Cite as 2010 Ark. App. 580

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA 09-1393

	Opinion Delivered SEPTEMBER 8, 2010
JANETTE HOPKINS APPELLANT	APPEAL FROM THE BAXTER COUNTY CIRCUIT COURT [NO. DR-2003-144-4]
V.	HONORABLE JOHN R. PUTMAN, JUDGE
JONATHAN HOPKINS APPELLEE	AFFIRMED

JOHN B. ROBBINS, Judge

This is an appeal from an order of the Baxter County Circuit Court modifying a father's child-support obligation. Appellant Janette Hopkins contends that the trial court erred in reducing appellee Jonathan Hopkins's monthly child support from $486 to $381. More precisely, Janette argues that the trial judge erred in modifying child support because the modification was made in reliance on matters in the record never made available to her. We affirm.

Our standard of review for an appeal from a child-support order is de novo on the record; we will not reverse a finding of fact by the circuit court unless it is clearly erroneous. *Ward v. Doss*, 361 Ark. 153, 205 S.W.3d 767 (2005). The party seeking a modification of child support bears the burden of proof to demonstrate a material change in circumstances. *Reynolds v. Reynolds*, 299 Ark. 200, 771 S.W.2d 764 (1989); *Morehouse v. Lawson*, 94 Ark.

App. 374, 231 S.W.3d 86 (2006). A trial court's determination of fact, whether there are sufficient material changes, will not be reversed on appeal unless it is clearly erroneous. *Ritchey v. Frazier*, 57 Ark. App. 92, 940 S.W.2d 892 (1997). In child-support cases, it is the ultimate task of the trial judge to determine the expendable income of a child-support payor. *Tucker v. Tucker*, 96 Ark. App. 194, 239 S.W.3d 532 (2006).

An overview of the events leading up to this appeal is important. The parties were divorced in April 2004. All other issues, including custody, visitation, and division of debts and assets, were reserved to a later date. Ultimately, Janette was granted custody of their three children, Jonathan was granted certain visitation rights, and Jonathan paid child support. An agreed order set support at $486 per month. The parties continued with their legal discord over several years, Jonathan primarily complaining about not being allowed proper visitation, and Janette primarily complaining about Jonathan's failure to provide evidence of his earnings and failure to pay any child support since January 2008.

A hearing was conducted on May 22, 2008, the leading subject of which was visitation. Child support was considered but not resolved at that hearing. Jonathan testified that he stopped paying child support since he had been approved for social-security disability, believing that those government benefits paid to the children replaced his child support. At the conclusion, the judge announced that he would have Jonathan submit an Affidavit of Financial Means, current income information with documentation, including social security and other sources of income, and "that will set it." Janette made no objection and, at her

request, the judge gave Jonathan a one-week deadline. The record reflects that Jonathan submitted an Affidavit of Financial Means, executed by him on May 29, 2008, seven days after the hearing.[1]

An order regarding the visitation issues was filed on July 1, 2008, noting the trial court's intention to issue a separate order regarding child support. Many months later, on April 9, 2009, the judge sent the attorneys a letter seeking assistance in officially determining Jonathan's monthly take-home pay because "the record is hopelessly unclear." On May 11, 2009, the judge sent another letter to the attorneys, stating that Jonathan's current monthly child support should be $842. The letter asked if either attorney disagreed with that calculation, requiring a response within one week.

On June 15, 2009, the trial judge wrote to the attorneys once more, reiterating that "from the information submitted to the court" his calculations set Jonathan's child-support obligation at $842. This letter then stated, "Does either party dispute this calculation? If so, we need to have a hearing? Let me know your client's position as soon as possible."

Janette's attorney[2] responded on June 17, 2009, stating that Jonathan's attorney provided a copy of a letter dated July 3, 2008, reflecting that Jonathan's VA benefits were $2985 per month, which translated into a child-support obligation of $854, slightly more than

[1]The Affidavit was made part of the record by our court's grant of a motion by Jonathan to supplement the record. The trial court found that the Affidavit was inadvertently not included in the record when it was initially brought up on appeal.

[2]Janette had fired her former attorney and was represented by a new attorney in this correspondence.

the judge's figure. Her attorney stressed that no documentation of his 2008 tax returns had been provided, and he asked that Jonathan's attorney provide those documents as he was earlier ordered to do. This letter stated that there was no need for an additional hearing since the documentation should reflect Jonathan's current income.

Jonathan's attorney sent the judge's June 15th letter back to the judge on June 17, writing atop the letter that "we agree with this [$842] calculation." This notation was signed by his attorney. Jonathan's attorney wrote a separate letter to the judge on June 22, stating that this was the first time he had been asked by Janette for his 2008 income information. His attorney stated, however, that he was asking Jonathan to provide it so that he could forward it to the judge and Janette's attorney.

On August 10, 2009, the judge sent a letter to the attorneys giving them until noon on August 14 to inform him whether to have the remaining issues decided on the record as it then-existed, or to have an additional evidentiary hearing. Janette's attorney wrote back on August 14, stating that she wanted the court to make a finding "based upon matters in the record as they existed on May 22, 2008, alone." Her attorney's letter further stated that it would not be proper to consider evidence after the hearing because it would not be of record nor subject to cross examination. The letter expressed that any further "evidence" was no more than letters back and forth among the attorneys and the judge.

The judge sent both parties a letter dated August 17, 2009, stating that he was abiding by Janette's request and "only considered the existing evidence in the record." The order

recited that Jonathan's "Affidavit of Financial Means reflects that his monthly income as of May 22, 2008 was $1,171.00" translating into a monthly child-support obligation of $381 per month. The letter accompanying the order stated in relevant part:

> The court would entertain a motion to reopen this matter for the submission of additional evidence regarding Mr. Hopkins' present take-home income. . . .
> The court attempted after the trial to keep the record open for additional evidence when it appeared from written correspondence that Mr. Hopkins' income was to increase. . . . That did not work.

No objection or post-trial motion for a new trial was made, and Janette appealed the judge's August 17, 2009 order, contending that the judge erred in considering evidence outside the record, without giving her an opportunity to challenge that evidence. She says that she never saw this Affidavit until after the order was entered, depriving her of the opportunity to challenge its accuracy. Essentially, she claims that she was denied a full and fair opportunity to be heard. We disagree.

It is apparent that the correspondence among the attorneys and the judge during 2009 indicated that Jonathan was receiving more income. But, the only evidence in the record concerning the amount of his May 2008 income was his May 29th affidavit. Janette specifically asked the judge to render a finding on the information in the existing record, which did not include all the latter income information discussed in the letters. The judge had before him evidence of Jonathan's income in May 2008, and he calculated child support accordingly.

Janette contends that she was not in receipt of, nor aware of, the May 2008 Affidavit. Janette contends that she relied on the general informal agreement in August 2009 of the child-support calculation. But, Janette did not settle the case and have an "agreed" support figure ordered by the trial court. Furthermore, Janette did not request to reopen the matter to submit additional evidence into the record, as invited by the trial judge. She simply appealed on an underdeveloped record.

Administrative Order No. 10 requires that the Affidavit of Financial Means be used in all support matters. It was. On this record, we cannot say that the trial court's decision to set child support at $381 per month is clearly erroneous, based upon the record before him at that time. So, we affirm.

Affirmed.

GLADWIN and BAKER, JJ., agree.