

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
October 2, 2000 Session

THOMAS FAIN DALTON, v. LYNDA F. DALTON

**Direct Appeal from the Circuit Court for McMinn County
No.19410 Hon. John B. Hagler, Circuit Judge**

FILED OCTOBER 27, 2000

No. E2060-00255-COA-R3-CV

Father's Petition to change custody of the parties' minor children was granted. The mother's Petition for an increase in child support was dismissed. We ordered increase in child support to date of filing.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Modified.

HERSCHEL PICKENS FRANKS, J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and CHARLES D. SUSANO, JR., J., joined.

James R. LaFevor, Knoxville, Tennessee, for Appellant, Lynda Faye Wamsley Dalton.

Donald B. Reid, Athens, Tennessee, for Appellee, Thomas Fain Dalton

OPINION

In this action the Trial Judge ordered custody of the three minor children changed from the wife to the husband, and refused to award the wife an increase in the child support from the time she filed a petition for such increase. The wife has appealed.

The parties were divorced in January 1995, and at the time agreed that the wife would have custody of the three minor children. The husband's child support obligation was based on his

1995 salary of \$57,500.00. Subsequently, the wife filed a Petition to increase child support and the husband filed a Petition for change of custody. The issues were tried by the Trial Judge on July 2, 1999, without the wife or the fifteen year old daughter being present for trial.

The issues raised by the wife's brief on appeal are:

1. Whether the trial court erred in not allowing the parties' daughter to state her preference regarding custody?
2. Whether the trial court erred by failing to award wife a child support increase retroactive to the date of wife's motion to increase?
3. Whether the misleading information given to the court by the wife's attorney required a new hearing to be held?

The parties stipulated during oral argument that the daughter was now in the custody of the wife, and that this issue is moot. The custody decision regarding the parties' sons is moot, because the wife did not appeal the custody decision with regard to the parties' sons.

The Trial Court dismissed the wife's motions to increase child support, finding that the husband had been forced to expend a great deal of money on the litigation, and therefore a downward deviation from the guidelines was warranted. The evidence at trial established that at the time of trial he was earning \$66,656.59 per year. Based upon a gross annual salary in this amount, the guideline child support obligation would be \$1,617.00 per month. The husband had been paying \$1,393.00 per month since the time of the divorce. The guideline amount based upon husband's salary at the time of trial represents a 16% increase over what the husband had been paying, and thus was a "significant variance" warranting increase as defined by the statute and the guidelines. *Turner v. Turner*, 919 S.W.2d 340 (Tenn. Ct. App. 1995); Tenn. Code Ann. §36-5-101(a)(1); Tenn. Comp. R. & Regs. 1240-2-4-.02(3). The guideline amount is applicable unless there are circumstances warranting a deviation. Tenn. Comp. R. & Regs. 1240-2-4-.02 to .04.

A trial court has limited discretion to deviate from the guidelines, and sufficient justification must be given. *Jones v. Jones*, 930 S.W.2d 541 (Tenn. 1996). In this case, the Trial Court simply found that a downward deviation was warranted "considering what [husband] has had to spend" on the litigation, apparently because wife had sought several continuances and the Trial Court felt that this had increased the expense of the litigation. The Supreme Court, however, has previously explained:

[T]he guidelines expressly provide for downward deviation where the obligee has utterly ceased to care for the child(ren); where the obligee clearly has a lower level of child care expense than that assumed in the guidelines; and where the obligor is saddled with an "extreme economic hardship." Although the rule does not purport to set forth an exhaustive list of instances in which downward deviation is allowed, these specific instances nevertheless are a powerful indication as to the types of

situations in which it is contemplated under the guidelines.

Jones v. Jones, 930 S.W.2d 541, 545 (Tenn. 1996).

The circumstances in this case do not fall within the situations outlined in *Jones*. The fact that the husband had to spend money on attorney's fees does not rise to the level of "extreme economic hardship", especially considering his level of income. The wife obviously had to spend money on attorney's fees as well. The fact that the husband was obligated to pay his attorney's fees, does not justify a downward deviation from his guideline child support obligation. Accordingly, we hold the wife is entitled to an increase in the child support from the time her action for increase was filed until the date of the court's order changing custody, and upon remand, the Trial Court will enter a judgment for that amount based upon the guidelines.

Finally, the wife argues that she should be granted a "new hearing for a judge to hear all of the proof and render a judgment based upon a proper record" because the wife's attorney misrepresented the status of the case. Wife's attorney represented that she had only one phone call and one letter from the wife since the April continuance, which the wife's Affidavit contradicts. The wife alleges that her attorney led her to believe that a continuance would be granted, and points to a letter written by her attorney on April 28, 1999, which is in the record. The letter states that wife's attorney wished to withdraw from representing the wife, and that she would "forward a statement for any services due, together with my Motion and Order of Withdrawal, after the date has been changed." Later letters, however, make it clear that the trial date remained and that the wife would need to make arrangements for herself and for her witnesses to be present. The wife sent a letter addressed to the Trial Judge which explained that she knew the trial date was set for July 2, but that she told her attorney immediately after the April hearing that her daughter would be on a mission trip on that date, that she later committed to chaperone the mission trip, and that she relied on her attorney to get the date changed.

The wife argues that the attorney's misrepresentations were so egregious as to warrant relief in the form of a new hearing pursuant to *Thornburgh v. Thornburgh*, 937 S.W.2d 925 (Tenn. Ct. App. 1996). It was inappropriate for the wife's attorney to advise the wife that the date would be changed, when the attorney had no control over the trial date, but such action does not rise to the level of egregiousness that would warrant a new trial. The wife admits in her Affidavit that she had personally checked with the court clerk in May to see if a Motion for Continuance had been filed, and was told that there had been none. She also admits that she received the letter from her attorney in June regarding the July 2 trial date still being scheduled. The wife's letter to the court demonstrates that she was fully aware that the trial date was set for July 2, and advises the Court what she wanted to be considered if it decides to proceed without her. Accordingly, the wife must accept the consequences of her action of failing to appear for a trial which she knew was set. We find this issue to be without merit.

Upon remand, a judgment will be entered in the wife's favor for the back child support as outlined, and the cost of this appeal is assessed one-half to each party.

HERSCHEL PICKENS FRANKS, J.