IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

CHERIE SANDERS LINDBERG,	)	
	)	
Plaintiff/Appellee,	)	**Shelby Circuit No. 125167 R.D.**
	)	
VS.	)	**Appeal No. 02A01-9407-CV-00169**
	)	
LARRY BENARD LINDBERG,	)	
	)	
Defendant/Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF SHELBY COUNTY
AT MEMPHIS, TENNESSEE
THE HONORABLE DARRELL BLANTON, SPECIAL JUDGE

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AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

ALAN E. HIGHERS, JUDGE

CONCUR:

DAVID R. FARMER, JUDGE

HEWITT P. TOMLIN, JR., SPECIAL JUDGE

This appeal arises from an order by the trial judge decreasing the father's child

support payments.

The parties involved were divorced pursuant to a final decree of divorce entered on November 9, 1989. The final decree incorporated the terms of a marital dissolution agreement entered into between the parties, which provided that appellant would pay child support in the amount of $2,200 per month for the parties' one child, in addition to maintaining health and dental insurance for the child.[1] The terms of the marital dissolution agreement also obligated appellant to pay for one-half of private school tuition in the event that the appellee should choose to send the child to private school.

In May of 1993, appellant filed a petition to reduce his child support and to modify visitation, alleging that he had experienced changed circumstances by virtue of a substantial and material reduction in his income as a Federal Express pilot. At the time of the divorce, appellant's home base was in Memphis, Tennessee. Approximately six months following the divorce, appellant moved to Vancouver, Washington. When the opportunity became available, he transferred his home base with Federal Express to Oakland, California. Shortly thereafter, pilots stationed at the Oakland location experienced an unanticipated reduction in pay and this action followed.

On November 1, 1993, the court below ruled that appellant had experienced a material and substantial change of circumstances and that the child had no need of the $2,200 per month that had been incorporated into the final decree of divorce. In the final order entered on November 23, 1993, the court reduced appellant's child support obligation to $1,928.00. The court also ordered appellant to pay $2,000 of appellee's attorney's fees and two-thirds of appellee's court costs. Based upon a subsequent motion by the appellant, the court modified its final order to reduce appellant's child support obligation even further so that the amount of child support that appellant paid for his child from a previous marriage would be credited against his monthly support level. Accordingly, appellant's final support obligation was reduced from $2,200 per month to $1828 per month.

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[1]Father also agreed to pay any medical and dental expenses of the minor that were not paid by insurance.

The appellant has appealed from this reduction in his payments, stating the issues for our consideration as follows: (1) Did the court err in calculating Husband's gross 1993 income by using his 1992 income figures when 1993 figures had been placed in evidence, and (2) did the court err in calculating Husband's net income for 1993 by applying withholding and FICA figures from a 1992 payroll document instead of employing "Circular E" as mandated by the Child Support Guidelines?

Conversely, appellee has raised on appeal several additional issues, which are: (1) Did the trial court err in finding that there had been a material and substantial change in circumstances sufficient to reduce appellant's child support, (2) did the trial court err in allowing only a $150 per month upward adjustment in child support due to appellant's infrequent visitation, and (3) did the trial court err in ordering appellant to pay only $2,000 of appellee's attorney fees?

The first consideration in this case is whether the lower court was bound to apply the child support guidelines when appellant's income exceeds $6,250 per month. The regulations provide in pertinent part:

> (2) There are other cases where the guidelines are neither appropriate nor equitable when a court so finds. Guidelines are inappropriate in cases including but not limited to, the following:
> (a) In cases where the net income of the obligor as calculated in the above rule exceeds $6,250 per month . . . . Tenn. Comp. R. & Regs. ch. 1240-2-4-.04(2)(a).

The Tennessee Supreme Court in Nash v. Mulle, 846 S.W.2d 803 (Tenn. 1993), held that in cases where the obligor's monthly net income exceeds $6,250, a court is not limited to a $1,312.00 cap (21% of $6,250), nor is the court bound to award 21% of the full net income. Id. at 806. Instead, a court "may exercise his discretion as the facts warrant." Id. The guidelines are thus a minimum base for determining child support obligations.

It necessarily follows that a court's analysis should proceed as follows. When the obligor's income exceeds $6,250 a month, a court must first conclude that a substantial and material change of circumstances has occurred since the date of the order that is

sought to be modified.[2] Tenn. Code Ann. § 36-5-101(a)(1) (1993); Elliot v. Elliot, 825 S.W.2d 87 (Tenn. App. 1991). If the court finds a material and substantial change in circumstances, then modification of the previous child support would be appropriate. Next, in determining the appropriate amount of modification, the analysis should commence with the basic proposition that "[t]he guidelines apply in *all* cases awarding financial support to a custodial parent for the maintenance of a child." Nash, 846 S.W.2d at 804. A court should then apply the guidelines, retaining discretion as to any amount greater than $1,312.00 per month (21% of $6,250) and equal to or less than 21% of the total net income.

Appellant's first issue, whether the court erred in its calculation of appellant's income, clearly questions a finding of fact made by the trial court. This case was tried without a jury. Consequently, pursuant to Rule 13(d) of the Tennessee Rules of Appellate Procedure, this Court is required to make a *de novo* review of the trial court's findings of fact with a presumption of correctness, unless the evidence preponderates otherwise. Jones v. Jones, 784 S.W.2d 349 (Tenn. App. 1989); Campanali v. Campanali, 695 S.W.2d 193 (Tenn. App. 1985).

Appellant filed a sworn affidavit of income and expenses setting forth his monthly income of $11,890.00 per month, or $142,680.00 per year. Appellant also produced a Federal Express computer-generated payroll summary of his 1992 income at the hearing, which reflected an income of $142,681.76. In contrast, appellant testified at trial that his income would be only $133,954.00 for 1993. He also supported this testimony by another Federal Express payroll summary that encompassed the first six months of 1993, which showed his income to be $66,977.79. Appellant testified that his income would be the same for the last six months of 1993, thereby yielding an annual 1993 income of $133,954.00. The trial judge elected to use appellant's affidavit and the 1992 payroll summary in calculating his gross income.

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[2]As of 1994, the "material change in circumstances" test has been replaced with a "significant variance" test when evaluating a child support modification case. *See* Public Chapter No. 987, 1994, codified at Tenn. Code Ann. § 36-5-101(a)(1) (Supp. 1994). Of course, the "significant variance" standard was not in effect at the time of the lower court's order and was, therefore, inapplicable.

The judge explained his calculations as follows:

> Next I came to the question of what was -- or what is Mr. Lindberg's income. If you go to Exhibit 3, it shows a total income through 7/6/93 of $66,977.79. If you annualize that, you get about $133,000. However, if you use Mr. Lindberg's affidavit, which shows a gross monthly income of $11,890 a month, you come up with $142,680, which is the exact -- almost the exact number for 1992.
>
> So what I did was, I went back to the 1992 figures as shown on Exhibit 5. If you take $142,681.76, subtract federal taxes of $27,416.50 -- because that's the only number that I had. The income tax return for 1992 included his present wife. So I couldn't calculate any other number but that one, you subtract FICA of $5,328.90, you get a net annual income of $109,936.36. Divide that by 12 gives you a monthly net of $9,161.36. From that amount, I deducted $375, which is one-half of $750, which was the amount of child support he was paying prior to his voluntarily assumed increase in child support for his two sons.

Appellant charges this determination as error, arguing that the weight of the evidence necessitates a finding that the 1993 payroll summary was a more reliable estimate of appellant's 1993 income than were the 1992 payroll summary and the appellant's affidavit.

We agree with appellant that the evidence preponderates against the trial judge's decision to use the 1992 figures as a prediction of appellant's total income for 1993.

Appellant's second issue, whether the court erred in failing to calculate the "Circular E" tax figures into the formula delineated in the guidelines, presents a question of law because appellant is basically challenging the manner in which the court applied the guidelines. Our review is, therefore, *de novo*. Kelley v. Johnson, 796 S.W. 2d 155, 158 (Tenn. App. 1990).

Appellant argues that the court should have applied "Circular E" from the Employer's Tax Guide in calculating the amount of taxes employed in the formula. The guidelines require that in order to calculate net income, the obligor's FICA and the amount of withholding tax deducted for a single wage earner claiming one deduction are to be subtracted from the obligor's gross income. Tenn. Comp. R. & Regs. ch. 1240-2-4-.03(4).

Specifically, the guidelines provide:

> Net income is calculated by subtracting from gross income of the obligor FICA (7.51% for regular wage earners and 13.02%

> for self employed, as of 1989, or any amount subsequently set by Federal law as FICA tax). The amount of withholding tax deducted for a single wage earner claiming one deduction (copies of appropriate table will be provided to courts with guidelines), and the amount of child support actually being paid pursuant to a previous order of child support for other children. Tenn. Comp. R. & Regs. ch. 1240-2-4-.03(4).

No evidence was presented at trial by either party setting forth the proper FICA deduction and withholding tax rates for 1993. We therefore remand this case to the trial court with instructions to use appellant's 1993 income in its calculations. The trial court should also determine the appropriate withholding tax and FICA deduction from the appellant's monthly income.

Appellee argues that the court erred in finding a material and substantial change in circumstances amply justifying a reduction in appellant's child support. She first reasons that the court should not have relied on the fact that the child no longer needs $2,200 a month because when the amount of child support was originally established in the marital dissolution agreement, there was no evidence indicating the child's need. Therefore, she reasons, the court cannot possibly find a change in circumstances because there is nothing from which the need could have changed. This argument is without merit. There exists competent evidence in the record to establish that expenses for the child have decreased since the time of the divorce. For instance, the record indicates that appellee's house note is approximately half of the amount that appellee paid at the time of the divorce. The finding of the trial judge is entitled to a presumption of correctness and the evidence on this issue does not require a contrary result.

Appellee next asserts that the court erred in finding that appellant neither voluntarily rendered himself underemployed nor voluntarily assumed an obligation.

Generally, in order to constitute a material change of circumstances, such change must have been unforeseeable at the time the final decree of divorce was entered. McCarty v. McCarty, 863 S.W.2d 716 (Tenn. App. 1992); Seal v. Seal, 802 S.W.2d 617, 620 (Tenn. App. 1990).

Under existing law, when an obligor voluntarily renders himself underemployed, he may not rely on his reduced income to provide a basis for changed circumstances. Tenn. Comp. R. & Regs. ch. 1240-2-4-.03(3)(c). Similarly, voluntarily assumed obligations may not be considered as changed circumstances in order to reduce child support payments. Dillon v. Dillon, 575 S.W.2d 289 (Tenn. App. 1978). Here, however, the appellee is asserting what is essentially a "but for" argument. According to the appellee, appellant voluntarily moved to Vancouver and his decrease in salary was a direct result of that move. In other words, "but for" appellant's relocation to Vancouver, there would have been no reduction in income. This argument is unpersuasive. Appellant's actions in this respect are inadequate under existing law to constitute voluntary actions. The record reflects that at the time appellant decided to relocate to Vancouver, he did not know with certainty that the move would result in a reduction in income. Appellant simply chose to relocate with the same company when factors beyond his control caused a diminution in his income. Accordingly, this issue is without merit.

Finally, appellee argues that the diminution in income appellant experienced between the time of the divorce and the time of the hearing was not great enough to be considered a substantial change. At the time of the divorce, in 1989, appellant's income was approximately $155,000. At the time of trial, appellant testified that his 1993 income would be only $133,954. The difference in the two figures amount to $21,046. This Court finds that the evidence does not preponderate against the trial court's determination that there was a substantial change of circumstances due to a $21,000 reduction in appellant's annual income.

Appellee's second main issue for evaluation is whether the lower court erroneously failed to adequately adjust the support upward due to appellant's lack of visitation.

The guidelines provide for upward adjustment when the obligor parent fails to exercise the amount of visitation contemplated by the guidelines. Tenn. Comp. R & Regs. 1240-2-4-.03 provides:

> [T]he Court shall increase the award calculated in Rule 1240-2-4-.03 for the following reasons:
> ...

> (b) If the child(ren) is/are not staying overnight with the obligor for the average visitation period of every other weekend from Friday evening to Sunday evening, two weeks during the summer and two weeks during holiday periods throughout the year, then an amount shall be added to the percentage calculated in the above rule to compensate the obligee for the cost of providing care for the child(ren) for the amount of time during the average visitation period that the child(ren) are not with the obligor.

The guidelines are subject to upward or downward deviation when certain assumptions upon which the Department of Health and Safety based the regulations are not present. One example of such an assumption, cited by the Tennessee Supreme Court in Nash v. Mulle, 846 S.W.2d 803, 805 (Tenn. 1993), is that the guidelines assume that the "children are living primarily with one parent but stay overnight with the other parent as often as every other weekend from Friday to Sunday, two weeks in the summer and two weeks during holidays throughout the year." Tenn. Comp. R & Regs. Ch. 1240-2-.02(7) When the obligor fails to exercise this amount of visitation, the child support award should be adjusted upward to compensate the custodial parent for additional expenses incurred as a result of keeping the child on days that the noncustodial parent would have otherwise kept the child. Nash, 846 S.W.2d at 805.

Appellant testified that during 1993, he spent two weeks with the child in the summer plus three overnight visits. The hearing took place on the first of November, 1993. Thus, from January until the end of October, 1993, appellant had exercised only seventeen nights of the approximately eighty nights contemplated by the guidelines. In the typical case, pursuant to the regulations, this evidence would have required a judge to increase the amount of support from the guidelines minimum to some amount that would approximate the expenses incurred by the custodial parent that she would not have otherwise have incurred if the obligor parent had appropriately exercised his visitation. Tenn. Comp. R & Regs. 1240-2-4-.03(b). As previously noted, however, the trial judge was afforded considerable discretion in setting child support in this case due to the fact that appellant's income exceeded $6,250 per month. In the instant case, the trial court set forth his reason for deviation from the guidelines as follows:

> However, based on the guidelines, I do believe that you have to increase that amount for--it's 1240-2-4-.02 Subparagraph 7 regarding the visitation where you don't have an every other weekend visitation, two weeks during the summer, holidays, Christmas holidays and those kind of things--and I understand the visitation problems.
>
> So what I did was I increased the child support amount by $150 per month and then deducted from that $67 a month in transportation costs,

> which is $800 a year for transportation to come up with a child support amount of $1,928.14, and that's the amount I will reduce the child support to--well, really it would be $1,928.

Based upon the fact that the trial judge found that appellee's affidavit setting forth the child's expenses was "a little suspect," and the fact that the judge had discretion in this matter, the decision to deviate upward by $150 a month will not be reversed on appeal. In any event, it is apparent from the record that the court considered the Child Support Guidelines, applied them, and subsequently made written findings of fact meriting an upward deviation from the amount produced by the guidelines.

Finally, appellee contests the amount of attorney's fees awarded to her by the trial court. We do not find that there was any abuse of that discretion.

Accordingly, the judgment of the trial court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Costs of this appeal are taxed equally to the parties.

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HIGHERS, J.

CONCUR:

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FARMER, J.

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TOMLIN, SP. J.