



This is a modification of child support case involving a noncustodial parent whose net monthly income exceeds \$6,250. Appellant, Janet K. Florence, and Appellee, David G. Florence, are the parents of four daughters who were ages 17, 15, 13 and 10 at the time of trial. The final divorce decree, entered in November 1993, awarded custody of the children to Ms. Florence and ordered Dr. Florence to pay child support in the amount of \$2,500 per month. In April 1994, Ms. Florence filed a petition to increase the support as "commensurate with the DHS Guidelines of 45% of [Dr. Florence's] earnings." She also requested an award of attorney's fees. Dr. Florence answered and asserted, *inter alia*, the inapplicability of the guidelines in light of the supreme court's decision in *Nash v. Mulle*, 846 S.W.2d 803 (Tenn. 1993). The matter was heard on November 10, 1994 with the trial court concluding that Dr. Florence's child support obligation should be increased to \$3,600 per month. Of that amount, \$1,600 was to be paid directly to Ms. Florence, with the remaining balance deposited into an educational trust fund for the children's benefit. An order was entered relative thereto on February 2, 1995. By separate order, the court awarded Ms. Florence one-half of her attorney's fees in the amount of \$2,187.50.

The court made the following findings of fact:

The evidence . . . established that [Dr. Florence] voluntarily increased the child support payment a small amount after entry of the Final Decree of Divorce and the parties worked out some arrangements between themselves for [Ms. Florence] to reimburse [Dr. Florence] \$100.00 per month for coverage under his medical insurance policy.

. . . the Court finds that there has been a significant increase in the income of . . . [Dr. Florence], since the entry of the Final Decree of Divorce and in 1993, Dr. Florence had an adjusted gross income of \$137,504.00.

. . . Dr. Florence's management of his personal financial affairs has been nothing short of disastrous, leaving a significant debt to the IRS as well as to the educational trust fund that assisted him in obtaining his medical degree. There was no proof presented at trial that the needs of the parties' minor daughters, . . . were not being met by both parents and in fact it appeared that Dr. Florence has been somewhat indulgent of his children in vacations, automobiles and spending money.

. . . [Ms. Florence], is an honors college graduate with a bachelor of science degree and is a licensed registered nurse in the states of Tennessee and Missouri, who has since the entry of the Final Decree of Divorce been consistently underemployed, working part-time at a high school, playing the piano at church, and working less than part-time in recent years as a home health nurse.

. . . . The parties in the instant case, disregarding prior orders of the Court, have made their own allocations of the funds heretofore decreed as child support with the net effect that Janet Kay Florence is receiving the sum of approximately \$1,473.00 per month, which is considerably less than the \$2,500.00 per month previously decreed by the Court.

The trial court reasoned the foregoing amount of child support appropriate when "[c]onsidering the directives of our Appellate Courts in matters concerning incomes in excess of guideline figures and looking at this case on its individual merits, . . . [including] the current perilous financial condition of [Dr. Florence], most of which is his own making, . . . . "

Appellant raises the following issues for our review:

1. Did the Trial Court err in allotting a large portion of the appropriate guideline percentage of the first \$6,250 of obligor's monthly net income to a trust fund?

2. Did the Trial Court err in failing to apply the appropriate guideline percentage to obligor's entire monthly income in setting child support?

3. Did the Trial Court err in failing to make written findings when he deviates from the guidelines' presumptive percentage of both the first \$6,250 and the balance of obligor's net monthly income?

4. The trial judge abused his discretion when he failed to order the respondent/non-custodial parent to pay the petitioner's attorney fees in full.

The parties do not dispute the underlying facts of this case, but merely question the applicability of the child support guidelines. Appellant first argues that under the guidelines, 46% of the first \$6,250 of Dr. Florence's net monthly income must be awarded directly to her, absent a written finding justifying any deviation. Thus, the trial court deviated from the guidelines when awarding only \$1,600 of the requisite percentage of the first \$6,250 to her, but failed to justify such deviation with a written finding. She further contends that allotting any portion of the requisite percentage of the first \$6,250 of Dr. Florence's net monthly income into a trust fund is a deviation from the guidelines which must be accompanied by a written finding. Appellee counters that in cases involving an obligor parent whose net monthly income exceeds \$6,250, the guidelines do not apply and the trial court is to determine an appropriate and equitable amount of support on a "case-

by-case basis." Appellee reasons that since the guidelines do not apply to that level of income, there is no deviation therefrom and thus, no requirement for a written finding.

Ms. Florence additionally points out to the court, and correctly so, that the Department of Human Services has, since the hearing on this matter, amended the child support guidelines to read:

The court must order child support based upon the appropriate percentage of all net income of the obligor as defined according to 1240-2-4-.03 of this rule but alternative payment arrangements may be made for the award from that portion of net income which exceeds \$6,250. When the net income of the obligor exceeds \$6,250 per month, the court may establish educational or other trust funds for the benefit of the child(ren) or make other provisions in the child(ren)'s best interest; however, all of the support award amount based on net income up through \$6,250 must be paid to the custodial parent.

Tenn. Comp. R. and Regs., ch. 1240-2-4-.04(3). In light of the amendment, which became effective December 14, 1994, Appellant requests this Court to remand with instructions that the trial court apply the amended guidelines or alternatively, she requests this Court to consider the new guidelines "as a tool in interpreting the former guidelines."

We agree that the issues raised pertaining to child support are readily resolved by application of the current regulations. Although the new guidelines were not in effect at the time of the hearing on this matter, nor were they raised at any time at the trial level, they were effective prior to the trial court's entry of its final judgment. We, therefore, find that their application is warranted.

This case is procedurally analogous to *Fleming v. Fleming*, No. 01-A-01-9504-CV-00178 (Tenn. App. Oct. 19, 1995), wherein the court addressed the issue of whether a custodial parent could claim the benefit of changes in the child support guidelines that became effective after a trial on the petition for increase in support, but prior to entry of the trial court's final order. There, the appellant custodial parent had argued that if the appellate court affirmed the trial court's decision, she would simply file a new petition for modification, necessitating application of the new guidelines. Indeed, Ms. Florence alludes to this fact in her appellate brief as well. *Fleming* remanded the cause in the interests of "judicial economy." We, likewise, conclude that this matter

should be remanded to the trial court for consideration of the new regulations. The parties are to be allowed to present new or additional evidence relating thereto.

As to the issue of attorney's fees, the trial court awarded Ms. Florence one-half of those she incurred or \$2,187.50. The awarding of attorney's fees in matters of child custody and support is, by statute, within the discretion of the trial court. T.C.A. § 36-5-103(c); *Deas v. Deas*, 774 S.W.2d 167, 169 (Tenn. 1989). The general rule is that such fees incurred on behalf of minors, are recoverable "when shown to be reasonable and appropriate." *Deas*, 774 S.W.2d at 169. There is, however, no absolute right to recover such fees. *Id.* at 170.

It is Ms. Florence's contention that she should be awarded the entire amount of her attorney's fees. She cites *McCarty v. McCarty*, 863 S.W.2d 716 (Tenn. App. 1992), wherein this Court held that the wife, who had petitioned for an increase in child support after husband's petition for termination of his alimony obligations, was entitled to an award of reasonable attorney's fees. *McCarty*, 863 S.W.2d at 722. *McCarty* reasoned that "[wife] should not have to pay the cost of defending her entitlement to alimony and asserting her child's right to increased support payments out of her employment income which, when combined with the support payments, still does not provide the standard of living to which she was accustomed during the parties' marriage." *Id.* The wife in *McCarty* worked as a full-time pharmacist earning approximately \$43,000 annually. *Id.* at 720. As found by the trial court in this case, Ms. Florence has been "consistently underemployed." Thus, if Ms. Florence enjoys a different standard of living than that to which she was accustomed during the marriage, it is to some extent of her own making. Also, unlike the trial court in *McCarty*, the trial court in this case has, in its discretion, seen fit to award Ms. Florence one-half of her attorney's fees as reasonable. "Where the services of a parent's attorney inures to the benefit of a minor child or children, the award of reasonable attorney's fees is in order." *Dalton v. Dalton*, 858 S.W.2d 324, 327 (Tenn. App. 1993). We find the award of one-half of Wife's attorney's fees in this case reasonable and conclude that there was no abuse of discretion by the trial court in this regard.

The judgment of the trial court is affirmed in part, reversed in part and remanded with instructions to the trial court to consider the current child support guidelines. Costs are assessed equally against Janet K. Florence and David G. Florence, for which execution may issue if necessary.

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FARMER, J.

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CRAWFORD, P.J., W.S. (Concurs)

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WILLIAMS, Sp. J. (Concurs)