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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002392-ME

LAURA HUDSON (NOW STANBERY) APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE PAULA SHERLOCK, JUDGE
ACTION NO. 09-CI-503251

DONALD HUDSON APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, JUDGE; HENRY AND ISAAC,[1] SENIOR JUDGES.

ACREE, JUDGE: Laura Hudson (Mother) appeals the December 1, 2009 order of the Jefferson Family Court increasing the monthly child support obligation of Donald Hudson (Father) from $210.00 to $396.72. We affirm.

[1] Senior Judges Michael L. Henry and Sheila R. Isaac sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580. Senior Judge Henry concurred in this opinion prior to the expiration of his term of senior judge service. Release of the opinion was delayed by administrative handling.

Mother and Father were married on February 19, 1993. One child, a son (Child), was born of the marriage on July 28, 1994. Mother initiated divorce proceedings on November 9, 1995. The same day, the parties filed a Marriage Settlement Agreement which required Father to pay child support of $210.00 per month. The decree of dissolution incorporating the agreement was entered on January 17, 1996. The parties operated under the terms of the agreement without problem until September 24, 2009, when Mother filed a motion to increase Father's monthly child support obligation.

Mother's motion was based on changes in the parties' financial circumstances.[2] More specifically, Mother informed the family court at the evidentiary hearing that she had become disabled and that Father, a Jefferson County Public School assistant principal, was earning approximately $7,167 per month, considerably more than he earned at the time the divorce decree was entered. She requested his monthly child support obligation be increased to $817.

Father objected to Mother's calculation. He argued he should be required to pay only $602.36 per month for support of Child. This was because Child directly received $513 per month in Social Security benefits due to Mother's disability. Father believed the Child's receipt of government benefits constituted an independent source of income that would impact his net support obligation and

[2] KRS 403.213(1) permits modification of child support payments "only upon a showing of a material change in circumstances that is substantial and continuing."

which must be considered in determining whether to deviate from the child support guidelines.

The family court was persuaded that the monthly Social Security benefits to Child should be considered an independent source of income, and determined that paying the full $817, as Mother sought, would constitute a windfall to Child. The family court concluded that deviation from the standard child support obligation was appropriate because of the monthly Social Security payment to the Child and deducted the benefit from the base amount of the parties' child support obligation. The court then apportioned the remaining base amount between Mother and Father according to their respective incomes. According to this calculation, Father was required to pay 87% of $456, or $396.72, per month.

At this point, we believe it appropriate to note that subsequent to the entry of the family court's order in this case, the Kentucky Supreme Court reached the opposite result in a case with facts virtually indistinguishable from those before us. In *Artrip v. Noe*, 311 S.W.3d 229 (Ky. 2010), the Supreme Court determined that the parent who is not the disabled parent through whom the child is receiving Social Security benefits is not entitled to a credit against child support payments. *Artrip*, 311 S.W.3d at 232-33.

Artrip still had not been rendered when Mother filed her initial brief. Mother's sole argument in that brief is that the family court's "error may stem from subtracting the child's Social Security Benefits." While Mother was obviously unable to cite *Artrip*, she also failed to cite any other legal authority in

support of that particular argument. However, *Artrip* was rendered two months before Mother's reply brief was due, and it became final more than a month before her reply brief was due.[3] Unfortunately, Mother filed no reply brief.

A more significant factor affects our review of this case however. Mother failed to comply with CR 76.12(4)(c)(v)[4] which requires her to direct this Court's attention to the place in the record where she preserved the error she now claims. Based on our review of the record, she appears not to have preserved the error.

In fact, Father responds that Mother waived the right to protest the deduction of the Social Security benefit from the base amount by conceding at the hearing that such benefits did constitute independent income to Child. He further argues that, even if the error had not been waived, but instead had been argued and preserved, the family court's decision still should be affirmed because it was not an abuse of the court's discretion.

Ordinarily, this Court will review a family court's decision to modify a child support order or to deviate from the child support guidelines and determine whether the family court's decision was an abuse of discretion. *Goldsmith v. Bennett-Goldsmith,* 227 S.W.3d 459, 461 (Ky. App. 2007); *Brown v. Brown*, 952 S.W.2d 707, 708 (Ky. App. 1997). If Mother had preserved the error, if Mother

[3] *Artrip v. Noe* was rendered on April 22, 2010, a little more than one month after Mother filed her first brief. However, Mother's reply brief was not due until June 18, 2010. *Artrip v. Noe* became final a month earlier, on May 13, 2010. Mother filed no reply brief.

[4] Kentucky Rule of Civil Procedure (CR) 76.12 (4)(c)(v) which requires the appellant to place "at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner."

had complied with CR 76.12(4)(c)(v), and if that standard of review applied, her argument would be persuasive. As we indicated, however, a different standard applies either when the error is not sufficiently preserved, CR 61.02,[5] or when the appellant fails to comply with CR 76.12(4)(c)(v), *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990), both of which occurred here.

In *Elwell*, this Court traced the history and purpose of the civil rule relating to the preservation and identification of error for review. The rule

> is designed to save the appellate court the time of canvassing the record in order to determine if the claimed error was properly preserved for appeal. . . . It goes without saying that errors to be considered for appellate review must be precisely preserved *and identified* . . . .

Id. (citations omitted; emphasis supplied). Failure to comply with CR 76.12(4)(c)(v) by identifying where in the record error was preserved is treated the same as if the error was not sufficiently preserved. *Compare* CR 61.02 *with Elwell*, 799 S.W.2d at 47-48.[6] "It is only to avert a manifest injustice that this court will entertain an argument . . . not presented in accordance with CR 76.12(4)(c)(iv)[, recodified as CR 76.12(4)(c)(v).]" *Elwell*, 799 S.W.2d at 48.

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[5] CR 61.02 states, in pertinent part: "A palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."

[6] In *Elwell*, the appellant alleged six separate errors. The appellee pointed out that "three of the alleged six errors assigned by appellants were not preserved[,]" thereby implying that the remaining three claims of error *were* preserved before the trial court. *Elwell*, 799 S.W.2d at 48. All six claims of error, however, were reviewed under the same manifest injustice standard. This Court "f[ou]nd no manifest injustice and decline[d] further to address any issues not presented in accordance with CR 76.12(4)(c)(iv)[.]" *Id.*

"On the other hand, a palpable error affecting the substantial rights of a party, even if insufficiently raised or preserved, is reviewable, and, upon a determination that it has resulted in manifest injustice, reversible. CR 61.02." *Deemer v. Finger*, 817 S.W.2d 435, 437 (Ky. 1990). Unfortunately, Mother has not asked that we review her case pursuant to CR 61.02. Under such circumstances, we generally decline any further review at all for even when a party does seek review under CR 61.02, it is applied sparingly and only to exceptional situations affecting the fairness, integrity or public reputation of judicial proceedings. *See id*.

However, given the oddly-timed circumstances of this appeal relative to the rendering of *Artrip v. Noe*, and despite Mother's failure to request review under CR 61.02, we have nonetheless decided to apply the manifest injustice standard of review. Applying that standard, the record does not make manifest to us that it was an injustice to increase Father's legal obligation of child support for his sixteen-year-old son from $210 per month to $396.72 per month but no more. The testimonial and documentary evidence here gives this Court the clear impression that whatever differences may remain between them, Mother and Father have in common a deep and abiding love of their Child; Father appears willing and able to provide more than his legal obligation; and nothing manifest in the record indicates that Child will suffer an injustice or want as a result of the family court's order. We simply find no manifest injustice here.

The family court's order is affirmed.

HENRY, SENIOR JUDGE, CONCURS.

ISAAC, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ISAAC, SENIOR JUDGE, DISSENTING: Respectfully, I dissent. I agree with the majority that the manifest injustice standard of review be applied, but I would reverse and remand for the trial court to recalculate its findings in light of the *Artrip* decision of the Kentucky Supreme Court. Regardless of Appellant's failure to cite this case, this Court is nevertheless aware of it and should apply its clear dictates.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
John T. Fowler, III Louisville, Kentucky	Christy M. Hanley Louisville, Kentucky