IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

DORA BELL CLARK,	)	
	)	Obion Chancery No. 101813 R.D.
Plaintiff/Appellee	)	
v.	)	
	)	Appeal No. 02-A-01-9501-CV-00012
JAMES LEWIS CLARK,	)	
	)	
Defendant/Appellant	)	

APPEAL FROM THE CHANCERY COURT OF OBION COUNTY
AT UNION CITY, TENNESSEE
THE HONORABLE GEORGE H. BROWN, JR., CHANCELLOR

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REVERSED AND REMANDED

WILLIAM H. INMAN, SENIOR JUDGE

CONCUR:

W. FRANK CRAWFORD, PRESIDING JUDGE

DAVID R. FARMER, JUDGE

O P I N I O N

These parties were divorced in March, 1986. They have one minor child whose custody was awarded to the appellee mother. The initial amount of child support is unclear; but whatever the amount it was increased to $200.00 per month by Order entered on May 23, 1990 pursuant to petition filed and heard.

On October 6, 1992 the appellee again petitioned for an increase in child support. The appellant thereupon filed a petition seeking a change in custody.

The custody litigation was heard first. The trial court found no material change in circumstances and dismissed the petition. The record does not explain the bifurcation, but we are not concerned with this feature of the relationship of these parties.

Thereafter, the petition for increased child support was heard. As nearly as may be deduced from the record, the trial judge considered some of the evidence offered at the custody hearing at the support hearing.

The procedure employed is somewhat baffling, since the appellee did not testify at either hearing, and, in fact, offered no proof, notwithstanding that she had the affirmative burden of proving the allegations of her petition. *See McCarty v. McCarty,* 863 S.W.2d 716 (Tenn. App. 1992).

Strangely enough, only the appellant and his accountant testified, by whom various exhibits were introduced, including the appellant's financial records. Following a protracted hearing, the matter culminated in an ordered increase in child support from $200.00 to $400.00 per month.

The appellant presents the propriety of the increase for review and strenuously insists that there is no evidence to support the action of the Court. Our review is *de novo* accompanied with the presumption that the judgment is correct unless the evidence otherwise preponderates. TENN. R. APP. P., RULE 13(d). We conclude the evidence preponderates against the judgment.

As we have seen, the appellee did not testify and offered no proof; only the appellant and his accountant testified, and the trial judge minced no words in decrying their lack of credibility. Thus it is that we have an appellee who did not

testify as to the needs of her child, and the appellant whom the trial judge did not credit.

At any rate, the trial court found changes in circumstances which were held to warrant an increase in child support. These changes were: the child is 2-1/2 years older and is now in the ninth grade with more school activities. The trial court then commented that "everyone knows it takes more to support a child after 2-1/2 years has passed," and "I don't know what this man makes," and "a person could hide his income in a self-owned business," and "could earn more money in some other business." The defendant had purchased an automobile for which he was obligated to pay $399.00 per month, and the trial judge stated that if he could afford to pay that amount for a car "then he could pay that amount for child support."

We could, perhaps, convince ourselves to live with all this if the appellee had testified concerning the needs of the child. We know what everybody knows, that the older the child, the greater the cost of rearing, during dependency; but we cannot presume too much; evidence fuels the Court, not philosophy. We certainly agree that as a general matter $200.00 monthly is not an adequate amount of support for a teen-aged boy. The proper amount might justiciably have been determined had the custodial parent testified in support of her petition for an increase; and having done so, the trial court might then have found that the appellant was capable of earning an income greater than $1,071.00 monthly, as he claimed, which might justify an award greater than $400.00 monthly. The Guidelines were not mentioned, and as they serve a salutary, if not mandated, purpose, we conclude the case should be remanded for the purpose of further proof respecting (1) the needs of the child, (2) the ability of the appellant to contribute increased support, (3) the amount of such contribution, and (4) attorney's fees. *See Malone v. Malone,* 842 S.W.2d 621 (Tenn. App. 1992).

As to the award of attorney fees of $1,500.00, appellant complains that it is excessive, and should not have included an award for the custody hearing which was tried separately from the support issue because the order therein entered made no provision for fees. Attorney fees are essentially discretionary, *Elliot v. Elliot,* 825

S.W.2d 87 (Tenn. App. 1991), and while evidence of the amount thereof may be and usually is presented by affidavits or other available means, in this case no proof was offered and we think the justice of the case requires that this issue should be determined in accord with approved standards.

The judgment is reversed and the case is remanded for a new trial. Costs are assessed evenly. Pending final action on the petition to increase support, the appellant will continue to pay the amount of $200.00 monthly.

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William H. Inman, Senior Judge

CONCUR:

_____
W. Frank Crawford, Presiding Judge

_____
David R. Farmer, Judge