she placed bets for friends and that she sometimes earned money under this ‘system,’ she claimed that her own gambling losses canceled out her earnings. There was simply no evidence of record to refute this admission.” *Id.* The Supreme Court of Kentucky held that “[n]either a ‘windshield appraisal’ that Appellee’s ‘lifestyle and property reflected an income greater than her W-2’s and tax returns indicated’ nor Appellant’s bare allegations of additional income are sufficient to support the trial court’s finding of additional income.” *Id.* The Court reasoned, “in making child support determinations, courts must consider all

income proven by substantial evidence, regardless of whether that income is documented.” *Id.* at 778.

In *Schoenbachler*, the only evidence before the trial court was appellee’s tax returns. In the present case, the trial court’s order provides that it considered Father’s bank account records and Father’s testimony regarding his business expenses in addition to Father’s tax return. Although Mother presented evidence of Father’s gross receipts, the trial court accepted Father’s testimony that certain expenditures were ordinary and necessary business expenses. Therefore, the trial court correctly applied *Schoenbachler* to the facts at hand.

Second, Mother argues the trial court failed to shift the burden to Father to prove his expenses were ordinary and necessary business expenses required to operate his business under KRS 403.212(2)(c). In *Bootes v. Bootes*, 470 S.W.3d 351, 355 (Ky. App. 2015), this Court relied on *Schoenbachler* in holding the trial court abused its discretion by basing its child support determination solely on the appellee’s tax returns when the appellant had presented substantial evidence that the appellee “chose to give all of the proceeds of the business to his father[.]” There, the appellant “provided the appropriate documentation to show that [appellee] was earning income from the tax preparation business. The burden then fell on [appellee] to prove that the amount paid to his father constituted an ‘ordinary and necessary business expense’ required

to operate the business pursuant to KRS 403.212(2)(c).” *Id.* This Court held the appellant “provided the appropriate documentation to show that [appellee] was earning income from the tax preparation business.” *Id.*

The facts at hand are distinguishable from *Bootes*. There, appellee reported none of the gross receipts from his business on his tax return and did not prove that his gross receipts went to ordinary and necessary expenses. Here, although Mother argues the trial court failed to shift the burden of proving that the expenses claimed on Father’s tax return were ordinary and necessary business expenses, the trial court considered Father’s testimony regarding his business expenses and his bank account records in determining that there was nothing in the record to support Mother’s assertion that Father’s child support obligation should be increased. As the trial court considered the evidence presented and found the evidence did not support Mother’s assertion that Father earned \$100,000.00 per year, the trial court did not abuse its discretion in denying Mother’s motion to modify Father’s child support obligation.

Finally, as the trial court did not abuse its discretion denying Mother’s motion to modify Father’s child support obligation, the trial court’s denial of Mother’s motion for a new trial under CR 59.01 was not clearly erroneous. *Miller v. Swift*, 42 S.W.3d 599, 601 (Ky. 2001).

For the foregoing reasons, we affirm the order of the Jefferson Circuit Court, Family Division.

ALL CONCUR.

BRIEF FOR APPELLANT:

Abigail Green
Louisville, Kentucky

BRIEF FOR APPELLEE:

Mason L. Trenaman
Louisville, Kentucky