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NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

JAN 24 2024

JOHN D. HADDEN
CLERK

IN RE THE MARRIAGE OF:

SARAH SOMER CAREY,

Petitioner/Appellee,

vs.

LUKE WESLEY CAREY,

Respondent/Appellant.

Case No. 120,467

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APPEAL FROM THE DISTRICT COURT OF
LOGAN COUNTY, OKLAHOMA

HONORABLE SUSAN WORTHINGTON, SPECIAL JUDGE

AFFIRMED AS MODIFIED

AJ Jones
JONES & DAVIS
AJ JONES, ATTORNEY AT LAW P.C.
Edmond, Oklahoma — For Petitioner/Appellee

Virginia Henson
VIRGINIA HENSON, PLLC
Norman, Oklahoma — For Respondent/Appellant

OPINION BY GREGORY C. BLACKWELL, JUDGE:

Appellant Luke Carey appeals the district court's order modifying his child support payments.[1] Luke also appeals the court's decision to proceed to a hearing on the motion to modify over his objection, to impose a sanction

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[1] Appellee's motion for leave to file a sur-reply filed April 17, 2023 is denied.

prohibiting him from presenting evidence regarding his finances, and to impose compounding interest of two percent on the child support arrearage after the court backdated his child support to the date the motion to modify was filed. After a thorough review of the record and applicable law, we affirm the district court's order modifying child support, but modify the amount to conform to the evidence presented.

BACKGROUND

Luke and Sarah Carey were divorced on April 20, 2017. On August 22, 2019, Sarah filed a motion to modify custody, visitation, and child support. The hearing on those motions, after various delays, was eventually set for June 1, 2021. The judge originally informed the parties that the hearing was set for thirty minutes. Because the hearing was only set for thirty minutes and there were three outstanding issues (custody, visitation, and support), Luke claims on appeal that he expected that the purpose of the hearing was to set a trial date. However, Sarah, claiming the custody and visitation issues had been satisfactorily resolved by the parties, withdrew the motion to modify custody and visitation and asked the court to proceed on the child support issue only. Luke at first objected to proceeding on the child support issue but was overruled by the court and the case proceeded by proffer, although both parties offered brief testimony.

Prior to the hearing, on October 13, 2020, Sarah filed a motion to compel discovery for some of Luke's financial documents that he had failed to produce. On March 30, 2021, the court granted the motion to compel and held that Luke

had five days to produce the documents. He did not. During the June 2021 hearing, Sarah specifically requested that Luke be barred from presenting any evidence related to the documents he failed to produce. The court agreed with Sarah and imposed a "sanction" on Luke for failure to comply with the court's order which prevented him from presenting any evidence related to the financial documents not produced. Nevertheless, Luke did not seek to introduce any such evidence. Sarah introduced various exhibits detailing the income of the parties and her own expenses. At one point in the hearing, Sarah's counsel stated that Sarah was only seeking $2,000 per month child support but later counsel asked the court to make a greater award.

Ultimately, the court calculated that the total support amount to be $4,207.87. Due to his income, the court found Luke was responsible for 93.3% of this amount.[2] The court thus awarded $3,900 per month to be paid in child support.[3] This represented a significant increase from his prior obligation of approximately $140 per month. In reaching this total, the court used a non-statutory formula, stating: "This Court adds $100.00 per every $1,000.00 of income above the $15,000.00 shown in the Guidelines computation ...."

The court also modified the new child support amount back to the date of the filing of the motion to modify. The court determined Luke's arrearage to be $93,600.00 and awarded compounding interest on that amount at two percent

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[2] The court found that Luke earned $41,666.66 per month and Sarah earned $3,000; thus, Luke's share of the total income was 93.3%.

[3] 93.3% of $4,207.87 is $3,925.94. The court appears to have rounded this number down to $3,900.

per year. The court ordered Luke to pay the arrearage at the rate of $7,800.00 per month until paid in full.

Luke appeals.

STANDARD OF REVIEW

An action for child support is a matter of equitable cognizance. *State ex rel. Dep't of Human Servs. v. Baggett*, 1999 OK 68, ¶ 3, 990 P.2d 235. When reviewing the decision of the trial court in an equity proceeding, the judgment will not be disturbed unless the trial court abused its discretion or unless the court's finding was clearly contrary to the weight of the evidence. *Creech v. Creech*, 1956 OK 10, ¶ 9, 292 P.2d 376, 378; *Tschauner v. Tschauner*, 1952 OK 230, ¶¶ 22, 25, 245 P.2d 448, 451.

ANALYSIS

Hearing on the Motion to Modify Child Support

First, Luke argues that the trial court abused its discretion by proceeding to hold the hearing on the child support issue over his objection when he mistakenly believed the purpose of the hearing was to set a trial date. Upon review, we find Luke waived any objection to the hearing by agreeing to proceed.

Luke's counsel started the hearing by admitting she believed the motion to modify custody, visitation, and child support were all still outstanding. Because of the three outstanding issues, she testified that the parties should, "get a scheduling and order and not be here." Tr. 3. However, Sarah's counsel testified that the only issue she was pursuing at the hearing was the modification of child support. After the counsel clarified that she would only proceed on the

child support issue, Luke's counsel agreed that they could "move forward" with the hearing. *Id.* at 7. By expressly agreeing to continue, Luke waived any objection to proceeding with the hearing on appeal.[4]

The Court's Sanction

Next, Luke argues that the trial court abused its discretion in imposing a discovery sanction on him with no notice or opportunity to be heard. We find that Luke waived this issue as well.

Luke complains that he was "prevented ... from presenting any exhibits supporting his case ...." *Brief-in-chief*, 9. However, at the onset of the hearing, Luke's counsel agreed that the primary concern was whether Luke would be permitted *to testify*, not whether he would be allowed to offer evidence that was not produced in discovery. Tr. at 9 ("I just want to be certain that there is no bar to [Luke] testifying in this hearing today. I mean, certainly he's not going to use any of the documents that weren't disclosed as evidence."). The trial court agreed he could testify, and he did. Luke never sought to enter *any* exhibits into the

[4] However, even if Luke had not waived his objection to proceed with the hearing, we find that the trial court did not err by allowing the hearing to continue over his initial objection. Sarah, through her attorney, expressly informed Luke's counsel that the single issue of child support modification had been set for hearing on the merits. She sent a letter to Luke's counsel before the hearing that read, "For your records, the hearing on the motion to modify child support is set for June 1, 2021, at 10:30 a.m." *Answer Brief of Appellee*, pg. 4. While counsel did not explicitly state that they were no longer pursing the motion as to custody or visitation, the letter makes it clear that the hearing was for the motion to modify child support. Therefore, even if Luke had doubt about whether the other two motions would be addressed, he should have at least been prepared to argue the motion to modify child support. The Oklahoma Supreme Court has held that the "[m]ere failure of a defendant or his attorney to learn that a case is set for trial is not sufficient ground in this state for vacating a judgment." *Concannon v. Hampton*, 1978 OK 117, ¶ 5, 584 P.2d 218, 220. Similarly, we find that Luke's failure to file a continuance or learn about the nature of the hearing he was to attend cannot be a ground for vacating the judgment, especially when opposing counsel informed him of the nature of the hearing. We find that the trial court did not abuse its discretion in proceeding to hold the hearing on child support over Luke's initial objection.

record and thus cannot be heard on appeal that the trial court failed to allow such exhibits to be entered. Nor, even if Luke had offered such exhibits, did he make any offer of proof as to what these alleged documents would show, further limiting our appellate review. 12 O.S. § 2104. For these reasons, we consider the issue waived.[5]

Amount of Child Support

Here, we turn to the heart of Luke's appeal, which concerns the trial court's substantial increase of child support. For the following reasons, we find that the trial court's basis for the award went beyond what is permissible under the statute and was contrary to evidence. The evidence before the court, even taken in the light most favorable to Sarah, supports a child support award of $3,510.41 per month. As such, we modify both the monthly payment obligation and corresponding arrearage judgment.

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[5] The only record evidence that the trial court appears to have excluded due to its sanction was Luke's testimony as to his income from "previous years." Tr. 27. The court disallowed any such testimony, stating, "If he did not provide anything to petitioner showing that this was not indicative of his income, then, no, he can't testify to that." *Id.* at 30. However, as previously noted, Luke does not complain on appeal that he was not allowed to offer any specific testimony, but only that he was not allowed to present documents and that he did not have proper notice of the opposing party's intent to seek sanctions. Issues not briefed may be deemed waived. Sup.Ct.R. 1.11(k).

Additionally, even if he had not waived the issue of discovery sanctions, we would find that the court had the statutory authority to issue the sanction and that Luke's right to due process was not infringed. Oklahoma's statute governing failure to make or cooperate in discovery provides various remedies for when a party fails comply with an order of the court. 12 O.S. § 3237. Specifically, § 3237(B)(2)(b) allows "an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence ...." While Luke argues that Sarah should have filed a motion to impose sanctions so he would have had notice of her intent to seek sanctions, it is clear she was not required to do so. The trial judge was permitted, by statute, to prevent Luke from presenting evidence related to the materials he failed to produce in discovery and did not abuse its discretion in making the ruling here.

Oklahoma law provides that child support orders may be modified upon a "material change in circumstances" including an increase in the income of the parents. 43 O.S. § 118(I)(A)(1). Further, "[t]he court shall apply the principles of equity in modifying any child support order due to changes in the circumstances to either party as it relates to the best interest of the children." *Id.* If the total parental income is above $15,000, the court is to calculate the support obligation at the $15,000 level but is permitted to assess "an additional amount determined by the court." 43 O.S.2021, § 119(B). In assessing this additional amount, "[t]he trial court should consider the childrens' needs, and the parents' ability to pay and prior standard of living." *Archer v. Archer*, 1991 OK CIV APP 28, ¶ 11, 813 P.2d 1059, 1061 (approved for publication by the Oklahoma Supreme Court).

Here, it is clear that the trial court entered its order primarily based on an impermissible, non-statutory formula. The order specifically states: "This Court adds $100.00 per every $1,000.00 of income above the $15,000.00 shown in the Guidelines computation ...." While this may be a permissible place from which to begin, the trial court's analysis cannot begin and end with such a formula. It must be based on the evidence presented.

In this case, Sarah's own evidence showed that the children needed only $3,762.50 in support. *Pet. Ex.* 10, pg. 2 ("Total kids' expenses"). There was no evidence presented at trial, by either party, that the children needed any greater amount. As such, the trial court's order finding a need $4,207.87, which was derived primarily from the non-statutory formula referenced above, was reversible error. Because we do not disturb the trial court's order regarding the

parties income (see note 5, *infra*) the need amount—$3,762.50—must be multiplied by 93.3% to arrive at a monthly obligation of $3,510.41, and a corresponding arrearage of $84,249.84. The judgment is so modified. *Carpenter v. Carpenter*, 1982 OK 38, ¶ 10, 645 P.2d 476, 480 ("Whenever possible, an appellate court must render, or cause to be rendered, that judgment which in its opinion the trial court should have rendered.").[6]

Interest on Child Support

Lastly, Luke argues that the trial court erred in imposing interest on the child support from the date of filing the motion to modify. However, we find that this argument misinterprets the court's ruling, as the judge did not impose interest on child support dating back to the filing of the motion to modify. Rather, the judge found that the child support itself was modified back to the date of filing, August 2019. The court, having issued this order in September 2021, found that the arrearage for support was for twenty-four months and totaled

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[6] Luke makes several other arguments regarding the amount of support. He argues that the trial court erred in assessing his income at $500,000, but we think the record supports the trial court's determination. This is what Luke's tax return showed and the trial court was perfectly justified on relying on this. If anything, the evidence suggested imputation of a higher amount. Additionally, Luke complains that Sarah's counsel at one point during the hearing requested just $2,000 in support. We also reject this argument as a basis for reversal. First, Sarah's counsel later retracted this request, and second, it was clear from the evidence presented that the needs of the children were greater. Additionally, there was no bar to Luke testifying or presenting other evidence as to the children's needs, but he did not present any such evidence. Finally, Luke complains that Sarah's budget—the previously referenced *Exhibit 10*—should not have been considered for various reasons. Luke does not point to any alternative evidence or testimony submitted below as to the children's needs. The trial court did not error in relying on *Exhibit 10*, which was, for better or worse, the *only* evidence the court had to go on. As such, Luke's allegations of error, except as noted above, are each rejected.

$93,600 exclusive of statutory interest which would be "compounded at two percent annually."

Additionally, Luke argues that he owes no interest on his child support payments because they were never delinquent. In support of this argument, Luke cites to Oklahoma's statute on interest for child support payments which provides:

> Court-ordered past-due child support payments, court-ordered payments of suit monies and judgments ... shall draw interest at the rate of two percent (2%) per year. Past-due child support payments accruing after the establishment of the current support order shall draw interest from the date they become delinquent. Lump-sum judgments ... for support owed prior to the establishment of current support shall draw interest from the first day of the month after the lump-sum judgment is entered.

43 O.S. § 114. Luke maintains that because he has not yet made any late payments on the arrearage, they are not delinquent as contemplated by the statute. We agree. Even though the court modified the date of support back to August 2019, Luke's payments could not have been delinquent as he was not ordered to pay the new monthly total and arrearage until September 2021. The child support payments would only become delinquent if Luke failed to pay the $93,600.00 in the equal installments of $7,800.00 per month for the next year as ordered by the court. Until such a failure to pay, we find that Luke's child support payments are not delinquent or past-due.

However, just because the child support payments are not delinquent does not mean that Luke owes no interest. The trial court determined the arrearage was $93,600 exclusive of statutory interest which was to be compounded at two percent annually. In his reply brief, Luke alternatively argues that the court erred

by ordering compounding interest at two percent. *Appellant's Reply Brief*, pg. 8. The Oklahoma Supreme Court has held that interest on delinquent child support payments accrue simple, not compounding, interest. *Phillips v. Hedges*, 2005 OK 77, 124 P.3d 227. While an Oklahoma court has never explicitly determined if the same principle applies to lump-sum child-support judgments, we find that it does.

The statute on interest for child support payments provides that court-ordered judgments for support shall draw interest at the rate of two percent per year. The statute distinguishes between delinquent payments and a lump-sum judgment regarding the start dates for accrual. However, it does not assign specific interest rates for the two differing kinds of payments. Therefore, we hold the broad language providing for two percent interest for court-ordered judgments applies to lump-sum judgments as it does delinquent child support payments.

The Oklahoma Supreme Court has addressed whether interest on delinquent child support payments should be simple or compounded. *Phillips*, 2005 OK 77. The *Phillips* Court held that there was a conflict between the specific statute on interest for delinquent child support payments, 43 O.S. § 114 mentioned above, and the Oklahoma statute that generally provides for compound interest on various judgments, 12 O.S. § 727(C). *Id.* ¶ 12, 231. The court found that a conflict arose between the two statutes, as at the time, § 114 provided for 10% simple interest "specifically to delinquent child support payments," and § 727(C) provided for annual compounding of interest at a

variable rate. *Id.* The court noted that "[w]hen there is a conflict between two statutes, one specific and one general, the statute enacted for the purpose of dealing with the subject matter controls over the general statute." *Id.* Therefore, the Court held that because § 114 specifically dealt with interest on delinquent child support payments, it controlled. *Id.*

In reaching its decision, the Court noted that it found "nothing in title 43, section 114's language which would imply a legislative intent that interest be compounded, rather the intent is for delinquent child support payments to draw simple interest, whether or not memorialized in a court order." *Id.* Similarly, we note that while *Phillips* explicitly applied to delinquent child support payments, the Court's reasoning also applies to lump-sum judgments. Section 114 does not mention compounding interest for lump-sum payments. Therefore, we find that in the absence of language that implies interest be compounded, the interest awarded for a lump-sum judgment is simple.

CONCLUSION

For the reasons set forth above, the trial court erred in determining the appellant's monthly child support obligation, the corresponding arrearage judgment, and in assessing compounding interest. The judgment is modified to reflect a monthly obligation of $3,510.41 and a corresponding arrearage judgment of $84,249.84, which is to earn two percent simple interest. All other appealed decisions of the trial court are affirmed.

AFFIRMED AS MODIFIED.

HUBER, P.J., and HIXON, J., concur.

January 24, 2024