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IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs October 30, 2025

CAROLINE LONG KILPATRICK v. CONNOR LEWIS KILPATRICK

Appeal from the Chancery Court for Williamson County
No. 18CV-47281-H Deana C. Hood, Judge

No. M2024-00803-COA-R3-CV

In this post-divorce action to modify child support, Appellant/Mother appeals the trial court's: (1) calculation of Appellee/Father's gross income; (2) determination that she was willfully underemployed; (3) imputation of income to her; (4) exclusion of summer work-related childcare expenses from the child support worksheet; (5) denial of an upward deviation; and (6) denial of her request for attorney's fees. Both parties seek an award of appellate attorney's fees. Because we determine that the trial court improperly excluded certain sources of income from its calculation of Father's gross income, we vacate Father's child support obligation. We reverse the trial court's denial of Mother's attorney's fees. We affirm the trial court's conclusions that Mother was willfully underemployed and its imputation of income to her as well as its exclusion of summer work-related childcare expenses and its denial of an upward deviation. Mother's request for appellate attorney's fees is granted. Father's request for same is denied.

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

VALERIE L. SMITH, J., delivered the opinion of the court, in which J. STEVEN STAFFORD, P.J., W.S., and CARMA DENNIS MCGEE, J., joined.

Demeka Kay Church, Franklin, Tennessee, for the appellant, Caroline Long Kilpatrick.

Gregory D. Smith, Elizabeth Garrett, Brenton H. Lankford, Nashville, Tennessee, for the appellee, Connor Lewis Kilpatrick.

OPINION

I. Background

Appellant Caroline Kilpatrick ("Mother") and Connor Kilpatrick ("Father") are the parents of three children, Benjamin (d/o/b March 2012), Luke (d/o/b March 2012), and Meredith (d/o/b April 2015) (together, the "Children"). On February 19, 2019, the Chancery Court for Williamson County, Tennessee (the "trial court") entered the final decree of divorce as to Mother and Father. Incorporated into the final decree was the parties' Marital Dissolution Agreement ("MDA") and Permanent Parenting Plan (the "Parenting Plan"). The Parenting Plan named Mother as the primary residential parent and awarded her 225 days with the Children; Father was awarded 140 days with the Children. The Parenting Plan set Father's gross monthly income at $25,000.00 and Mother's gross monthly income at $2,441.00. Father's monthly child support obligation was set at $2,505.00 per month.

On January 24, 2022, Mother filed a petition to modify child support (the "Petition"). Therein, she alleged that Father's income had increased since the trial court entered the final decree, and that a significant variance existed between Father's current child support obligation and the amount he should have been paying under the Tennessee Child Support Guidelines (the "Guidelines"). Mother also alleged that she began working after the divorce was finalized and that she was incurring work-related childcare costs. Mother asked the trial court to award her attorney's fees and costs incurred in bringing the Petition.

On February 24, 2022, Father filed an answer. On April 12, 2022, Mother filed a motion to maintain status quo with regard to private school expenses.[1] In Father's response to the motion, he alleged that Mother was "voluntarily under[]employed, choosing to work only 15-16 hours per week, no more than two (2) days per week." As discussed further, *infra*, Father's trial brief also alleged that Mother was underemployed and asked the trial court to impute a monthly income to her between $5,130.67 and $6,4133.33.

On November 27, 2023 and December 8, 2023, the trial court heard the Petition. Six witnesses testified: (1) Mother; (2) Father; (3) Kurt Myers, CPA, Mother's expert on Father's income; (4) Vic Alexander, CPA, Father's expert on his income; (5) Michelle Weiss, Father's expert on vocational rehabilitation; and (6) Camden Filer, a caregiver who provided Mother's childcare during the summer. Thirty-nine exhibits were entered into evidence.

On May 7, 2024, the trial court entered its memorandum and order. Relevant here, concerning Father's gross income for prospective child support, the trial court: (1)

[1] The issue in this motion is not an issue on appeal.

concluded that a three-year average of Father's income from 2020, 2021, and 2022 was the most appropriate reflection of his income; (2) omitted a one-time software sale from being included in Father's income calculation; (3) included in Father's income consulting fees that his company, the Kilpatrick Group, received; (4) concluded that the forgiveness of loans that the Kilpatrick Group received from the Paycheck Protection Program ("PPP") during the Covid-19 pandemic did not fall within the definition of gross income under the Guidelines; (5) determined that Father's annual income was $468,649.00 per year or $39,054.00 per month; (6) concluded that the three-year average for Father's self-employment tax was $1,352.00; and (7) determined that Father's total gross monthly income was $39,394.00. As to Mother's prospective income, the trial court found that: (1) Mother had a bachelor's degree in fashion merchandising but earned her dental hygienist license shortly before the birth of the oldest children; (2) Mother began working as a dental hygienist after the parties' divorce; (3) Mother worked from 8:00 a.m. until 5:00 p.m. on Tuesdays and Thursdays, earning $37 per hour; (4) for 2022, Mother earned $30,656.79 or $2,554.73 per month; and (5) additional gross monthly income should be imputed to Mother for a total gross monthly income of $4,933.00 per month. The trial court also limited its consideration of Mother's work-related childcare expenses to before and after care at the Children's school, which totaled $67 per month and declined Mother's request for an upward deviation in child support. Based on the foregoing, the trial court set Father's prospective child support amount at $3,418.00 per month. It awarded Mother retroactive child support from February 2022 through December 2023 of $3,592.00 per month, giving Father a credit of $2,505.00 for support he paid during such time. The trial court entered a judgment for retroactive child support in Mother's favor of $16,522.00. The trial court declined to award either party attorney's fees.

On May 31, 2024, Mother filed a motion to alter or amend. Therein, Mother alleged that the trial court erred when it: (1) failed to consider certain fringe benefits Father received from the Kilpatrick Group when calculating Father's child support obligation; (2) calculated her monthly childcare costs; and (3) calculated the judgment Father owed to Mother for retroactive child support. Father filed a response. On September 26, 2024, the trial court entered an order on the motion to alter or amend. In the order, the trial court included Father's fringe benefits when calculating his child support obligation. The trial court concluded that Father's prospective monthly income was $40,806.00, and Father's monthly income for retroactive support purposes was $40,279.00. The trial court declined to adjust its calculation of Mother's childcare expenses. Based on the foregoing, the trial court set Father's prospective child support obligation at $3,509.00 per month and entered a new judgment for retroactive child support, totaling $31,332.00.

Mother filed a timely notice of appeal with this Court.

II. Issues

As stated in her appellate brief, Mother raises the following issues for our review:

1. Whether the trial court erred in calculating Appellee/Father's income by:

    a. Limiting Appellee/Father's income for child support calculation to his total taxable income;

    b. Adopting gross income reduced by self-employment tax; and

    c. Excluding from Appellee/Father's income the purported []sale of software.

2. Whether the trial court erred in imputing Appellant/Mother with additional income.

3. Whether the trial court erred in omitting Mother's summer work-related childcare for inclusion in the child support worksheet.

4. Whether the trial court erred in declining to consider an upward deviation of child support.

5. Whether the child support and retroactive support amounts should be recalculated.

6. Whether the trial court erred in failing to find Appellant/Mother the prevailing party and awarding her attorney's fees and discretionary costs.

7. Whether Appellant/Mother should be awarded her attorney's fees and discretionary costs for appeal.

As Appellee, Father raises the additional issue of whether he is entitled to the attorney's fees he has incurred defending this appeal.

III. Standard of Review

We review a non-jury case "*de novo* upon the record with a presumption of correctness as to the findings of fact, unless the preponderance of the evidence is otherwise." *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000) (citing Tenn. R. App. P. 13(d)). The trial court's conclusions of law are reviewed *de novo* and "are accorded no presumption of correctness." *Brunswick Acceptance Co., LLC v. MEJ, LLC*, 292 S.W.3d 638, 642 (Tenn. 2008).

IV. Analysis

A. Child Support Modification Calculation

"Parents have 'deeply rooted moral responsibilities' to support their minor children[,]" and "Tennessee law imposes a legal obligation on parents to support [them] in a manner commensurate with [the parents'] own means and station in life." *Richardson v. Spanos*, 189 S.W.3d 720, 724 (Tenn. Ct. App. 2005) (quoting *Boggs v. Boggs*, 520 U.S. 833, 847 (1997) and citing Tenn. Code Ann. § 34-1-102(a)) (other citations omitted). The Guidelines, promulgated by the Tennessee Department of Human Services Child Support Services Division, govern awards of child support. *Taylor v. Fezell*, 158 S.W.3d 352, 357 (Tenn. 2005) (citing Tenn. Code Ann. § 36-5-101(e)(2)). For this reason, courts have very limited discretion when determining awards of child support and such decisions "must be made within the strictures of the [Guidelines]." *Richardson*, 189 S.W.3d at 725. This Court reviews a trial court's decision concerning child support under an abuse of discretion standard. *Id.* Under this standard, a trial court's decision will be upheld as long as it is not clearly unreasonable and reasonable minds could disagree about its correctness. *Id.* (citing *Bogan v. Bogan*, 60 S.W.3d 721, 733 (Tenn. 2001); *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001)). A trial court abuses its discretion "when it applies an incorrect legal standard, reaches a decision that is illogical, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party." *Richardson*, 189 S.W.3d at 725 (citing *Perry v. Perry,* 114 S.W.3d 465, 467 (Tenn. 2003)). We are not permitted to substitute our judgment for that of the trial court. *Eldridge*, 42 S.W.3d at 85.

The Guidelines are "based on an Income Shares Model," which "presumes that both parents contribute to the financial support of the child[ren] in pro rata proportion to the actual income available to each parent." Tenn. Comp. R. & Regs. 1240-02-04-.03(1). All modifications of child support orders are also calculated under the Income Shares Model. Tenn. Comp. R. & Regs. 1240-02-04-.05(1). The initial inquiry in a petition to modify child support is whether a "significant variance," "defined as at least [a] fifteen percent (15%) difference in the current support obligation and the proposed support obligation," exists. Tenn. Comp. R. & Regs. 1240-02-04-.05(2)(b); *see also* Tenn. Code Ann. § 36-5-101(g)(1); *Wine v. Wine*, 245 S.W.3d 389, 394 (Tenn. Ct. App. 2007) (quoting *Huntley v. Huntley*, 61 S.W.3d 329, 335 (Tenn. Ct. App. 2001)) ("[T]he initial inquiry in a petition for child support modification is 'whether there is a 'significant variance' between the current obligation and the obligation set by the Guidelines.'"). Whether a significant variance existed is not at issue in this appeal, so we need not address it. "Upon a demonstration of a significant variance, the tribunal shall increase or decrease the support order as appropriate in accordance with the[] Guidelines." Tenn. Comp. R. & Regs. 1240-02-04-.05(5).

The first step in making a child support award is to determine each parent's gross

income. The Guidelines provide:

> 1. Gross income of each parent shall be determined in the process of setting the presumptive child support order and shall include all income from any source (before deductions for taxes and other deductions such as credits for other qualified children), whether earned or unearned, and includes, but is not limited to, the following:
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> (i) Wages;
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> (ii) Salaries;
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> (iii) Commissions, fees, and tips;
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> (iv) Income from self-employment;
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> (v) Bonuses;
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> (vi) Overtime payments;
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> (vii) Severance pay;
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> (viii) Pensions or retirement plans including, but not limited to, Social Security, Veterans Affairs Department, Railroad Retirement Board, Keoughs, and Individual Retirement Accounts (IRAs);
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> (ix) Interest income;
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> (x) Dividend income;
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> (xi) Trust income;
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> (xii) Annuities;
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> (xiii) Net capital gains;
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> (xiv) Disability or retirement benefits that are received from the Social Security Administration pursuant to Title II of the Social Security Act or from the Veterans Affairs Department, whether paid to the parent or to the child based upon the parent's account;

> (xv) Workers compensation benefits, whether temporary or permanent;
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> (xvi) Unemployment insurance benefits;
>
> (xvii) Judgments recovered for personal injuries and awards from other civil actions;
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> (xviii) Gifts that consist of cash or other liquid instruments, or which can be converted to cash, or which can produce income such as real estate, or which reduces a parent's living expenses such as housing paid by others; in whole or in part;
>
> (xix) Inheritances that consist of cash or other liquid instruments, or which can be converted to cash, or which can produce income such as real estate;
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> (xx) Prizes;
>
> (xxi) Lottery winnings;
>
> (xxii) Alimony or maintenance received from persons other than parties to the proceeding before the tribunal; and
>
> (xxiii) Actual income earned during incarceration by an inmate.

Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)1. Relevant here, and as discussed further, *infra*, the Guidelines allow a trial court to impute additional gross income to a parent who is willfully under- or unemployed. *See* Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)2. Also discussed further below, courts may consider additional expenses, such as work-related childcare expenses, and adjust a support obligation accordingly. *See* Tenn. Comp. R. & Regs. 1240-02-04-.04(8)(c). Lastly, relevant here and discussed below, the Guidelines provide that they "are a minimum base for determining child support obligations," and "[t]he presumptive child support order may be increased according to the best interest of the child[ren] [and] the circumstances of the parties[.]" Tenn. Comp. R. & Regs. 1240-02-04-.01(4); *see also* Tenn. Comp. R. & Regs. 1240-02-04-.07. With the foregoing in mind, we turn to review the trial court's child support award.

1. Father's Income

We first address Mother's argument that the trial court erred in its calculation of Father's gross income. Specifically, Mother argues that the trial court: (1) only considered

Father's taxable income in its calculation; (2) excluded the software sale proceeds from the calculation of Father's income; and (3) misapplied the deduction for self-employment taxes. Below, we review Mother's first and second arguments together before turning to the third.

a. PPP Loan Forgiveness and Software Sale

Before beginning our analysis, we briefly discuss Father's employment as well as the foregoing alleged sources of his income. Father is a founder and 50% owner of the Kilpatrick Group, which he described as a third-party marketing company whose clients consist of funeral homes. Mr. Myers, Mother's expert who testified as to Father's income, considered three documents when creating his report: (1) Father's personal tax returns; (2) the Kilpatrick Group's tax returns; and (3) Father's K-1 statements. Mr. Alexander, Father's expert on the matter, reviewed only Father's tax returns when making his report. Relevant here, Mr. Myers testified that a K-1 "is what a member or partner in a partnership receives to tell them how much of the company's profits should be reported on their personal taxes." Mr. Myers further testified, and the trial exhibits support, that Father's *distributions* from the company were higher than his *taxable* income for 2020, 2021, and 2022. The record shows that, in 2020, Father's taxable income was $560,421.00, and he received distributions from the Kilpatrick Group totaling $593,208.00. In 2021, Father's taxable income was $621,962.00, and he received $662,551.00 in distributions. Finally, in 2022, Father's taxable income was $430,624.00, and he received $509,431.00 in distributions. Mr. Myers testified that Father received the difference between the distributions and his taxable income, tax free. When asked the source of the tax-free funds, Mr. Myers testified that he could not say "unequivocally," but that, in 2020 and 2021, the Kilpatrick Group received funds under the PPP, which was not taxable income to the company, and that the company had "additional cash to pay out." Father's K-1 from 2020 shows that his share of the tax-free funds the Kilpatrick Group received from the PPP loans was $121,617.00. Similarly, Father's 2021 K-1 shows his share of the funds received was $103,643.00. Concerning the PPP loans, Mr. Myers testified:

> [T]he way that the PPP money worked was [that a business] applied for the loan under the PPP, and then if you spent it in accordance with the requirements of it, the government would forgive it. And normally under normal circumstances, a loan that is forgiven is taxable income. But under this program, because of COVID and the pandemic . . . [the] government decided that the forgiveness of that loan would be tax-free.

For this reason, neither expert included the PPP loan forgiveness amounts in their calculation of Father's *taxable* income. Turning to the software sale, one component of the Kilpatrick Group's business was to provide their clients with a customer relationship management ("CRM") software system. In 2020, the Kilpatrick Group sold the software to Homesteaders Life Insurance Company ("Homesteaders") for $400,000.00. In his

report, Mr. Myers did not exclude from Father's income the income he received from the proceeds the Kilpatrick Group received from the software sale. Mr. Alexander excluded such income on his conclusion that the sale was "a non-recurring item that could not be expected to occur in the future."

Turning to the trial court's order, it first acknowledged that a child support obligation is based on a parent's gross income, quoted 1240-02-04-.04(3)(a)1 of the Guidelines, discussed above, and emphasized that the list of income sources in the Guidelines was non-exclusive. The trial court then quoted the Guideline's provision concerning self-employment, to-wit:

> 3. Self-Employment Income.
>
> > (i) Income from self-employment includes income from, but not limited to, business operations, work as an independent contractor or consultant, sales of goods or services, and rental properties, etc., less ordinary and reasonable expenses necessary to produce such income.
> >
> > (ii) Ordinary and Reasonable Expenses of Self-Employment Necessary to Produce Income.
> >
> > > (I) Excessive promotional expenses, excessive travel expenses, excessive car expenses or excessive personal expenses, or depreciation on equipment, the cost of operation of home offices, etc., shall not be considered reasonable expenses.
> > >
> > > (II) Amounts allowed by the Internal Revenue Service for accelerated depreciation or investment tax credits shall not be considered reasonable expenses.

Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)3.

Concerning Father's income, the trial court's order provided:

> Under the facts and circumstances of this case, the [c]ourt concludes that a three-year average of Father's income for the years of 2020, 2021 and 2022 is the most appropriate reflection of Father's income. The one-time sale of software should not be included in [Father's] gross income as it was a one-time occurrence and is an aberration to his regular income. This sale occurred in 2020 and his portion of the income was $200,000.00. However,

> the income derived as a result of consulting fees earned in 2020 ($30,000), in 2021 ($97,500) and in 2022 ($66,083) should be included as it is income earned monthly for over a two-year period for services provided.
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> ***
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> In 2020, Father received a tax-exempt loan in the amount of $121,617 and in 2021, in the amount of $103,643 as a recipient of the PPP.
>
> Father argues that loan forgiveness is not included in the definition of gross income as set forth in Tenn. Comp. R. & Refs. 1240-02-04-.(3)(a)(1). . . .
>
> The [c]ourt concurs that [the] PPP loan[s] do[] not fall within the definition of gross income as promulgated by the Child Support Regulations. Nor would it as the COVID-19 pandemic and the historic response thereto is indeed an aberration: One in which the [c]ourt is not comfortable including for child support purposes, as it most assuredly cannot be relied upon in the future as a source of income.
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> ***
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> At the [c]ourt's request, Mr. Myers revised his calculations to deduct the one-time software sale and to exclude the PPP loan forgiveness payment. For years 2020, 2021 and 2022, Father's average gross annual salary is $468,649.00. . . . The [c]ourt concludes that Father's gross monthly income for child support purposes is $39,054.00.

Given Father's self-employment, the trial court then considered Father's ordinary and reasonable expenses and increased Father's gross monthly income to $39,394.00.

On appeal, Mother argues that the trial court considered Father's *taxable* income only and disregarded distributions Father received from the Kilpatrick Group when setting his income for child support purposes. This argument is predicated on the trial court's exclusion of the PPP loan forgiveness from its calculations. Similarly, Mother argues that the trial court should have included the proceeds Father received from the software sale in its calculation of his income.

On review of the trial court's order, it appears that the trial court's rationale for excluding the PPP loan forgiveness and the software sale from its calculation of Father's gross income was because these were "aberration[s]" and "one-time" occurrences that could not "be relied upon in the future as a source of income." This reasoning is not aligned with our case law. In *Moore v. Moore*, the Tennessee Supreme Court held that "income from a single or 'one-time' capital gain" should have been considered when calculating a

parent's income for child support purposes, even when the income arose from "an isolated transaction." 254 S.W.3d 357, 359-60 (Tenn. 2007). The Court noted that the Guidelines also included bonuses, gifts, severance pay, and prizes as "gross income," "all of which are typically nonrecurring income." *Id.* (citing Tenn. Comp. R. & Regs. 1240-2-4-.03(3)(a)(*l*) (1994)). The Court concluded that its holding was "consistent with the plain language of the [] Guidelines and with the goal expressed in the [] Guidelines that 'to the extent that either parent enjoys a higher standard of living, the child(ren) share(s) in that higher standard.'" *Id.* (citing Tenn. Comp. R. & Regs. 1240-2-4.01(3)(e) (2006)). This Court has extended this reasoning to money a parent receives via an inheritance. *See generally Collins v. Harrison*, No. M2023-00248-COA-R3-JV, 2024 WL 1750072, at *6 (Tenn. Ct. App. Apr. 24, 2024), *perm. app. denied* (Sept. 12, 2024); *Wadhwani v. White*, No. M2015-01447-COA-R3-CV, 2016 WL 4579192, at *17 (Tenn. Ct. App. Aug. 31, 2016). Although the Guidelines specifically include capital gains and inheritance as sources of income, *see* Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)1(xiii), (xix), the Guidelines explicitly state that the list is non-exclusive, to-wit: courts "*shall* include *all income from any source* . . . whether earned *or unearned*[.]" Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)1 (emphases added).

We conclude that the trial court should have considered both the income Father received from the PPP loan forgiveness as well as the income Father received from the software sale in its calculation of his income. As noted above, "sales of goods or services" are included in self-employment income under the Guidelines. *See* Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)3. This Court previously held that transactions involving software programs are transactions involving "goods." *Highland Rim Constructors v. Atl. Software Corp.*, No. 01-A-01-9104CV00147, 1992 WL 184872, at *3 (Tenn. Ct. App. Aug. 5, 1992). Accordingly, the Guidelines specifically provide that the income Father received from the sale of the software should have been included in his income calculation. As to the PPP loan forgiveness, although there is no explicit provision designating same as income, we conclude that it should have been considered as such. As noted above, the Guidelines explicitly provide that courts "*shall* include *all income from any source* . . . whether earned *or unearned*" in income calculations. Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)1 (emphases added). The PPP loan forgiveness income was unearned income that Father received. It matters not that these forms of income arose from isolated transactions.

When a parent's income is variable, courts are required to average his or her income "over a reasonable period of time consistent with the circumstances of the case[.]" Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(b) ("Variable income such as commissions, bonuses, overtime pay, dividends, etc. shall be averaged over a reasonable period of time consistent with the circumstances of the case and added to a parent's fixed salary or wages to determine gross income."); *Smith v. Smith*, No. M20000-1094-COA-R3-CV, 2001 WL 459108, at *5 (Tenn. Ct. App. May 2, 2001) ("Although that provision of the guidelines applies to variable components of income, the reasoning is just as applicable to situations

where a parent is self-employed or whose total income is variable."). "The time period used for purposes of averaging 'lies within the discretion of the trial court based upon the facts of the situation.'" *Wadhwani*, 2016 WL 4579192, at *17 (quoting *State ex rel. Moss v. Moss*, No. M2013-00393-COA-R3-CV, 2014 WL 1998738, at *3 (Tenn. Ct. App. Apr. 24, 2014)); *see also Cox v. Cox*, No. M2024-00827-COA-R3-CV, 2025 WL 1517810, at *12 (Tenn. Ct. App. May 28, 2025); *Robeson v. Robeson*, No. M2023-01449-COA-R3-CV, 2025 WL 368233, at *7 (Tenn. Ct. App. Feb. 3, 2025), *perm. app. denied* (June 18, 2025). "Thus, while the Guidelines afford the court discretion to average variable income or prorate one-time income amounts . . . , it does not permit the court to merely disregard a source of income." *Collins*, 2024 WL 1750072, at *6.

While the trial court calculated Father's income based on a three-year average (2020, 2021, and 2022), it omitted the software sale and PPP loan forgiveness as income earned during 2020 and 2021 for prospective child support purposes. However, the trial court acknowledged that the Children should have benefitted from the additional income Father received and stated that it included it in Father's retroactive child support amount. While we understand the trial court's reasoning for proceeding in this way, the Guidelines simply do not provide for a tribunal to omit a source of income from a parent's gross income calculation when setting/modifying a prospective child support award. We also note that, despite stating that it included the PPP loan forgiveness and software sale in Father's retroactive child support obligation, it does not appear that these sources of income were, in fact, included. In its order on Mother's motion to alter or amend, the trial court found Father's monthly income for prospective child support to be $40,806.00 and his monthly income for retroactive child support to be $40,279.00. On review of the record, the difference in Father's monthly income is due to the trial court's inclusion of certain fringe benefits, rather than the PPP loan forgiveness or software sale. Indeed, the order shows that the trial court used $39,054.00 as the base income for both the prospective and retroactive child support obligations. Thus, over $400,000.00 in income ($200,000.00 from the software sale and $225,260.00 from the PPP loan forgiveness) was excluded from Father's gross income. This was error.

Based on the foregoing, we reverse the trial court's exclusion of the proceeds from the software sale and the income received from the PPP loan forgiveness from Father's gross income for his prospective child support obligation. Accordingly, we vacate the trial court's order concerning Father's child support obligation. On remand, the trial court is instructed to include both the software sale and the income received from the PPP loan forgiveness when calculating Father's gross income.

b. Self-Employment Taxes

Mother's next issue concerns the trial court's application of self-employment tax to Father's child support obligation. The Guidelines provide for adjustments to gross income for self-employed parents, including accounting for any self-employment tax, to-wit:

> (e) Any self-employment tax paid up to one-half of the maximum amounts due in a year shall be deducted from gross income as part of the calculation of a parent's Adjusted Gross Income, as indicated in Part II of the CS Worksheet.

Tenn. Comp. R. & Regs. 1240-02-04-.04(4)(e); *see also* Tenn. Comp. R. & Regs. 1240-02-04-.02(1)(b) (defining "adjusted gross income" as the net determination of a parent's income, calculated by modifying the parent's gross income by deducting from it any self-employment taxes the parent pays). Mother argues that the trial court included the deduction for self-employment tax twice when calculating Father's child support obligation. We agree. As noted above, the trial court averaged Father's income for 2020, 2021, and 2022 to arrive at an average gross annual income of $468,649.00. The trial court used Mr. Myers' calculations of Father's gross income for 2020, 2021, and 2022 to obtain this number. The record shows that the yearly incomes Mr. Myers used already included a reduction in income for the self-employment tax. Thus, when the trial court concluded that Father's average gross annual income was $468,649.00, the deduction for self-employment tax was already included in this number. The trial court divided $468,649.00 by 12 to obtain a gross monthly income for Father, which amount was entered on the Child Support Worksheet. Thereafter, the trial court included $1,352.00 on the Child Support Worksheet for self-employment tax paid. As such, Father was twice allowed a deduction from his gross income for the self-employment tax. Given that we vacate Father's child support obligation, we need not engage in a calculation to correct this error. As noted further, *infra*, on remand the trial court is not to include a double deduction for self-employment tax in its calculations.

2. Mother's Income

Having reviewed Father's income, we turn to address Mother's income. Mother argues that the trial court erred when it imputed additional income to her. To "impute" income means to "assign or attribute an income level to the parent that may not reflect the parent's actual gross income." *Massey v. Casals*, 315 S.W.3d 788, 795 (Tenn. Ct. App. 2009). The Guidelines allow courts to impute additional gross income to a parent "[i]f a parent has been determined by a tribunal to be willfully underemployed or unemployed." Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)2(i)(I). "The Guidelines do not presume that any parent is willfully underemployed or unemployed." Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)2(ii). Rather, "[t]he purpose of the determination is to ascertain the reasons for the parent's occupational choices, to assess the reasonableness of these choices in light of the parent's obligation to support his or her child(ren), and to determine whether such choices benefit the children." *Id.* A determination of willful under- or unemployment "is not limited to choices motivated by an intent to avoid or reduce the payment of child support," but "may be based on any intentional choice or act that adversely affects a parent's income." Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)2(ii)(I)I. Before turning

to the substantive issues, we briefly address an argument from this portion of Mother's appellate brief that she did not list as a separate issue for our review.

a. Estoppel/Res Judicata

Mother alleges that Father should be estopped from arguing that she is willfully underemployed or that his claim should be barred by *res judicata*. In his appellate brief, Father argues that, because Mother failed to raise this argument in the trial court, she has waived it on appeal. In her reply brief, Mother argues that she did not waive this issue, rather, the parties did not present opening or closing statements during trial. Although the trial court initially asked the parties to submit post-trial arguments, the trial court later deemed them unnecessary. Mother argues that she "put on ample proof on the issues of estoppel and *res judicata* [] without objection or contradiction." Specifically, she argues that she showed there had been no changes to her education, skill set, or ability since the parties' divorce. On our review, both parties filed pretrial briefs, witness and exhibit lists, and statements of issues for trial. In one of Father's issues/requests for relief from the trial court, he asked that it "impute income to Mother consistent with her hourly rate at full-time employment." Additionally, nearly three pages of Father's pretrial brief was devoted to arguing that Mother was willfully underemployed. The first issue listed in Mother's pretrial brief concerns whether she was underemployed. Notably absent from Mother's list of issues was that Father should be estopped or precluded from asserting that she was willfully underemployed. The only mention of this "argument" in Mother's pretrial brief was a single sentence stating that "Father should be estopped at this juncture to request she be imputed at higher income." Even when Mother later supplemented her pretrial brief with additional arguments, she did not provide a substantive argument concerning either estoppel or *res judicata*. Lastly, we note that while the trial court's lengthy and methodical order addressed each argument the parties presented in their pretrial briefs, it made no mention of estoppel or *res judicata*. It is well-settled in Tennessee that "issues not raised in the trial court cannot be raised for the first time on appeal." *Wallis v. Brainerd Baptist Church*, 509 S.W.3d 886, 898 (Tenn. 2016) (quoting *Simpson v. Frontier Cmty. Credit Union*, 810 S.W.2d 147, 153 (Tenn. 1991)). Given the foregoing, we conclude that Mother failed to raise the estoppel and *res judicata* arguments with the trial court and, consequently, waived these issues for our review. We now turn to the substantive issues.

b. Willful Underemployment

Courts may use the following factors when determining whether a parent is under- or unemployed:

(I) The parent's past and present employment;

(II) The parent's education, training, and ability to work;

> (III) The State of Tennessee recognizes the role of a stay-at-home parent as an important and valuable factor in a child's life. In considering whether there should be any imputation of income to a stay-at-home parent, the tribunal shall consider:
>
> > I. Whether the parent acted in the role of full-time caretaker while the parents were living in the same household;
> >
> > II. The length of time the parent staying at home has remained out of the workforce for this purpose; and
> >
> > III. The age of the minor children.
>
> (IV) A parent's extravagant lifestyle, including ownership of valuable assets and resources (such as an expensive home or automobile), that appears inappropriate or unreasonable for the income claimed by the parent;
>
> (V) The parent's role 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 parent's ability to work outside the home, and the need of that parent to continue in that role in the future;
>
> (VI) Whether unemployment or underemployment for the purpose of pursuing additional training or education is reasonable in light of the parent's obligation to support his/her children and, to this end, whether the training or education will ultimately benefit the child in the case immediately under consideration by increasing the parent's level of support for that child in the future; and
>
> (VII) Any additional factors deemed relevant to the particular circumstances of the case.

Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)2(iii). Concerning the standard of review under which we analyze a trial court's finding of willful underemployment, we have explained:

> Determining whether a parent is willfully and voluntarily underemployed . . . [is a] question[] of fact that require[s] careful consideration of all the attendant circumstances. *Richardson*, 189 S.W.3d at 726 (citing *Eldridge*, 137 S.W.3d at 21); *Willis* [*v. Willis*, 62 S.W.3d 735, 738-39 (Tenn. Ct. App. 2001)]). Thus, this [C]ourt reviews a trial court's determination regarding willful and voluntary underemployment using Tenn. R. App. P. 13(d) and

> accords substantial deference to the trial court's decision, *Willis*, 62 S.W.3d at 738, especially when it is premised on the trial court's singular ability to ascertain the credibility of the witnesses. *Richardson*, 189 S.W.3d at 726 (citations omitted).

Owensby v. Davis, No. M2007-01262-COA-R3-JV, 2008 WL 3069777, at *4 (Tenn. Ct. App. July 31, 2008).

Concerning Mother's employment, the trial court first made the following findings, *inter alia*: (1) Mother works on Tuesdays and Thursdays from 8:00 a.m. until 5:00 p.m. and has approximately a 30-minute commute to and from work; (2) the dental practice at which she is employed is closed on Fridays; (3) Mother uses her days off to "tackle household chores, grocery shopping, and other errands so that she is fully available to her children when they get out of school;" and (5) Mother "strongly prefers" to be the person to transport the Children to their extracurricular activities throughout the week. On our review, these findings are supported by Mother's testimony.

After making findings concerning Ms. Weiss' testimony, discussed further, *infra*, the trial court quoted the Guidelines' factors concerning willful underemployment, discussed above, before making the following findings:

> As factors V and VI do not apply in this matter, the [c]ourt will not consider them. As to the first three (3) factors, the [c]ourt looks to the facts detailed *supra*. []Mother had a nine (9) year period of working in retail management before seeking the necessary education to transition into working as a dental hygienist. Shortly after beginning her new line of work, she became pregnant with the oldest children and the parties agreed that she would become a stay-at-home parent. []Mother served in her role as a stay-at home parent from 2012 until around the time the parties began divorce proceedings in 2018. It is clear to the [c]ourt that []Mother served as the primary caregiver to the parties' children during those six (6) years. Additionally, the children are all still fairly young, with the oldest twin children being 11-years-old and the youngest child being 8-years-old at the time of this Order, and all of the children being involved in extracurricular activities such as team sports, choir, and dance. The [c]ourt acknowledges that they could benefit from having their primary custodial parent be more present. As to factor IV, there is no evidence to suggest that []Mother lives an extravagant lifestyle.
>
> However, the reality is that most families need the income from both parents, especially in divorce situations. Mother testified that the alimony she currently receives [is] set to expire in early 2024, and that she will need to increase her work hours at that point. The [c]ourt places more weight on factor VII, given the facts and circumstances of this particular case. It is

> worth noting that, since all of the parties' children are now school aged, for the majority of the year they would only be missing out on a few hours per week with []Mother if she were to pursue full-time employment in her current profession. Based upon Mother's testimony, which is consistent with Ms. Weiss, the Court finds that Mother's gross monthly income should be imputed at 32 hours per week for 50 weeks annually at the rate of $37.00 per hour divided by 12 months, which totals $4,933.33.

On appeal, Mother's first argument is that the trial court erred when it failed to make an *explicit* finding that she was willfully underemployed. Mother cites *Goodman v. Goodman*, No. W2011-01971-COA-R3-CV, 2012 WL 1605164 (Tenn. Ct. App. May 7, 2012) as support for this argument. In *Goodman*, the trial court imputed an income to the father based on his earning capacity, rather than his actual income. *Id.* at 4. We explained that "[n]othing in the record indicate[d] that the trial court determined that [the father] was 'willfully . . . underemployed[.]" *Goodman*, 2012 WL 1605164, at *6 (quoting *Marcus v. Marcus*, No. 02A01-9611-CV-00286, 1998 WL 29645, at *3 (Tenn. Ct. App. Jan. 28, 1998)). Accordingly, we reversed the trial court's judgment as to the father's child support obligation based on its failure to first make a finding that the father was willfully underemployed. Unlike the trial court in *Goodman*, here, the trial court first delineated the factors it was to consider from the Guidelines when making a finding of willful underemployment before making several factual findings in accordance with same. Then, the trial court concluded that it should impute additional income to Mother. In doing so, it is clear that the trial court made an implicit finding that Mother was willfully underemployed. Although the trial court should have explicitly stated this finding, such omission does not constitute reversible error in this case. *See State ex rel. Ledbetter v. Godsey*, No. M1998-00958-COA-R3-CV, 2000 WL 798641, at *9 (Tenn. Ct. App. June 22, 2000) ("The trial court herein implicitly found that Mother was willfully . . . unemployed or underemployed, based upon the facts and circumstances of this case. The evidence does not preponderate against that finding."); *Hyden v. Hyden*, No. 02A01-9611-CH-00273, 1997 WL 593800, at *3 (Tenn. Ct. App. Sept. 25, 1997) ("Although the trial court made no express determination that Father is willfully . . . underemployed, we find the court's decision to necessarily imply such finding."); *Johnson v. Johnson*, No. M2008-00236-COA-R3-CV, 2009 WL 890893, at *8-9 (Tenn. Ct. App. Apr. 2, 2009) (inferring and affirming the trial court's finding that Wife was underemployed).

We recall that a court is required to ascertain the reasons for a parent's occupational choice to assess whether the choice is reasonable in light of a parent's obligation to support her children, and to determine whether such choice benefits the children. Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)2(ii). In her testimony, Mother admitted that it was her choice to work part-time, stating that it was "[f]or [the] kids." The record shows that the oldest children usually rode the bus to and from school and that Mother drove the youngest child to school. Aftercare was not available for the older children, and they would return home immediately after school, even on the days Mother worked. The youngest child

participated in aftercare on the days Mother worked. However, Father was responsible for picking up the Children from school every Thursday. Furthermore, Mother's place of employment was closed on Fridays. When asked about her typical schedule on the days she was off (Monday/Wednesday/Friday), Mother testified that, after the Children were in school, she cleaned the kitchen, went to the grocery store, went to Sam's, worked out, got gas, prepared for dinner, washed laundry, and completed various other errands for the Children or herself. Mother testified that she could accomplish these errands on Fridays, when her place of employment was closed. Concerning the Children's extracurriculars, Mother testified that the youngest had dance every Wednesday from 4:30 until 6:00 p.m. during the school year, and that the oldest children had flag football and baseball practice and games throughout the year. Although not specified in the record, we presume these practices and games occurred outside of school hours and perhaps on the weekends. As such, at least some of them were likely outside of work hours.

We recognize that we are constrained by the abuse of discretion standard and are required to give substantial deference to the trial court. Although this Court may not have arrived at the same conclusion, we cannot say that the trial court abused its discretion when it found Mother to be willfully underemployed. While the trial court acknowledged that the Children "could benefit from having their primary custodial parent be more present," it "place[d] more weight on factor VII, given the facts and circumstances of this particular case." Specifically, the trial court found that the Children are school-aged, with the youngest being 8 years old and the older children being 11 at the time the order was entered. For this reason, the trial court found that the Children "would only be missing out of a few hours per week with []Mother if she were to pursue full-time employment in her current profession." Indeed, if Mother worked the 32 hours the trial court imputed to her, the only additional time she would miss with the Children would be Monday and Wednesday afternoons from the time school ended until Mother either picked up the youngest and/or returned home from work. Unfortunately, divorce often precipitates major lifestyle changes. While Mother had the ability to be a stay-at-home parent during the marriage, "in most divorce cases it is unlikely that both parties will be able to maintain their pre-divorce lifestyle once the proceedings are concluded." *Kinard v. Kinard*, 986 S.W.2d 220, 234 (Tenn. Ct. App. 1998). We have explained before that "[t]wo persons living separately incur more expenses than two persons living together." *Id.* Given that the Income Shares Model presumes that both parents contribute to the Children's support in pro rata proportion to the actual income available to each parent, Mother's choice to work part-time limits her financial contribution to the Children. Undoubtedly, Mother contributes to the Children in very meaningful and non-financial ways, but she cannot be allowed to lessen her child support obligation to them due to her choice to work part-time when the Children are in school full-time. *Von Tagen v. Von Tagen*, No. M2009-00850-COA-R3-CV, 2010 WL 891893, at *14 (Tenn. Ct. App. Mar. 12, 2010) ("The rule that a 'parent will not be allowed to lessen his [or her] child support obligation as a result of choosing to work at a lower paying job' applies to both the primary residential parent and the alternate residential parent.") (quoting *Johnson*, 2009 WL 890893, at *7); *see also Willis*, 62 S.W.3d at 738

("Although we realize that a person has a right to pursue happiness and to make reasonable employment choices, a[] [] parent will not be allowed to lessen his [or her] child support obligation as a result of choosing to work at a lower paying job."). Having affirmed the trial court's finding that Mother was willfully underemployed, we turn to discuss the income it imputed to her.

c. Amount Imputed

In her appellate briefing, Mother fails to provide any substantive argument or legal authority to support her allegations that the trial court's calculations were error. Rather, she briefly argues that: (1) the proof showed that no dental hygienist in Mother's office worked 32 hours per week; and (2) that Mother had no history of earning the amount imputed to her. Although we could find that Mother waived appellate review of this issue, for completeness, we address it. *Sneed v. Bd. of Pro. Resp. of Supreme Ct.*, 301 S.W.3d 603, 615 (Tenn. 2010) ("It is not the role of the courts, trial or appellate, to research or construct a litigant's case or arguments for him or her, and where a party fails to develop an argument in support of his or her contention or merely constructs a skeletal argument, the issue is waived.").

Under the Guidelines, when a parent is found to be willfully under or unemployed, "additional income can be allocated to that parent to increase [her] gross income to an amount which reflect[s] [her] *income potential* or earning *capacity*[.]" Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)2(ii)(II) (emphases added); *see also Massey*, 315 S.W.3d at 795. Courts use the following criteria when determining the additional income allotted:

I. The parent's past and present employment; and

II. The parent's education and training.

Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)2(ii)(II). As the parent alleging willful underemployment, Father had the burden of proving the amount of income the trial court should have imputed to Mother. *See* Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)2(ii) ("The Guidelines do not presume that any parent is willfully underemployed or unemployed."); *Richardson*, 189 S.W.3d at 727; *Massey*, 315 S.W.3d at 796. Father met this burden through Ms. Weiss' and Mother's testimonies. Ms. Weiss testified as a vocational expert concerning the wage-earning capacity for a dental hygienist in the parties' area.[2] Ms. Weiss testified that the hourly mean for dental hygienists in the area was $33.44/hour, and that the job market for dental hygienists was good, with a 7% growth

[2] There appears to be an issue with the exhibits in our appellate record. Although the trial transcript provides that Ms. Weiss' expert report was entered as Exhibit 18, Exhibit 18 in our record is Mr. Alexander's report concerning Father's income. Exhibit 19 is Ms. Weiss' professional services agreement with Father's attorney. On our review, Ms. Weiss' report is not in the record.

rate. Ms. Weiss also testified that the Bureau of Labor Statistics considered a dental hygienist to work full-time at 35 hours per week, but after surveying practices in the area, Ms. Weiss found the local standard to be 32-40 hours per week. As noted above, Mother testified that she earned $37/hour. The trial court imputed an income to Mother based on a 32-hour work week, 50 weeks annually, at an hourly rate of $37.00/hour, for a total monthly income of $4,933.33. This calculation was made under the direction of the Guidelines and based on the proof in the record. Given the foregoing, we affirm the trial court's finding that Mother was willfully underemployed and its imputation of income to her of $4,933.33 per month.

3. Summer Work-Related Childcare Expenses

Mother's next issue concerns the trial court's exclusion of her summer work-related childcare expenses from the child support worksheet. The Guidelines provide for adjustments to the child support schedule under certain circumstances, including when a parent is required to pay for childcare expenses due to his or her employment schedule. Tenn. Comp. R. & Regs. 1240-02-04-.04(8)(a)(1), (3), (c)(1); Tenn. Comp. R. & Regs. 1240-02-04-.02(32). The total amount of the cost of work-related childcare is "divided between the parents pro rata[.]" Tenn. Comp. R. & Regs. 1240-02-04-.04(8)(a)(3). After a trial court determines that such expenses are appropriate, they are averaged for a monthly amount that is entered into the child support worksheet under the column of the parent initially paying the expense. Tenn. Comp. R. & Regs. 1240-02-04-.04(8)(c)(1).

Here, the trial court found that Mother paid Ms. Camden Filer to watch the Children during the summer while Mother worked. However, the trial court also found that Mother failed to establish, by a preponderance of the evidence, "how much she actually paid for work-related childcare expenses to Ms. Filer." The trial court opined that it "would be merely guessing or estimating" any amount of summer childcare expenses. Accordingly, it limited its consideration of Mother's work-related childcare expenses to expenses incurred during the school year, for which Mother provided specific evidence.

Turning to the record, Ms. Filer initially testified that she babysat the Children during the summer, from the last week of May through the first week of August, on Tuesdays and Thursdays, from 7 a.m. until 6 p.m. Later, Ms. Filer testified that Father picked up the Children around 4:30 p.m. on Thursdays. Furthermore, although the dates are not specified, the record shows that, during the summer, Mother and Father each exercised two weeks of vacation with the Children under the Parenting Plan. Indeed, the "Summer Vacation" provision states that "[e]ach parent shall have two non-consecutive weeks of parenting time from Saturday to Saturday." When asked if she had any records "to reflect what time [she] actually spent caring for the [C]hildren while [Mother] was working," Ms. Filer admitted that she did not. When Mother was asked on cross-examination whether she "kept any kind of record to substantiate when [she] had used" a babysitter, Mother testified, "No." Accordingly, the record is devoid of any specific dates

that Ms. Filer babysat the Children during the summer months.

The record is equally devoid of any specific amount that Mother paid to Ms. Filer for work-related childcare during the summer. Ms. Filer testified that Mother paid her in cash. Mother corroborated this testimony and explained that she would withdraw cash from the ATM to pay Ms. Filer. Exhibit 33 contains, *inter alia*, a record of Mother's banking transactions from May 2023 through August 2023 and May 2022 through August 2022, which included ATM withdrawals. During the summer months of 2023, Mother withdrew money from the ATM nine times, ranging between $120 and $280 for each withdrawal. During the summer months of 2022, Mother withdrew money from the ATM eight times, ranging between $200 and $280 for each withdrawal. Mother's testimony and her counsel's statements to the trial court demonstrate the uncertainty of this evidence:

> Q: And tell [t]he [c]ourt, do you believe these amounts are for Ms. Filer, or do you believe it's possible you might have taken 20 bucks out here or there or something?
>
> A: I mean it is possible that I would have taken an extra $20 out for something else while I was at the ATM, but I normally don't go to the ATM every week and take out 280 just for the summer.
>
> Counsel to the trial court: And so what we've done, Your Honor, is we've actually reduced each ATM withdrawal by $20, just to be conservative about what we paid Ms. Filer. It's the best records we could get for this.

As the party initially incurring summer childcare expenses, it was Mother's burden to prove the amount incurred. Tenn. Comp. R. & Regs. 1240-02-04-.04(8)(c)(1). Given the foregoing, we cannot say that the trial court abused its discretion when it concluded that it was unable to calculate Mother's summer childcare expenses because it "would be merely guessing or estimating" the amount. Indeed, a trial court's "calculation of work-related childcare expenses must be supported by evidence in the record." *In re Makinna B.*, No. M2018-00979-COA-R3-JV, 2019 WL 2375434, at *6 (Tenn. Ct. App. June 5, 2019) (citing *In re Briley R.*, No. M2016-01968-COA-R3-JV, 2017 WL 5054304, at *6 (Tenn. Ct. App. Oct. 31, 2017)). While the record shows that Mother paid Ms. Filer for work-related childcare during the summer, the trial court would have been required to speculate as to a specific amount paid given the uncertainty surrounding the dates Ms. Filer watched the Children and a lack of a reliable payment record for the same. We affirm the trial court's denial of Mother's request for summer work-related childcare expenses.

4. Upward Deviation

Mother also appeals the trial court's denial of her request for an upward deviation in child support. The Guidelines provide a "minimum base for determining child support

obligations," and the presumptive child support order may be increased according to the best interests of the children, the circumstances of the parties, and other rules provided in the Guidelines. Tenn. Comp. R. & Regs. 1240-02-04-.01(4). If a court deviates from the presumptive child support amount, it is required to make written findings of fact stating, *inter alia*, 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. 1240-02-04-.07(1)(c)3; *see also* Tenn. Code Ann. § 36-5-101(e)(1)(A). The Guidelines further provide that deviation may be appropriate "when the tribunal finds it is in the best interest of the child . . . and:"

> (a) Consideration of Needs of the Children and Income and Expenses of the Parents for Purposes of Deviation.
>
> > 1. In making its determination regarding a request for deviation pursuant to this chapter, the tribunal shall consider all available income of the parents as defined by this chapter and shall make a written finding that an amount of child support other than the amount calculated under the Guidelines is reasonably necessary to provide for the needs of the minor child or children for whom support is being determined in the case immediately under consideration.

Tenn. Comp. R. & Regs. 1240-02-04-.07(2)(a)1.

In her appellate brief, Mother appears to argue that the following facts demonstrate why the presumptive child support amount was unjust or inappropriate: (1) the Kilpatrick Group purchased gasoline for Father's vehicles; (2) the Kilpatrick Group frequently paid for Father's meals; (3) the Kilpatrick Group purchased two vehicles for Father; and (4) Father purchased a new home after the parties' divorce. The extent of Mother's "arguments" as to these facts are that: (1) she purchases her own gas and meals; (2) "the[se] items were not added to Father's income" by the trial court; and (3) she continues to reside in the home that she was awarded in the divorce. We disagree that the foregoing facts make application of the presumptive child support amount unjust or inappropriate.

As an initial matter, Father testified that the Kilpatrick Group paid for his gas, vehicles, and meals because Father traveled extensively for the company and met with clients over meals. Furthermore, as Mother was awarded the marital home in the divorce,

it is unsurprising that Father purchased a new residence thereafter. More importantly, Mother fails to make any argument as to how the presumptive child support amount is not in the *Children's* best interests. Rather, she states that Father's company provided vehicles and meals that are "luxur[ies] that Mother does not have." As to Mother's argument that she and the Children "continue to reside in the home she was awarded in the divorce," there is simply nothing in the record to show that the home is inadequate or that the Children's needs are not being met there.[3]

Concerning Mother's "argument" that the trial court failed to include in Father's income the Kilpatrick Group's payment of Father's gasoline and meals and the purchase of vehicles for his use, we deduce that Mother references the trial court's orders concerning what the Guidelines refer to as "Fringe Benefits." *See* Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)4. The trial court's decision concerning any fringe benefits Father may have received was not listed as an issue in Mother's appellate brief nor was any substantive argument concerning same made in the body of her brief. As such, she has waived our review of this issue. *See* Tenn. R. App. P. 27(a)(4), (7); *Sneed*, 301 S.W.3d at 615; *Hodge v. Craig*, 382 S.W.3d 325, 334 (Tenn. 2012) (citing Tenn. R. App. P. 13(b)) ("Appellate review is generally limited to the issues that have been presented for review."); *Hawkins v. Hart*, 86 S.W.3d 522, 531 (Tenn. Ct. App. 2001) ("Courts have consistently held that issues must be included in the Statement of Issues Presented for Review required by Tennessee Rules of Appellate Procedure 27(a)(4). An issue not included is not properly before the Court of Appeals.").

Lastly, Mother states that the Kilpatrick Group "had an increase in retained earnings (member's equity) from $227,000 at the end of 2019 to $468,000 at the end of 2022." The record citation for this statement is an excerpt of Mr. Myers' testimony concerning Father's income. Given that no substantive argument accompanies this statement, this Court is unsure why Mother included it in this portion of her briefing given that she devoted a substantial portion of her appellate brief to the trial court's calculation of Father's income, *see discussion supra* VI(A)(1). For the myriad of reasons discussed above, we agree with and affirm the trial court's conclusion that an upward deviation in child support was not appropriate under these facts and circumstances.

5. Re-Calculation of Current and Retroactive Support

In her appellate brief, Mother states that she does not dispute the time period for which the trial court awarded retroactive child support, but that this issue is predicated on her argument that Father's child support obligation should be revised. Given our above holdings and discussion, we vacate Father's current and retroactive child support obligations. On remand, the trial court is instructed to recalculate both and to include in its calculation the income Father received from the software sale and the PPP loan

[3] On the contrary, the record shows that Mother's home is valued in excess of $800,000.00.

forgiveness. The trial court is also cautioned not to include a double deduction for self-employment tax in its calculations. We do not disturb the trial court's holdings as to: (1) Mother being underemployed; (2) the income the trial court imputed to Mother; (3) the trial court's exclusion of Mother's summer work-related childcare expenses; and (4) the trial court's denial of Mother's request for an upward deviation.

B. Attorney's Fees

The final issues in this appeal concern the parties' attorney's fees. Mother argues that the trial court erred when it denied her request for attorney's fees. Both parties ask this Court to award them attorney's fees incurred on appeal. In Tennessee, "litigants are responsible for their own attorney's fees absent a statute or agreement between the parties providing otherwise."[4] *Darvarmanesh v. Gharacholou*, No. M2004-00262-COA-R3-CV, 2005 WL 1684050, at *16 (Tenn. Ct. App. July 19, 2005) (citing *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 194 (Tenn. 2000)). Tennessee Code Annotated section 36-5-103(c) allows a court, in its discretion, to award attorney's fees to the "prevailing party" in a proceeding to modify child support. Tenn. Code Ann. § 36-5-103(c). When deciding whether to award attorney's fees, courts consider the parties' financial circumstances, a party's status as the prevailing party, and the requesting party's good faith. *Berl v. Berl*, No. M2023-00558-COA-R3-CV, 2024 WL 1711966, at *5 (Tenn. Ct. App. Apr. 22, 2024) (citing *Dale v. Dale*, No. M2018-01999-COA-R3-CV, 2019 WL 7116204, at *3 (Tenn. Ct. App. Dec. 20, 2019)). "While proof of inability to pay may be considered, 'such consideration will not be controlling.'" *Berl*, 2024 WL 1711966, at *5 (quoting *Taylor*, 158 S.W.3d at 360).

Concerning attorney's fees, the trial court's order provided:

> Each party seeks attorney fees in this matter. However, the [c]ourt finds that there is not a prevailing party, given the facts and circumstances. Each party made compelling arguments as to the calculation of both the Mother['s] and Father's income. Neither party were awarded exactly what he/she were asking. The [c]ourt believes that this matter involved a legitimate dispute, requiring expert testimony, given the nature of the Father's employment as a 50% partner in the Kilpatrick Group. The [c]ourt found Mr. Myers' testimony valuable and believes that Father should have the ability to employ a competing expert without risking assessment of attorney fees against him for doing so. The [c]ourt did not find the testimony of Ms. Weiss to be particularly probative, but Father was responsible for payment of her fees. Father has paid his child support and there were no allegations of contempt

[4] While the parties' MDA allowed for reasonable attorney's fees to be awarded to the party who successfully *enforced* a provision of the MDA, it did not allow for reasonable attorney's fees related to any *modification* action.

> for his failure to pay support. Therefore, Mother was not enforcing an Order of child support, but rather, modifying an Order of child support. Both parties have substantial assets and are capable of employing attorneys to assist them in securing the appropriate award of child support for the benefit of the [C]hildren. Considering all these factors, the [c]ourt cannot conclude that either party is the prevailing party and therefore, declines to award attorney fees to either party.

In a footnote concerning the parties' assets, the trial court found: "The testimony at trial included that Father had recently purchased a new home and Mother had accumulated assets since the divorce in excess of $1,000,000.00."

As shown above, the trial court's decision not to award Mother attorney's fees was based on its conclusion that neither party was the "prevailing party" as "[n]either party [was] awarded exactly what he/she [was] asking." Whether a party may recover as the "prevailing party" is a "subtle and fact specific" inquiry. *Standley v. Standley*, No. M2021-00591-COA-R3-CV, 2022 WL 1448226, at *5 (Tenn. Ct. App. May 9, 2022). The mere fact that a party did not prevail on *every* aspect of his or her case does not, *ipso facto*, foreclose his or her recovery of attorney's fees. *Id.*; *see also Berl*, 2024 WL 1711966, at *6 (quoting *Stancil v. Stancil*, No. M2017-01485-COA-R3-CV, 2018 WL 1733452, at *3 (Tenn. Ct. App. Apr. 10, 2018)). For example, in *Richardson v. Spanos*, the trial court declined to award either party attorney's fees based on its finding that both parties were partially successful. *Richardson*, 189 S.W.3d at 729. Specifically, the mother prevailed on her request that the father be required to pay a portion of their child's school tuition, and the father prevailed on his request to decrease his child support obligation. *Id.* Under such circumstances, we declined to conclude that the trial court abused its discretion when it denied the parties' respective requests for attorney's fees, and we noted that "their child [was] no better off as a result of th[e] litigation than he would have been had the parties decided to settle these issues by agreement[.]" *Id.* Conversely, in *Standley v. Standley*, the trial court awarded the father his attorney's fees where he prevailed on his request to modify custody, but the mother prevailed on her request to modify child support. 2022 WL 1448226, at *5. In affirming the trial court, this Court reasoned that the mother's behavior before and during litigation precipitated the father's petition to modify custody, and that said petition comprised the majority of the litigation, while "the parties spent considerably less time on the litigation of [the mother's] petition to modify child support[.]" *Id.*

As discussed above, Mother prevailed on the Petition, which was the foundation for the entire litigation. While Father prevailed in his argument that Mother was underemployed, this does not, *ipso facto*, foreclose Mother's recovery of attorney's fees. After the divorce, Father's monthly child support obligation was $2,505.00. After the Petition was granted, Father's monthly child support obligation increased to $3,509.00 per month. Without Mother's petition to modify, the *Children* would have been without the

benefit of Father's increased income. These circumstances highlight the public policy behind allowing attorney's fee awards in child support proceedings. Specifically, trial courts are given the authority to award legal fees in support proceedings to *facilitate a child's access to the courts*. *Sherrod v. Wix*, 849 S.W.2d 780, 784 (Tenn. Ct. App. 1992) (citing *Graham v. Graham*, 204 S.W. 987, 989 (Tenn. 1918)) ("These awards are not primarily for the benefit of the custodial parent but rather to facilitate a child's access to the courts."). We note that the trial court appeared to deny Mother's request, in part, based on its reasoning that Father should have been able to "employ a competing expert without risking assessment of attorney fees against him for doing so." This reasoning is contrary to the above stated public policy.

Lastly, we discuss the trial court's finding that "both parties have substantial assets" with which to pay attorneys and its finding that Mother had accumulated assets exceeding $1,000,000.00 *since the divorce*. The record does not show that Mother accumulated significant assets post-divorce, rather, Mother admitted that she had "almost a million dollars in net assets." The record shows that the majority of Mother's net worth came from the home in which she and the Children resided. Father entered a statement of Mother's assets and liabilities as Exhibit 37. The exhibit shows that, as of September/October 2023, Mother had approximately $256,000.00 in liquid assets, including investment and retirement accounts. Mother testified that she used an unspecified portion of those funds to purchase new windows for the house, to refinance the house, and on attorney's fees in this litigation. We also recall that a parent's ability to pay attorney's fees is not "the controlling consideration." *Sherrod*, 849 S.W.2d at 785; *see also Taylor*, 158 S.W.3d at 360. While it is a factor, "trial courts may award attorney's fees without proof that the requesting party is unable to pay them as long as the award is just and equitable under the facts of the case." *Sherrod*, 849 S.W.2d at 785.

We review a trial court's decision concerning attorney's fees under an abuse of discretion. *Huntley*, 61 S.W.3d at 341. "Unless it 'affirmatively appears that the trial court's decision was against logic or reasoning, and caused an injustice to the party complaining,' the trial court's exercise of discretion will not be reversed on appeal." *Id.* (quoting *Marcus v. Marcus*, 993 S.W.2d 596, 601 (Tenn. 1999)). We disagree with the trial court's declination of Mother's request for attorney's fees. Respectfully, the trial court's reasoning that neither party prevailed and that Father should have had the benefit of participating in the litigation without the risk of an assessment of attorney's fees is in tension with our case law and the policy underlying attorney's fee awards in child support proceedings. Mother prevailed on her petition to modify child support, which resulted in the Children receiving a benefit of more than $1,000.00 per month. Furthermore, while the trial court could consider Mother's liquid assets when determining whether to award her attorney's fees, such consideration should not be controlling. Additionally, although the trial court considered Mother's assets, it omitted from its consideration the vast discrepancy in the parties' incomes. Namely, that it imputed a monthly income to Mother of $4,933.33, while it found Father's monthly income, *excluding* the software sale and PPP

loan forgiveness, to be $40,806.00. Given the foregoing, we reverse the trial court's denial of Mother's attorney's fees.

Concerning an award of appellate attorney's fees, it is within the sole discretion of this Court whether to award them, *Strickland v. Strickland*, 644 S.W.3d 620, 635-36 (Tenn. Ct. App. 2021), and we consider the same factors that trial courts consider, discussed above. *Berl*, 2024 WL 1711966, at *8. While Mother has not prevailed on each of her stated appellate issues, she has been successful in her issues concerning Father's income, which will result in an even greater benefit to the Children. Considering the foregoing as well as the discrepancy in the parties' incomes, we exercise our discretion to grant Mother's request for appellate attorney's fees. Father's request as to same is denied.

V. Conclusion

For the foregoing reasons, we vacate the trial court's modification of Father's child support obligation and remand with instructions consistent with this Opinion. The trial court's denial of Mother's attorney's fees is reversed. The trial court's order is otherwise affirmed. Mother's motion for appellate attorney's fees is granted, and Father's motion for appellate attorney's fees is denied. On remand, the trial court is instructed to calculate Mother's reasonable and necessary attorney's fees incurred in bringing the Petition as well as this appeal and for such further proceedings as may be necessary and consistent with this Opinion. Costs of the appeal are assessed one-half to the Appellant, Caroline Long Kilpatrick, and one-half to the Appellee, Connor Lewis Kilpatrick. Execution for costs may issue if necessary.

s/ Valerie L. Smith
VALERIE L. SMITH, JUDGE