

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
May 22, 2006 Session

**KENNY ALLEN NOAH v. MELISSA GAIL NOAH**

**Appeal from the Chancery Court for Washington County  
No. 6920 G. Richard Johnson, Chancellor**

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**No. E2005-02511-COA-R3-CV - FILED JUNE 19, 2006**

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Following the parties' divorce in 1995, considerable disagreement between them arose as to whether Kenny Allen Noah ("Father") should continue to pay alimony to Melissa Gail Noah ("Mother"), whether Father was in arrears on his child support, and the appropriate amount of his current child support payment. The Trial Court ordered the parties to mediate their disagreements and following a successful mediation, the parties entered into a handwritten settlement agreement (the "Agreement"). The Agreement required Father, among other things, to provide current income information so the amount of his child support payment could be calculated in accordance with the Guidelines. When Father failed to timely provide this information, Mother filed a motion asking the Trial Court to enforce the Agreement by requiring Father to provide the income information. A hearing was held on Mother's motion, but neither Father nor his attorney were present. Instead of ordering Father to provide the requested income information, the Trial Court determined Father's child support payment based on available information and imputed \$18,000 in business income to Father, while not allowing Father any offsets for claimed related business expenses. Father filed a Tenn. R. Civ. P. 60.02 motion for relief from the judgment which the Trial Court denied. We vacate the judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the  
Chancery Court Vacated; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and SHARON G. LEE, JJ., joined.

Douglas R. Beier, Morristown, Tennessee, for the Appellant Kenny Allen Noah.

Clifton L. Corker, Johnson City, Tennessee, for the Appellee Melissa Gail Noah.

## OPINION

### Background

The parties were divorced in January of 1995. A few months later and by agreement, the parties' Marital Dissolution Agreement ("MDA") was amended to provide that Father would pay alimony *in futuro* of \$350 per month beginning thirty days after the closing on the sale of the marital residence. In August of 2003, Father filed a petition to modify or terminate his alimony obligation. According to Father, there had been a material change in circumstances in that Mother, who was unemployed when the MDA was amended, had become employed full-time with a substantially increased income and a corresponding decrease in her need for alimony. Mother responded to the petition and while she did not deny that she had a full-time job, she did deny that her need for alimony had decreased and that there had been a material change in circumstances.

In October of 2004, Mother filed a motion to modify Father's child support payment and for contempt. Mother claimed Father was sheltering money in order to reduce his child support payments. Mother also claimed Father was in contempt for his failure to comply with previous court orders by refusing to timely provide information regarding his tax returns and work bonuses, and for his failure to timely pay child support and medical and dental expenses not otherwise covered by insurance.

A hearing was held on February 1, 2005, after which the Trial Court referred all the disputed issues to mediation. The parties mediated the alimony and child support issues as ordered by the Trial Court and on March 14, 2005, the parties entered into the handwritten Agreement. The Agreement provides, in its entirety, as follows<sup>1</sup>:

1. Child support going forward will be calculated in accordance w/ the new guidelines. The parties will immediately share present income information to calculate monthly child support and to develop the pro rata formula to be used for other guidelines cost – medical and dental insurance, uncovered medical and dental expenses, work-related day care, etc. The language on child support in the existing order, including "paragraphs 9 and 10" is eliminated. M will continue to provide the children's health and dental insurance through her employer. M will get both tax deductions in 2005 and thereafter. She can have both deductions in 2003 by amended return if she wishes.
2. The parties were in dispute as to whether there was child support arrearage and as to whether alimony should be

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<sup>1</sup> The Agreement refers to Mother as "M" and Father as "F".

terminated or otherwise modified. These issues are resolved in full on the following terms:

- a) Alimony for the first ½ of March 2005 will be paid. Alimony thereafter is terminated.
  - b) F will pay M \$5,000 on or before 4/15/05. He will pay M an additional \$1,250 on or before 6/15/05. In addition to those payments, F will pay M \$350.00 per month for 36 months, with each payment on the 1<sup>st</sup> of the month beginning April 1, 2005. All of these payments will be treated as payment of child support arrearage.
- 3 Each side pays their own atty fees & expenses. They will equally divide any unbilled clerk's court costs.
  4. The financial settlement set forth here resolves all financial issues raised in the pleadings, including any claims for arrearages related to health insurance premiums, medical costs, preschool or day care costs, life insurance premium costs, etc.
  5. F will mail or e-mail M a tax form, signed by him, enabling her to file the amended 2003 return.

The Agreement was signed by both parties and their respective attorneys.

On June 10, 2005, Mother filed a motion to enforce the Agreement asking the Trial Court to compel Father to comply with the Agreement by providing his current income information to her. According to the motion, Mother's counsel had requested current income information from Father "including income not just from his job but from his numerous business enterprises which he declares on his tax return to be operating." Mother stated that she had not received any information from Father and her attorney consequently was unable to "calculate child support unless he knows the current wages and income of the Father." Along with the motion, Mother filed a Notice of Hearing indicating that the motion had been scheduled for a hearing on July 5, 2005.

The hearing took place as scheduled on July 5, 2005. However, neither Father nor his attorney were present. Following the hearing, the Trial Court entered an order on July 29 finding that the parties had entered into an enforceable mediated settlement agreement. The Trial Court then stated:

Upon further inquiry as to what the appropriate current child support should be, Counsel for Respondent advised that he had requested from the Petitioner/Counter-Respondent a current wage statement which was to be provided as part of the Mediation Agreement as well as income information for the Petitioner/Counter-Respondent's businesses so that child support could be calculated consistent with the child support guidelines. Counsel advised that no current wage information was provided to him by the Petitioner/Counter-Respondent and, therefore, he has sought to base child support on the Petitioner/Counter-Respondent's deposition testimony that he earned \$91,000 per year and a Schedule C for his business for 2003 attached to his tax return.... Upon review of the Schedule C it appears that approximately \$18,000 was received in gross income, however, the legitimacy of the expenses, Counsel could not comment on and Mr. Noah has not cooperated consistent with the agreement, and therefore, this Court finds that the gross income shall be imputed to the Petitioner/Counter-Respondent, Kenny Allen Noah, in the amount of \$18,000, bringing the total wages earned to be \$109,000 per year. This translates into a monthly child support obligation of \$1,560.00.... (emphasis in original)

The Schedule C from Father's 2003 income tax return which was referred to by the Trial Court shows Father having \$18,457 in gross income from his operation of an express lube business. However, that same schedule also shows related operating expenses totaling \$43,038, for an overall net loss of \$24,581.

On August 26, 2005, Father filed a Motion for Relief of Judgment/Motion to Vacate and Set Aside Order of July 29, 2005. The motion was filed pursuant to Rules 59 and 60 of the Tennessee Rules of Civil Procedure. Father claimed he was entitled to relief from the judgment pursuant to Rule 60 on the basis of mistake, inadvertence, surprise and/or excusable neglect. According to the motion, following the mediation Father's attorney faxed a proposed order to Mother's attorney which incorporated into an order the terms of the Agreement. Counsel for the parties remained in contact in an attempt to come to an agreement on the terms of the order, but apparently there was disagreement regarding the intent of the parties as it pertained to child support. More specifically, Mother claimed the parties had agreed that a new child support amount would be established regardless of whether the new amount was a significant variance from the old amount. Father claimed there had to be a significant variance before his child support obligation could be modified. Although Father's W-2 statements had been provided, Mother's attorney did not consider this sufficient and wanted more documentation concerning Father's then current income, in particular as it related to his business income.

As noted previously, the Notice of Hearing was sent to Father's attorney on June 10, 2005. Unbeknownst to Mother's attorney, the father of Father's attorney had died suddenly on June

6. Father's attorney was out of town attending to his father's funeral when his office received the Notice of Hearing, which apparently was placed in the file by an assistant without Father's attorney ever being apprised of it. As a result, Father's attorney was unaware that a hearing was scheduled for July 5, 2005.

Following a hearing on Father's Motion for Relief of Judgment/Motion to Vacate and Set Aside Order, the Trial Court entered an order denying the motion. Father appeals claiming the Trial Court erred when it denied his Tenn. R. Civ. P. 60.02 motion for relief from the judgment. Father's second issue is his claim that the Trial Court erred in the manner in which it enforced the Agreement wherein it imputed \$18,000 in business income to Father without offsetting any related business expenses.

### Discussion

The applicable standard for reviewing a trial court's grant or denial of a Tenn. R. Civ. P. 60.02 motion is set forth in *Henry v. Goins*, 104 S.W.3d 475 (Tenn. 2003):

In reviewing a trial court's decision to grant or deny relief pursuant to Rule 60.02, we give great deference to the trial court. *See Underwood v. Zurich Ins. Co.*, 854 S.W.2d 94, 97 (Tenn. 1993). Consequently, we will not set aside the trial court's ruling unless the trial court has abused its discretion. *See id.* An abuse of discretion is found only when a trial court has "applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining." *State v. Stevens*, 78 S.W.3d 817, 832 (Tenn. 2002) (quoting *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997)). The abuse of discretion standard does not permit an appellate court to merely substitute its judgment for that of the trial court. *See Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001).

*Goins*, 104 S.W.3d at 479.<sup>2</sup>

In *Goins*, the Supreme Court also note that the Tenn. R. Civ. P. 60.02 "escape valve" should not be opened easily, but is to be used to protect parties "from possible inequity that might otherwise arise from the unrelenting imposition of finality imbedded in our procedural rules." *Id.* at 482 (quoting *Toney v. Mueller Co.*, 810 S.W.2d 145, 146 (Tenn.1991)).

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<sup>2</sup> To the extent Father's motion for relief from the judgment should be treated as a Tenn. R. Civ. P. 59.04 motion to alter or amend the judgment, we likewise would review the Trial Court's denial of such a motion under the abuse of discretion standard. *See Chambliss v. Stohler*, 124 S.W.3d 116, 120 (Tenn. Ct. App. 2003). The ultimate result we reach in this case would not be affected by whether we treated Father's motion as a Rule 59.04 motion or a Rule 60.02 motion.

Returning to the facts of the present case, prior to the mediation there was considerable disagreement between the parties over child support, child support arrearages, alimony, etc. Both parties engaged in good faith mediation and an agreement on the various issues was reached. After an agreement was reached, the parties began to disagree on the intent of the language contained in the Agreement regarding child support. Specifically, the parties were in disagreement regarding whether, under the Agreement, there needed to be a significant variance in Father's child support payment before that payment could be adjusted. Because Father had not furnished Mother with current information regarding his income, Mother's counsel was unable to calculate Father's child support payment under the Guidelines. Accordingly, Mother filed a motion to enforce the Agreement asking the Trial Court to take appropriate action to force Father to provide current income information as he had agreed to do in the Agreement. Mother did not ask the Trial Court to determine the parties intent under the Agreement or to determine what Father's child support obligation should be. In short, Mother wanted current income information from Father. Mother filed a motion requesting the Trial Court to order Father to provide that information and scheduled a hearing with the hopes of obtaining such an order. Because neither Father nor his attorney were present, the Trial Court essentially granted a default judgment against Father when it went well beyond the relief sought in Mother's motion and imputed \$18,000 in business income to Father and also refused to offset any related business expenses, neither of which was requested by Mother in her motion. Again, we emphasize that what Mother was seeking in her motion was an order compelling Father to provide current income information. Although the Trial Court did not technically enter a Tenn. R. Civ. P. 55 default judgment against Father, its order had the same effect. "Courts construe requests for relief pursuant to Rule 60.02 much more liberally in cases involving default judgment than in cases following a trial on the merits." *Goins*, 104 S.W.3d at 481.

At the hearing on Father's Rule 60.02 motion, the Trial Court determined that any neglect that may have happened was by Father's attorney's assistant who filed away the Notice of Hearing without informing Father's attorney of its existence upon his return from his father's funeral. The Trial Court determined that such neglect was not attributable to Father's attorney and, therefore, could not form the basis for granting a Tenn. R. Civ. P. 60.02 motion. Even if this analysis was correct<sup>3</sup>, we nevertheless believe Father proved a sufficient basis for relief from the judgment based on surprise. The "surprise" being the Trial Court's going far beyond the scope of the relief sought in Mother's motion. The Trial Court had various options available to it when Father and his attorney failed to appear at the hearing, including granting Mother the relief she requested in her motion by ordering Father to provide the necessary income information. If Father did not comply with such an order, his noncompliance could have been punishable via contempt sanctions.

Even though Father's attorney may have been afforded notice of the hearing on Mother's motion seeking current income information, neither Father nor his attorney were given notice that the Trial Court was going to calculate Father's child support payment at the hearing and determine if any income should be imputed to Father based on his business ventures. These facts

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<sup>3</sup> We need not decide whether the Trial Court was correct when ruling that any neglect by the assistant could not be attributed to the attorney.

likely would also support a claim for Rule 60.02 relief based on excusable neglect. *See Goins*, 104 S.W.3d at 480 (“When a party has no notice of a critical step in a court proceeding, the circumstances may make out a case of excusable neglect [pursuant to Tenn. R. Civ. P. 60.02].”) (citations omitted).

Interestingly, at the end of the hearing where the Trial Court denied Father’s motion for relief from the judgment, the Trial Court stated the following:

[I]t appears to me that having said all of that that the appropriate thing to do would be for somebody to file a motion to set the child support pursuant to the child support Law, including the child support Guidelines based upon current information, income information....

Implicit in this ruling is the fact that the Trial Court was aware that imputing income of \$18,000 to Father without allowing for any offset for legitimate business expenses was not consistent with the Guidelines.

We conclude that the Trial Court erred when it denied Father’s Tenn. R. Civ. P. 60.02 motion for relief from the judgment based on surprise and/or excusable neglect. The Trial Court’s judgment determining the amount of Father’s income and current child support payment is vacated. This case is remanded to the Trial Court to require Father to provide current income information, if he has not already done so, and to determine Father’s child support obligation consistent with the Guidelines and the Agreement.<sup>4</sup>

### **Conclusion**

The judgment of the Trial Court is vacated and this cause is remanded to the Trial Court for further proceedings consistent with this Opinion and for collection of the costs below. Exercising our discretion, costs on appeal are taxed 50% to the Appellant, Kenny Allen Noah, and his surety, and 50% to the Appellee, Melissa Gail Noah.

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D. MICHAEL SWINEY, JUDGE

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<sup>4</sup> At the hearing on Father’s Rule 60.02 motion, counsel for Father acknowledged that the parties agreed at mediation that Father’s business losses would not be offset against his income from his full-time job when determining his child support obligation. For example, if Father’s net income was \$50,000 from his full-time job, any net business losses would not be used to lower his income from the full-time job for purposes of calculating child support. Since this was part of the negotiated Agreement between the parties, our remanding of this case to the Trial Court to determine Father’s child support payment in no way alters this or any similar aspect of the Agreement.