IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 2, 2016

EMILY MAE KELLY v. RYAN MARSHALL KELLY

Direct Appeal from the Chancery Court for Lewis County
No. 2011-CV-127 Joseph Woodruff, Judge

No. M2015-01779-COA-R3-CV – Filed October 19, 2016

This is an appeal of an order denying Father's petition to modify custody and visitation and for Rule 60.02 relief from a previous judgment of the court. Father appeals the trial court's finding that no material change in circumstance existed that warranted a change in the parties' parenting plan. Additionally, Mother appeals the trial court's finding that Father is not voluntarily underemployed. We affirm.

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

BRANDON O. GIBSON, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and JOHN W. MCCLARTY, J., joined.

Ryan Marshall Kelly, Allison Park, Pennsylvania, *Pro se*.

Douglas Tompson Bates, IV, Centerville, Tennessee, for the appellee, Emily Mae Kelly.

OPINION
Background & Procedure

Emily Mae Kelly ("Mother") and Ryan Marshall Kelly ("Father") were granted a divorce[1] on October 22, 2012 and entered into a Marital Dissolution Agreement ("2012 MDA"), which allocated the parties' property, assets, and debts. The court also adopted the parties' agreed permanent parenting plan, which named Mother the primary residential parent for the parties' then eleven year-old daughter and awarded Mother 285

[1]These same parties were previously married and divorced in 2010. Although the Marital Dissolution Agreement from their first divorce ("2010 MDA") is not present in the record, testimony at trial below indicates that as a result of the 2010 MDA, Father assumed the "indebtedness" for the parties' residence in Hohenwald, Tennessee (approximately $148,210.74) although the property itself was awarded to Mother.

days and Father 80 days. Based on Father's income of $12,079 per month, Father was ordered to pay Mother, who earned considerably less, $1,229 per month in child support. With respect to major decisions regarding their daughter's upbringing, the parenting plan provided that Mother and Father were to make their decisions jointly. In the event that the parties could not agree, the parenting plan gave Mother the authority to make final decisions.

On July 10, 2013, Father filed a petition to modify the permanent parenting plan and to enforce the final decree of divorce. In his petition, Father alleged a material change of circumstance in that Mother was failing to properly parent and supervise their daughter. Father specifically alleged that the daughter had a dental issue Mother failed to address, that Mother failed to supervise the daughter with respect to the daughter's school work and use of social media, and also that Mother purposefully made it difficult for Father to exercise his visitation with the daughter. Father's petition also alleged that the final decree and MDA in the parties' 2010 divorce provided for Father to pay the indebtedness on the parties' residence, which Father argued does not include taxes, insurance, or homeowner's association fees. On August 29, 2013, Mother filed an answer and counter-complaint for civil contempt alleging that Father had failed to make credit card payments to Chase Bank USA as ordered by the court in the parties' 2012 divorce.

On June 4, 2014, Father filed a motion for temporary modification of child support, alleging that since the entry of the last order, his income had changed drastically and that he did not have the ability to meet all of his obligations under the final decree. The court then allowed Father to file an amended petition on July 28, 2014, in which Father sought a modification of child support and relief under Tennessee Rule of Civil Procedure 60 from the final judgment in the parties' 2010 divorce. With respect to Father's request for Rule 60 relief, Father alleged that the provision that required him to pay the indebtedness on the mortgage was "no longer equitable and should not have prospective application." Mother filed an answer to Father's amended petition, arguing that Father's request for Rule 60 relief should be denied because it was not made "within a reasonable time" as prescribed by Tennessee Rule of Civil Procedure 60.02(4) and 60.02(5). The chancery court heard testimony from Father, Mother, and a private investigator, and argument from counsel on July 6, 2015.

Father served in the United States Marine Corps from July 1998 to August 2003. He was involved in a motor vehicle accident in North Carolina in 2000 where he struck and killed a pedestrian in what he described as a "tragic accident." Father testified that he suffered "severe emotional consequences" as a result of the accident, including recurring nightmares and flashbacks. According to Father, he was diagnosed with post-traumatic stress disorder ("PTSD") and prescribed an anti-depressant for

"[a]pproximately five months." In 2002, continuing emotional stress caused Father to seek further treatment from a military hospital. Father was deployed in 2002 and was part of the invading force into Iraq in 2003. Father stated that his unit suffered heavy losses during the invasion and that he witnessed the deaths of two of his close friends. Father's deployment ended shortly thereafter due to Father suffering a broken leg. At trial, Father reported having been "traumatized" by his time in combat and noted that he was again diagnosed with PTSD in 2012 and also in 2015 when he began to receive services from the Veterans Administration.

After leaving the military in 2003, Father worked briefly for a commercial diving company before taking an offshore drilling job in the Gulf of Mexico. Father was employed in the offshore drilling industry for approximately ten years from 2004 to 2014. By the end of his tenure offshore, Father earned roughly $12,000 per month working twelve hour shifts on an oil rig off the coast of Angola, Africa. He described his twenty-eight days on, twenty eight days off work schedule as being both physically and mentally strenuous, as well as dangerous. He noted that physical limitations, including tightness in his back and soreness and loss of range of motion in his shoulder, as well as increasing mental and emotional stress caused him to eventually request a hardship transfer back to the Gulf of Mexico. According to Father, the position to which he was transferred turned out to be even more physically demanding than the one in Africa, and he resigned after three days. Additionally, the court admitted into evidence, over objection by Mother's counsel, a radiology report of Father's shoulder and back that Father explained demonstrated the physical limitations that made difficult his working on an oil rig.

At the time of trial, Father, who does not have college education, was employed seasonally by the State of Pennsylvania as a maintenance repairman earning $14.23 per hour. He stated that he works no more than nine months per year and that his take-home income is about $1,200 per month. Father testified that he applied, but was not selected, for positions with Halliburton and the U.S. Army Corp of Engineers that would have paid $17 per hour and $33 per hour, respectively. Furthermore, Father stated that he has been prescribed anxiety and antipsychotic medications since 2011 that he believes would render him ineligible for another offshore drilling position. However, he did admit that he was routinely subjected to urinalysis testing since 2011 and the results of those tests were never questioned by his employer.

Father also testified concerning his ability to meet his financial obligations under the 2010 and 2012 MDAs. At the time of trial, Father lived with his girlfriend and paid roughly $500 per month toward the mortgage as rent. He paid "half" the utilities, although he did not specify an amount. He noted that he lives a fairly strict financial lifestyle and that he "barely [keeps his] head above water." Father admitted to traveling to Florida for a concert but stated that he redeemed airline miles earned from flying back

and forth to Africa for work and that his girlfriend paid for the concert tickets. He also noted that he was at that time current with his child support obligation. However, Father failed to meet his total child support obligation of $1,229 per month beginning in January 2015. He testified that he made a $425 payment in January, did not make a payment in February or March, and then made $100 payments in April, May, and June of 2015. With respect to Father's obligation under the 2010 MDA to pay the "indebtedness" of $148,000 for Wife's residence, Father testified that although he had paid the principal and interest on the mortgage since 2010, he now believes that the MDA only obligated him to pay the principal and not any interest or taxes in escrow.[2] However, he did admit to missing recent mortgage payments, which caused Mother to pay them instead. Father also stated that he had paid off the Chase Bank credit card debt that was the subject of Mother's petition for civil contempt before Mother filed her petition.

Having discussed his financial issues at great length, Father then testified concerning his allegation that circumstances had so materially changed that a modification in the parties' parenting plan was warranted. Father's testimony primarily addressed his concerns over Mother's supervision of their daughter's social media activity and grades in school. With respect to the social media issue, Father shared with the court a number of daughter's social media posts, conversations, and "likes,"[3] which Father deemed inappropriate for a fourteen year-old child. He testified to sharing these concerns with Mother and attempting to gain access to his daughter's social media accounts but stated that Mother and the daughter both made it difficult for him to gain access to the accounts. Father admitted that Mother did make sure the material was deleted when he first notified her of his concerns but noted that the behavior continued nonetheless. Father also admitted that he was unaware of any measures taken by Mother, if any, to address the concerns. He also noted that he did not make any suggestions to Mother about how the issue should be handled.

Father also expressed concern over his daughter's performance in school and said Mother very seldom communicates with him regarding their daughter's educational struggles. He testified that his daughter earned mostly Cs and Ds in school and that she was failing some classes. According to Father, he proposed holding their daughter out of dance until her grades improved, but Mother was not responsive to the proposal. Father also said he proposed hiring a tutor to help their daughter with science and math, but Mother was again not responsive to that suggestion. However, Father did admit that he was unaware that his daughter had been enrolled in a morning program at school and that

[2]Father contends that he has overpaid his indebtedness obligation by $4,083.92 to date.

[3]A social media user's "like" of social media content, which generally occurs by tapping or clicking a specified button on the user interface, generally denotes that the user enjoyed or identified with said content. In many cases, when a user "likes" a piece of content, that "like" is made public to a varying degree based on the user's privacy settings.

she had studied math with her teacher and principal on a nearly weekly basis. He also admitted to not being aware of any efforts made by Mother to improve their daughter's grades. Additionally, Father never used his visitation time with the daughter to get her extra help or a tutor. Father also indicated that their daughter's performance in school led to her being assigned to summer school, which she apparently did not complete because Mother pulled her out to go on vacation. Nonetheless, the daughter moved on to the next grade when school started in the fall.

Lastly, Father testified generally regarding his perceived difficulty arranging visitation through Mother. The parenting plan provided that Father "shall have parenting time with the minor child any time he comes to the State of Tennessee, provided that he gives Mother written notice within 21 days in advance," in addition to certain holidays. According to Father, Mother routinely makes it difficult for him to exercise his parenting time. He described situations where he claims to have provided Mother with adequate notice that he intended to exercise visitation only to be told that Mother had already made plans for daughter on those days. In one circumstance, Father e-mailed Mother expressing his intent to exercise his visitation on his birthday about a week in advance but was told that Mother had already made other plans. Ultimately, this area of disagreement led to the parties' attorneys stepping in and working out the situation.

Corey King, a licensed private investigator, also testified regarding Mother's supervision of daughter. He stated that he was hired on March 5, 2013 and began his surveillance on March 8, 2013. He testified that he observed the daughter arriving home from school around three o'clock in the afternoon. According to Mr. King, the daughter entered her residence and stayed there until around 5 p.m., when she came outside to play with a young boy and his dog. Later, a group of children joined the daughter in her residence for roughly ten minutes before they all left, including the daughter, and "roamed around their neighborhood" until 10 p.m., when Mother arrived home. Mr. King admitted that the daughter never appeared to be in distress or in any sort of danger and that she seemed comfortable "playing with her friends."

With Father's proof concluded, Mother's counsel moved for dismissal under Tennessee Rule of Civil Procedure 41.02, arguing that Father had failed to meet the burden of proving that there had been a material change in circumstances warranting a modification of the parenting plan. Mother's counsel also requested that the court dismiss Father's claim for relief under Rule 60.02 and as well as his claim that his obligation for the "indebtedness" of Mother's residence was limited only to the principal amount of the loan. The court granted Mother's motion with respect to the modification of the parenting plan, finding Father's proof was "inadequate to carry the burden of showing a material change in circumstance." The court noted that while Father provided testimony about his concerns, he failed to provide report cards, that the daughter

apparently did well enough to earn a promotion to the next grade, and that Father failed to call Mother as an adverse witness in order to explore whether or how Mother dealt with their daughter's social media access. The court also noted that Father even admitted that he is not in a position to know what efforts Mother has or has not made to improve their daughter's grades. The court also granted Mother's motion with respect to Father's claim for Rule 60.02 relief, noting that there was "insufficient proof to justify" that relief and also that Father's claim was not brought in a reasonable time. However, the court denied Mother's motion with respect to the issue of the mortgage "indebtedness," claiming that the court had "heard sufficient evidence about what the MDA 1 and MDA 2 mean and how to properly interpret those contractual provisions." Finally, the court found that Father was not voluntarily under-employed based on his attempt to find higher paying employment, that his change in income constituted a material change in circumstance, and that he was "entitled to an adjustment to his child support obligation."

The court then heard testimony on Mother's counter-claim regarding the credit card debt owed to Chase Bank. Father and Mother both testified that at the time of trial, Father had paid the debt but could not agree on when the debt was paid and whether it was paid prior to Mother filing her counter-complaint for civil contempt. Ultimately, the court determined that it could not grant any relief to Mother on this issue because the debt had already been paid.

The court entered its order on August 19, 2015, denying Father's request for a modification of designation of primary residential parent and request for Rule 60.02 relief from its previous judgment and the 2010 and 2012 MDAs. However, the court did find that Father was not voluntarily underemployed and that the child support order should be modified dating back to when Father began to work for the State of Pennsylvania. The court also found that the language of the 2010 and 2012 MDAs was unambiguous and that the term "indebtedness" included only the principal amount of the loan but did not award a judgment against Mother for the repayment of amounts paid by Father toward real estate taxes and insurance. Finally, the court found that Mother's counter-claim for civil contempt was rendered moot when Father paid the debt.

Issues

Father presents the following issues for review on appeal, which we have reworded slightly:

1. Whether the trial court erred in finding that no material change in circumstance existed that warrants a change in primary residential parent designation.

2. Whether the trial court erred in declining to grant Father Rule 60.02 relief.

3. Whether the trial court erred in finding that no material change in circumstances affecting the child's best interests existed that warrants a change in visitation.

Mother presents two additional issues for review:

4. Whether the Court should dismiss Father's three issues that were briefed for failure to properly cite to the record in its statement of facts and argument and for inclusion of post-hearing facts that were not litigated at trial.

5. Whether the trial court erred in not finding Father voluntarily underemployed.

Standard of Review

In nonjury cases, this Court's review is *de novo* upon the record of the proceedings in the trial court, with a presumption of correctness as to the trial court's factual determinations, unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d); *Union Carbide Corp. v. Huddleston,* 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's conclusions of law, however, are afforded no such presumption. *Campbell v. Florida Steel*, 919 S.W.2d 26, 35 (Tenn. 1996).

Analysis

As an initial matter, we address Mother's argument that Father's failure to properly cite to the record in accordance with Tennessee Rule of Appellate Procedure 27(a) and inclusion of post-hearing facts that were not litigated at trial should result in a waiver of Father's issues raised on appeal. We first note that Father submitted his appellate brief to this Court pro se. However, "pro se litigants must comply with the same standards to which lawyers must adhere." *Watson v. City of Jackson,* 448 S.W.3d 919, 926 (Tenn. Ct. App. 2014). As explained by this Court:

> Parties who decide to represent themselves are entitled to fair and equal treatment by the courts. The courts should take into account that many pro se litigants have no legal training and little familiarity with the judicial system. However, the courts must also be mindful of the boundary between

> fairness to a pro se litigant and unfairness to the pro se litigant's adversary. Thus, the courts must not excuse pro se litigants from complying with the same substantive and procedural rules that represented parties are expected to observe.

Id. (quoting *Jackson v. Lanphere*, No. M2010-01401-COA-R3-CV, 2011 WL 3566978, at *3 (Tenn. Ct. App. Aug. 12, 2011)).

Rule 27(a) requires that an appellant submit a brief to this Court which contains the following:

> (1) A table of contents, with references to the pages in the brief;
> (2) A table of authorities, including cases (alphabetically arranged), statutes and other authorities cited, with references to the pages in the brief where they are cited;
> ….
> (4) A statement of issues presented for review;
> (5) A statement of the case, indicating briefly the nature of the case, the course of the proceedings, and its disposition in the court below;
> (6) A statement of facts, setting forth the facts relevant to the issues presented for review with appropriate references to the record;
> (7) An argument, which may be preceded by a summary of argument, setting forth:
> (A) the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on; and
> ….
> (8) A short conclusion, stating the precise relief sought.

Tenn. R. App. P. 27(a)(1)-(8).

A. Material Change in Circumstance

Father's first and second assignments of error concern the trial court's determination that there had not been any material change in circumstance warranting a modification of the parties' parenting plan. Although not clearly argued, Father appears to raise two distinct issues with respect to his allegation that there has been a material change of circumstance: first, Father argues that that the trial court erred in failing to find a material change in circumstance as required for the modification of the primary residential parent; in the alternative, Father argues that the evidence was at least sufficient

to establish a material change in circumstance for purposes of modifying the residential parenting schedule.

In *Burnett v. Burnett*, this Court addressed the criteria for modifying a parenting plan:

> We apply the two-step analysis in Tennessee Code Annotated § 36-6-101(a) (2014) to requests for modification of the primary residential parent or the residential parenting schedule. *See, e.g.*, *In re T.C.D.*, 261 S.W.3d at 743 (primary residential parent modification); *In re C.R.D.*, No. M2005-02376-COA-R3-JV, 2007 WL 2491821, at *6 (Tenn. Ct. App. Sept. 4, 2007) (residential parenting schedule modification). The threshold issue is whether a material change in circumstance has occurred since the court's prior custody order. *See* Tenn. Code Ann. § 36-6-101(a)(2)(B); *Armbrister v. Armbrister*, 414 S.W.3d [685, 697-98 (Tenn. 2013)]. Only after it is determined that a material change in circumstance has occurred must the court determine whether modification is in the child's best interest. *Armbrister*, 414 S.W.3d at 705.
>
> A change in circumstance with regard to a residential parenting schedule is "a distinct concept" from a change in circumstance with regard to custody. *Massey–Holt v. Holt*, 255 S.W.3d 603, 607 (Tenn. Ct. App. 2007); *see also* Tenn. Code Ann. §§ 36-6-101(a)(2)(B), -101(a)(2)(C). If a parent requests a modification of custody, also known as a change in the primary residential parent, then the parent must "prove by a preponderance of the evidence a material change in circumstance." *Massey–Holt*, 255 S.W.3d at 607. . . . Although there are "no hard and fast rules for determining when" a material change in circumstance has occurred, factors for our consideration include: (1) whether the change occurred after entry of the order sought to be modified; (2) whether the change was known or reasonably anticipated when the order was entered; and (3) whether the change affects the child's well-being in a meaningful way. *Kendrick v. Shoemake*, 90 S.W.3d [566, 570 (Tenn. 2002)].
>
> The threshold for establishing a material change in circumstance where the issue before the court is a modification of the residential parenting schedule is much lower. *See, e.g.*, *Boyer v. Heimermann*, 238 S.W.3d 249, 259 (Tenn. Ct. App. 2007); *see also* Tenn. Code Ann. §§ 36-6-101(a)(2)(B), -101(a)(2)(C). The petitioner still must "prove by a preponderance of the evidence a material change of circumstance affecting the child's best interest," Tennessee Code Annotated § 36-6-101(a)(2)(C), and like a

> material change for modification of the primary residential parent, the change must have occurred after entry of the order sought to be modified. *Caldwell v. Hill*, 250 S.W.3d 865, 870 (Tenn. Ct. App. 2007). However, unlike the standard for a change of primary residential parent, whether the change was reasonably anticipated when the prior residential parenting schedule order was entered is irrelevant. *Armbrister*, 414 S.W.3d at 703.

Burnett v. Burnett, No. M2014-00833-COA-R3-CV, 2015 WL 5157489, at *6 (Tenn. Ct. App. Aug. 31, 2015) (*no perm. app. filed*).

Here, from our review of the record, the evidence does not preponderate against the facts found by the trial court. Likewise, considering those facts, we conclude that the trial court did not err in determining that there has been no material change in circumstance warranting a modification of primary residential parent. As noted by the trial court, Father failed to meet his burden of proving that any allegedly material change occurred that affected the wellbeing of the parties' daughter. While Father testified, apparently credibly, that he was concerned about his daughter's use of social media and her academic performance, he failed to present evidence of any kind that Mother had failed to supervise the daughter in those areas.

Although the "threshold . . . is much lower" when determining whether a material change in circumstance has occurred with respect to a modification in visitation, Father similarly failed to prove by a preponderance of the evidence that such a change had occurred with respect to this issue. *See id.* at *6. As noted above, Father presented credible concerns regarding his daughter's social media behavior and academic performance but failed to prove any material change in circumstance warranting modification of the parenting schedule. Because Father failed to prove any material change, we do not consider whether modification would be in the daughter's best interest. Accordingly, we affirm the decision of the trial court that Father failed to meet his burden to prove that a material change in circumstance occurred with respect to both the issue of primary residential parent and of visitation.

B. Rule 60 Relief

Father's final assignment of error concerns the trial court's decision to deny him relief under Tennessee Rule of Civil Procedure 60.02(4) and (5). Neither the 2010 judgment nor the 2010 MDA is contained within the record. "Generally, this Court 'is precluded from addressing an issue on appeal when the record fails to include relevant documents.'" *Chiozza v. Chiozza*, 315 S.W.3d 482, 492 (Tenn. Ct. App. 2009) (quoting *State v. Zirkle*, 910 S.W.2d 874, 884 (Tenn. Ct. Crim. App. 1995)). "The failure of the appellant to ensure that an adequate transcript or record on appeal is filed in the appellate

court constitutes an effective waiver of the appellant's right to appeal." *Chiozza* at 492. Because Father failed to include in the record the judgment from which he seeks to be relieved or the 2010 MDA that was allegedly incorporated into that judgment, Father has waived this issue.

C. Voluntary Underemployment

Finally, we address Mother's argument that the trial court erred in finding that Father is not voluntarily underemployed. Included in this issue is Mother's assertion that the trial court improperly allowed inadmissible medical evidence.

"'Determining whether a person is willfully and voluntarily underemployed is a fact-driven inquiry requiring a careful consideration of all the attendant circumstances.'" *Von Tagen v. Von Tagen*, No. M2009-00850-COA-R3-CV, 2010 WL 891893, at *8 (Tenn. Ct. App. Mar. 12, 2010), *perm. app. denied* (Tenn. Aug. 25, 2010)(quotin*g Lane v. Lane*, No. M2008-02802-COA-R3-CV, 2009 WL 3925461, at *6 (Tenn. Ct. App. Nov. 17, 2009)). Therefore, an appellate court "accords substantial deference to the trial court's decision, especially when it is premised on the trial judge's singular ability to ascertain the credibility of the witnesses." *Von Tagen*, 2010 WL 891893 at *8 (citing *Walker v. Walker*, No. M2002-02786-COA-R3-CV, 2005 WL 229847, at *2 (Tenn. Ct. App. Jan. 28, 2005)). In order to determine whether an individual is voluntarily underemployed, we consider his or her past and present employment and the reasons for taking a lower paying job. *Byrd. v. Byrd*, 184 S.W.3d 686, 691 (Tenn. Ct. App. 2005) (citation omitted). If the reason for taking the lower paying job is reasonable and made in good faith, the court will not find the person to be willfully and voluntarily underemployed. *Id.*

The Tennessee Rules of Evidence govern the admissibility of evidence in Tennessee. Rules 803(4) and (6) and Rule 902(11) are particularly relevant to the evidence offered at trial. Rules 803(4) and (6) concern exceptions to the hearsay rule, while Rule 902(11) relates to certified records of regularly conducted activities. At trial, Mother's attorney objected to the inclusion of several statements that Father attributed to his doctors as well as a radiology report Father offered into evidence. Mother specifically argues that the court misapplied Rule 803(4) in allowing Father to testify about what his doctors told him and did not properly apply Rules 803(6) and 902(11) in allowing the radiology report to come into evidence. Additionally, Mother argues that the court improperly allowed Father to attach causation of a medical drug's alleged side effect to his weight gain.

Under Rule 803(4), "[s]tatements made for purposes of medical diagnosis and treatment describing medical history; past or present symptoms, pain, or sensations; or

the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis and treatment" are not considered hearsay. Tenn. R. Evid. 803(4). Because the "rationale for this exception to the hearsay rule is that persons who are seeking medical diagnosis and treatment will make reliable statements to assure proper medical care," *Monypeny v. Kheiv*, No. W2014-00656-COA-R3-CV, 2015 WL 1541333, at *15 (Tenn. Ct. App. Apr. 1, 2015) (*no perm. app. filed*) (citing *State v. Livingston*, 907 S.W.2d 392, 396 (Tenn. 1995)), the rule does not extend beyond statements made by "persons who are seeking medical diagnosis and treatment." In this case, Father repeating what doctors told him constitutes hearsay and is not admissible.

With respect to the radiology report, the court did not properly apply Rules 803(6) and 902(11). Those rules allow records of regularly conducted activities, including hospital records, to be introduced into evidence provided that they are accompanied by a custodian of those records or affidavit. Tenn. R. Evid. 803(6) and 902(11). The radiology report entered into evidence in this case may have been admissible had it met the requirements of the rules of evidence. However, it did not, and is therefore inadmissible. Although Mother argues that the court allowed Father to attach causation of a drug's alleged side effect to his weight gain, our review of the record indicates that the court merely received the testimony "as the witness' opinion testimony about his own personal health," and not as expert medical testimony.

Although the trial court did make errors with respect to the admissibility of evidence, it does not appear from the record that the trial court relied on the improperly admitted evidence in determining that Father is not underemployed. The record is replete with evidence that Father suffers from physical and emotional limitations that affect his ability to be employed in a physically and mentally strenuous environment. The record also demonstrates that Father has unsuccessfully attempted to procure higher paying employment. While the court did not specifically articulate whether it found Father's reasons for leaving his previous employment to be reasonable and made in good faith, we emphasize our "substantial deference to the trial court's decision" in this realm. *Von Tagen*, 2010 WL 891893 at *8. This deference, taken together with the facts established in the record, causes us to conclude that the trial court did not err in finding that Father is not voluntarily underemployed.

Conclusion

For these reasons, we affirm the order of the trial court. Costs of this appeal are taxed to one-half to the appellee Emily Mae Kelly, and one-half to the appellant, Ryan Marshall Kelly. Because Ryan Marshall Kelly is proceeding *in forma pauperis* in this

appeal, execution may issue for costs if necessary.

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BRANDON O. GIBSON, JUDGE