

Cite as 2023 Ark. App. 254
ARKANSAS COURT OF APPEALS
DIVISION II
No. CV-22-333

KENNETH COLEMAN COLLEY II

APPELLANT

V.

AUDREY HAMILTON (COLLEY)

APPELLEE

Opinion Delivered May 3, 2023

APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT,
GREENWOOD DISTRICT
[NO. 66GDR-11-332]

HONORABLE ANNIE POWELL
HENDRICKS, JUDGE

REMANDED TO SETTLE AND
SUPPLEMENT THE RECORD

RITA W. GRUBER, Judge

Appellant Kenneth Colley appeals from a decision of the Sebastian County Circuit Court finding that he had not established a material change in circumstances warranting a reduction in child support and awarding attorney's fees to appellee Audrey Colley. Mr. Colley raises three points on appeal: (1) the circuit court erred in its application of the net-worth method by failing to establish a beginning and ending net worth; (2) the circuit court's finding that a material change of circumstances did not exist is clearly erroneous; and (3) the circuit court erred in awarding attorney's fees to Ms. Colley. Because the record before us does not contain all the items necessary for our review, we remand to settle and supplement the record.

This is the third time these parties have been before this court since their divorce decree was entered on June 12, 2013. The parties have one child (MC), who was three years old at the time of the divorce. In *Colley v. Colley*, 2014 Ark. App. 194, we dismissed the first appeal without prejudice because of a lack of finality in the circuit court's decree that granted Ms. Colley's complaint for divorce. Thereafter, the circuit court entered a final order of child support that ordered Mr. Colley to pay \$900 a month, which he appealed. In *Colley v. Colley*, 2014 Ark. App. 698, at 2, 450 S.W.3d 274, 275, we held that "the circuit court, in calculating child support under Administrative Order No. 10, erred as a matter of law by failing to follow the appropriate procedure for determining Mr. Colley's net worth and to consider the factors required for determining child support." Therefore, we remanded for the court to perform the required analysis.

On November 2, 2015, Mr. Colley filed a motion for a hearing in accordance with our decision and for modification. He stated that if his child-support obligation was not substantially reduced in light of our decision, then the court should modify his child-support obligation because a material change of circumstances had occurred. Ms. Colley filed an answer on December 21 denying that there should be a substantial reduction in child support and that a material change of circumstances had not occurred to warrant a modification. A hearing took place on June 7, 2016, and the court entered an order the same day pursuant to an agreement of the parties. This order dismissed Mr. Colley's motion and ordered that child support remain at \$900 a month. The order noted that at the time of the hearing, Mr. Colley was \$3600 in arrears. The court offset \$2,754.30 in court costs that had

previously been assessed against Ms. Colley and in favor of Mr. Colley and ordered Mr. Colley to pay an additional \$100 a month until the arrearage was satisfied. Mr. Colley did not appeal this order.

Over two years later, on July 19, 2018, Ms. Colley filed a motion for contempt and to modify visitation. With respect to the contempt allegation, Ms. Colley alleged that Mr. Colley had not paid his child support as ordered and was four months delinquent in the amount of \$3600. As for modification of visitation, she alleged that the MC was in school, and the back and forth during the week was disruptive; Mr. Colley was habitually late in picking up MC for midweek visits and in returning MC from Sunday visits; Mr. Colley discussed inappropriate issues with MC, such as his child-support payments; Mr. Colley's girlfriend was living with him and her son was allowed to sleep in MC's bed and wear his clothing when MC was not there; and Mr. Colley used the girlfriend's son to influence MC by saying things such as "if I had to pick, I would live with your Dad over your Mom." Ms. Colley requested that visitation be changed to standard visitation during the school year and Mr. Colley be admonished for discussing custody and child support with MC. She also sought \$2500 in attorney's fees and costs in filing the motion. Mr. Colley filed a response on September 10.

Over a year later on March 31, 2020, Mr. Colley filed a counterclaim for modification of visitation and child support. He alleged that a material change in circumstances had occurred to warrant that he have a right of first refusal when MC is in Ms. Colley's care, or alternatively, joint physical custody. Specifically, Mr. Colley asserted that Ms. Colley often

left MC in the care of other family members; that she bartered Mr. Colley's time with MC depending on her own emotional needs instead of MC's; and that MC wanted to spend more time with him. The counterclaim also alleged a material change in circumstances in his income sufficient to warrant a modification of child support. Alternatively, he asked that his obligation be reduced given the extra time he spends with MC "above and beyond" the standard visitation and that he bears all the transportation costs for visitation.

A hearing took place on July 21, 2020, where the court heard testimony from both parties. The circuit court ruled from the bench on several issues but reserved a ruling on attorney's fees and child support and requested briefs on the child-support issue. Mr. Colley's counsel was to prepare an interim order.

On August 6, 2020, the circuit court issued a letter decision that cited Administrative Order No. 10(III)(3), "Income from Self-employment Business Owners, Executives, and Others," continued the matter, and directed Mr. Colley "to provide his individual and business tax returns with all W-2's, 1099's included in addition to schedule C's for each return for the years 2016, 2017 and 2018." The order memorializing the letter ruling was entered October 6, 2020.

On August 12, 2020, the circuit court entered an order finding, in part, that that Mr. Colley's child support was current or overpaid and ordering the parties to submit briefs on the issue of whether the new child-support guidelines applied. The order stated that it would enter a separate order regarding the amount of Mr. Colley's child-support obligation after reviewing the briefs. The court also ordered the parties not to discuss the case with MC or

have overnight guests to whom they are not married when MC is present. The court ordered that each party shall have the right of first refusal to care for MC when the other parent cannot do so for a period of four or more hours. Ms. Colley's request for additional discovery was denied, and her request for attorney's fees was taken under advisement.

In response to an August 4, 2021 letter from Mr. Colley's counsel requesting the status of the court's decision, the circuit court issued a letter on August 26 stating that Mr. Colley had "left copies of some tax returns in the clerk's office" that had not been reviewed. The letter further stated, "Quite frankly, based upon the fact that it has been one year since the most recent order was entered, I am certain income information is not current or complete. The child-support guidelines that were placed in effect July 1, 2020, obviously apply."

On February 16, 2022, the circuit court entered an order denying Mr. Colley's motion for modification of child support and awarding attorney's fees to Ms. Colley. According to the language of the order, the court's decision was based on the testimony and evidence presented at the July 21, 2020 hearing, the posttrial briefs, and the tax returns submitted. Further, the court referenced its October 6, 2020 order that directed Mr. Colley to submit the specified tax returns and other documents for 2016, 2017, and 2018. Mr. Colley filed a notice of appeal on March 17, 2022, which designated the entire record.

If anything material to either party is omitted from the record, by error or by accident, we may direct that the omission be corrected and, if necessary, that a supplemental record be certified and transmitted. *See* Ark. R. App. P.-Civ. 6(e). The record does not contain the

tax records the circuit court ordered Mr. Colley to provide after the 2020 hearing and considered in reaching its 2022 decision on the child-support issue. Mr. Colley acknowledged such in his brief. Because these documents are necessary to our appellate review of this case, we remand the case to the circuit court to settle the record to include the tax records submitted by Mr. Colley and considered by the circuit court after the July 2020 hearing. Upon completion of the record below, Mr. Colley shall then transmit a certified copy of the supplemental record to the clerk of our court. Mr. Colley has fifteen calendar days in which to settle and supplement the record. We encourage counsel to review our rules and the record to ensure that no additional deficiencies are present.

Remanded to settle and supplement the record.

ABRAMSON and MURPHY, JJ., agree.

Kevin L. Hickey, for appellant.

DeeAnna Weimar, for appellee.