

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 28, 2015 Session

JESSICA CATHERINE HAYES v. DOUGLAS AARON HAYES

**Appeal from the Circuit Court for Montgomery County
No. MCCCCVDV122823 John H. Gasaway, III, Judge**

No. M2014-00237-COA-R3-CV – Filed March 26, 2015

This appeal involves various financial issues related to a divorce. Father appeals the trial court's determination of variable income for Father that he earns as an amateur bowler; the trial court's award of transitional alimony to Mother; and the trial court's order that Father pay half of the minor children's private school tuition. We affirm the trial court's rulings regarding child support and alimony. However, we vacate the trial court's ruling on the payment of private school tuition due to the trial court's failure to comply with the Tennessee Child Support Guidelines.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part, Vacated in Part, and Remanded

J. STEVEN STAFFORD, P.J., W.S., delivered the opinion of the Court, in which ARNOLD B. GOLDIN, J., and KENNY ARMSTRONG, J., joined.

Kathryn W. Olita and John W. Crow, Clarksville, Tennessee, for the appellant, Douglas Aaron Hayes.

Sharon T. Massey, Clarksville, Tennessee, for the appellee, Jessica Catherine Hayes.

OPINION

Background

Catherine Hayes (“Mother”) and Douglas Aaron Hayes (“Father”) were married on November 18, 2006. The parties have two minor children, who attended private school throughout the marriage. After almost six years of marriage, Mother filed for divorce on November 16, 2012, alleging irreconcilable differences had arisen between the parties. She amended her complaint on September 17, 2013 to include inappropriate marital conduct as a ground for divorce. Father filed his answer on September 23, 2013.

On January 28, 2013, the parties attended mediation. At mediation, Father and Mother settled many issues. The parties, however, were unable to resolve the issues of the ground for divorce, alimony, responsibility for payment of private school tuition, decision-making authority for education, and child support. A bench trial was held on September 26, 2013 to resolve the remaining issues.

Father and Mother were the only witnesses to testify at trial. Father testified that he had earned a college degree and had been employed as a sales representative for Budweiser of Hopkinsville for four years. The evidence surrounding Father’s income was somewhat muddled. Father testified that, in November 2012, Budweiser restructured their compensation scheme whereby sales representatives no longer earned commissions. Father stated that this restructuring reduced his prior income by about \$500.00 to \$600.00 per month. After Budweiser restructured its pay system, Father testified that he made approximately \$3,600.00 per month in gross income. Father also testified that his net income was approximately \$2,400.00 per month because various expenses, such as taxes and insurance, are deducted from his paychecks. Mother offered evidence of Father’s current paystubs, which tended to contradict Father’s assertion.

In addition to working for Budweiser, Father also earned income as an amateur bowler by bowling in tournaments and local league play; however, his income from bowling varies by year depending on how successful he is at tournaments and in league play. At trial in September 2013, Father testified he had been to several bowling tournaments in 2013, but he had only earned \$500.00 in gross winnings so far. In 2012, he participated in twelve bowling tournaments over a period of six months. According to Father, the year 2012 was Father’s most productive year in bowling, and he earned gross winnings of approximately \$5,500.00. Father reported his 2012 bowling winnings on his 2012 tax return. Father also received earnings from bowling in 2010 and 2011; however, the record does not include the tax information for these years. Instead, Father testified that in both 2010 and 2011¹ he earned

¹The evidence presented at trial does not reflect whether Father bowled prior to 2010.

approximately \$3,200.00 each year in gross earnings from bowling. During a good year, Father testified that he can win two tournaments, where the prize money typically varies from \$1,000.00 to \$3,000.00. However, included in his bowling expenses are entry fees, gas, hotel accommodations, and food expenses. After Father pays his bowling expenses, he testified that he is able to net approximately one-half or one-third of the actual prize amount. Furthermore, Father testified that his father is his “backer” and receives a portion of the prize money for covering Father’s up-front expenses. Father’s testimony is unclear as to when he pays his bowling expenses or when his father pays his expenses. Father did not testify about the specific instances in which he reimbursed his father or the details of their arrangement, such as whether Father was required to pay interest on any money loaned to him by his father. In addition, Father testified that he would be unable to bowl as often as he had previously because it would conflict with his visitation schedule with the children.

Father also testified that he is on the amateur staff for Ebonite International, a bowling equipment company. Father appeared in both a television commercial and on the front page of a magazine as advertisements for Ebonite International. Although Father’s compensation from Ebonite International is not monetary, Father does receive free equipment from the company. For example, in the first eight months of 2013, Father received five shirts and four bowling balls ranging in value from \$60.00 to \$200.00.

At trial, Mother produced a calendar of the times Father spent bowling or participating in other activities. Her calendar, which includes dates from March 2012 to September 2012, indicates that Father spent twelve weekends out of town bowling, spent thirty-nine nights at local bowling, attended four out-of-town golf trips, and spent one weekend at a “beer fest.” Mother testified that Father often would inform her the night before a trip that he would be out of town. Although Father testified and reported on his tax return that his gross earnings from bowling in 2012 were \$5,500.00, Mother’s testimony contradicted Father’s evidence. According to Mother, in July 2012, Father won \$4,000.00 in a tournament, and in December 2012, Father won half of the \$7,000.00 prize at a tournament as part of a two-man team. Thus, Father’s gross earnings from bowling in 2012, according to Mother, were \$7,500.00.

Mother, who was thirty-three years old at the time of trial, testified that she has a high school diploma and also attended college for some time, but she never earned a college degree. She did, however, hold several jobs at different times throughout the marriage. Specifically, Mother was employed at a country club, as a dance teacher, and as a massage therapist. Mother had lost her job at the Clarksville Country Club, where her father was the golf pro, due to the passage of a new board rule in January 2012 prohibiting family members from being employed concurrently. In the year prior to trial, Mother earned \$1,100.00 doing choreography for the local high school. Further, although she obtained a degree in massage

therapy, she testified that her license is not current because she had been unable to attend the out-of-town continuing education classes. Mother stated that she was unable to attend the classes because Father was out-of-town at the same time and she had no child care. In addition, she was unable to afford the cost of the classes, and Father declined to assist in paying for the classes. Mother testified that she intends to regain her license to practice massage therapy although her old salon had been sold to another company, along with her client list. At the time of trial, Mother was employed part-time teaching dance classes where her daughter attended classes, earning \$400.00 per month. She also expected to be able to secure employment at a new golf club, The River Club. At no point did Mother indicate that she could earn more than minimum wage.

Father was the primary earner during the marriage and admitted that he controlled the parties' finances. During the parties' marriage, Mother had no access to any of Father's financial accounts. Father also refused to allow Mother to participate in the finances of the family and did not consult her when preparing their tax returns. Father's mother prepared the tax returns for the parties, and when Mother requested copies of the returns, Father's mother refused to provide them.

Both parties testified regarding the minor children, focusing heavily on the children's private school. The children have attended a local Catholic private school since preschool. At the time of trial, the minor children were in the first and second grades. According to the testimony of both Mother and Father, the decision to enroll the children in private school was a mutual decision. However, while Mother testified that she intended for the children to remain in their private school until eighth grade, Father testified that he only intended for them to remain in the private school during their "formative years," which he indicated as only up until first or second grade. Mother testified that Father always used his bowling earnings to cover the cost of the children's private schooling, which tuition totaled approximately \$1,000.00 per month. Mother wanted the children to remain in private school after the divorce because of their need for stability.

The trial court entered its written Final Decree of Divorce on January 9, 2013 resolving the issues of the ground for divorce, child support, educational decision-making, alimony, and payment for private school tuition for the minor children. The trial court awarded Mother a divorce based on the ground of inappropriate marital conduct. The trial court also awarded Mother the authority to make all of the educational decisions for the children. Mother's request that the children remain in their private school was also granted. With regard to child support, the trial court found that Father's annual income from his employment at Budweiser was approximately \$49,949.00, with a gross monthly income of \$4,162.50. The trial court imputed an additional \$500.00 per month to Father for his bowling

earnings. Father was ordered to pay Mother \$500.00 per month for thirty-six (36) months as transitional alimony and \$2,500.00 for her attorney's fees as alimony *in solido*. In addition, Father was ordered to pay \$807.00 per month for child support and \$500.00 per month for the children's private schooling.

On February 4, 2013, Father filed a timely notice of appeal.

Issues

Father raises the following issues for review, which are taken from his brief:

1. Whether the trial court erred in attributing \$500.00 per month to Father's income for his bowling earnings, which in turn increased Father's child support obligation;
2. Whether the trial court erred by ordering Father to pay for approximately half of the minor children's private school tuition; and
3. Whether the trial court erred by ordering Father to pay to Mother transitional alimony.

We address each issue, along with the appropriate standard of review, in turn.

Analysis

Determination of Income to Father from Bowling Earnings

In his first issue, Father contends that the trial court erred when it determined that Father "earn[ed] on average \$500.00 a month" to his income for money he won bowling.² Courts are required to use the Child Support Guidelines developed by the Tennessee Department of Human Services to calculate a parents' child support obligation, as the Guidelines are intended "to promote both efficient child support proceedings and dependable, consistent child support awards." *Id.* at 249; *see also* Tenn. Code Ann. § 36-5-101(e); Tenn. Comp. R. & Regs. 1240-02-04-.01(3)(b), (c). Even with the adoption of the Child Support Guidelines, however, trial courts retain a certain amount of discretion in their decisions regarding child support, which decisions we review under an abuse of discretion standard. *Richardson v. Spanos*, 189 S.W.3d 720, 725 (Tenn. Ct. App. 2005). A trial court abuses its

² Father does not raise as an issue presented in his appellate brief that the trial court erred in finding that his annual income, prior to any determination of his bowling earnings, totals \$49,949.00.

discretion only when it has “applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.” *Pace v. Pace*, M2009-01037-COA-R3-CV, 2010 WL 1687740, at *3 (Tenn. Ct. App. Apr. 26, 2010) (citing *Henry v. Goins*, 104 S.W.3d 475, 479 (Tenn. 2003)).

“The fairness of a child support award depends on an accurate determination of both parents’ gross income.” *Massey v. Casals*, 315 S.W.3d 788, 795 (Tenn. Ct. App. 2009). The Child Support Guidelines provide, in relevant part, that the gross income of each parent “shall include income from any source . . . and includes, but is not limited to, the following: (i) Wages, (ii) Salaries, . . . (iv) Income from self-employment, . . . (xix) Prizes[.]”³ Furthermore, the trial court may impute income to either party for the purpose of setting child support payments when (1) a parent has been determined to be willfully and/or voluntarily underemployed or unemployed, (2) when there is no reliable evidence of income, or (3) when the parent owns substantial non-income producing assets. Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2)(I); *Thomas v. Thomas*, No. M2011-00906-COA-R3-CV, 2013 WL 1225849, at *2 (Tenn. Ct. App. Mar. 26, 2013). Courts, however, “should be wary of increasing child support based on possible income that is merely speculative Instead, they should focus on ‘income regularly received by the obligor.’” *Ford v. Ford*, No. 01A01-9611-CV-00536, 1998 WL 730201, at *4 (Tenn. Ct. App. Oct. 21, 1998) (citations omitted).

Applying the Child Support Guidelines is straightforward when parents’ incomes are stable; however, such as in the case-at-bar, “it is becoming increasingly common for an obligor spouse’s income to fluctuate” *Hanselman v. Hanselman*, No. M1998-00919-COA-R3-CV, 2001 WL 252792, at *3 (Tenn. Ct. App. Mar. 15, 2001). Although the courts have entertained various arguments concerning how to properly calculate and include an obligor parent’s fluctuating income, the Child Support Guidelines now provide the approach for calculating fluctuating income. *See* Tenn. Comp. R. & Regs. 1240-02-04-.03(3)(b); *Hanselman*, 2001 WL 252792, at *3. If an obligor parent receives variable income, the income “shall be averaged over a reasonable period of time consistent with the circumstances of the case.” Tenn. Comp. R. & Regs. 1240-02-04-.03(3)(b). Still, while the Guidelines direct courts to average the variable income, the Guidelines do not specify how to average the incomes, including the proper time period to be utilized. As such, “it is left to the courts to determine on a case-by-case basis the most appropriate way to average fluctuating income.” *Hanselman*, 2001 WL 252792, at *3. Tennessee courts, often met by the arguments of obligor parents in favor of calculating averages using shorter intervals, have consistently

³The parties do not dispute that Father’s income from bowling constitutes income to Father pursuant to the Child Support Guidelines.

concluded that it is inappropriate to base child support obligations on the averages of short durations. *Miglin v. Miglin*, No. 01A01-9802-CH-00080, 1999 WL 398205, at *3 (Tenn. Ct. App. June 18, 1999) (rejecting a proposed four month average in favor of a one year average); *Whitfield v. Whitfield*, No. 03A01-9404-CV-00140, 1994 WL 465796, at *2 (Tenn. Ct. App. Aug. 30, 1994) (rejecting a five-pay-period average in favor of a one-year average). Likewise, averages calculated using durations of a year or more have been consistently upheld by the courts. *Alexander v. Alexander*, 34 S.W.3d 456, 464-65 (Tenn. Ct. App.2000) (adopting a four-year average); *Norton v. Norton*, No. W1999-02176-COA-R3-CV, 2000 WL 52819, at *7 n. 7 (Tenn. Ct. App. Jan. 10, 2000) (adopting a two-year average); *Stacey v. Stacey*, No. 02A01-9802-CV-00050, 1999 WL 1097975, at *4 (Tenn. Ct. App. Oct. 6, 1999) (adopting a two-year average); *Smith v. Smith*, No. 01A01-9705-CH-00216, 1997 WL 672646, at *3 (Tenn. Ct. App. Oct. 29, 1997) (adopting a three-year average); *Bell v. Bell*, No. 01A01-9511-CH-00493, 1996 WL 548150, at *1 (Tenn. Ct. App. Sept. 25, 1996) (adopting a four-year average). In light of the foregoing, we must determine whether the trial court applied the appropriate standard when it determined Father’s bowling earnings for child support purposes.

We begin with the trial court’s written order, which states:

Mr. Hayes has a history of bowling in tournaments as a second income. The [] undisputed testimony is that in 2012 he went to 12 bowling tournaments in a six (6) month period of time and 39 nights of bowling in league play, prior to the parties’ separation. . . . He admitted he earns cash awards in league play. In just two tournaments, he made \$3,500.00 and \$4,000.00 respectively. The Court is put in a position to make a determination to say what he is earning from bowling based upon diametrically opposing testimony. Court concludes that Mr. Hayes must earn something from bowling due to the significant expenses incurred in traveling, lodging, entry fees, and food. The Court finds that Mr. Hayes earns on average \$500.00 a month in bowling income. Thus, Mr. Hayes’ total earning capacity is \$55,949.90 per year.

As shown above, the trial court found that it was tasked with determining Father’s variable income based on “diametrically opposing testimony” from the parties. As such, the trial court’s ruling is the product of its credibility determination after hearing the parties’ conflicting testimony. Indeed, the trial court’s oral ruling illuminates the trial court’s reasoning on this issue:

[Father] says he doesn't earn anything [after deducting expenses]; in fact he might make \$500 a year [from bowling]. The Court has to believe that there is a payoff somewhere down the line. So he says he doesn't earn anything. She says he does. . . . And the only thing that I have - - if I'm going to conclude that he earns something, the only thing that I have to go on is the evidence really from her based on what she says he said.

Clearly, the trial court simply did not credit Father's testimony that although Father may be awarded substantial amounts from bowling, the expenses from bowling match or exceed all his earnings.

When the resolution of the issues in a case depends upon the truthfulness of witnesses, the trial judge who has the opportunity to observe the manner and demeanor of the witnesses while testifying is in a far better position than this Court to decide those issues. *McCaleb v. Saturn Corp.*, 910 S.W.2d 412, 415 (Tenn. 1995). If the trial court's factual determinations are based on its assessment of witness credibility, this Court "will not reevaluate that assessment absent clear and convincing evidence to the contrary." *Franklin County Bd. Of Educ. v. Crabtree*, 337 S.W.3d 808, 811 (Tenn. Ct. App. 2010) (citing *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002)).

Accordingly, we turn to the evidence contained in the record on appeal to determine if the trial court abused its discretion in determining Father's income or in declining to credit Father's testimony. Father testified that, in 2012, he earned \$5,500.00 in gross winnings from bowling as evidenced on his 2012 tax return. Father, however, claimed that his expenses for attending different bowling tournaments subsumed a significant portion of his winnings.⁴

Mother, on the other hand, testified that Father made \$7,500.00 in gross winnings from bowling, and Father told Mother this information after winning the money. Mother further stated that the children's private school tuition had always been paid with Father's bowling earnings. Mother admitted, however, she was generally unaware of the parties' finances, as Father had generally excluded her from the family's financial decisions.

⁴On Father's 2012 amended tax return, he lists \$5,440.00 as self-employment income from bowling. He lists \$2,225.00 as his total expenses, leaving a net profit of \$3,215.00. However, on Father's original 2012 tax return, he listed \$2,290.00 as self-employment income from bowling. He listed \$2,225.00 as his total expenses, leaving a net profit of \$65.00. Although Father's 2012 amended tax return was introduced at trial, Father included the original 2012 tax return in his motion for reconsideration of the final order—after the divorce trial.

Although both parties' testimony contained inconsistencies, the trial court gave more credit to Mother's statements regarding the amount Father had earned when making its ruling. From the trial court's order, we are able to glean that the trial court found Father's testimony as to his expenses to not be credible as to the extent Father stated he made little profit from bowling. The record reflects that Father spent a substantial amount of time and money on bowling, and Father referred to bowling as a second job. Thus, the trial court reasonably concluded that Father was involved in an income-producing endeavor, not merely a hobby. Our review of the record does not indicate that the trial court abused its discretion in crediting Mother's testimony over Father's, and we accordingly decline to second-guess the trial court's credibility determinations absent clear and convincing evidence to the contrary. *See Nelson v. Nelson*, 66 S.W.3d 896, 904 (Tenn. Ct. App. 2001).

We next address whether the trial court abused its discretion in its actual determination of the amount of bowling income earned by Father. Although less clear than preferable, the trial court's ruling indicates that it calculated Father's income earned from bowling by using the evidence that he earned a total of \$7,500.00 in 2012. Upon our review of the record, it appears that the trial court actually imposed a more favorable average to Father. Here, the trial court averaged Father's 2012 bowling earnings of \$7,500.00 using a one-year duration; other courts have concluded that the use of a one-year duration is reasonable. *Miglin*, 1999 WL 398205, at *3 (holding that a one-year duration was reasonable); *Whitfield*, 1994 WL 465796, at *2 (same). However, it appears that the trial court's average of \$500.00 per month actually was less than the average when \$7,500.00 (Father's bowling winnings in 2012) is divided over the course of twelve months. The actual average of gross winnings by Father amounts to \$625.00 per month. However, as previously discussed, there was some indication in the record that Father was required to pay entry fees or other expenses related to his bowling. Thus, while the trial court may not have credited Father's testimony that all his winnings were used to pay expenses, it was certainly not an abuse of discretion for the trial court to take into account expenses in an amount less than testified by Father, but more than testified by Mother. *See* Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(3) (allowing a self-employed parent to deduct reasonable and necessary business expenses); *see also Edmunds v. Delta Partners, L.L.C.*, 403 S.W.3d 812, 826 (Tenn. Ct. App. 2012) ("If a discretionary decision is **within a range of acceptable alternatives**, we will not substitute our judgment for that of the trial court simply because we may have chosen a different alternative.") (emphasis added). As such, we cannot conclude that the trial court abused its discretion when it found that Father earned \$500.00 per month in bowling income.

Transitional Alimony

Next, Father contends that the trial court erred when it ordered him to pay to Mother transitional alimony of \$500.00 per month for thirty-six months. Specifically, in its written order, the trial court provided:

The Court has considered the factors in [Tennessee Code Annotated] § 36-5-121(i)(1) et seq. and based on those factors, transitional alimony is appropriate. [Father] and [Mother] have lived a comfortable lifestyle until now, and [Mother] is now living with her parents. [Father] has no complaints about [Mother] as a mother and a wife. Consequently, he must contribute to her transition with his funds.

Father asserts that he is unable to pay Mother the \$500.00 per month in spousal support due to his salary reduction at Budweiser, his inability to compete in bowling tournaments as often as he had during the marriage, and his other court-ordered obligations. Additionally, Father asserts that any need Mother has for alimony is outweighed by his inability to pay.

The Tennessee Supreme Court has consistently recognized that trial courts in Tennessee have broad discretion to determine whether spousal support is needed and, if so, to determine the nature, amount, and duration of the award. *See, e.g., Gonszewski v. Gonszewski*, 350 S.W.3d 99, 105 (Tenn. 2011); *Bratton v. Bratton*, 136 S.W.3d 595, 605 (Tenn. 2004); *Burlew v. Burlew*, 40 S.W.3d 465, 470 (Tenn. 2001); *Crabtree v. Crabtree*, 16 S.W.3d 356, 360 (Tenn. 2000). Because a trial court's "decision regarding spousal support is factually driven and involves the careful balancing of many factors," *Gonszewski*, 350 S.W.3d at 105 (footnote omitted), the role of an appellate court is not to second guess the trial court or to substitute its judgment for that of the trial court, but to determine whether the trial court abused its discretion in awarding, or refusing to award, spousal support. *Id.*; *Edmunds v. Delta Partners, L.L.C.*, 403 S.W.3d 812, 826 (Tenn. Ct. App. 2012) ("If a discretionary decision is within a range of acceptable alternatives, we will not substitute our judgment for that of the trial court simply because we may have chosen a different alternative."). "An abuse of discretion occurs when the trial court causes an injustice by applying an incorrect legal standard, reaches an illogical result, resolves the case on a clearly erroneous assessment of the evidence, or relies on reasoning that causes an injustice." *Id.* (citing *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 176 (Tenn. 2011); *Henderson v. SAIA, Inc.*, 318 S.W.3d 328, 335 (Tenn. 2010)). In determining whether the trial court abused its discretion, an appellate court "should presume that the [trial court's] decision is correct and review the evidence in the light most favorable to the decision." *Gonszewski*, 350 S.W.3d at 105-06; *see also* Tenn. R. App. P. 13(d) ("[R]eview of findings of fact by the trial court in civil actions

shall be *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding[s], unless the preponderance of the evidence is otherwise.”). Additionally, in deciding whether to award spousal support and, if so, determining the nature, amount, length, and manner of payment, the trial court must balance the factors in Section 36-4-121(i). *See* Tenn. Code Ann. § 36-4-121(c) (listing several factors that the trial court “shall” consider when awarding spousal support). **Holifield v. Holifield**, No. W2012-00806-COA-R3-CV, 2014 WL 527641, at *5 (Tenn. Ct. App. Feb. 10, 2014). “An alimony award depends on the circumstances of each case, with financial need of the recipient spouse and the obligor spouse’s ability to pay being the primary considerations.” *Id.* (citing **Burlew**, 40 S.W.2d at 472).

Tennessee recognizes four distinct types of spousal support: (1) alimony *in futuro*, (2) alimony *in solido*, (3) rehabilitative alimony, and (4) transitional alimony. Tenn. Code Ann. § 36-5-121(d)(1). Alimony *in futuro* is a form of long-term support. Where economic rehabilitation is unnecessary, transitional alimony may be awarded. Transitional alimony assists the disadvantaged spouse with the “transition to the status of a single person.” **Gonsewski**, 350 S.W.3d at 109 (internal quotation marks omitted). Rehabilitative alimony is “designed to aid a spouse who already possesses the capacity for self-sufficiency,” whereas “transitional alimony is designed to aid a spouse who already possesses the capacity for self-sufficiency but needs financial assistance in adjusting to the economic consequences of establishing and maintaining a household without the benefit of the other spouse’s income.” *Id.* Consequently, “transitional alimony has been described as a form of short-term ‘bridge-the-gap’ support designed to ‘smooth the transition of a spouse from married to single life.’” **Mayfield v. Mayfield**, 395 S.W.3d 108, 115 (Tenn. 2012) (citing **Engesser v. Engesser**, 42 So.3d 249, 251 (Fla. Dist. Ct. App. 2010)). Transitional alimony is payable for a definite period of time and may be modified only if: (1) the parties agree that it may be modified; (2) the court provides for modification in the divorce decree, decree of legal separation; or order of protection; or (3) the recipient spouse resides with a third person following the divorce. Tenn. Code Ann. § 36-5-121(g)(2).

Tennessee statutes concerning spousal support reflect a legislative preference favoring rehabilitative or transitional alimony rather than alimony *in futuro* or *in solido*. *See* Tenn. Code Ann. § 36-5-121(d)(2)–(3); **Gonsewski**, 350 S.W.3d at 109. Not even long-term support is a guarantee that the recipient spouse will be able to maintain the same standard of living enjoyed before the divorce because “two persons living separately incur more expenses than two persons living together.” *Id.* at 108 (quoting **Kinard v. Kinard**, 986 S.W.2d 220, 234 (Tenn. Ct. App. 1998)). Although the parties’ standard of living is a factor courts must consider when making alimony determinations, *see* Tenn. Code Ann. § 36-5-121(i)(9), the economic reality is that the parties’ post-divorce assets and incomes often will not permit

each spouse to maintain the same standard of living after the divorce that the couple enjoyed during the marriage. *Gonsewski*, 350 S.W.3d at 113. Decisions regarding the type, length, and amount of alimony turn upon the unique facts of each case and careful consideration of many factors, including, but not limited to, the statutory factors contained in Tennessee Code Annotated Section 36-5-121(i), including the age and relative earning capacity of the parties, the marital property awarded to each party, the separate property retained by each party, and other equitable factors. *See* Tenn. Code Ann. § 36-5-121(i). The two most important factors, however, are the disadvantaged spouse's need and the obligor spouse's ability to pay. *Gonsewski*, 350 S.W.3d at 109–10.

A significant number of the statutory factors enumerated in Tennessee Code Annotated § 36-5-121 weigh in Mother's favor in this case. Here, Mother has a high school diploma as opposed to Father's college degree, and she had not had regular full-time employment throughout the duration of the marriage. *See* Tenn. Code Ann. § 36-5-121(i)(1), (2) (requiring the court to consider the relative earning capacity and education of the parties or a party's ability to secure education and training to improve such party's earning capacity). In addition, Wife as the primary residential parent for the minor children would have to secure child care, which Father testified would amount to approximately \$400.00 per month through the children's school. *See id.* at (6) (requiring the court to consider the extent to which it would be undesirable for the custodian of the children to seek employment outside the home). Further, Father had no complaints about Mother as a wife or mother and acknowledged her contributions to the development of the parties' children and to the financial state of the parties by providing child care and not creating any marital debt. *See id.* at (10) (requiring the court to consider the extent of tangible and intangible contributions to the marriage as monetary or homemaker contributions). Finally, it is undisputed that Father committed inappropriate marital conduct, ultimately leading to the demise of the marriage. *See id.* at (11) (requiring the court to consider the relative fault of the parties).

Father generally does not dispute these findings. Instead, the majority of Father's argument is premised on his inability to pay the ordered alimony. As previously discussed, the need of the disadvantaged spouse and obligor spouse's ability to pay support are the two most important factors when analyzing spousal support awards. *See Gonsewski*, 350 S.W.3d at 109–10. In his brief, Father argues that the trial court's spousal support order financially devastates him because, after paying his court-ordered obligations and other obligatory expenses (such as taxes and health insurance), he is left with \$793.00 for his own living expenses. To support this assertion, Father relies on his own "undisputed testimony" that his

monthly net income equals \$2,600.00.⁵ Father's contention that this net income is undisputed and must be used to calculate whether he has the ability to pay alimony is simply not supported by the record. From our review of the record, Father's testimony regarding his net income of \$2,600.00 is based on a gross income of \$3,600.00 per month. The trial court, however, rejected Father's testimony that he earned only \$3,600.00 per month, and instead held that Father's income from Budweiser was approximately \$4,162.00, and that Father was earning an additional \$500.00 per month in income from bowling. Although Father properly raised the issue of the trial court's calculation of his bowling income, Father's Statement of the Issues Presented on appeal does not raise as an error the trial court's finding that Father's income from Budweiser totals approximately \$4,162.00 per month. Our review "generally will extend only to those issues presented for review." Tenn. R. App. P. 13(b). As such, this Court has repeatedly held that arguments regarding errors made by the trial court will be waived by a party's failure to designate the error as an issue on appeal. *See e.g., Forbess v. Forbess*, 370 S.W.3d 347, 356 (Tenn. Ct. App. 2011) (holding that husband waived an issue by his failure to designate it as an issue in his statement of the issues). Thus, Father's testimony indicating that his net income would be \$2,600.00 from a gross income of \$3,600.00 is not relevant to this Court's determination of what Father's net income should be from an income of \$4,162.00.

In addition, we cannot discern Father's monthly living expenses as Father has failed to include an income and expense statement in the record on appeal.⁶ It appears from the record, specifically Father's cross-examination by Mother, that Father initially disclosed information regarding all of his monthly expenses to the trial court. In his testimony, Father indicated that he had several monthly expenses, including a monthly house payment and homeowner's insurance. Father also testified that one of his monthly expenses was the children's private school tuition; however, as of the date of trial in September 2013, he conceded he had not paid tuition at any time during the year of 2013. Other than Father's fleeting testimony during cross-examination as to some of his expenses, it is unclear what his actual monthly living expenses were because his income and expense statement is not included in the record on appeal. As such, this Court is left to speculate as to Father's monthly expenses for everyday items, such as food, clothing, and utilities. This we cannot do. Tennessee law is clear that

⁵Father's calculations in his brief are unclear. In his brief, Father states that his "undisputed testimony" was that his net income every two-week pay period was \$1,200.00. However, in his calculation he uses \$2,600.00 as his "net income."

⁶The record on appeal includes an exhibit titled "Income/Expense." However, this exhibit only includes his earnings from Budweiser, his federal and state taxes related to that income, and various insurance premiums. The exhibit does not include any of Father's personal expenses, such as those related to clothing, food, automobile insurance, or other household expenses.

“[w]hen a party seeks appellate review there is a duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal.” *State v. Ballard*, 855 S.W.2d 557, 560 (Tenn. 1993). The omission of this relevant material in the record hinders our review in this case. *See* Tenn. R. App. 24(b). As this Court has held numerous times, without a proper record, appellate courts must affirm the decision of the trial court and presume that “there was sufficient evidence before the trial court to support its judgment.” *In re Sarah E. L.*, No.09-002186/09-002185, 2011 WL 676006, at *2 (Tenn. Ct. App. 2011) (citing *Outdoor Mgmt., LLC v. Thomas*, 249 S.W.3d 368, 377 (Tenn. Ct. App. 2007)). Thus, this Court will only reverse based upon a finding in the technical record that there is an error of law. *Id.* (citing *In re M.R.*, No. M2007-002532-COA-R3-JV, 2008 WL 2331030, at *3 (Tenn. Ct. App. June 3, 2008)). Because there is no relevant evidence regarding Father’s expenses in the record, we must presume that the trial court correctly found that Father had the ability to pay \$500.00 per month in alimony to Mother for thirty-six months. Accordingly, we affirm.

Private School Tuition

Last, we address Father’s argument that the trial court erred in requiring him to pay a portion of the children’s private school tuition as a deviation from the presumed child support amount. Out of the \$987.00 monthly cost for tuition, the trial court ordered Father to pay \$500.00 per month. Father asserts that the trial court did not consider or apply the child support guidelines in ordering him to pay private school tuition and expenses that greatly exceed his financial means. Specifically, Father asserts that this decision was in error because the trial court did not consider or make written findings concerning the parties’ abilities to pay. We agree.

In its written order, the trial court did not reference the Child Support Guidelines, nor did it include private school tuition as an upward deviation on the Child Support Worksheet. Instead, the trial court found:

9. The children have attended private school since they were enrolled in preschool. They are now in the 1st and 2nd grades. The decision to send them to a private school was a joint decision according to both parties’ testimony. The parties[] differ as to how long this was to continue. [Mother] testified that they discussed the children continuing until the 8th grade although [Father] would like the children to be removed from private school immediately. [Father] has always paid for the private school tuition.

10. It is in the best interest of the children that they continue to remain in the private school. [Mother] volunteers at the school and has been the parent who has been involved in their education. [Father's] motivation to move the children from the private school is based on his financial interests and not in the best interest of the children. It is appropriate for [Mother] to make all educational decisions.

As explained by this Court in *Richardson v. Spanos*:

Under current law, the amount of support derived from a proper application of the formula in the Child Support Guidelines becomes the presumptive amount of the child support owed. This amount of support is rebuttable. Tenn. Code Ann. § 36-5-101(e)(1)(A); Tenn. Comp. R. & Regs. 1240-2-4-.01(1)(d)(1) (Mar. 2005); *Taylor v. Fezell*, 158 S.W.3d 352, 357 (Tenn. 2005). Accordingly, trial courts may, in their discretion, deviate from the amount of support required by the Child Support Guidelines, *State v. Wilson*, 132 S.W.3d 340, 343 (Tenn. 2004); *Jones v. Jones*, 930 S.W.2d at 545, but when they do, they must make specific written findings regarding how the application of the Child Support Guidelines would be unjust or inappropriate in the case. Tenn. Code Ann. § 36-5-101(e)(1)(A); Tenn. Comp. R. & Regs. 1240-2-4-.07(1)(b) (Mar. 2005).

Richardson, 189 S.W.3d at 725. The Guidelines specifically address educational expenses as a deviation from the standard child support amounts:

(i) Extraordinary education expenses may be added to the presumptive child support as a deviation. Extraordinary education expenses include, but are not limited to, tuition, room and board, lab fees, books, fees, and other reasonable and necessary expenses associated with special needs education or private elementary and/or secondary schooling that are appropriate to the parents' financial abilities and to the lifestyle of the child if the parents and child were living together.

(ii) In determining the amount of deviation for extraordinary educational expenses, scholarships, grants, stipends, and other cost-reducing programs received by or on behalf of the child shall be considered.

(iii) If a deviation is allowed for extraordinary educational expenses, a monthly average of these expenses shall be based on evidence of prior or anticipated expenses and entered on the Worksheet in the deviation section.

Tenn. Comp. R. & Regs. 1240-2-4-.07(2)(d)(1). Private school tuition constitutes an “extraordinary educational expenses” for which the trial court may make an upward deviation to the presumptive child support amount. *Richardson*, 189 S.W.3d at 727 (citing *Barnett v. Barnett*, 27 S.W.3d 904, 907 (Tenn. 2000)). Indeed, the Child Support Guidelines confirm that additional support for private elementary or secondary education should be calculated separately and should be added to the basic support award as an upward deviation from the presumptive amount. Tenn. Comp. R. & Regs. 1240-2-4-.07(2)(d)(1)(i). The Child Support Guidelines also provide that these expenses should be considered on a case-by-case basis and that the court should also consider whether the private elementary or secondary schooling is “appropriate to the parents’ financial abilities and to the lifestyle of the child if the parents and the child were living together.” Tenn. Comp. R. & Regs. 1240-2-4-.07(2)(d)(1)(ii).

When making a deviation from the presumptive amount of support, the court must make written findings in its order detailing “the basis for the deviation and the amount the child support order would have been without the deviation.” Tenn. Code Ann. §36-5-101(e)(1)(A); Tenn. Comp. R. & Regs. 1240-2-4-.07(1)(b). The Guidelines further explain the procedure for deviation and require that:

(c) When ordering a deviation from the presumptive amount of child support established by the Guidelines, the tribunal’s order shall contain written findings of fact stating:

1. The reasons for the change or deviation from the presumptive amount of child support that would have been paid pursuant to the Guidelines; and
2. The amount of child support that would have been required under the Guidelines if the presumptive amount had not been rebutted; and
3. How, in its determination,
 - (i) Application of the Guidelines would be unjust or inappropriate in the particular case before the tribunal; and

(ii) The best interests of the child for whom support is being determined will be served by deviation from the presumptive guideline amount.

Tenn. Comp. R. & Regs. 1240-2-4-.07(1)(c).

The trial court in this case made no written findings that state: (1) the reason for the deviation from the presumptive amount of child support; (2) the amount of child support that would have been required absent a rebuttal of the presumptive amount; or (3) why application of the guidelines would be unjust or inappropriate. Indeed, the Child Support Worksheet attached to the Final Decree of Divorce does not specify *any* deviations. In addition, the trial court found, to Father's disfavor, that Father's motivation to remove the children from their private school was financial. Financial ability to pay, however, is proper to consider when determining if the upward deviation for private school expenses is warranted. *See* Tenn. Comp. R. & Regs. 1240-2-4-.07(2)(d)(1)(ii) (directing the trial court to consider whether private schooling is "appropriate to the parents' financial abilities . . .").

In light of the trial court's failure to specify whether the children's private school tuition is an appropriate upward deviation for which Father is financially responsible, we vacate and remand on this issue. Upon remand, the trial court should make a fresh determination as to whether a deviation from the presumptive child support amount is warranted in this case. The trial court shall also reconsider the financial abilities of the parties to continue the children's enrollment in private school. Tenn. Comp. R. & Regs. 1240-2-4-.07(2)(d)(1)(ii). Accordingly, the trial court's decision on the issue of payment of private school tuition for the parties' minor children is vacated and remanded.

Conclusion

The judgment of the Circuit Court of Montgomery County is hereby affirmed in part, vacated in part, and remanded. Costs of this appeal are taxed one-half to Appellant Douglas Aaron Hayes, and his surety, and one-half to Appellee Jessica Catherine Hayes, for all of which execution may issue if necessary. This cause is remanded to the trial court for the collection of costs and all further proceedings as may be necessary and are consistent with this Opinion.

J. STEVEN STAFFORD, JUDGE

