

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
August 29, 2000 Session

**CHRISTYAL DARLENE SIMMONS (VAN DYKE) v. JIMMIE DALE
SIMMONS**

**Direct Appeal from the Chancery Court for Gibson County
No. 13423 George R. Ellis, Chancellor**

No. W1999-01393-COA-R3-CV - Filed October 10, 2000

This appeal arises from a petition by a non-custodial Father for a modification of his child support obligation. After several delays, the court refused to modify the Father's obligation on the basis that he had fallen behind on his support payments between the filing of the petition and the date upon which the court finally considered the matter. In addition, the trial court found him in contempt of court for failing to make his payments and ordered his incarceration. On appeal, Father argues that the trial court improperly refused to modify his child support obligation upon his first request. In addition, he asks that this court vacate the contempt ruling on the basis that he did not willfully disobey the court's order. We remand to the trial court for a modification of the Father's child support obligation based on his current income and order this modification prospectively applied from the date of his first petition. We also vacate the trial court's contempt ruling.

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

DAVID R. FARMER, J., delivered the opinion of the court, in which ALAN E. HIGHERS and HOLLY K. LILLARD, J.J., joined.

Jerald M. Campbell, Jr., Trenton, Tennessee, for the appellant, Jimmie Dale Simmons.

OPINION

According to the statement of the evidence filed in this cause, in November of 1998, the appellant, Jimmie Dale Simmons, filed a Petition for Change of Custody and Other Relief to address several issues surrounding a child custody dispute with his former wife, Christyal Darlene Simmons. Mr. Simmons sought custody of his children, or, in the alternative, a reduction in his child support. Mr. Simmons had been ordered to pay \$1,050 per week in the original divorce decree and he requested a reduction because of his change of circumstances. Mr. Simmons was the owner of Mid-America Plastics, Inc. (Mid-America) which, at the time of his divorce, had provided him with a \$3,000 weekly income. However, only a few weeks before Mr.

Simmons had filed his petition, Mid-America lost a contract representing sixty percent (60%) of its business.¹ As a result, Mr. Simmons' salary was reduced to \$1,100 per week, and some weeks he went unpaid.

In November, 1998, and again in December of the same year, the trial court refused to hear the matter of a reduction of child support separate from the child custody hearing. Mr. Simmons was current on his child support payments during both of these trial dates. The child custody hearing was finally held in June, 1999. By that time, Mr. Simmons had fallen behind on his child support payments. After his reduction in salary, Mr. Simmons had paid his \$1050 per week payments mostly out of his savings. When his savings were gone, Mr. Simmons could only afford \$400 per week payments and made these payments until the hearing in June, 1999.²

In that hearing, the trial court refused to consider a reduction of Mr. Simmons' support payments because he was currently behind on them. Instead, citing numerous expenditures by Mr. Simmons in 1998,³ the court found him in willful contempt of court and ordered his incarceration until he purged himself of contempt. Upon a payment of \$5,000, Mr. Simmons was released from jail. This appeal followed.⁴

The issues presented by the appellant as we perceive them are as follows:

1. Was the trial court incorrect in its denial of the appellant's request to reduce his child support obligation?
2. If the appellant should have been granted a child support reduction, should this reduction be modified retroactively to the date of the filing of his petition?
3. Was it proper for the trial court to hold the appellant in contempt of court for willful failure to pay child support?

To the extent that the issues involve questions of fact, our review of the trial court's ruling is *de novo* with a presumption of correctness. *See* Tenn. R. App. P. 13(d). Accordingly, we may not reverse the court's factual findings unless they are contrary to the preponderance of the evidence.

¹The loss of this contract resulted in a loss for the corporation in 1998. In addition, the corporation owed over \$90,000 to the Internal Revenue Service.

²It is unclear from the record exactly when Mr. Simmons began to fall behind on his child support payments.

³The court cited several factors including Mr. Simmons' 1998 salary of \$156,300 and a \$3800 trip to Hawaii in October, 1998. We take notice that Mr. Simmons did draw a \$3,000 per week salary through most of 1998, but that it was reduced to \$1,100 towards the end of 1998. In addition, it is clear that Mr. Simmons trip to Hawaii was paid for before his company fell upon hard times.

⁴The appellee, Ms. Christyal Darlene Simmons, did not file a brief in this case. As per our previous order, this court will only consider the record, the appellant's brief and the appellant's oral argument.

See, e.g., Randolph v. Randolph, 937 S.W.2d 815, 819 (Tenn. 1996); Tenn R. App. P. 13(d). With respect to the court’s legal conclusions, however, our review is *de novo* with no presumption of correctness. *See, e.g., Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen and Ginsburg, P.A.*, 986 S.W.2d 550, 554 (Tenn. 1999); Tenn. R. App. P. 13(d).

Denial of Child Support Reduction

Tennessee Code Annotated section 36-5-101(a)(1) clearly states that a “court shall not refuse to consider a modification of a prior order and decree as it relates to future payments of child support because the party is in arrears under that order and decree, unless the arrearage is a result of intentional action by the party.” Tenn. Code Ann. § 36-5-101(a)(1) (Supp. 1999). From the record before us, it is clear that Mr. Simmons was not in arrearage because of “intentional action.” Rather, a reversal of his business lead to a reversal of his personal fortunes. As a result, his income dropped dramatically. Mr. Simmons’ struggle to meet his child support payments by dipping into his savings shows his willingness to meet these obligations to the best of his ability. As such, it is clear to this court that Mr. Simmons’ request for modification in his child support payments should have been considered by the trial court.

We now turn to the actual modification of Mr. Simmons child support obligation. Tennessee Code Annotated section 36-5-101(a)(1) states that:

In cases involving child support, upon application of either party, the court shall decree an increase or decrease of such allowance when there is found to be a significant variance, as defined in the child support guidelines . . . between the guidelines and the amount of support currently ordered unless the variance has resulted from a previously court-ordered deviation from the guidelines and the circumstances which caused the deviation have not changed.

Tenn. Code Ann. § 36-5-101(a)(1)(Supp. 1999).

The current guidelines require that decisions to modify existing child support orders must be based on a comparison of the amount of the existing support obligation and the amount that the obligation would be if it were based on the obligor parent's current income. A modification *must* be made if the existing support obligation varies by fifteen percent or more from the amount that the obligation would be based on the obligor parent's current income.

Turner v. Turner, 919 S.W.2d 340, 344 (Tenn. Ct. App. 1995) (citations omitted) (emphasis added). A court may only deny a request to modify based on a “significant variance” under two circumstances “(1) when the obligor parent is willfully or voluntarily unemployed or under-employed and (2) if the variance results from a previous decision of a court to deviate from the guidelines and the circumstances which caused the deviation have not changed.” *Id.* at 344 (quotations omitted).

Turning to Mr. Simmons' case, it is clear from a review of the record that he meets neither of these circumstances. As such, he is entitled to a modification of his child support payments. However, the record does not provide this court with enough information to accurately state Mr. Simmons' current income. As the determination of the amount of this income is "the most important element of proof in a proceeding to set child support," we find it necessary to remand this matter to the trial court. *Id.* As such, the trial court is hereby ordered to determine Mr. Simmons' total income for 1999, and use this income in calculating his future child support obligation in accordance with the standards set forth by the child support guidelines.⁵

Retroactive Child Support

"Retroactive modifications [of child support orders] are plainly unauthorized," under Tennessee law. *Ausbrooks v. Moore*, No. 01A01-9803-CH-00114, 1999 WL 317626, at *3 (Tenn. Ct. App. May 21, 1999) (*no perm. app. filed*) (quoting *Rutledge v. Barrett*, 802 S.W.2d 604, 606 (Tenn. 1991)). However, "prospective modifications can be made, but only after notice as provided in Tennessee Code Annotated 36-5-101 subsection (a)(5)." *Id.* at *3 (quotations omitted). Mr. Simmons is asking for a "retroactive modification" to the date when he first filed his Petition for Change of Custody and Other Relief, wherein he requested a modification of his child support obligations based upon his changed circumstances. As such, this court recognizes that Mr. Simmons is actually requesting a *prospective* modification to his support obligations from the date of his first petition.

It is clear from our review of the record, and for the reasons already cited above, that Mr. Simmons had a significant variance in his financial outlook that would radically affect his ability to provide child support at the level set at the time of his divorce. Diligently, and as required by Tennessee statute, he requested a modification of his support payments. Through the inaction of the trial court, he was not granted this modification in the timely manner envisioned by the legislature and is entitled to relief.

The trial court is hereby directed to determine Mr. Simmons' income level for 1999. From this computation, the court will then calculate Mr. Simmons' weekly child support obligation in accordance with the child support guidelines. It shall then modify Mr. Simmons' support payments effective from the date of his petition, November 25, 1998. Any overpayment by Mr. Simmons of his child support during this period will be credited towards his future required support payments.

Contempt of Court

Tennessee Code Annotated section 29-9-102 states:

⁵With this opinion, we by no means suggest that Mr. Simmons child support obligation will remain static. A significant variance of his income in the future may affect his obligation either upwards or downwards.

The power of the several courts to issue attachments, and inflict punishments for contempts of court, shall not be construed to extend to any except the following cases:

- (1) The willful misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice.
- (2) The willful misbehavior of any of the officers of such courts, in their official transactions.
- (3) The willful disobedience or resistance of any officer of the such courts, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree, or command of such courts.
- (4) Abuse of, or unlawful interference with, the process or proceedings of the court.
- (5) Willfully conversing with jurors in relation to the merits of the cause in the trial of which they are engaged, or otherwise tampering with them.
- (6) Any other act or omission declared a contempt by law.

Tenn. Code Ann. § 29-9-102 (1980). A court may only find contempt under this statute if it discovers that the disobedience or resistance is willful. *See Ahern v. Ahern*, 15 S.W.3d 73, 79 (Tenn. 2000). For a court to find that the failure of a party to pay child support is contemptuous, the court must first determine that the party “had the ability to pay at the time the support was due and then determine that the failure to pay was wilful.” *Id.* at 79. As we have previously discussed, Mr. Simmons did not have the ability to pay his child support obligation at the time he was found in contempt. Therefore, we find that Mr. Simmons did not act willfully and thus was not in contempt. We hereby vacate the trial court’s contempt order.

Conclusion

Based on the foregoing conclusions, we hereby direct the trial court to determine Mr. Simmons’ total income for 1999. This calculation should be used to determine Mr. Simmons’ future weekly child support obligation. In addition, the trial court shall then modify Mr. Simmons’ support payments effective from the date of his petition, November 25, 1998. Any overpayment by Mr. Simmons of his child support during this period will be credited towards his future required support payments. The trial court’s finding that Mr. Simmons was in contempt of the orders of that court is hereby vacated. Costs on appeal are assessed against the appellee, Christyal Darlene Simmons, and her surety, for which execution may issue if necessary.

DAVID R. FARMER, JUDGE