

IN THE COURT OF APPEALS OF TENNESSEE

AT KNOXVILLE

FILED

March 15, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

LAURA ANN PASKULY
LOWENKRON,

Plaintiff-Appellee,

vs.

STUART EDWIN LOWENKRON,

Defendant-Appellant.

) C/A NO. E1999-00332-C0A-R3-CV

)

) HAMBLEN CHANCERY

)

) HON. THOMAS R. FRIERSON, II,

) JUDGE

)

) AFFIRMED, AS

) MODIFIED AND

) REMANDED

DENISE TERRY STAPLETON, Morristown, for Plaintiff-Appellee.

JAMES D. CAUSEY and JEAN E. MARKOWITZ, Memphis, for Defendant-Appellant.

OPINION

Franks, J.

In this divorce action, the husband appeals from the award of child support, alimony and custody.

At the time of trial, the wife was 35 and the husband was 36 years of age. The parties had been married 10 ½ years, and two minor children had been born to the marriage, and were ages 3 ½ and 6 years old.

When the parties were married, the husband was in his fourth year of medical school, he now practices as a physician in pulmonary critical care medicine. He earns a base salary of \$180,000.00 per year, plus bonuses if his productivity is

high. For 1998 he received a bonus of \$40,000.00. He also receives approximately \$3,000.00 per month from Lakeway Hospital, which is used to defray the husband's school loans. He works very long hours, such that he typically leaves home around 7:00 am and does not return until very late at night.

The wife has a bachelor's degree in Human Development and Family Studies from Cornell University. She has training and work experience in the field of retail sales and management, and was the couple's sole source of income during the husband's fourth year of medical school. The wife worked in that field until just before the birth of the parties' first child, but has not worked since. By agreement of the parties, she stayed home and cared for the children. At trial, she had not looked for employment, but testified that she was willing to work, provided that she could find a job that would allow her some flexibility so that she could be with her children.

Husband presented a vocational expert, who testified that he believed the wife could move into the work force immediately in the retail field, and earn approximately \$40,000.00 per year in a full time position. He did concede, however, that such positions typically required long hours and that this could be in conflict with the wife's desire to be with the children.

After hearing all of the proof, the Trial Judge entered a Judgment which granted the wife a divorce and custody of the children. The husband was granted standard visitation, and the court found that husband had a yearly gross income of at least \$256,000.00, and ordered child support in the amount of \$4,600.00 per month, with \$3,200.00 going directly to wife, and \$1,400.00 going into an educational account for the children. The court determined this amount based upon the child support guidelines, and did not make any findings requiring a deviation from the amount. The Court awarded the wife rehabilitative spousal support for six years, in the amount of \$1,800.00 per month for two years, \$1,250.00 per month for two years, and \$1,000.00 for two years. The court also awarded wife attorney's fees in the amount of \$2,500.00.

Subsequently, the Court reaffirmed its award of child support, but ordered that the support could be paid weekly for the husband's convenience.

We review a trial court's findings of fact *de novo* with a presumption of correctness. No presumption of correctness attaches to the trial court's conclusions of law. The Trial Court found that husband had a gross yearly income of \$256,000.00. Further, the husband had made \$286,000.00 in 1997 according to his income tax return.

The Trial Court then set child support at \$4,600.00 per month based upon the Child Support Guidelines, and determined that a deviation was not

appropriate. There is no calculation in the Court's Memorandum Opinion as to how the amount of child support was determined.

Tenn. Code Ann. §36-5-101 provides that there is a rebuttable presumption that the Child Support Guidelines (contained in Tenn. Comp. R. and Regs. Ch. 1240-2-4) and the percentages utilized therein will produce the appropriate amount of monthly child support. *See Nash v. Mulle*, 846 S.W.2d 803 (Tenn. 1993). The Guidelines provide that "net income" is to be calculated by "subtracting from gross income of the obligor FICA (6.2% Social Security + 1.45% Medicare for regular wage earners and 12.4% Social Security + 2.9% Medicare for self-employed, as of 1991, or any amount subsequently set by federal law as FICA tax)" and "the amount of withholding tax deducted for a single wage earner claiming one withholding allowance". Tenn. Comp. R. and Regs. Ch. 1240-2-4-.03(4). The Guidelines explain that after the net income is determined, that amount should be multiplied by the corresponding percentage provided in the chart depending upon the number of children. Tenn. Comp. R. and Regs. Ch. 1240-2-4-.03(5). For two children, that percentage is 32%. *Id.*

As the Court properly found, the husband's gross monthly income would be \$21,333.00. The proper calculation to reach husband's net income for purposes of the Guidelines is as follows:

FICA: $\$21,333 \times 7.65\% \text{ FICA}^1 = \$1,631.97$
Federal: $\$21,333 - \$225 \text{ (one federal withholding allowance)}^2 = \$21,108$
 $\$21,108 - \$10,804 = \$10,304$
 $\$10,304 \times 36\% = \$3,709.44 + \$2,880.99 = \$6,590.43^3$

Net income = $\$21,333 - \$1,631.97 \text{ FICA and } \$6,590.43 \text{ federal} = \$13,110.60$
Child support = $\$13,110.60 \times 32\% = \$4,195.39$

1

As a salaried employee, husband's FICA tax should be figured at 7.65%. Tenn. Comp. R. and Regs. Ch. 1240-2-4-.03(4).

2

As set out in the 1998 Circular E, Employer's Tax Guide, Publication 15 by the Internal Revenue Service, Table 5 on page 32. Tenn. Comp. R. and Regs. Ch. 1240-2-4-.03(4).

3

This portion of the calculation for determining the amount of federal withholding tax is set forth in the 1998 Circular E, Employer's Tax Guide, Publication 15 by the Internal Revenue Service, Tables for Percentage Method of Withholding on page 34. Tenn. Comp. R. and Regs. Ch. 1240-2-4-.03(4).

Thus, the appropriate amount of child support is \$4,200.00 per month, not \$4,600.00 per month, as determined by the Trial court. Accordingly, we amend the Trial Court's judgment such that the husband is ordered to pay a total of \$4,200.00 per month in child support, with \$3,200.00 per month going to wife and \$1,000.00 per month going into an educational fund for the children.

The husband's issue does not address the foregoing, but argues that there should have been a deviation downward from the Guideline, based upon the fact that the wife did not show a need for the amount of child support awarded, and because the money paid to husband by Lakeway is designated to help repay the husband's school loans. This money paid by Lakeway is, however, paid directly to husband, in return for husband working there, and husband reports it as income for tax purposes. The Guidelines define gross income as including "all income from any source (before taxes and other deductions), whether earned or unearned, and includes but is not limited to, the following: wages, salaries, commissions, bonuses, overtime payments, dividends, severance pay, pensions, interest, trust income, annuities, capital gains" and even including "unemployment compensation benefits, gifts, prizes, lottery winnings". Tenn. Comp. R. and Regs. Ch. 1240-2-4-.03(3)(a). The listing of gross income sources, was designed to be as exhaustive and all-encompassing as possible, and the only things specifically excluded are child support payments for other children, AFDC benefits, food stamps, and SSI. Tenn. Comp. R. and Regs. Ch. 1240-2-4-.03(3)(a) and (b). The Trial Court properly counted husband's payments from Lakeway as part of his gross income.

The Guidelines further provide very specific criteria required for a deviation from the provided percentages, and most of those criteria only deal with an upward deviation. Tenn. Comp. R. and Regs. Ch. 1240-2-4-.04. The criteria applicable to provide a downward deviation is contained in Tenn. Comp. R. and Regs. Ch. 1240-2-4-.04(3), which states that the court must consider all net income of the obligor, but if the net income exceeds \$10,000.00 per month, the court may consider a downward deviation "if the obligor demonstrates that the percentage applied to the excess of the net income above \$10,000.00 a month exceeds a reasonable amount of child support based upon the best interest of the child and the circumstance of the parties." Tenn. Comp. R. and Regs. Ch. 1240-2-4-.04(3) also provides that the percentage applied to the amount above \$10,000 may be placed into an educational fund for the child. The Guidelines further provide that the primary consideration in regard to a deviation must be the best interest of the children. Tenn. Comp. R. and Regs. Ch. 1240-2-4-.04(5).

The husband did not show that the amount of child support he is paying is not in the children's best interests, he simply argues that the wife did not prove that amount of support was needed. Need is not the sole factor in determining an award of

child support. *See Nash v. Mulle*, 846 S.W.2d 803 (Tenn. 1993). One of the goals of the child support Guidelines is “[t]o ensure that when parents live separately, the economic impact on the child(ren) is minimized and to the extent that either parent enjoys a higher standard of living, the child(ren) share(s) in that higher standard.” Tenn. Comp. R. and Regs. Ch. 1240-2-4-.02(2). *Also see Nash*. Moreover, a significant portion of the child support goes into an educational fund for the children, which is in their best interests. We conclude the husband’s argument with regard to a downward deviation of child support is without merit.

The trial court awarded the wife rehabilitative alimony, as herein before noted, and the husband argues the wife is not entitled to alimony because she testified that her needs were \$3,329.00 per month, which could be covered by the child support payments and wife’s income if she were to re-enter the work force.

The wife demonstrated a need for alimony, since she has no job, and has not worked in over six years. The husband has the ability to pay, and given these facts, there can be no question that the Trial Court was correct in finding the wife is entitled to an award of rehabilitative alimony. *See Anderton v. Anderton*, 988 S.W.2d 675, 682 (Tenn. Ct. App 1998). *Cranford v. Cranford*, 772 S.W.2d 48 (Tenn. Ct. App. 1989).

The standard of review of an initial custody determination is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. *Hass v. Knighton*, 676 S.W.2d 554 (Tenn. 1984). It is well-settled that in custody cases, the welfare and best interests of the children are of paramount concern. *Koch v. Koch*, 874 S.W.2d 571 (Tenn. App. 1993). In determining the child’s best interests, the factors to consider are set forth in T.C.A. §36-6-106, and courts are instructed to apply the doctrine of comparative fitness, such that neither party must be deemed unfit, but rather the two possible custodians should be compared and a judgment made as to appropriate custody. *Koch*.

Upon considering the statutory factors and comparing the fitness of the two parents, the evidence does not preponderate against the Trial Court’s award of custody to the wife. T.R.A.P. Rule 13(d).

Finally, husband argues that he should not have been found in arrears of his support obligation *pendente lite*, because the Trial Court’s written Memorandum setting the amount of support was never incorporated in an Order. While this matter was still pending before the Trial Court, the husband never raised the issue of the effectiveness of the court’s Memorandum Opinion. During the trial on the merits, much testimony was heard about what had been paid *pendente lite* and whether an arrearage existed, with no mention or objection by the husband regarding his

obligation to pay the support. It is well-settled that issues not raised before the Trial Court cannot properly be raised on appeal for the first time. *Simpson v. Frontier Comm. Credit Union*, 810 S.W.2d 147 (Tenn. 1991); *Warmath v. Payne*, 3 S.W.3d 487 (Tenn. Ct. App. 1999).

For the foregoing reasons, the Trial Court's judgment is modified as to the child support obligation.

The cost of the appeal is assessed to the husband.

Herschel P. Franks, J.

CONCUR:

Houston M. Goddard, P.J.

D. Michael Swiney, J.