

IN THE COURT OF APPEALS OF TENNESSEE  
EASTERN SECTION

**FILED**  
**November 29, 1995**  
**Cecil Crowson, Jr.**  
Appellate Court Clerk

FREDA S. WHITFIELD

Plaintiff - Appellant

v.

DANIEL E. WHITFIELD

Defendant - Appellee

) HAMILTON COUNTY  
) 03A01-9504-CV-00138  
) 03A01-9404-CV-00140  
)  
)  
) HON. SAMUEL H. PAYNE,  
) JUDGE  
)  
) AFFIRMED AS MODIFIED  
) and REMANDED

JACQUELINE E. SCHULTEN OF CHATTANOOGA FOR APPELLANT

MICHAEL A. ANDERSON OF CHATTANOOGA FOR APPELLEE

O P I N I O N

Goddard, P. J.

This is an action for modification of child support payments which has been before this Court on a previous appeal. The Plaintiff appeals the Trial Court's most recent order, contending the award of child support was improper because the reasons advanced by the Trial Court do not justify deviating from the Child Support Guidelines.

The parties to this action were divorced in Georgia in 1984. The Plaintiff was awarded custody of their minor child, Lauren. Sometime after the divorce, the Plaintiff and Lauren moved to Chattanooga. The Defendant remained in Georgia.

In 1990, the Plaintiff filed a complaint in the Hamilton County Circuit Court seeking, inter alia, to modify the Georgia decree as to visitation and child support payments. An order was signed on April 23, 1991, granting the Defendant 88 days of visitation per year with Lauren. The order also directed the Defendant to pay child support in the amount of \$750.00 per month, provide health insurance for the minor child, and pay one-half of all other medical bills not covered by insurance.

At the time of the hearing, the Defendant, an airline pilot, was disabled and his disability insurance benefits were his only source of income. Because a substantial portion of the Defendant's disability insurance had expired, the parties agreed to reduce the monthly child support payments to \$375 per month.

In June of 1993, the Defendant returned to full-time employment at Northwest Airlines. Shortly thereafter, the Plaintiff filed a petition to modify the agreed order to increase the child support payments and to change the visitation arrangement. A hearing was held on the petition on October 25, 1993. The Court sustained the petition and increased the Defendant's child support payments to \$800 per month, retroactive

to the time of filing the petition. The Plaintiff appealed from this order on the grounds that the Trial Court erred by deviating from the Child Support Guidelines and that the Trial Court erred by using the Defendant's gross monthly salary in determining the Defendant's support obligation.

We addressed the salary issue first and concluded that the evidence did not preponderate against the Trial Court's finding.

As for the deviation issue, the Trial Court stated that it deviated from the Child Support Guidelines in order to allow for the expenses the Defendant incurs when travelling from Atlanta to Chattanooga to visit his daughter. The guidelines provided that the Defendant pay \$1309 per month. The amount set by the Court deviated from the guidelines by \$509 per month. We determined there was no evidence in the record to support this deviation. The case was remanded to the Trial Court for a determination of visitation expenses and for a rehearing on the amount of child support.

On remand, the Trial Court entered an order on February 8, 1995, that determined the Defendant's expenses as follows:

\$100.00	Long distance phone calls
\$246.40	Automobile mileage
\$ 23.30	Motel expenses in Chattanooga

\$ 50.00

Airline tickets

These expenses total \$419.70. The Trial Court subtracted this amount from the amount provided by the guidelines (\$1,309.00), which left the Defendant with a monthly obligation of \$889.30 per month, rounded to \$890 per month beginning January 1, 1995. The \$90 increase was retroactive to the date of the first order.

The Plaintiff now appeals the February 8, 1995, order. The issues presented on appeal are:

1. Did the Trial Court err in deviating from the Child Support Guidelines by allowing a reduction in child support payments for the expenses the Defendant incurs in exercising his visitation rights?

2. Did the Trial Court err in refusing to grant the Plaintiff's motion for attorney's fees incident to her earlier appeal?

The standard of review of this case is de novo upon the record with a presumption of correctness of the findings of fact by the Trial Court. Unless the evidence preponderates against the findings, we must affirm absent an error of law. See Rule 13(d) of the Tennessee Rules of Appellate Procedure.

The Child Support Guidelines "apply in *all* cases awarding financial support to a custodial parent for the maintenance of a child." Nash v. Mille, 846 S.W2d 803 (Tenn.1993). The guidelines are based on many assumptions; thus, there is room for deviation where the circumstances do not comport with the assumptions.

In determining the amount of child support obligations, the court should apply the Child Support Guidelines as a rebuttable presumption. T.C.A. 36-5-101(e)(1). If the court finds evidence sufficient to rebut this presumption, the court shall make written findings of fact that the application of the Child Support Guidelines would be unjust or inappropriate in that particular case. T.C.A. 36-5-101(e)(1). Such findings must sufficiently rebut the presumption and must justify the deviation from the guidelines.

The Rules of the Tennessee Department of Human Services provide that the Child Support Guidelines are "designed to apply to situations where children are living primarily with one parent but stay overnight with the other parent at least as often as every other weekend from Friday to Sunday, two weeks in the summer and two weeks during holidays throughout the year. These guidelines are designed to consider the actual physical custody of the child(ren) . . . In situations where overnight time is divided more equally between the parents, the courts will have to make a case-by-case determination as to the appropriate amount of

support." Tennessee Compilation Rules & Regulations, ch. 1240-2-4-.02(6)(1994).

For example, in Koch v. Koch, 874 S.W2d 571 (Tenn. App.1993), the Court upheld a deviation from the Child Support Guidelines because of an "enlarged visitation schedule." Because the schedule was not as anticipated by the guidelines, the deviation was held proper.

In the case now before us, the visitation schedule is not an enlarged one and is in fact very close to that contemplated by the guidelines. The Defendant has visitation with Lauren on the first, third, and fifth weekends of each month, for 30 days in the summer, and during some holiday periods. This schedule provides the Defendant with 88 days of visitation per year. This schedule is like that anticipated by the guidelines and, therefore, we find that the deviation from the guidelines was not proper or appropriate. Furthermore, the expenses the Defendant incurs in visiting his daughter are not extraordinary so as to justify the Trial Court's deviation.

In accordance with the guidelines, the Defendant shall pay \$1309 as child support per month, retroactive to November 16, 1993, the date of the Trial Court's first order concerning the amount of child support.

As to the issue of attorney's fees, the trial court has wide discretion in such matters and this Court will not interfere unless this discretion is abused. Threadgill v. Threadgill, 740 S.W2d 419 (Tenn.App.1987). Because the Plaintiff in this case has failed to show such an abuse, we affirm the Trial Court's denial of attorney's fees.

For the foregoing reasons the judgment of the Trial Court as modified is affirmed and the cause remanded for such further proceedings as may be necessary and collection of costs below. Costs of appeal are adjudged against the Defendant.

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Houston M Goddard, P. J.

CONCUR:

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Don T. Murray, J.

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Charles D. Susano, Jr., J.