NOT FOR OFFICIAL PUBLICATION
See Okla.Sup.Ct.R. 1.200 before citing.

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

IN THE MARRIAGE OF:

WILLIAM WITTMER,

Petitioner/Appellant,

vs.

RIKKI WITTMER,

Respondent/Appellee,

and

STATE OF OKLAHOMA ex rel.
CHILD SUPPORT ENFORCEMENT,

Intervener.

Case No. 120,998

APPEAL FROM THE DISTRICT COURT OF
GARFIELD COUNTY, OKLAHOMA

HONORABLE DENNIS W. HLADIK, DISTRICT JUDGE

AFFIRMED IN PART, DISMISSED IN PART, REVERSED IN PART, AND REMANDED

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OPINION BY GREGORY C. BLACKWELL, JUDGE:

William Wittmer appeals a decision of the district court setting child support payment levels for 2021 and 2022, requiring him to pay Rikki Wittmer (now Peck) $800 on account of an unpaid debt, and awarding fees to Rikki. On review, we dismiss the award of attorney fees, as the agreed order awarding fees was not appealed and was entered with the consent of both parties. The remaining decisions were within the discretion of the district court, with the exception of the retroactive modification of child support for 2021 and the first portion of 2022. We reverse this part of the award and affirm all other challenged decisions of the district court.

BACKGROUND

The involved couple were divorced in April 2017. The decree provided for joint custody of the two minor children, found that William had a gross monthly income of $3,167.81, and awarded child support of $476.86 per month to Rikki based on the degree of parenting time between the parties.

Post-decree proceedings have been substantial. The docket sheet of Garfield County Case No. FD-2016-460 shows the following history. Two months after the divorce, William filed a motion to vacate it in part on the grounds that the agreed custody order had been obtained by fraud and concealment. In June 2017, he filed a motion to terminate joint custody. In September of that year, however, he dismissed these claims. In November 2019, William filed another motion to terminate joint custody. Rikki responded with her own motion to modify. In March of 2020, William and Rikki agreed to a settlement that retained joint custody. This was memorialized in a Journal Entry filed in December of

2020. The journal entry stated that William's support arrearage was set to zero as of March 31, 2020, and that the parties must exchange income information for the purposes of setting modified child support "beginning April 1, 2020." R. 17.

In February 2021, Rikki filed a motion for contempt citation alleging that William had failed to pay any child support in the eleven months after March 1, 2020, and failed to provide any income information to allow a recalculation of support as of April 1, 2020. On February 17, 2022, the court issued a journal entry indicating that William had finally provided income information and that his income had reportedly fallen to $1,270.00 a month. The parties submitted a joint calculation reducing the child support paid by William only $5.90 per month as of April 1, 2020.

In April 2022, Rikki filed a motion to modify child support and visitation. In July 2022, William filed a third motion seeking to terminate joint custody. In August 2022, Rikki filed a motion for contempt citation alleging that William had now failed to pay child support for twenty-seven months and failed to disclose his income. In November 2022, William sent Rikki a notice of relocation, which Rikki opposed on the grounds that it would be detrimental to the best interests of the children under the current, split-custody scheme.

At trial, Rikki brought evidence that William's income for 2021 was materially greater than he represented when the parties submitted the agreed calculation reducing his child support to $5.90 per month. On December 16, 2022, the court entered an order finding that:

1. Joint custody was terminated, and Rikki was awarded sole custody.
2. The court imputed income of $160,000 per year to William for 2021, and set child support at $1,167.11 for 2021, retroactive to January 1, 2021.
3. Child support for 2022 was set at $1,329.38 per month, retroactive to January 1, 2022.
4. Rikki was awarded a judgment of $800 because her wages had been garnished for this amount on account of a debt William was required to pay.
5. Rikki will be awarded her attorney's fees on application.

William appeals the amount and timing of the child support award, the decision awarding Rikki all her fees, and the ordered $800 payment.

STANDARD OF REVIEW

Child support proceedings are matters of equitable cognizance. On appeal, an appellate court reviews the entire record, weighs the evidence, and will affirm a trial court's judgment relating to child support where it is just and equitable. *State, ex rel. Dep't of Human Servs. ex rel. Jones v. Baggett*, 1999 OK 68, ¶ 3, 990 P.2d 235, 238 (citations omitted). Further, the amount of child support set by a trial court will not be modified or set aside on appeal unless the award is clearly against the weight of the evidence or is somehow unjust and inequitable. *Id.*

ANALYSIS

Child support of $476.86 per month was initially provided to Rikki in the decree. William's alleged support arrearage was set to zero by agreement as of

March 31, 2021, and that the parties were required to exchange income information for the purposes of setting child support "beginning April 1, 2021." When this information was finally obtained, the court ordered in February 2022 that William's child support should be reduced to only $5.90 per month, retroactive to April 2021.

In a December 2022 order, however, the court found that William had not properly disclosed his income, and the income of $1,270.00 a month used to calculate that he owed only $5.90 per month in child support was substantially incorrect.[1] After hearing, it found that William's self-employment income was, in fact, $160,000 for 2021 and $204,000 for 2022. It ordered child support of $1,167.11 per month for the whole of 2021 and $1,329.38 per month for 2022. *Id.*

Retroactive Modification

William first argues that modifying child support for all of 2021 and the first part of 2022 constituted an improper retroactive modification because Rikki did not file her motion for modification until April 2022, and no modification could therefore be made until May[2] of that year. We agree with William.

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[1] By example, William's 2021 tax return showed net income of $25,013, and he testified that he had deposited another "thirty-five or thirty-six thousand" of his earned income into his fiancée's bank account. Tr. (Nov 21, 2022), pgs. 40-41. He also admitted that his bank statements indicated that he was "grossing" $28,000-$30,000 on certain months from his business activities in 2022. *Id.*

[2] "An order of modification shall be effective on the first day of the month *following* the date the motion to modify was filed, unless the parties agree to another date or the court makes a specific finding of fact that the material change of circumstance did not occur until a later date." 43 O.S. § 118I(A)(3) (emphasis supplied).

The rule against "retroactive modification" is well established and presently required by clear statutory law. "A child support order shall not be modified retroactively regardless of whether support was ordered in a temporary order, a decree of divorce, an order establishing paternity, modification of an order of support, or other action to establish or to enforce support." 43 O.S. § 118I(B)(1). The requirement can be waived by agreement, *id.* at § 118I(A)(3), but no such agreement occurred here. Additionally, the court can select a *later date* for enforcement upon "a specific finding of fact that the material change of circumstance did not occur until a later date." *Id.* at § 118I(A)(3). However, nothing in the statute permits the court to do what it did here: to make its changes to child support effective on an *earlier* date.

Rikki thus argues that the ban on retroactive modification is subject to equitable exceptions, and that the equities demand an exception here. She cites to *McNeal v. Robinson*, 1981 OK 43, ¶ 11, 628 P.2d 358, 360, for the following general proposition:

> The original absolute rule against retroactive modification should admit of some qualification. The original rule was formulated when the rate of divorce was fairly low, but with the rate increasing rapidly, multiplying the numerous problems concerning the children of these divorced families, a rule which gives the trial court some flexibility in solving these problems is far superior to the prior rigid rule.

However, we find that Rikki overeads *McNeal* and its progeny, and note that *McNeal* was decided prior to the ban contained in § 118I. The general principle cited above notwithstanding, it is clear that current cases allowing an equitable exceptions to the retroactive modification rule do not truly allow "modification"

at all. Rather those cases, beginning with *McNeal*, have allowed a *defense* that a valid judgment has been complied with in some alternative fashion.

Indeed, subsequent cases often characterize *McNeal* as allowing "*equitable defenses*" to child support enforcement actions. *See, e.g., Merritt v. Merritt*, 2003 OK 68, ¶ 13, 73 P.3d 878, 883. *Aguero v. Aguero*, 1999 OK CIV APP 38, 976 P.2d 1088, notes that even these equitable defenses provided by *McNeal* are generally limited to defenses of "alternative compliance," *i.e.*, that the ordered support was provided by some means other than that specified by the court. *Cowan v. Cowan*, 2001 OK CIV APP 14, ¶ 10, 19 P.3d 322, 325, reaches the same conclusion. *Merritt* found, for example, that when the Social Security Administration had made payments of $13,101.00 directly to the child of the parties on account of mother's disability, this alternative support could be equitably offset against mother's support arrearage, and *McNeal* found that father had provided alternative support by caring for the child in his home at a time when wife was supposed to be caring for them.

The rule of *McNeal*, as developed in subsequent cases, appears generally limited to equitable defenses to enforcement, and specifically to situations where a judgment had been satisfied through alternative means.[3] We find no case approving of a retroactive *increase* in child support on the grounds argued here. Such an exception would entirely nullify the clear rule, set forth in 18 O.S.

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[3] *See, e.g., Aguero v. Aguero*, 1999 OK CIV APP 38, ¶ 24, 976 P.2d 1088, 1094 "Nothing in the subsequent case law convinces us that *McNeal's* equitable recognition of 'alternative compliance' has been, or should be, expanded to include the divergent concept of 'noncompliance due to laches, estoppel, waiver.'"

§ 118I, banning retroactive modification. While some might find the result in a case such as this troubling,[4] we are bound by this current law and precedent. As such, we find the trial court erred in ordering any increase in support prior to May 2022, the month after Rikki filed her motion to modify child support, and remand the matter for a modification of the judgment.

The Amount of Income

William also argues that the income the court imputed to him was unrealistically high. The court imputed income of $160,000 per year to William for 2021 and $204,000 for 2022.[5] A rationale for the imputed 2021 income appears in the hearing transcript as follows.

William's 2021 return showed net income of $25,013, and he testified that he had deposited another "thirty-five or thirty-six thousand" of his earned income into his fiancée's bank account. Tr. (11/21/22), pgs. 40-41. He also admitted that two bank statements showed that he was "grossing" $28,000-$30,000 a month from his business activities in 2022. When asked what portion of this gross was consumed by expenses, William seemed unsure as to what spending actually constituted a business expense. *Id.* at 42-43. When examined

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[4] The current law allows a party, such as it appears William did here, to misrepresent the party's income for the purpose of obtaining a reduced support payment and allows that party to profit financially from this act, all while the children are deprived of the support they are entitled to. However, this is no different than in any other civil case where a party might obtain a judgment through false testimony. Such judgments are subject to standard rules of vacatur. *See* 12 O.S. §§ 1031-1038. We make no ruling here as to whether any such remedy remains available to Rikki in this matter.

[5] Although we have found that the retroactive increase of support for all of 2021 was improper, William's income in 2021 is still relevant to his earning capacity that underlies the legitimate increase of support in April 2022. As such, we will analyze it here.

over his 2021 tax return, he agreed that his business showed gross sales of $105,446, and that the additional $35,000 deposited into his fiancée's bank account should be added to this. *Id.* at 44. This totaled $140,446 in income. William claimed total business expenses of $53,000. *Id.* This indicates an adjusted income of $87,446. William also testified that he had also purchased a $60,000 truck that year for cash, and that he had deposited $30,000 in a savings account in that year. *Id.* at 45-46. He and his fiancée have also entered into a lease agreement on a $500,000 property with an option to buy. *Id.* at 47-48.

In briefing, William argues that the undisputed testimony established that he had an income $100,000 less than the court found, *i.e.*, $60,000 a year. *Brief-in-chief*, pg. 6. As noted above, William's own tax returns and testimony at trial indicated an adjusted income of $87,446, not $60,000. There was also evidence of spending that was inconsistent with this income level. He also testified that he was providing his fiancée approximately $4,500 per month, although whether this was in addition to the $35,000 of income that he deposited directly into her bank account is unclear. *Id.* at 94. He also testified that the rent on the couple's new house would be $2,000 per month, and that he spent approximately $10,000 a year on medical marijuana. *Id.* at 94, 98.

William relies on *Parnell v. Parnell,* 2010 OK CIV APP 74, 239 P.3d 216, as persuasive in this situation. *Parnell* held that "[i]mputing income based upon a single high paycheck did not result in a fair approximation of Husband's actual wage potential." *Id.* ¶ 12. The *Parnell* opinion was quite clear, however, that the trial court had an entire year's paychecks at its disposal but picked the highest

one showing $4,760.96 in gross income as exemplary, even though "all his other paychecks for 2008 were for less than $4,000, and one was $2,210." *Id.* n. 4. The distinguishing factor in *Parnell* was that the court had an entire year's paychecks in the record. Nothing here appears to have prevented William from providing a year's financial disclosures supporting his contention that his average income was much lower. No such documentary evidence was introduced at trial, however.

William also relies on *Hogue v. Hogue*, 2008 OK CIV APP 63, 190 P.3d 1177. In *Hogue,* the trial court decreased father's income for support purposes from $4,167 to $2,535 per month based on his last three pay stubs. Examining the record as a whole, the Court found this to be an abuse of discretion because father's 2004 tax return, and other evidence, showed an income that approximated $3,750 per month. *Id.* ¶ 16. William argues that the situation in *Hogue* is analogous to the situation here, and the court should have relied on his tax returns. In *Hogue*, however, the court could reasonably presume that the higher income shown on the tax return was accurate because a party does not typically *overreport* their income for tax purposes. Human nature being what it is, the same does not necessarily hold true for the under reporting that is implied here.

William finally cites *Decker v. Davis*, 2007 OK CIV APP 46, 162 P.3d 956, as rejecting a determination of income based upon earnings testimony for a five-month span and recalculating fathers' income according to W-2s for three years. In *Decker*, the trial court found that father's gross yearly income was $50,000.

The Court found that father's average gross income over the three prior years was $53,266, and father had earned more than $50,000 in each of these prior years.[6] As such, it held the finding of income of only $50,000 was against the clear weight of the evidence and increased it to $53,266. The holding William apparently extrapolates from this is that the five-month span of income supported the $50,000 figure, and the Court rejected this in favor of a three-year average. This is not so. The trial court did not rely on the five-month figures in setting income.[7] Arguments in this form are common in any imputed income case, but courts must rule based on the information the parties choose to provide. We find the courts imputation of William's income for 2021 was not against the clear weight of the evidence here.

The same principle applies to the court's determination that William's income for 2022 was likely $204,000. He argues in his brief that this was based on only two bank statements, and his income in these months was unrepresentatively high. He had an opportunity to introduce documentary evidence of other months' income, but none appears in the record. Parties that do not provide full verifiable disclosure of all income assume the risk that a court,

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[6] At the time of *Decker*, 40 O.S. § 118B provided for a three-year average income as a method of calculation. This was amended in 2021 to provide for a one-year average instead.

[7] Why the *Decker* court mentioned the five-month income figure at all is unclear from the opinion. It appears that wife may have argued on appeal that the court should have calculated husband's income based on the higher five-month figure rather than the three-year average. If so, the holding of *Decker* is that the trial court did not *abuse its discretion* by *refusing* to use this figure, rather than one reversing a determination of income based upon a five-month span.

acting on limited information, may estimate income that is higher or lower than the actual figure.

The Court's Methodology

William next argues that, even if the court's mathematical calculations were not clearly in error, its methodology for calculating his income was not statutorily authorized. 43 O.S. § 118B(C) provides:

> 1. For purposes of computing gross income of the parents, gross income shall include for each parent whichever is the most equitable of:
>
> a. all current monthly gross income described in this section, plus such overtime and supplemental income as the court deems appropriate,
>
> b. the average of the gross monthly income for the time actually employed during the previous year, or
>
> c. gross monthly income imputed as set forth in paragraph 3 of this subsection.

Paragraph three of subsection (C), in turn provides that:

> Imputed income. If evidence of current or average income of a parent is not available or not the most equitable, the court may consider the following factors to impute the parent's monthly gross income:
>
> a. the average wages and hours worked in the parent's particular industry and geographic area and the parent's education, training, work experience and ability to work,
>
> b. wages the parent could earn consistent with the minimum wage rate of not less than twenty-five (25) hours per week,
>
> c. whether a parent has been determined by the court to be willfully or voluntarily underemployed or unemployed including whether unemployment or underemployment for the purpose of pursuing additional training or education is reasonable in light of the obligation of the parent to support his or her children or other voluntary action to reduce a parent's income,

d. the lifestyle of the parent including ownership of valuable assets and resources, whether in the name of the parent or the current spouse of the parent, that appears inappropriate or unreasonable for the income claimed by the parent,

e. the role of the parent as caretaker of a handicapped or seriously ill child of that parent, or any other handicapped or seriously ill relative for whom that parent has assumed the role of caretaker which eliminates or substantially reduces the ability of the parent to work outside the home, and the need of that parent to continue in that role in the future, or

f. any additional factors deemed relevant to the particular circumstances of the case.

William apparently argues that the court should have used his "average of the gross monthly income for the time actually employed during the previous year" to calculate child support, based almost entirely on his own testimony as to his income. The court evidently found that no reliable yearly information was available. We find no error in that decision.

The Eight-Hundred-Dollar Debt

William was also ordered in the original decree to pay the "debt on a repossessed truck." He did not pay it, and Rikki's wages were subsequently garnished for $800. William argues that he was unable to pay the debt as the decree required because Rikki failed to execute a release allowing William to communicate with the debt holder. Even so, the exact basis of William's complaint is hard to discern. Had the court sanctioned William for a failure to pay that was not his fault, he may have grounds for complaint. The court did not find William guilty of contempt, however. It merely ordered him to pay the same debt that the decree required him to pay. He appears to argue that the court should have sanctioned Rikki for her alleged failure to execute a release by

cancelling the requirement that he pay the debt. The court did not do so, and we find no abuse of discretion in that decision.

Fees

William finally argues that the award of attorney fees to Rikki was inequitable. We must first examine whether William preserved this issue for appellate review.

At the November 2022 hearing, the court ordered that Rikki "is afforded her attorney fees. The amount to be determined upon proper application." Tr. (Nov. 21, 2022), pg. 235. On December 2, Rikki filed her application requesting $8,062.50 in fees and $1,340.74 in costs. However, the trial court was never asked to rule on this application, as the parties settled the matter. A journal entry announcing a settlement of the fee issues and awarding Rikki $3,409.26 in fees and $1,340.74 in costs was entered on December 15. This order was not appealed. However, the December 16 order (which memorialized the orders announced at the November hearing and which was appealed) stated—despite the fact that fees had been awarded in a separate order the previous day—that Rikki "will be awarded her attorney fees upon application." R. 66. From this order, William did appeal, seeking to undo the entirety of the agreed-upon award.

We hold that the trial court's statement concerning a future award of fees to be made upon request, with no statement as to the actual amount of fees awarded (and, indeed, no application for fees on file), is an interlocutory order, akin to the reservation of a fee issue to be made upon proper application. *See* 12 O.S. § 696.4(B) ("If attorney fees or costs, *including the amount of such attorney*

fees or costs have not been included in the judgment, decree or appealable order, a party seeking any of these items must file an application with the court clerk along with the proof of service of the application on all affected parties in accordance with Section 2005 of this title."). The trial court was free to change its ruling up to the point of the entry of the December 15 order, which was the final order concerning fees. *See* 12 O.S. § 953 (defining "final order"). Because that order was not appealed, we are without jurisdiction to review the fee award made therein.

Additionally, we note that the December 15 order, even if it had been appealed, is an *agreed* order on fees. Nothing in the December 15 order, or anything in the appellate record, suggests that the parties intended to preserve any controversy as to fees. Rather, the order, which was entered with the consent of both parties, appears to be a full settlement of the issue. "Consent ends all contention between the parties, and there is nothing to review on appeal." *Napier v. Dilday*, 1913 OK 388, ¶ 1, 132 P. 1085.

For each of these reasons, we dismiss the appeal as to the award of attorney fees. *See Long v. McMahan*, 1952 OK 35, ¶ 3, 241 P.2d 185, 186 ("[I]t is the duty of the appellate court in each case to examine into its jurisdiction, and if it is without jurisdiction to dismiss the appeal.").

CONCLUSION

We dismiss that portion of the appeal concerning the award of attorney fees. We find no abuse of discretion in the district court's other decisions, with the exception of the court's retroactive modification of child support. We reverse

this part of the award, and remand for the entry of a modified award. All other challenged decisions of the district court are affirmed.

AFFIRMED IN PART, DISMISSED IN PART, REVERSED IN PART, AND REMANDED.

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

July 2, 2024