

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
August 20, 2015 Session

**IN RE ANDREA R.**

**Appeal from the Juvenile Court for Davidson County  
No. 20084618      Sophia Brown Crawford, Judge**

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**No. M2014-01895-COA-R3-JV – Filed November 30, 2015**

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This is the second appeal from a 2008 petition filed by Mother to set Father’s child support obligation for the parties’ five-year-old child, to make an upward deviation to pay for private school, and to determine the amount of retroactive support owed. Father responded, contending that an upward deviation for private school was not appropriate. He also contended that he should be credited for voluntary payments he made throughout the retroactive period. The trial court established Father’s current support obligation, which included an upward deviation for private school; however, the court made no findings to justify the deviation as required by Tenn. Comp. R. & Regs. 1240-2-4-.07(2)(a)(1). Father appealed the upward deviation. We reversed and remanded with instructions for the trial court to “make the requisite findings of fact to determine, *inter alia*, whether private schooling for the child is appropriate based upon the facts of this case.” *In re Andrea A.R.*, No. M2011-00574-COA-R3-JV, 2012 WL 397475, at \*7-8 (Tenn. Ct. App. Feb. 7, 2012). On remand, Mother sought to introduce additional evidence about the appropriateness of private school. The trial court declined to accept additional evidence, relied on the evidence introduced in the first trial, and, based on its written findings of fact, concluded that deviating from the child support guidelines was not appropriate because the parties could not afford private school. The trial court also established Father’s child support obligation for each of the six years preceding the filing of the petition to set support, calculated Father’s total obligation for the retroactive period, determined that Father’s voluntary payments exceeded that obligation, and held that no arrearage was owed. Because Mother filed a new petition to modify the current support obligation, which was consolidated with the above petition, the trial court allowed each party to introduce evidence of their current income. Based on that evidence, the court imputed income to Mother because she failed to provide reliable evidence of her income and modified Father’s child support obligation, which was established pursuant to the guidelines without a deviation. Mother appealed, raising several issues. We affirm in all respects.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed**

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which RICHARD R. DINKINS and W. NEAL MCBRAYER, JJ., joined.

Robert A. Anderson, Nashville, Tennessee, for the appellant, Renza P. A.<sup>1</sup>

Matthew Maniatis, Nashville, Tennessee, for the appellee, Victor R.

## OPINION

Renza P. A. (“Mother”) and Victor R. (“Father”) met in 2002. They were involved in a brief relationship, which resulted in the birth of their child in May 2003. The parties never married or resided together, and the child, who is now twelve, has lived with Mother since birth.

In August 2008, Mother filed a petition to establish paternity, to determine the amount of retroactive support Father owed, and to set Father’s current support obligation. Father filed a response and a counterclaim, in part seeking credit for voluntary payments he made during the retroactive support period from 2003 to 2008. In January 2009, the juvenile court magistrate entered an agreed order setting Father’s pendente lite support obligation at \$520 per month effective the first week of January 2009.

In September 2009, the magistrate entered a final order finding that Father did not owe Mother any retroactive child support because he had fully supported her from 2003 to 2008 (the “retroactive period”). Mother appealed to the juvenile court judge.

The de novo appeal was tried before the juvenile court judge over three days on August 17, December 6, and December 7, 2010. Mother and Father testified at the trial regarding their respective sources of income. The only other witness was a bookkeeper who prepared Father’s taxes both personally and for the business, R. Family Services, Inc. (“RFS”), where Father worked at the time of the hearing. Principally at issue during the trial was the 2005 sale of Father’s principal asset, RFS, for only \$20,000, and whether Father’s income was greater than he disclosed.

In January 2011, the juvenile court judge (“the trial court”) set Father’s child support obligation, which included an upward deviation for the cost of private school tuition. For the purpose of calculating the presumptive amount of child support, the court found that Mother’s current income was \$1,300.00 and Father’s current income was \$2,239.56 per month. Based on these findings the trial court ordered Father to pay child support in the amount of \$767 per month, retroactive to September 23, 2009. The court

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<sup>1</sup> This court has a policy of protecting the identity of children in parental termination cases by initializing the last names of the parties.

also ordered Father to pay the child's monthly private school tuition, which was \$720 per month, as well as \$50 per month in medical expenses and child care during the summer.

Mother filed a motion to clarify the January 2011 order concerning whether private school tuition was a separate expense from child support. In February 2011, the trial court issued an order stating that Father's child support obligation would be \$841 per month, which included a presumptive child support obligation of \$398 and a deviation of \$443 for private school tuition.<sup>2</sup> The trial court did not rule on Father's obligation for retroactive support for the period from 2003 through 2008; that issue was reserved.<sup>3</sup>

Father appealed the February 2011 order, contending the trial court erred in granting an upward deviation for private school. In February 2012, we reversed and remanded the upward deviation for private school tuition, an extraordinary education expense, because the trial court made no findings regarding the parents' financial abilities or the lifestyle of the child. *In re Andrea A.R.*, No. M2011-00574-COA-R3-JV, 2012 WL 397475, at \*7-8 (Tenn. Ct. App. Feb. 7, 2012) ("*Andrea I*"); see Tenn. Comp. R. & Regs. 1240-2-4-.07(2)(d)(1)(i).<sup>4</sup> More specifically, we remanded with instructions for the trial court to "make the requisite findings of fact to determine, *inter alia*, whether private schooling for the child is appropriate based upon the facts of this case." *Id.* at \*8.

While the upward deviation issue was pending before the trial court on remand, Mother filed a new petition to increase child support.<sup>5</sup> The new petition was consolidated with the initial petition, and all outstanding issues were tried over numerous days.

On August 23, 2013, the trial court conducted a hearing to determine the appropriateness of the upward deviation for private school. The court allowed the parties to present their arguments but did not permit either party to present additional evidence. Instead, it relied on the evidence that was introduced before the appeal in *Andrea I*. In February 2014, the trial court issued an order stating that a deviation from the guidelines for private school tuition was inappropriate because both parties had a "woefully inadequate financial situation" and "[r]equiring [Father] to pay even a portion of the

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<sup>2</sup> The February 2011 order stated that Father was ordered to pay tuition "whatever amount that is or becomes" and that the deviation was "subject to recalculation with tuition increases."

<sup>3</sup> The retroactive child support issue was not ruled upon prior to the first appeal. It was first tried in 2013, along with the other issues that are not on appeal.

<sup>4</sup> "Extraordinary education expenses include, but are not limited to, tuition . . . and other reasonable and necessary expenses associated with . . . private elementary and/or secondary schooling that are *appropriate to the parents' financial abilities and to the lifestyle of the child* if the parents and child were living together." Tenn. Comp. R. & Regs. 1240-2-4-.07(2)(d)(1)(i) (emphasis added).

<sup>5</sup> The new petition was filed on June 28, 2012.

private school tuition, in addition to the standard child support award, would create an unreasonable burden on his finances, as well as [Mother's].”

The two remaining issues, Father's obligation for support during the retroactive period (2003-2008) and Mother's new petition to modify child support, were tried over a period of seven non-consecutive days. Several witnesses testified, including Father, Mother, and Fidelis Madu, Father's bookkeeper and tax preparer. Both Mother and Father testified that Father deposited money into Mother's bank account from 2003 to 2008. Mother used this money to pay for rent, food, and utilities. Indeed, Mother testified that she asked Father for “whatever the cost was” for various bills and Father deposited that money into her bank account. The parties also testified that Father bought Mother a car and some furniture.

Father testified that from 2003 to 2005 he was the sole proprietor of RFS, an unincorporated entity, and that he deposited money from that business into his personal account. In 2005, he sold the business to his sister, who incorporated the business. Father continued to work at RFS as a manager.

Father's tax returns were introduced into evidence through Mr. Madu, who testified that Father provided him with documentation for the claimed deductions and that the information in Father's tax returns were correct to the best of his knowledge.

Mother introduced Father's bank statements into evidence and argued that the gross deposits he made into his personal account were a more reliable indicator of Father's income than his tax returns. Although Mother provided her own tax returns for 2004 to 2009, she testified that she had not filed tax returns since 2010. Mother testified that she was currently employed but stated that she could not provide any documentation about her wages because she was paid in cash. Instead, Mother testified about the income she received from 2010 to 2013 based on records she created herself.

Mother also offered the testimony of Richard Chavez, who had paid Mother hourly wages in the past. Mr. Chavez testified that he only paid Mother in cash and that he did not provide her with any tax forms. When asked how much he paid Mother in 2013, he stated: “Maybe . . .13,000, roughly. I'm going to give you an estimate.” When asked how he arrived at that estimate, Mr. Chavez stated: “Because I have numbers in my mind.”

At the final hearing, Mother's attorney attempted to read excerpts of the transcript of Father's testimony from the hearings that occurred prior to the first appeal. The trial court ruled that the testimony was inadmissible but allowed Mother's attorney to read portions of the transcript as an offer of proof.

On August 25, 2014, the trial court issued its order regarding Mother's petition for retroactive support and her petition to modify Father's current child support obligation. Regarding retroactive support, the court found that the relevant time period was from the child's birth in May 2003 to the entry of the magistrate's order in September 2009. The trial court found that each party's income was accurately reflected by their respective tax returns. Regarding Father's income, the court's order states:

Father provided testimony concerning his income from 2003 to 2009 as being accurately reflected by his tax returns, which were introduced into evidence. Father's bookkeeper and tax preparer, Mr. Fidelis Madu, testified as to the authenticity of the documents, including the business expenses listed on Father's tax return and the method of calculation of those expenses. The Court finds Mr. Madu's testimony credible . . . .

The trial court declined to use Father's bank statements and gross deposits to calculate his income because Father testified that he ran multiple businesses, commingled funds in separate accounts, transferred money between accounts, and took cash advances on his accounts; thus, "[t]he amount in deposits would therefore have no relationship to actual business income."

After calculating Father's child support obligation for each year during the six-year retroactive period, the court determined that Father's retroactive support obligation was \$41,743. The trial court also found that Father voluntarily paid Mother \$84,275 from May 2003 to September 2009, which was in excess of his obligation; therefore, Father did not owe any retroactive support. As the trial court explained: "Father is deemed to have fully supported the minor child during [the retroactive period] and no retroactive judgment shall be awarded. Even using mothers' [sic] argument that he should not be entitled to all or some of the credits, he has far exceeded the amount owed."

Regarding Mother's 2012 petition to modify support, the trial court found that Father's tax returns accurately reflected his income and that Father's bookkeeper provided credible testimony about the authenticity of the returns and the method of calculating the deductions that Father had claimed. In contrast, the court found that Mother was voluntarily underemployed and that she had failed to provide reliable evidence of her income because she had not filed tax returns since 2010 and was "paid only in cash, with no paystubs or receipts." The court imputed income to Mother, found that a significant variance existed, and modified the support obligation according to the guidelines without any deviation. Mother appealed.

#### **STANDARD OF REVIEW**

In cases such as this where the action is tried without a jury, we review a trial court's factual findings de novo, accompanied by a presumption of the correctness unless

the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *see Boarman v. Jaynes*, 109 S.W.3d 286, 289-90 (Tenn. 2003). The evidence preponderates against a trial court's finding of fact when it supports another factual finding with greater convincing effect. *Watson v. Watson*, 196 S.W.3d 695, 701 (Tenn. Ct. App. 2005). The presumption of correctness in Tenn. R. App. P. 13(d) applies only to findings of fact, not to conclusions of law. *See Blair v. Brownson*, 197 S.W.3d 681, 683-84 (Tenn. 2006). Accordingly, no presumption of correctness attaches to the trial court's conclusions of law, and our review is de novo. *Id.*

Trial courts have substantial discretion when setting child support, and accordingly we review such matters using the deferential abuse of discretion standard of review. *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000). "This standard requires us to consider (1) whether the decision has a sufficient evidentiary foundation, (2) whether the court correctly identified and properly applied the appropriate legal principles, and (3) whether the decision is within the range of acceptable alternatives." *Id.* (citing *BIF v. Service Constr. Co.*, No. 87-136-II, 1988 WL 72409, at \*2 (Tenn. Ct. App. July 13, 1988)).

Additionally, we give great weight to the trial court's findings regarding the credibility of witnesses. *Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997). This is because "[u]nlike appellate courts, trial courts are able to observe witnesses as they testify and to assess their demeanor, which best situates trial judges to evaluate witness credibility." *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999). Accordingly, appellate courts do not usually second-guess a trial court's credibility determinations unless there is "concrete, clear, and convincing evidence to the contrary." *In re Adoption of Kleshinski*, No. M2004-00986-COA-R3-CV, 2005 WL 1046796, at \*21 (Tenn. Ct. App. May 4, 2005) (quoting *Mitchell v. Archibald*, 971 S.W.2d 25, 29 (Tenn. Ct. App. 1998)).

## ANALYSIS

In this appeal, Mother contends the trial court erred by denying her claim for an upward deviation to pay for private school and her claim for retroactive support. She contests the modification of Father's current child support obligation. She also contends that she should be awarded attorney's fees both for the trial and this appeal. We will address each issue in turn.

### I. PRIVATE SCHOOL TUITION

On remand, the trial court did not accept any additional evidence regarding the appropriateness of private school tuition. Instead, it relied on the proof taken before the appeal in *Andrea I*. Mother contends this was error and that the trial court should have

allowed her to present additional evidence about the appropriateness of private school and Father's ability to pay for it.

When a trial court considers deviating from the guidelines for extraordinary educational expenses like private school tuition, *see* Tenn. Comp. R. & Regs. 1240-2-4-.07(2)(d)(1)(i), it must first determine whether private school is appropriate based on both "the parents' financial abilities" and "the lifestyle of the child." *Andrea I*, 2012 WL 397475, at \*6; *Richardson v. Spanos*, 189 S.W.3d 720, 727-28 (Tenn. Ct. App. 2005); Tenn. Comp. R. & Regs. 1240-2-4-.07(2)(d)(1)(i). Moreover, when a trial court considers a deviation, the Child Support Guidelines expressly require that the court:

*[S]hall consider all available income of the parents as defined by this chapter and shall make a written finding that an amount of child support other than the amount calculated under the Guidelines is reasonably necessary to provide for the needs of the minor child or children for whom support is being determined in the case immediately under consideration.*

Tenn. Comp. R. & Regs. 1240-2-4-.07(2)(a)(1) (emphasis added).

The record in *Andrea I* contained no findings of fact concerning the parents' financial abilities or the lifestyle of the child. *Andrea I*, 2012 WL 397475, at \*7. Therefore, we reversed the trial court's decision to deviate from the guidelines and remanded with specific instructions for the trial court "to make the requisite findings of fact to determine, *inter alia*, whether private schooling for the child is appropriate based upon the facts of this case." *Id.* at \*8.

It is significant to note that we did not indicate that the record was insufficient for the trial court to make the required factual findings or direct the trial court to reopen proof and accept additional evidence on remand. *See id.* In the absence of such a directive, the trial court's decision not to hear any additional evidence was discretionary. *See Thornton v. Massey*, No. W2013-01022-COA-R3-CV, 2014 WL 2472206, at \*12 (Tenn. Ct. App. May 30, 2014), *no perm. app. filed*. We will reverse such a decision only if the trial court applied an incorrect legal standard, based its decision on a clearly erroneous assessment of the evidence, or reached an illogical or unreasonable result. *See Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524-25 (Tenn. 2010).

Before the first appeal in this case, the trial court held a three-day trial concerning both retroactive and current child support. *See Andrea I*, 2012 WL 397475, at \*1-2. During that trial, Mother had ample opportunity to present evidence about Father's income and "the parents' financial abilities and . . . the lifestyle of the child if the parents and child were living together" in order to support the contention that a deviation for private school tuition was appropriate. *See* Tenn. Comp. R. & Regs. 1240-2-4-.07(2)(d)(1)(i). Thus, the parties already had a full and fair opportunity to litigate the

relevant issues, and the trial court did not abuse its discretion by refusing to accept additional evidence. *See Thornton*, 2014 WL 2472206, at \*12, 14.

Finding no error with the trial court's decision to limit its consideration to the evidence presented by the parties during the first trial, we turn our attention to the trial court's findings with respect to the parties income and the cost of a private school. The child was to begin private school in 2009. In its January 2011 order, which followed the first trial, the court found that Mother's income was \$1,300.00 and Father's income was \$2,239.56 per month. Based on these findings, the trial court's February 2011 order required Father to pay \$841 per month in child support, which included a deviation of \$443 for private school tuition.

On remand, the trial court did not modify its previous findings that Mother's income was \$1,300.00 and Father's income was \$2,239.56 per month, and the evidence does not preponderate against these findings. Additionally, the trial court found that the parents could not afford to pay for private school, and the evidence does not preponderate against this finding. Having affirmed these findings, we affirm the trial court's determination on remand that a deviation in child support for private school tuition was not warranted.

## II. RETROACTIVE SUPPORT

“[T]he obligation to support a child exists from the child's birth, and upon entry of an order establishing paternity, the father is liable for support back to that date.” *State ex rel. Clark v. Wilson*, No. M2001-01626-COA-R3-CV, 2002 WL 31863296, at \*3 (Tenn. Ct. App. Dec. 23, 2002). When the trial court sets the amount of child support for the first time, the judgment must include the amount of support due from the date of the child's birth until the entry of an order of support. *See* Tenn. Code Ann. § 36-2-311(a)(11); Tenn. Comp. R. & Regs. 1240-2-4-.06(1). An award for retroactive support “may be thought of as a form of reimbursement for the . . . [mother's] assumption of the entire duty during the period covered by the arrearages.” *Vaughn*, 21 S.W.3d at 248 (quoting *Hoyle v. Wilson*, 746 S.W.2d 665, 677 (Tenn. 1988)) (internal quotation marks omitted) (alterations in original).

In this case, the trial court determined the retroactive period was from May 2003 to September 2009. Because child support had not been established for any part of the retroactive period, which spanned several years, and the parties' respective incomes varied during this period, the court established a monthly child support obligation for each year. For 2003, Father was ordered to pay child support of \$719 per month; for 2004 he was ordered to pay \$699 per month; for 2005 he was ordered to pay \$755 per month; for 2006 he was ordered to pay \$755 per month; for 2007 he was ordered to pay \$600 per month; for 2008 he was ordered to pay \$387 per month; and for 2009 he was ordered to



pay \$227 per month. Based on these findings, Father's total retroactive support obligation for the period from 2003 to 2009 was \$41,700.

The trial court additionally determined that Father had voluntarily paid \$84,275 of support for the child to Mother during the retroactive period. Because his payments exceeded his obligation for the retroactive period, the court found that Father did not owe any retroactive support.

Mother contends this was error for two reasons. She contends the trial court erroneously gave Father full credit for the amount of money he paid to Mother during the retroactive period. She also contends the court miscalculated Father's income during that period. For his part, Father argues that he is entitled to a judgment against Mother for overpayment of child support. Father also argues that the trial court erred by failing to give him the benefit of the self-employment tax exemption.

#### A. The Retroactive Period: When Did it End?

It is undisputed that the retroactive period began at the birth of the child in May 2003. The magistrate entered a final order in September 2009. Relying on this date, the trial court included Father's 2009 child support obligation of \$2,043 and Father's 2009 pendente lite child support payments totaling \$6,240 in its calculations. Although, the magistrate did not enter his final order until September 2009, the order setting Father's pendente lite support obligation was entered in January 2009.

A pendente lite order for child support "is the initial order regarding child support" and a parent who complies with such an order does not owe any retroactive support for that time period. *Smith v. Smith*, No. M2006-01390-COA-R3-CV, 2010 WL 288758, at \*11 (Tenn. Ct. App. Jan. 25, 2010). Thus, the retroactive-support period ended as of January 2009, when Father began paying pendente lite support. Consequently, Father's 2009 child support obligation and 2009 pendente lite payments should not have been included when calculating Father's retroactive support obligation or the amount of voluntary payments he made. Therefore, within the correct period – May 2003 through December 2008 – Father's child support obligation was \$39,700 and his voluntary contributions totaled \$78,035.<sup>6</sup>

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<sup>6</sup> These sums were calculated as follows: Father's 2009 child support obligation is \$2,043. Deducting \$2,043 from the total of his obligation for the retroactive period, which is \$41,734, results in a net arrearage obligation of \$39,700. As for his voluntary payments, Father remitted \$6,240 in pendente lite child support payments in 2009. By deducting \$6,240 from the total of his voluntary payments during the retroactive period, which is \$84,275, Father is entitled to a net credit of \$78,035.

## B. Credit for Voluntary Payments During the Retroactive Period

Mother acknowledges that Father is entitled to a credit for some of the voluntary payments he made during the retroactive period; however, she contends the trial court erred when it gave Father credit for all payments he made for rent, food, and utilities from 2003 to 2005. She contends Father should not have received credit for the portion of these payments that was used to support her rather than the child. She also contends Father should not receive child support credit for giving her a car and some furniture.

Tennessee recognizes two doctrines under which obligor parents may receive credit for voluntary payments that do not comply with a court order. *See In re Jacob H.*, No. M2013-01027-COA-R3-JV, 2014 WL 5481112, at \*4 (Tenn. Ct. App. Oct. 28, 2014), *no perm. app. filed*. One is the necessities rule, and the other is the equitable considerations rule. *Id.*

Under the necessities rule, obligor parents can receive credit against their child support obligation when they make payments for necessities that the custodial parent has failed or refused to provide. *Peycheck v. Rutherford*, No. W2003-01805-COA-R3-JV, 2004 WL 1269313, at \*4 (Tenn. Ct. App. June 8, 2004); *see Gilland v. Gilland*, No. M2002-02276-COA-R3-CV, 2004 WL 2583885, at \*7-8 (Tenn. Ct. App. Nov. 9, 2004). Although necessities typically include food, shelter, tuition, medical care, and legal services, “[w]hat items are appropriate and needed depends on the parent’s ability to provide and this issue is to be determined by the trier of fact.” *Peycheck*, 2004 WL 1269313, at \*4. In order to obtain credit for such payments, the obligor parent must show that “the expenditures were based on the child’s need for the goods, that the custodial parent was responsible for but failed to provide the goods, and the actual cost of the goods provided.” *State ex rel. Mock v. Decker*, No. W2004-02587-COA-R3-JV, 2005 WL 3447682, at \*3 (Tenn. Ct. App. Dec. 15, 2005) (quoting *State ex rel. Mitchell v. Lea*, No. W2003-01650-COA-R3-JV, 2004 WL 2607564, at \*9 (Tenn. Ct. App. Nov. 16, 2004)). When obligor parents receive credit for voluntary payments for necessities, the amount of the credit cannot exceed the amount of support due for the period during which the necessities were furnished. *Peycheck*, 2004 WL 1269313, at \*4.

Under the equitable considerations rule, an obligor parent may receive credit for voluntary payments “in specific circumstances when, for example: (1) the obligee parent received the payments, directly or indirectly, and exercised control over the funds . . . and (2) the specific circumstances demand a credit to avoid an injustice.” *In re Jacob H.*, 2014 WL 5481112, at \*7 (internal quotation marks omitted); *see Smith v. Smith*, 255 S.W.3d 77, 84-85 (Tenn. Ct. App. 2007). The parties’ agreement or consent to a manner of payment constitutes a “specific circumstance” that demands a credit to avoid injustice. *See In re Jacob H.*, 2014 WL 5481112, at \*7 (quoting *Smith*, 255 S.W.3d at 84). Applying this rule, this court has held that a father was entitled a child support credit

when the mother specifically asked him to remit all payments directly to her rather than to the court clerk's office. *See id.* at \*8.

Based on the foregoing, the majority of Father's payments fall under the equitable considerations rule. Although retroactive support is often intended to reimburse one party for bearing the entire burden of supporting a child during the period covered by the arrearages, *see Vaughn*, 21 S.W.3d at 248, the record in this case reveals Mother did not bear that burden alone. Mother testified that she asked Father for money and that he deposited it into her bank account. There is no indication that Father exercised any control over the money after he gave it to Mother, and the evidence at trial was that both parties agreed to this arrangement. Mother asked Father for "whatever the cost was" for various bills, and Father deposited that money into her bank account. As a result of these payments she was able provide for the child. Accordingly, these payments achieved the purpose of a support award: "to fulfill the non-custodial parent's obligation to contribute to the child's support." *See Smith*, 255 S.W.3d at 85 (quoting *Rutledge v. Barrett*, 802 S.W.2d 604, 607 (Tenn. 1991)). Therefore, it would be inequitable to deny Father credit for making these payments.

The total amount of payments that Mother either agreed to or does not challenge on appeal is \$73,335.<sup>7</sup> Accordingly, Father is entitled to a credit against his child support obligation in this amount.

### C. Father's Income During the Retroactive Period

Mother argues that the trial court should have used Father's bank account information instead of his tax returns to calculate his income for the retroactive period. She also argues that Father's tax returns do not accurately reflect his income because they include excessive deductions for business expenses and other errors. Further, Mother contends that the trial court erroneously found that Father had 14 days of parenting time in 2008 and 85 days of parenting time in 2009.

According to Mother's argument, recalculating Father's income using his bank account information and the correct amount of parenting time results in a child support

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<sup>7</sup> This figure does not include \$2,200 Father spent to purchase Mother a car, \$1,400 he spent to have it repaired, or \$1,100 worth of furniture that Father gave Mother in 2007. The testimony at trial was that Mother did not have control over the way in which this money was spent and did not agree to these purchases. Consequently, these payments may or may not fall within the equitable considerations rule. *See In re Jacob H.*, 2014 WL 5481112, at \*7. Although it is possible that a car and furniture were necessities, *see Peycheck*, 2004 WL 1269313, at \*4, we need not determine whether they were because, as discussed later in this opinion, \$73,335 is more than sufficient to exceed Father's retroactive support obligation.

obligation of \$60,620 for the retroactive period.<sup>8</sup> Therefore, even if the trial court erred as Mother suggests, she would not be entitled to any retroactive support in view of our determination that Father was entitled to a credit of \$73,335.

Final judgments will not be set aside unless an error “involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process.” Tenn. R. App. P. 36(b). Because Father is entitled to a credit of over \$73,000, Mother would not be entitled to receive any retroactive support even if Father’s obligation was \$60,620 during the retroactive period. Consequently, the trial court’s calculation of Father’s income, even if erroneous, did not affect the judgment that Mother was not entitled to any retroactive support. As a result, Mother’s arguments on this point are not grounds for reversing the judgment in this case. *See id.*

#### D. Overpayment of Child Support and the Self-Employment Tax Credit

Father contends that he is entitled to a judgment for overpayment of child support based on the trial court’s findings. In support of his contention, Father cites *Huffman v. Huffman*, No. M2012-01538-COA-R3-CV, 2013 WL 1858798, at \*3-4 (Tenn. Ct. App. May 1, 2013). In *Huffman*, the father, who was first ordered to pay child support in 2002, filed a petition to recalculate his child support obligation in 2006, but the trial court did not modify child support until 2012. *Id.* at \*1-2. Thus, from 2006 to 2012, the father was paying a child support obligation that the trial court later determined was too high. *See id.* Consequently, this court held that the father was entitled to a judgment for the amount he overpaid during that period. *Id.* at \*3-4.

In contrast, in this case all of Father’s payments to Mother were voluntary rather than the result of a court order. Until January 2009, Father was not ordered to pay any child support to Mother. Instead, he voluntarily and freely decided to contribute more than he was ultimately obligated to pay to support his child. Under such circumstances, this court has held that the obligor parent was not entitled to a judgment for overpayment. *See Gilland*, 2004 WL 2583885, at \*8 (stating that the obligor parent was entitled to a credit for amounts voluntarily paid before the entry of a support order but holding that he was “not entitled to credit for monies paid in excess of the arrearage award . . .”). Accordingly, Father is not entitled to a judgment for overpayment of child support.<sup>9</sup>

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<sup>8</sup> This figure comes from Mother’s brief in this appeal and was apparently calculated by her attorney.

<sup>9</sup> This holding is consistent with cases involving the necessities rule, the only other doctrine in Tennessee that allows obligor parents to receive a credit against their child support obligation for voluntary payments. *See Peycheck*, 2004 WL 1269313, at \*4 (noting that, under the necessities rule, credit is limited to the amount of the support arrearage).

Father also contends the trial court erred when it failed to give him credit for the self-employment tax, a credit he may have been entitled to receive prior to selling his business in 2005. The child support guidelines provide that self-employment taxes paid by a parent “shall be deducted from that parent’s gross income earned from self-employment . . . .” See Tenn. Comp. R. & Regs. 1240-2-4-.04(4)(b) (emphasis added). Although it appears that the trial court did not give Father credit for the self-employment tax for the years he was self-employed, this error is harmless in light of our holding that Father is not entitled to a judgment for overpayment of child support. See Tenn. R. App. P. 36(b).

### III. MOTHER’S 2012 PETITION TO MODIFY SUPPORT

On June 28, 2012, while the issues raised in the 2008 appeal were on remand to the trial court, Mother filed a petition to modify child support. Following a full evidentiary hearing on the new petition, the court found a significant variance had been proven and modified Father’s child support obligation going forward. Mother appeals this decision, contending the trial court miscalculated Father’s income from 2011 to 2013 and erred by imputing income to her.

#### A. Father’s Income

Mother contends that Father’s income for 2011 to 2013 should include income from RFS because he retained control of the company and used its money to pay for his personal expenses after he sold the business to his sister in 2005.

For Mother to prevail on this issue, the court must disregard RFS’s corporate form and attribute its income to Father. A corporation’s separate identity may be disregarded based upon a showing that it is a sham or where necessary to accomplish justice. *Oceanics Schools, Inc. v. Barbour*, 112 S.W.3d 135, 140 (Tenn. Ct. App. 2003). The party seeking to pierce the corporate veil has the burden of proving facts sufficient to justify it. *Edmunds v. Delta Partners, L.L.C.*, 403 S.W.3d 812, 829 (Tenn. Ct. App. 2012) (quoting *VP Buildings, Inc. v. Polygon Grp.*, No. M2001-00613-COA-R3-CV, 2002 WL 15634, at \*5 (Tenn. Ct. App. Jan. 8, 2002)). Determining whether to pierce the corporate veil is particularly within the province of the trial court and should be done “with great caution and not precipitately.” *Id.* (quoting *Schlater v. Haynie*, 833 S.W.2d 919, 925 (Tenn. Ct. App. 1991)). The trial court’s credibility assessments are an important part of this determination. See *Piper v. Andrews*, No. 01A01-9612-CV-00570, 1997 WL 772127, at \*3 (Tenn. Ct. App. Dec. 17, 1997).

In this case, the trial court determined that Father’s income from 2011 to 2013 was accurately reflected in his tax returns. The trial court had the opportunity to listen to and observe Mother, Father, and Mr. Madu as they testified, and the court specifically found that Mr. Madu offered credible testimony. Mother argues that she proved facts sufficient

to justify piercing the corporate veil by demonstrating that there were large cash withdrawals from RFS's account from 2011 to 2013 and that Father's personal expenses are greater than the income derived from his paychecks. Although there were cash withdrawals from the RFS account, there is no direct evidence that these withdrawals were used to pay for Father's personal expenses rather than for RFS's business expenses. Consequently, this evidence does not justify piercing the corporate veil or preponderate against the trial court's determination that Father's tax returns were reliable evidence of his income from 2011 to 2013. As a result, we affirm the trial court's calculation of Father's income for purposes of determining his current support obligation.

### B. Imputing Income to Mother

The trial court imputed income to Mother because it found that she had not produced reliable evidence of her income and was voluntarily underemployed. Mother contends that both these findings are erroneous.

When modifying an order of support, if a parent fails to produce reliable evidence of income and the trial court does not otherwise have reliable evidence of income or income potential, then the trial court may impute income to the parent. *See* Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2)(iv)(II). Reliable evidence of income usually includes "tax returns for prior years, check stubs, or other information for determining current ability to support . . . ." Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2)(iv)(I). When a trial court imputes income to a party for failure to provide reliable evidence of income, it may only "increase the gross income of the parent failing or refusing to produce evidence of income by an increment not to exceed ten percent (10%) per year for each year since the support order was entered or last modified . . . ." Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2)(iv)(II).

Mother claims she provided reliable evidence of her income by introducing a summary of her income for 2012 and the testimony of Mr. Chavez. However, the trial court implicitly found that neither of these sources were reliable, and the evidence supports that finding. The summaries were based on Mother's review of her records and her recollection of the number of hours she worked. Because Mother was paid in cash and did not file tax returns for the years in question, she could not provide any documentation to support the information contained in her summary.

Similarly, Mr. Chavez testified that he paid Mother in cash and did not keep or provide records of these payments. Although Mr. Chavez was able to testify about the amount he paid Mother in 2013, this amount was, by his own admission, an estimate based on the "number in [his] mind." Accordingly, the evidence does not preponderate against the trial court's finding that Mother did not provide reliable evidence of income.

As previously stated, when a party fails to provide reliable evidence of income, the guidelines only permit courts to impute income at an increment of 10 percent per year. *See* Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2)(iv)(II). The trial court followed this provision when it imputed income to Mother. Accordingly, the trial court's finding that Mother did not provide reliable evidence of income justifies the imputation of income to Mother, and we need not discuss Mother's argument regarding voluntary underemployment.

#### IV. EVIDENTIARY ISSUES

Mother contends the trial court erred when it prohibited her attorney from asking Father leading questions on direct examination and from introducing Father's testimony from a previous trial into evidence.

Although leading questions are not typically permitted on direct examination, they may be allowed when one party conducts the direct examination of an adverse party. *See* Tenn. R. Evid. 611(c)(2). Ultimately, however, decisions concerning whether to allow leading questions are in the discretion of the trial court. *Wilkerson v. Altizer*, 845 S.W.2d 744, 747 (Tenn. Ct. App. 1992); *see State v. James*, 315 S.W.3d 440, 460 (Tenn. 2010) (“[T]he propriety, scope, manner and control of the examination of witnesses is a matter within the discretion of the trial judge, subject to appellate review for abuse of discretion.”). A trial court's refusal to allow leading questions, even if erroneous, will not be grounds for reversal if it did not prevent the complaining party from eliciting relevant testimony. *See Pitner v. Fayette Cnty.*, No. W1999-01217-COA-R3-CV, 2000 WL 557869, at \*5 (Tenn. Ct. App. May 4, 2000); Tenn. R. App. P. 36(b).

Here, even if the trial court's refusal to allow leading questions was erroneous, it is not grounds for reversal because it did not affect the judgment in this case. *See* Tenn. R. App. P. 36(b). Mother's attorney was allowed to question Father about a variety of subjects over a long period of time. Indeed, on appeal Mother has not demonstrated any way in which her attorney's inability to ask leading questions prevented him from eliciting Father's testimony about any topic relevant to the proceedings. *See Pitner*, 2000 WL 557869, at \*5. Accordingly, any error related to leading questions was harmless.

Mother also contends the trial court erred when it prohibited her from introducing Father's testimony from the previous trial. Rule 803 of the Tennessee Rules of Evidence provides that “[a] statement offered against a party that is . . . the party's own statement in either an individual or representative capacity” is “not excluded by the hearsay rule.” Tenn. R. Evid. 803(1.2). Under this rule, “[a]nything the opposing party said or wrote out of court is admissible in court against that party” subject to other applicable rules of evidence. *See State v. Lewis*, 235 S.W.3d 136, 145 (Tenn. 2007) (quoting Donald F. Paine, *Paine on Procedure: Admissions 'Against Interest'*, 43 Tenn. B.J. 32 (April 2007)). In addition, extrinsic evidence of an opposing party's prior inconsistent

statements is admissible even when the opposing party has not been afforded an opportunity to explain or deny those statements. *See* Tenn. R. Evid. 613(b).

Here, Mother sought to introduce Father's testimony from a prior trial into evidence. The trial court ruled that Mother could not do so, and, based on the foregoing, we conclude that this was error. However, our conclusion that this ruling was error does not end the inquiry.

The exclusion of evidence, even if erroneous, is not grounds for reversal unless the evidence would have affected the outcome of trial had it been admitted. *See* Tenn. R. Evid. 103(a); *Hill v. Hill*, No. M2006-01792-COA-R3-CV, 2008 WL 110101, at \*5 (Tenn. Ct. App. Jan. 9, 2008); *see also Pankow v. Mitchell*, 737 S.W.2d 293, 298 (Tenn. Ct. App. 1987) ("A trial court's erroneous exclusion of competent evidence will not require reversal if it did not affect the jury's verdict."). In order to aid this court in determining whether excluded evidence would have affected the outcome of trial, the proponent of the excluded evidence must submit an offer of proof to the trial court. Tenn. R. Evid. 103(a)(2); *Hill*, 2008 WL 110101, at \*5. The offer should contain the substance of the excluded evidence and the basis for admitting it. *Hill*, 2008 WL 110101, at \*5.

In this case, Mother's attorney made an offer of proof that complied with the above requirements. However, the substance of the excluded evidence would not have affected the outcome of the trial if it had been admitted. The portions of Father's testimony that Mother submitted as an offer of proof include testimony about the proceeds from the sale of RFS, whether Father's wife was employed during the retroactive period, and whether Father's sister had experience in the construction industry when she purchased RFS. Much of this testimony had already been elicited during the direct examination of Father, and the new information contained in the offer of proof is not sufficient to cause the evidence to preponderate against the trial court's factual findings. Accordingly, the decision not to admit Father's prior testimony is not grounds for reversal in this case. *See* Tenn. R. Evid. 103(a); *Pankow*, 737 S.W.2d at 298.

#### IV. ATTORNEY'S FEES

Mother seeks an award of the attorney's fees she incurred in the trial court, and both parties seek attorney's fees on appeal.

##### A. Fees Incurred in the Trial Court

Mother contends she was entitled to recover the attorney's fees she incurred in the trial court. The trial court is vested with wide discretion when determining whether to award attorney's fees. *Threadgill v. Threadgill*, 740 S.W.2d 419, 426 (Tenn. Ct. App.1987); *see* Tenn. Code Ann. § 36-2-311(a)(14) (requiring orders establishing paternity to include a "[d]etermination of liability for counsel fees to either or both parties



after consideration of all relevant factors”). We review a trial court’s discretionary decision regarding attorney’s fees pursuant to the abuse of discretion standard. *See Aaron v. Aaron*, 909 S.W.2d 408, 411 (Tenn. 1995). Under this standard, we will reverse the trial court’s decision regarding attorney’s fees only when the court applied an incorrect legal standard, reached a decision that is illogical, based its decision on a clearly erroneous assessment of the evidence, or employed reasoning that caused an injustice to the complaining party. *Church v. Church*, 346 S.W.3d 474, 487 (Tenn. Ct. App. 2010). After reviewing the record, we have determined that the trial court did not abuse its discretion when it ordered the parties to pay their own attorney’s fees. Accordingly, we affirm.

#### B. Fees Incurred on Appeal

Both Mother and Father seek to recover the attorney’s fees they incurred in this appeal. Determining whether to award attorney’s fees on appeal is a matter within this court’s discretion. *Id.* “In considering a request for attorney fees on appeal, we consider the ability of the party seeking the fee award to pay such fees, his or her success on appeal, whether the appeal was taken in good faith, and any other equitable factors relevant in a given case.” *Id.* (citing *Darvarmanesh v. Gharacholou*, No. M2004-00262-COA-R3-CV, 2005 WL 1684050, at \*16 (Tenn. Ct. App. July 19, 2005)).

Mother brought this appeal in good faith; however, she had little success on appeal, and we respectfully deny her request to recover the attorney’s fees she incurred in this appeal.

Father contends he is entitled to recover his attorney’s fees on appeal because Mother’s appeal is frivolous. This court may award a party damages when it appears that “the appeal from any court of record was frivolous or taken solely for delay . . . .” Tenn. Code Ann. § 27-1-122. In order to avoid discouraging legitimate appeals, this statute must be construed strictly. *GSB Contractors, Inc. v. Hess*, 179 S.W.3d 535, 547 (Tenn. Ct. App. 2005). Accordingly, an appeal is frivolous only when it is devoid of merit or has little prospect of success. *See id.* (quoting *Wakefield v Longmire*, 54 S.W.3d 300, 304 (Tenn. Ct. App. 2001)). Determining whether to award damages for a frivolous appeal is discretionary decision. *Id.*; *Young v. Barrow*, 130 S.W.3d 59, 66-67 (Tenn. Ct. App. 2003).

Although Mother has not succeeded on appeal, her arguments were not frivolous or made only for purposes of delay. Accordingly, Mother’s appeal was not frivolous.

**IN CONCLUSION**

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Mother.

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FRANK G. CLEMENT, JR., JUDGE