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Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 7, 2022 Session

MAZIE F. WHITE v. THOMAS GRAY MILLER

**Appeal from the Juvenile Court for Williamson County
No. 39098-2019-PAT-19 Sharon Guffee, Judge**

No. M2021-01189-COA-R3-JV

The trial court found Father to be willfully underemployed and imputed income to him for calculation of child support. Mother appeals the juvenile court's determination, arguing the trial court erred as to the amount of income imputed to Father for the purposes of setting child support and also as to its determination of the amount of retroactive support. We affirm the trial court's income imputation. However, we conclude the trial court erred in its calculation of retroactive support owed by Father. Therefore, this Court affirms the judgment of the trial court in part and reverses in part.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed in Part; Reversed in Part; Case Remanded

JEFFREY USMAN, J., delivered the opinion of the court, in which ANDY D. BENNETT, and W. NEAL MCBRAYER, JJ., joined.

Elizabeth S. Russell, Franklin, Tennessee, for the appellant, Mazie F. White.

Sarah Richter Perky, Nashville, Tennessee, for the appellee, Thomas Gray Miller.

OPINION

I.

This appeal centers upon the amount of income imputed to a willfully underemployed parent in determining child support. Maize F. White (Mother) and Thomas Gray Miller (Father) had a brief relationship. Mother discovered that she was pregnant in February 2018 and informed Father. The two were not married. Their Child was born in October 2018.

Mother maintained physical custody of the Child but allowed Father visitation. She provided for the Child's needs and his care. Father sent Mother a total of \$37 dollars in child support between the Child's birth in October 2018 and February 2019. In February of 2019, Mother filed a Petition to Establish Paternity and to Set Child Support (the "Petition").

Beginning in March 2019, Father began paying Mother \$300 every other week as child support. In June 2019, Father filed a Voluntary Acknowledgment of Paternity and took a DNA test establishing himself as the Child's father. Father continued to pay child support to Mother in the amount of \$300 every other week until the parties participated in voluntary mediation in August 2019.

As a result of the voluntary mediation in August 2019, Father began paying Mother \$1,400 per month in child support. After a November 2020 hearing, the trial court continued the child support at a rate of \$1,400 per month and entered a graduated visitation schedule. The trial court set Mother's Petition for trial in February 2021.

At trial, both Mother and Father testified. Mother has a high school diploma and one year of college education. She works as a patient service specialist at Vanderbilt Children's Hospital. Mother makes \$26,032 per year and provides health, dental, and vision insurance for the Child at the cost of \$125.93 per month. Her income has remained consistent throughout these proceedings. Mother is currently in school to become a licensed massage therapist.

Mother has been the primary caregiver for the Child since his birth. Until the Child was six months old, while Mother was at work, the Child stayed with Mother's friends and family. After that, Mother placed the Child into daycare, the costs of which have varied but remained around \$1000 a month.

Father has three sources of money to support his livelihood: work, investment accounts, and his parents. Father graduated from Elon University with a bachelor's degree in Business Administration in 2016. Since then, Father has worked in a variety of jobs including in customer service at Top Golf, as a driver with Lyft, as a booking agent for Stewart Entertainment Agency, as an assistant coordinator with Dead Horse Branding, and in a sales position with Total Quality Logistics. At the time of trial, Father's only occasional employment was in an event-related position with the Nashville Predators.

In addition to his limited employment income at the time of trial, Father also has an investment account with Wells Fargo funded with money received from his family. Father receives dividend payments from the Wells Fargo account that he reinvests into the account. Father's investment account has increased with gains in 2019 and 2020. In 2019,

Father's account increased from approximately \$240,000 to \$305,000. In 2020, Father's account increased to approximately \$345,000.

Father also receives money from his parents directly and indirectly, for example, through paying various bills and financial obligations for him. Father testified that he entered into a Secured Promissory Note with his parents that his parents would pay the \$1,400 child support payment, his attorney's fees, and other costs associated with these proceedings. Father testified that the Promissory Note is indefinite in that his parents will pay child support on his behalf as long as he must pay child support for the Child. The note is due in full on August 16, 2025; however, he has no obligation in the meantime to make any payments on the note.

In addition, Father's parents pay for his cell phone and car insurance. Father's parents provided him with a 2016 Toyota 4Runner when his previous vehicle stopped working in 2019. Father's residence is owned by a family friend. He testified that he pays \$950 in rent per month, including utilities. However, Father's bank statements reflected that he paid rent in some months but not others. Father indicated that paying rent was also included in the Promissory Note with his parents, but he could not point out where in the Promissory Note this was stated. Father testified that he pays minimal amounts for any household expenses each month, approximately \$200-250 for groceries, \$50 to \$75 for eating out, and \$10 for a gym membership. Father did acknowledge that he receives money on a regular basis from his parents, noting, for example, that he received \$6,500 in 2019.

In 2018, Father made \$18,991 in gross income from work and capital gains. In 2019, Father made \$45,686 in gross income from work and capital gains. In 2020, Father made \$495 from Stewart Entertainment, \$1,613.65 from Dead Horse Branding, \$2,028.26 from work with the Nashville Predators, and \$18,398.21 from Total Quality Logistics. At the time of the hearing, Father was only continuing in his occasional event-related work with the Nashville Predators for \$13 dollars an hour. The testimony at trial established that Father's lifestyle did not correspond with his earned income.

The trial court ruled that Mother would have primary custody of the Child and Father would have 85 days of parenting time. The Court also found that "Father is willfully underemployed" and imputed to him an income of \$60,000 per year, resulting in a \$1,423 per month child support obligation for Father. The trial court ordered retroactive child support to be paid by Father for the time period from October 2018 through February 2019 at the current rate of \$1,423 per month for a total retroactive support obligation of \$7,115. The trial court concluded that each party would be responsible for his or her own attorney's fees.

In considering Father's income and the amount to impute, the trial court stated the following:

[L]et's go to Father's actual proof of his income and where the biggest argument probably is. The Court has to consider for income all sources from wages to commissions to income from self-employment, interest income, dividend income, net capital gains, and gifts and those gifts can be what reduces a parent's living expenses. . . .

In the Court's estimation, one would have to earn more money than what Father's earning to live at the standard at which he's living. For the standard at which he's living, he would not be able to live at that standard at just 18 some-odd thousand dollars that he made in '18. He would not be able to live at that standard at the, closer but not quite, at the \$45,000 he made the previous year.

So let's go to investment income. The Court does look at dividends, the Court looks at capital, net capital gains, or capital gains. And there's a summary that was submitted by [Mother's counsel] that the Court looked at. And I understand where [Mother's counsel] gets what she labels as Wells Fargo Net Capital Gains.

Looking through all the different summaries and then looking to the other evidence, the Court doesn't agree with what [Mother's counsel] has submitted in terms of what Father's net capital gains are. That is labeled in the summary as . . . Change in Value. However, the best evidence the Court has is to look at what Father submitted to the IRS as capital gains; one year it was \$14,265, that was in 2019, and then in the next year it was \$35,206.

The best way for the Court to put the child in the position and the child's best interests for [the] child to have the support that it needs is to find that Father could gain an income of \$60,000. That fits with Father's lifestyle, that fits with basically what he is earning when he does have a job and then what he is drawing out from his investment accounts and also what he's receiving in gifts from the parents from time to time and it also fits with what Father would likely have to make if he were paying all of his bills living where he's living in order to do what he's doing. . . .

[T]he Court is going to find that Father makes \$60,000 a year, that going to break down to \$5,000 a month, the Court finding that Father is willfully underemployed. It's in the child's best interest that the Court deviate child support from what was in terms of his income. What was recommended in the proposed child support worksheet from [counsel for Father] that was filed on the 24th, where he's saying that Father's making \$3,500, the Court's going to impute more income to Father to make that \$5,000 [a month] That gives him a child support obligation of roughly \$1,400.

Addressing retroactive child support, the trial court stated the following:

However, it is just that the Court not rule that Father owes retroactive child support from today's day back to the child's birth. There was evidence that Father was paying child support at certain amounts at certain levels up until Ms. White was receiving roughly \$1,400 a month.

That said, while Mr. Miller can't contract away his duty, the Court is going to find that there was support on Mr. Miller's behalf given to the child to Ms. White. . . .

Here's what the Court will find: The Court will order retroactive support for October 2018, November 2018, December 2018, . . . January 2019, and February 2019 because at a certain point, it looks like March, from Ms. White's testimony, is when he began to pay \$300 biweekly. . . .

So the amount of monthly support that the Court came to was \$1,423 a month. That's imputing that income to Father, \$5,000 a month, also accounting for childcare and insurance. So in terms of October, November, December of 2018, January and February of 2019, Father will owe \$7,115. . . .

I based that off his current support that we have of \$1,423. And the Court's finding overall the Father's employment situation hasn't changed from then to now. He didn't hold down a job; however, his lifestyle, which the Court did take into account through the child support guidelines, would fit a \$5,000 a month income. Whether he's getting that assistance from his parents or drawing from his investments, the Court is imputing that income to Father.

Mother appealed. On appeal, she challenges the amount of income imputed to Father, the amount of retroactive child support, and the trial court's denial of attorney's fees. Father concedes that the trial court properly imputed income to him and does not dispute the amount. He argues the trial court did not abuse its discretion in determining the amount of income to impute to him or his retroactive obligation. Father also contends that the trial court did not abuse its discretion in declining to award Mother her attorney's fees. Both Mother and Father seek an award of attorney's fees on appeal.

II. Imputed Income

Mother argues that the trial court erred in determining the amount of income to impute to Father. She contends the trial court erred by failing to view the promissory note funds provided to Father by his parents as a gift, rather than as part of a loan, when

determining his income. Furthermore, she contends that the trial court erred by failing to consider the full amount of Father's investment account and the net gains in valuation thereof in determining his income. Father does not challenge the amount of income imputed to him by the trial court. He insists that the trial court did consider the disputed sources of funds raised by Mother when determining the amount of income to impute to him. With regard to consideration of the promissory note, Father argues, in the alternative, that the promissory note reflected a valid loan agreement and should not have been included in his income. Father does not seek to modify the imputed income amount based upon what he implicitly contends was an error by the trial court in considering the promissory note funds, which he indicates are a loan, as part of his income. With regard to the increased valuation of his investment account, Father argues that Mother misapprehends what is appropriately considered to be capital gains, and that the trial court did properly assess his capital gains in imputing income. Accordingly, he argues the trial court properly considered this source of income.

This court's review of a trial court's decision as to child support is reviewed under an abuse of discretion standard. *State ex rel. Groesse v. Sumner*, 582 S.W.3d 241, 250 (Tenn. Ct. App. 2019); *State ex rel. Nichols v. Songstad*, 563 S.W.3d 868, 871 (Tenn. Ct. App. 2018). While the standard for reviewing child support determinations is one of abuse of discretion, "the adoption of the Child Support Guidelines has limited the courts' discretion substantially, and decisions regarding child support must be made within the strictures of the Child Support Guidelines." *Richardson v. Spanos*, 189 S.W.3d 720, 725 (Tenn. Ct. App. 2005). Appellate courts will set aside a discretionary decision by a trial court "only when the court that made the decision applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party." *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008).

The Child Support Guidelines contain a formula for courts to use to determine the appropriate amount of support. Tenn. Code Ann. § 36-5-101(e)(1)(A); Tenn. Comp. R. & Regs. 1240-02-04-.01(1)(d)(1). In making these determinations, the obligor is "the parent that is responsible for payment of the child support obligation. . . ." Tenn. Comp. R. & Regs. 1240-02-04-.02(17). "Generally, the most important finding in a child support proceeding is the obligor's income." *Eldridge v. Eldridge*, 137 S.W.3d 1, 20 (Tenn. Ct. App. 2002) (citing *Anderton v. Anderton*, 988 S.W.2d 675, 680 (Tenn. Ct. App. 1998)).

To determine the obligor's income, the Child Support Guidelines provide a nonexclusive and nonexhaustive list to determine the parent's gross income:

- (i) Wages;
- (ii) Salaries;
- (iii) Commissions, fees, and tips;

- (iv) Income from self-employment;
- (v) Bonuses;
- (vi) Overtime payments;
- (vii) Severance pay;
- (viii) Pensions or retirement plans including, but not limited to, Social Security, Veterans Affairs Department, Railroad Retirement Board, Keoughs, and Individual Retirement Accounts (IRAs);
- (ix) Interest income;
- (x) Dividend income;
- (xi) Trust income;
- (xii) Annuities;
- (xiii) Net capital gains;
- (xiv) Disability or retirement benefits that are received from the Social Security Administration pursuant to Title II of the Social Security Act or from the Veterans Affairs Department, whether paid to the parent or to the child based upon the parent's account;
- (xv) Workers compensation benefits, whether temporary or permanent;
- (xvi) Unemployment insurance benefits;
- (xvii) Judgments recovered for personal injuries and awards from other civil actions;
- (xviii) Gifts that consist of cash or other liquid instruments, or which can be converted to cash, or which can produce income such as real estate, or which reduces a parent's living expenses such as housing paid by others; in whole or in part;
- (xix) Inheritances that consist of cash or other liquid instruments, or which can be converted to cash, or which can produce income such as real estate;
- (xx) Prizes;
- (xxi) Lottery winnings;
- (xxii) Alimony or maintenance received from persons other than parties to the proceeding before the tribunal; and
- (xxiii) Actual income earned during incarceration by an inmate.

Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(1). The formula presupposes that the court is able to determine the obligor's income; accordingly, the fairness of a child support award depends on an accurate determination of each parent's income. *In re Samuel P.*, W2016-01665-COA-R3-JV, 2018 WL 1046784, at *12 (Tenn. Ct. App. Feb. 23, 2018) (citing *Massey v. Casals*, 315 S.W.3d 788, 795 (Tenn. Ct. App. 2009)).

Situations do arise in which a court may "impute" income to a parent. "To 'impute' income means to 'assign or attribute an income level to the parent that may not reflect the parent's actual gross income.'" *Id.* A Tennessee court may impute income to determine appropriate child support:

(I) If a parent has been determined by a tribunal to be willfully underemployed or unemployed; or

(II) When there is no reliable evidence of income due to a parent failing to participate in a child support proceeding or a parent failing to supply adequate and reliable financial information in a child support proceeding; or

(III) When the parent owns substantial non-income producing assets, the court may impute income based upon a reasonable rate of return upon the assets.

Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2). If a Tennessee trial court determines that a parent is willfully underemployed, then the court imputes additional income “to that parent to increase the parent’s gross income to an amount which reflects the parent’s income potential or earning capacity....” Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2)(ii)(II). That total “increased amount” then “shall be used for child support calculation purposes.” *Id.*

The trial court in the present case found that Father was willfully underemployed and, therefore, imputed income for purposes of child support calculations. On appeal neither party challenges the trial court’s finding that Father is underemployed. Through imputation of additional income, as noted above, the trial court set Father’s income for purposes of child support calculations at \$60,000 dollars per year.

In attempting to determine Father’s income and the proper amount to be imputed given his willful underemployment, the trial court confronted a challenging circumstance in the present case. The circumstance confronting the trial court was somewhat reminiscent of Gertrude Stein’s observation regarding Oakland: “[T]here is no there there.”¹ In trying to determine Father’s “income,” there is no there there. Father’s level of engagement and success with working has been inconsistent. He made \$18,000 one year and \$45,000 the next. He lost the highest paying job he held as a result of it exceeding his knowledge and skills. Father, who has a bachelor’s degree in business, was essentially only working at occasional Nashville Predators games for four hours at a time for \$13 dollars an hour as the entirety of his work involvement at the time of the hearing in the present case. He had worked seven such games over the course of the two months before trial, which would mean approximately \$364 dollars earned over two months. Father, however, also has a bachelor’s degree in Business Administration. He also had an investment account with funds originating with his family with more than \$300,000 in investments. Father’s lifestyle was largely funded from his parents and the benevolence of a family friend, who owns the residence where Father lives. The trial court concluded that he was living in a manner that exceeded his actual income. Much of this support came through bills being

¹ Gertrude Stein, EVERYBODY’S AUTOBIOGRAPHY 289 (1937).

paid directly by others rather than being paid through Father. As noted by the trial court judge, “Father for the most part doesn’t pay any reoccurring-bills that most adults would have to pay, whether that be rent, cell phone, car payment, insurance, NES bill from Nashville Electric Service: Father doesn’t pay any of those bills.” The trial court did note, however, that Father did pay his rent in some months.

Working through this amorphous nature of Father’s actual and potential income, the trial court, as noted above, set his imputed income at \$60,000 per year. In reaching this conclusion, the trial court stated that it considered “income from all sources from wages to commissions to income from self-employment, interest income, dividend income, net capital gains, and gifts and those gifts can be what reduces a parent’s living expenses.” Regarding “investment income,” the court further elaborated that it was looking at “dividends, . . . at capital, net capital gains, or capital gains.”

While Mother objects to the trial court considering the promissory note funds from Father’s parents as a loan to Father rather than as a gift, she fails to cite to where in the record such a conclusion is reflected. The oral or written ruling of the trial court does not indicate that it considered the agreement between Father and his parents to constitute a true valid loan agreement for purposes of assessing Father’s child support obligations. To the contrary, the court observed that the Father cannot contract away his child support obligation and concluded that for purposes of child support determination that Father’s agreement with his parents was “void.” Furthermore, the trial court stated that “while Mr. Miller can’t contract away his [child support] duty, . . . there was support on Mr. Miller’s behalf given to the child to Ms. White.” The court also expressly indicated that it was considering gifts given to Father in determining his income. Simply stated, the record does not appear to support Mother’s contention that the trial court considered the promissory note to be a true loan and thereby excluded from calculation in determining Father’s income. Mother has not directed the court to where in the record a contrary conclusion is reflected.

As noted above, Mother also contends that the trial court should have considered the full value of Father’s investment account in determining income. Under the Child Support Guidelines, “[a] parent’s extravagant lifestyle, including ownership of valuable assets and resources (such as an expensive home or automobile), that appears inappropriate or unreasonable for the income claimed by the parent” is a factor to be considered in determining whether an individual is willfully underemployed or unemployed. Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(2)(iii)(IV). The Guidelines also provide that “[w]hen the parent owns substantial non-income producing assets, the court may impute income based upon a reasonable rate of return upon the assets.” Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(2)(i)(III). The trial court concluded that Father was underemployed and imputed income to him, with the inconsistency between his lifestyle and his income being critical to this determination. Thus, the trial court walked through the doorway to imputation of income that could alternatively have been opened by the ownership of a large

asset that is inconsistent with a claimed income level. Additionally, Father's investment account is not a non-incoming producing asset; rather, it produces income including dividends and capital gains that are part of an income calculation. *See* Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(1)(x) & (xiii). Assuming, for purposes of argument, that an unreasonable rate of return could be the basis for imputation, Mother offers no contention or showing that there is anything unreasonable about the rate of return on Father's investment account. Mother has offered no argument that establishes an abuse of discretion by the trial court in its handling of the total value of Father's investment account by the trial court in determining Father's income.

Mother also contends that the trial court erred by failing to consider the change in value of Father's investment account as constituting the net capital gain for child support purposes. The trial court rejected Mother's contention that the valuation change in Father's investment account should be considered as the net capital gain for purposes of determining income for child support. Instead, the trial court relied upon what the Internal Revenue Service regards as capital gains for taxation purposes in determining Father's net capital gains. Father insists that the trial court was correct to do so and contends that Mother's approach is not an accurate reflection of what constitutes a capital gain under Tennessee law for purposes of child support.

The parties both agree that "net capital gains" are considered income for purposes of child support calculations. The dispute centers upon what constitutes a net capital gain. Mother fails to adequately develop her argument that the trial court abused its discretion in determining Father's net capital gains. Mother's argument is conclusory, an assertion that "net capital gains" equals change in valuation of an investment account. She offers no legal authority or any other form of legal argument to demonstrate why her understanding is correct and the trial court's reliance upon the IRS's divergent understanding of capital gains is errant, much less that the trial court's understanding constitutes an abuse of discretion. "[I]t is not our role 'to research or construct a litigant's case or arguments for him or her, and where a party fails to develop an argument in support of his or her contention or merely constructs a skeletal argument, the issue is waived.'" *Sneed v. Bd. of Prof. Resp. of S. Ct.*, 301 S.W.3d 603, 615 (Tenn. 2010). Accordingly, this issue is waived.

We therefore affirm the trial court's imputation of income to Father in the amount of \$60,000 per year.

III. Retroactive Child Support

Mother argues that the trial court erred with regard to its calculation of the retroactive child support award. She contends that the trial court deviated from the retroactive support requirements of the Child Support Guidelines. Father argues that the trial court's ruling as to retroactive child support did not constitute an abuse of discretion.

This court reviews a trial court's decision as to retroactive child support under an abuse of discretion standard. *State ex rel. Kennamore v. Thompson*, No. W2009-00034-COA-R3-JV, 2009 WL 2632759, at *2 (Tenn. Ct. App. Aug. 27, 2009); *see also State ex rel. Williams v. Woods*, 530 S.W.3d 129, 139 (Tenn. Ct. App. 2017). While the standard for reviewing child support determinations is one of abuse of discretion, "the adoption of the Child Support Guidelines has limited the courts' discretion substantially, and decisions regarding child support must be made within the strictures of the Child Support Guidelines." *Richardson*, 189 S.W.3d at 725. Appellate courts will set aside a discretionary decision by a trial court "only when the court that made the decision applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party." *Konvalinka*, 249 S.W.3d at 358.

Tennessee Code Annotated section 36-5-101(e)(1)(A) requires the trial court to "apply, as a rebuttable presumption, the child support guidelines." When the trial court deems that an award of retroactive support is appropriate, the applicable statutes and regulations include a presumption that the retroactive support will be awarded from the date of the child's birth in accordance with the Child Support Guidelines. *See* Tenn. Code Ann. § 36-2-311(a)(11)(A); Tenn. Comp. R. & Regs. 1240-2-4-.06(1) (2008). If the trial court deviates from the Child Support Guidelines, the statutes and regulations mandate that the trial court's decision "shall be supported by written findings in the tribunal's order" explaining the reasons for the determination and specific findings that application of the guidelines would be inappropriate or unjust. *See* Tenn. Code Ann. §§ 36-2-311(a)(11)(B), 36-5-101(e)(1)(A); Tenn. Comp. R. & Regs. 1240-2-4-.06(2), -.07(1) (2008). If the trial court finds "that the application of the guidelines would be unjust or inappropriate" the trial court "shall state the amount of support that would have been ordered under the child support guidelines and a justification for the variance from the guidelines." Tenn. Code Ann. § 36-5-101(e)(1)(A).

Tennessee Code Annotated section 36-2-311(11)(A) requires that

When making retroactive support awards pursuant to the child support guidelines established pursuant to this subsection (a), the court shall consider the following factors as a basis for deviation from the presumption in the child support guidelines that child . . . support for the benefit of the child shall be awarded retroactively to the date of the child's birth:

- (i) The extent to which the father did not know, and could not have known, of the existence of the child, the birth of the child, his possible parentage of the child or the location of the child;
- (ii) The extent to which the mother intentionally, and without good cause, failed or refused to notify the father of the existence of

the child, the birth of the child, the father's possible parentage of the child or the location of the child; and

- (iii) The attempts, if any, by the child's mother or caretaker to notify the father of the mother's pregnancy, or the existence of the child, the father's possible parentage or the location of the child.

None of these factors are applicable in the present case. Mother promptly informed Father and sought to engage him in parenting the Child.

In the present case, the trial court set child support at \$1,423 per month pursuant to the Child Support Guidelines. In reaching its conclusion regarding retroactive child support, the trial court determined that Father's income situation, though its precise sources had varied, had been consistent from the time of the child's birth. In accordance with its overall income and child support determination, the trial court ordered retroactive child support of \$7,115 for the period of October 2018, when the Child was born, to February 2019. This is the time period during which Father did not make any regular child support payments, providing only \$37 in child support. The total reflects five months of failure to pay child support at the amount of \$1,423.

Father began paying child support in March 2019 at an amount of \$300 every two weeks. He continued at this rate until he increased his amount of payment to \$1400 in August 2019. The trial court provided for no retroactive child support once Father began making regular payments. Assessed against the trial court's conclusion as to the appropriate amount of child support dating to the child's birth, which was set at \$1,423, the payments during these time periods deviate from the statutory and guideline presumptions with regard to retroactive support. For the March 2019 to August 2019 time period in which Father paid approximately \$600 a month, Father's payments were deficient by approximately \$823 dollars per month.² After August 2019, when Father's payments increased to \$1,400, they were, nevertheless, deficient by \$23 per month. In deviating from the presumptions established by statute and the guidelines, the trial court did not adhere to the required procedures. The trial court did not provide any indication of what equities might underlie such deviation nor does the record provide support for the trial court's deviation from the statutory and guideline presumptions. Consequently, we conclude that the trial court erred in its retroactive support calculation. On remand, the trial court should determine the total amount of the deficiency in retroactive support and modify the retroactive support award accordingly.

IV. Attorney's Fees for Trial Court Proceedings

² The reference to approximate deficiency rather than a precise amount per month is related to Father's payments being made every two weeks rather than monthly. Given the record before this court, this creates challenges in determining the exact amount of deficiency for this time period.

The trial court declined to award attorney's fees to either party finding that each party should bear the costs of their own attorney's fees. Mother argues this decision constitutes error; Father insists that the trial court's decision is correct. Mother contends that she is entitled to attorney's fees pursuant to Tennessee Code Annotated section 36-5-103(c) (effective July 1, 2018, to June 30, 2021), which provides,

A prevailing party may recover reasonable attorney's fees, which may be fixed and allowed in the court's discretion, from the non-prevailing party in any . . . proceeding to enforce, alter, change, or modify any decree of alimony, child support, or provision of a permanent parenting plan order, or in any suit or action concerning the adjudication of the custody or change of custody of any children, both upon the original divorce hearing and at any subsequent hearing.³

Mother asserts that she qualifies as the prevailing party because at the initiation of her petition Father was not paying any regular child support and the transformation from non-payment to a regular child support award of \$1,423 per month warrants an award of attorney's fees. Father counters that the trial court embraced his proposed parenting schedule, rather than Mother's proposed schedule, and that the child support amount was only \$23 per month different than the amount proposed by Father prior to trial. He contends that he, not Mother, is the prevailing party. Father also asserts that Mother's approach to litigation, especially with regard to discovery but also in connection with litigating child support determinations for which Mother sought to impute an income of \$144,000 per year, were unreasonable and significantly increased the costs of litigation in this case.

A trial court's award of attorney's fees under Tennessee Code Annotated section 36-5-103 lies within its discretionary authority, and "absent an abuse of discretion, appellate courts will not interfere with the trial court's finding." *Eberbach v. Eberbach*, 535 S.W.3d 467, 475 (Tenn. 2017). Appellate courts will set aside a discretionary decision by a trial court "only when the court that made the decision applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party." *Konvalinka*, 249 S.W.3d at 358.

Based upon the facts, arguments, and authority presented by Mother and Father as well as the record before us, we cannot conclude that Mother has made a sufficient showing to demonstrate that the trial court abused its discretion in declining to award her attorney's fees in connection with the proceedings before the trial court.

³ With regard to Tennessee Code Annotated section 36-5-103(c), the statute was amended effective July 1, 2021, and "nonprevailing" has replaced "non-prevailing" in the updated version of the statute.

V. Attorney's Fees for Appellate Court Proceedings

Mother and Father both seek attorney's fees in connection with the proceedings before this court.⁴ The award of such attorney's fees is a discretionary matter for this court. *Ellis v. Ellis*, 621 S.W.3d 700, 709 (Tenn. Ct. App. 2019) (quoting *Luplow v. Luplow*, 450 S.W.3d 105, 119 (Tenn. Ct. App. 2014)). In determining whether an award of attorney's fees is warranted, this court should consider, among other factors, "the ability of the requesting party to pay the accrued fees, the requesting party's success in the appeal, whether the requesting party sought the appeal in good faith, and any other equitable factor that need be considered." *Baxter v. Rowan*, 620 S.W.3d 889, 897 (Tenn. Ct. App. 2020) (citing *Shofner v. Shofner*, 181 S.W.3d 703, 719 (Tenn. Ct. App. 2004)).

We have considered each of these factors. We note that the parties' handling of the appeal appears to have been in good faith. We also note that Mother prevailed on appeal with regard to retroactive child support while Father prevailed as to the trial court's ruling on the amount of income to be imputed and the question of attorney's fees before the trial court. In the exercise of our discretion as to this matter, we decline both parties' request for attorney's fees in this appeal, and like the trial court, leave both parties bearing their own respective attorney's fees.

VI.

For the foregoing reasons, we affirm the judgment of the trial court in part, reverse the trial court in part, and remand to the trial court to determine the deficiency in the retroactive child support payment between March 2019 and the date Father began paying \$1,423 per month in child support and to modify the retroactive child support amount due from Father accordingly. Costs of this appeal shall be split evenly and taxed to the appellant, Maize F. White, and the appellee, Thomas Gray Miller, for which execution shall issue if necessary.

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⁴ In seeking such fees, neither party expressly cites a statutory or other basis. From their arguments, we are able to discern that they are seeking attorney's fees on appeal pursuant to Tennessee Code Annotated section 36-5-103(c), rather than, for example, Tennessee Code Annotated section 27-1-122 (2017) (providing for attorney's fees in connection with frivolous appeals).