

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA12-451

J. DAVID JOHN

APPELLANT

V.

MEGAN MARIE BOLINDER

APPELLEE

Opinion Delivered APRIL 10, 2013

APPEAL FROM THE BENTON
COUNTY CIRCUIT COURT
[NO. DR-2010-1327-6]

HONORABLE DOUG SCHRANTZ,
JUDGE

AFFIRMED ON DIRECT APPEAL;
REVERSED AND REMANDED ON
CROSS-APPEAL

BILL H. WALMSLEY, Judge

Appellant David John appeals from the trial court's order deciding custody, visitation, and child-support issues and the award of attorneys' fees in favor of appellee Megan Bolinder. Appellee has filed a cross-appeal on the child-support issue. We affirm on direct appeal and reverse and remand on cross-appeal.

On July 27, 2010, appellant filed a petition in Benton County Circuit Court to establish paternity of his son, I.J., born March 12, 2010. Appellant had previously filed an action in Michigan, where his son and appellee were residing. He alleged that appellee was now a resident of Benton County, whereas he remained a resident of Illinois. Appellant requested that the court determine custody and visitation. After a hearing in September 2010, a temporary order was entered granting visitation to appellant and establishing temporary child support.



A final hearing was held in January 2012. The trial court awarded custody to appellee and granted appellant visitation. Appellant was ordered to pay \$515 per month in child support and to provide the transportation costs for visitation. Appellant was also ordered to pay appellee's attorneys' fees.

I. *Custody*

Appellant argues that the trial court erred in awarding custody to appellee because it was in the best interest of the child to award custody to him. We review child-custody cases de novo, but we will not reverse a circuit court's findings unless they are clearly erroneous. *Donato v. Walker*, 2010 Ark. App. 566, 377 S.W.3d 437. Because the question of whether the circuit court's findings are clearly erroneous turns largely on the credibility of the witnesses, we give special deference to the superior position of the trial judge to evaluate the witnesses, their testimony, and the child's best interest. *Id.*

Appellant argues that he is more stable than appellee mentally and morally, that appellee's home is a hostile environment for the child, and that appellee has interfered with his visitation and relationship with the child. Dr. John Childers, a psychologist and licensed professional counselor, evaluated both parties and diagnosed appellee with "major depressive disorder recurrent." Appellee admitted that she had an affair and attempted suicide in 2001. Appellee argues that in the eleven years since then, she has been in counseling, taken medication, had no suicidal ideation, maintained gainful employment, and earned advanced degrees. Appellant's allegations of multiple affairs and "impulsive and deviant sexual activity" were disputed by appellee. When questioned by the court, Dr. Childers stated that he had



been presented with no facts of inappropriate behavior that would suggest appellee was not qualified to be a primary custodian.

Contrary to appellant's arguments, testimony established that appellee and the child led happy lives living in a comfortable home with her parents. Appellee's mother cares for the child while appellee works, and appellee's flexible schedule allows her to spend most afternoons with the child. Lastly, appellant argues that appellee has only allowed him the bare minimum visitation without court intervention and that she once refused his visitation without justification. Appellee notes that visitation was modified by agreement of the parties on several occasions, and they did not require a hearing on visitation issues between the first temporary hearing in the fall of 2010 and the final hearing in January 2012. Deferring to the trial court's ability to judge the credibility of the witnesses, we hold that the custody decision was not clearly erroneous.

II. *Child Support*

At trial, the court found that there was no credibility in appellant's tax returns and that it could not accept them "as being any kind of measure of his actual income." The court stated that it was apparent from his lifestyle, the money passing through his bank account, and his credit-card statements that appellant enjoyed more than the \$40,000-a-year income he testified to and reported on his tax returns. The court found that the expenses he admitted to were "somewhat lacking in terms of veracity." However, the court stated that it did not have any basis to impute income because net worth was not established. At trial, the court relied on the 2009 tax returns and calculated appellant's child-support obligation to be \$494



per month. In its order, the court used appellant's 2008 and 2009 tax returns to calculate his income and set child support at \$515 per month.

Appellant argues that the trial court erred in refusing to consider his most recent income tax return. He argues that the trial court should have averaged his income from the 2009 and 2010 tax returns and ultimately set child support at \$379 per month. The 2010 tax return was admitted at trial, but it was not yet signed or filed.

On cross-appeal, appellee argues that the trial court erred in using any of the tax returns once determining that they were unreliable. Appellee argues that the trial court should have imputed additional income because there was ample evidence to demonstrate that appellant was the recipient or beneficiary of additional funds over the amounts claimed on his tax returns. She notes the large sums of money passing through his bank account and the fact that he did not pay rent or utilities, employed a housekeeping and yard service, and admitted he was underemployed. Appellant argues that the majority of the deposits and withdrawals in his checking account were for construction expenses on his parents' home and other deposits were from loans. However, he also testified that he traveled internationally and paid \$30,000 to a private investigating agency to conduct surveillance on appellee.

Our standard of review for an appeal from a child-support order is *de novo*, and we will not reverse a finding of fact by the circuit court unless it is clearly erroneous. *Wright v. Wright*, 2010 Ark. App. 250, 377 S.W.3d 369. In reviewing a circuit court's findings, we give due deference to that court's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Id.* However, a circuit court's conclusion



of law is given no deference on appeal. *Id.*

In determining an appropriate amount of child support, courts are to refer to the family-support chart contained in our Administrative Order Number 10, which provides a means of calculating child support based on the payor's net income. Ark. Code Ann. § 9-12-312(a)(2) (Repl. 2009). Income is defined as "any form of payment, periodic or otherwise, due to an individual, regardless of source, including wages, salaries, commissions, bonuses, workers' compensation, disability, payments pursuant to a pension or retirement program, and interest less proper deductions[.]" Ark. Sup. Ct. Admin. Order No. 10(II)(a). It is well established that this definition of income is broadly construed, intended to encompass the widest range of potential income sources. *Wright, supra*. The administrative order also states that

[f]or self-employed payors, support shall be calculated based on the last two years' federal and state income tax returns and the quarterly estimates for the current year. A self-employed payor's income should include contributions made to retirement plans, alimony paid, and self-employed health insurance paid; this figure appears on line 22 of the current federal income tax form. Depreciation should be allowed as a deduction only to the extent that it reflects actual decrease in value of an asset. Also the court shall consider the amount the payor is capable of earning or net worth approach based on property, life-style, etc.

Ark. Sup. Ct. Admin. Order No. 10(III)(c). Our supreme court in *Tucker v. Office of Child Support Enforcement*, 368 Ark. 481, 247 S.W.3d 485 (2007), clarified when the trial court should proceed with the income-tax method of calculation and when it should use a net-worth approach:

Pursuant to Administrative Order No. 10, Section III(c), for self-employed payors, the circuit court should first consider the last two years' federal and state income tax returns and the quarterly estimates for the current year. A self-employed payor's



income should include contributions made to retirement plans, alimony paid, and self-employed insurance paid. Depreciation should be allowed only to the extent that it reflects actual decrease in value of an asset.

If the circuit court determines that the tax returns are unreliable, then it shall make specific findings explaining the basis of its determination. The circuit court shall then proceed using the net-worth method. The circuit court shall establish a beginning net worth at the start of the relevant period and an ending net worth at the end of the period, considering living expenses and allowable deductions for the same period. Additionally, the circuit court shall consider the following factors: (1) the impact of inflation or deflation on the payor's net worth; (2) liquidity of the payor's assets; (3) the payor's cash flow; (4) the payor's current and long-term financial obligations; (5) the payor's lifestyle; and (6) any other relevant factors. After determining the payor's disposable income, the circuit court shall calculate child support in accordance with the child-support guidelines.

368 Ark. at 489–90, 247 S.W.3d at 492 (emphasis added) (citations omitted).

We hold that it was error for the trial court to calculate appellant's income based on his tax returns after determining that the tax returns were not credible. As stated in *Tucker*, available tax returns are of no use if they are unreliable. Administrative Order No. 10(III)(c) provides that the court can “consider the amount the payor is capable of earning or a net worth approach based on property, life-style, etc.” Section (III)(d) allows the court to impute income in cases such as this one, stating in part:

If a payor is unemployed or working below full earning capacity, the court may consider the reasons therefor. If earnings are reduced as a matter of choice and not for reasonable cause, the court may attribute income to a payor up to his or her earning capacity, including consideration of the payor's life-style.

The trial court found that appellant was earning more than his reported \$40,000 salary and questioned him regarding his underemployment. We reverse and remand on cross-appeal and direct the trial court to use an alternative method to determine appellant's income.

III. Visitation



Appellant argues that the trial court abused its discretion in ordering him to pay all of the costs of transportation for exercising his visitation with the child. He notes that each visitation requires him to buy two round-trip tickets for himself and one round-trip ticket for the child. He argues that the parties are financial equals and that appellee should have to pay one-half of the costs because she moved to Arkansas. As stated above, the trial court did not find appellant's reported income credible. We see no error and affirm on this point.

IV. *Attorneys' Fees*

Appellant argues that the parties' financial situations are substantially equal and that the amount of fees awarded is excessive because there were no novel or complex issues. He argues that he should not have been ordered to pay fees for tasks that were unnecessary and did not result in any evidence at trial and that the fee should at least be reduced for fees he had previously been ordered to pay. He also complains that it was error to award costs; however, the trial court's order did not award any costs to appellee.

In domestic-relations proceedings, the circuit court has the inherent power to award attorney's fees, and the decision to award fees and the amount thereof are matters within the discretion of the circuit court. *Coker v. Coker*, 2012 Ark. 383, 423 S.W.3d 599. Absent an abuse of that discretion, an award of attorney's fees will not be disturbed on appeal. *Id.* Appellee requested \$47,970.18 in attorneys' fees, "less the \$2010.00 previously paid by Plaintiff on September 15, 2011." The court awarded \$45,960 in fees, noting in its letter to the parties that appellant's resources seemed to be "unlimited when it comes to use of the legal process" against appellee. The court was familiar with the parties and their level of



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cooperation, had heard evidence of their financial abilities, and had before it appellee's counsel's documentation of time and expenses. We hold that the trial court did not abuse its discretion and affirm on this point.

Affirmed on direct appeal; reversed and remanded on cross-appeal.

WYNNE and BROWN, JJ., agree.

Conner & Winters, LLP, by: *G. Alan Wooten* and *Vicki Bronson*, for appellant.

Keith, Miller, Butler, Schneider & Pawlik, PLLC, by: *Kristin L. Pawlik*, for appellee.