

RALPH GUEST MADDUX, III, )

Plaintiff/Appellee, )

VS. )

SHERYL LYNNE MADDUX, )

Defendant/Appellant. )

) Maury Chancery

) No. 91-440

) Appeal No.

) 01-A-01-9509-CH-00394

**FILED**

**March 13, 1996**

**Cecil W. Crowson  
Appellate Court Clerk**

IN THE COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT OF MAURY COUNTY

AT COLUMBIA, TENNESSEE

HONORABLE JIM T. HAMILTON, JUDGE

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AFFIRMED AND REMANDED

HENRY F. TODD  
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:  
SAMUEL L. LEWIS, JUDGE  
BEN H. CANTRELL, JUDGE

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Plaintiff/Appellee,	)	
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OPINION

The captioned defendant-wife, has appealed an unsatisfactory decision of the Trial Court regarding her post-divorce decree petition for increase in child support. The wife presents the following issues for review:

1. Whether the trial court erred in deviating from the child support guidelines.
2. Whether the trial court erred in failing to award attorney's fees to Mrs. Muehlbauer on behalf of the children.

On November 6, 1991, the Trial Court entered an "Agreed Order of Divorce" which contained the following:

. . . 2. Custody of Zachry Guest Maddux and Miranda Ellison Maddux, the minor children of the parties, is awarded jointly to husband and wife, with primary physical custody being placed with wife.

3. (a) Husband shall be entitled to have the children every other weekend from Friday afternoon until Sunday afternoon; every Tuesday afternoon, or after school, until Wednesday morning, when husband shall return the children to school or to wife, if there is no school; and every other Thursday afternoon, or after school, (during the week in which wife has the children for the weekend) until Friday morning when husband shall return the children to school or to wife, if there is no school. [It is agreed that so long as the parties reside in Maury County that the children shall remain enrolled in Columbia Academy with the husband paying the tuition fees, unless both parties mutually agree to a change of schools. - Initialed by BWS, RELD, SLM, RGM]

(b) For 1991, the children will be with wife on Thanksgiving Day until 4:00 p.m., when husband will pick them up and return them to wife the following morning. The children will be with wife for Christmas Eve, except from 5:00 p.m. until 8:00 p.m., when husband will take them to his family's Christmas party. On Christmas Day, husband will

pick up the children at 10:00 a.m. and return them to wife by 1:00 p.m. Husband will again pick up the children at 6:00 p.m. on Christmas Day and return them to wife the following morning.

(c) Thereafter the major holidays (Thanksgiving, Christmas, Easter, Spring Break, and 4th of July) will be divided or alternated between the parties as they may agree. Labor Day and Memorial Day will be with the party who has the children on that weekend.

4. All other matters, including child support, alimony, attorney's fees, and division of property, are reserved to be litigated if necessary.

On May 1, 1992, a "Final Decree" was entered requiring parties to contribute equally to mortgage payments "line of credit payments," taxes and insurance on the family home to be occupied by the wife and children, and requiring the husband to pay \$750.00 per month child support in addition to tuition.

In June, 1994, the wife remarried and purchased the interest of the husband in the home after which the husband ceased contributing to mortgage payments, taxes and insurance.

On December 22, 1994, the wife filed the present petition which alleged the following changes of circumstances:

1. Cessation of contributions to mortgage and line of credit payments, taxes and insurance.
2. Child support payments no longer conform to Child Support Guidelines.

The order of the Trial Court contains the following findings:

. . . Mrs. Maddux was unemployed or between jobs at the time of the divorce and is now employed as a Guidance Counselor with the Maury County Board of Education. Mr. Maddux remains a part owner and employee of Columbia Paint and Wallcover, Inc. The evidence shows that his income has increased slightly from the date of the divorce from approximately \$48,000.00 to \$51,000.00 for the most recent year which is about a seven percent (7%) increase since 1991.

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. . .Under the applicable guidelines on an income of \$51,000.00, the court finds that the plaintiff would have a child support obligation for two (2) children of \$987.00 per month. .

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1. The parties have joint legal custody of their children with Mrs. Maddux as the primary physical custodian.
2. The husband has the children in his primary care for ten (10) days of each month which is thirty percent (30%) of the time. The record indicates that he has the primary responsibility for the total care of the children on those days.
3. The record also indicates that Mr. Maddux pays or is responsible for the children's tuition at private school (Columbia Academy) and also pays for the children's lunches at school.
4. The Court finds that the record establishes that Mr. Maddux also pays a substantial portion of the children's incidental school expenses, one-half of all extracurricular activities including dance, riding lessons, summer camps, and one-half of all birthday gifts. The record also establishes that Mr. Maddux expends additional monies for the children's clothing and vacations.
5. While Mr. Maddux does not have insurance as a benefit of his employment, he pays to Mrs. Maddux who through her husband has the benefit of a group policy, Mr. Maddux pays the cost of insurance directly to Mrs. Maddux.

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The Court finds that upon the facts of this case that the rebuttable presumption established by the guidelines is overcome and the application of the guidelines without modification would be inappropriate in this case. Upon a consideration of the particular factors of this case, the Court rejects the contention that the payment of a mortgage on a jointly owned residence should be equated as child support and the termination of that obligation by the remarriage of one party and the purchase of the ex-spouse's interest does not require an increase in child support per se.

The Court further finds that the application of the guidelines would be inappropriate upon the facts of this case considering the time-sharing of the parties and the concurrent cost associated with the children while they are within the parties care which is beyond that contemplated by the guidelines, plus the additional support provided by Mr. Maddux in the form of private school tuition, school lunch money, extracurricular activities, contribution toward party gifts, clothing expenses and other incidental expenses.

The Court therefore finds that the original cash award of child support of \$750.00 should be increased to the sum of \$800.00 per month which correlates with the increase in the plaintiff, Mr. Maddux's, income. The award shall be retroactive to January, 1995 and Mr. Maddux shall make a lump sum payment of \$300.00 directly to the Mrs. Muehlbauer.

Appellant first argues that the Trial Court “apparently found that the facts . . . did justify a modification of child support.” Based upon this assumption, appellant insists that the Trial Court should have granted child support in accordance with Child Support Guidelines, i.e. 32% of the father’s net income, computed by deducting 13.02% from income of self employed persons. §1240-2-4-.03(4) Child Support Guidelines.

The original divorce decree, quoted above, required payment of tuition fees in an unspecified amount. The present record is silent on the amount of such fees. “All other matters,” including child support were reserved.

The “Final Decree” incorporated, and approved a “Marital Dissolution Agreement,” which contained the following provisions regarding the home:

1. The parties own, as tenants by the entirety, a house and lot located at 905 Hillcrest Avenue in Columbia, Tennessee. The parties shall remain equal tenants in common in said home; however, wife shall continue to reside in said home with the parties’ two children until she remarries, dies, moves, or the youngest child turns 18 (whichever event first occurs). The parties acknowledge that the outside of said house needs to be painted, the roof needs to be replaced, water damage from prior leaks needs to be repaired, and new carpet needs to be installed. The parties shall apply for a home equity line of credit in order to make these repairs. Each party shall be responsible for one-half of the existing mortgage payment, taxes and insurance, and one-half of the payment on the line of credit. Wife shall be responsible for general maintenance and upkeep of the inside of said house while she is living there. If any other major repairs need to be made during the time wife is residing in said home, then the parties may agree to draw on the equity line of credit. If the parties cannot agree, then either party may petition the court regarding the necessity of making such a repair. Upon the sale of said home, the net proceeds shall be divided equally between the parties.

The same decree contained the following provisions for child support:

4. Beginning May 1, 1992, and on the 1st day of each month thereafter, husband shall pay to wife child support in the amount of \$750 per month for the support and maintenance of the parties’ two minor children. As additional child support, husband shall be responsible for paying for the children’s lunches at school, one-half of the summer day-care, and one-

half of the extended day-care during school. . . . Said child support payments (including husband's contribution to the housing costs of the family) are in compliance with the Tennessee Child Support Guidelines based upon husband's income from his interest in Columbia Paint & Wallcover.

. . . .

12. Husband shall be responsible for providing health insurance coverage for the parties' minor children. If wife is able to obtain health insurance coverage through her employment, then husband shall have the option of paying wife an amount equal to what wife's employer deducts from her salary for family coverage for the two children. The parties shall be equally responsible for all medical and dental bills of the minor children not covered by insurance, including the deductible.

"Said child support payments" may be strictly limited to the payments mentioned in paragraph 4, i.e., \$750.00 per month, lunches at school, summer day care, extended day care and "contribution to housing costs." It would be more reasonable to include health care costs described in paragraph 12. In any event, \$750.00 is the only specific amount of child support mentioned. Other items are not quantified in the agreement or the evidence, except that "extended day care contribution" is \$15.00 per month.

Unquestionably, the occupancy of the family residence by the mother and children was, to some degree, child support. However, it is not quantified in this record in terms of rental value. Contribution to mortgage was \$375.00 per month, but the amount of repairs, insurance and taxes are not mentioned in the agreement or the record. There is no indication of what part of the various home expenses were attributable to child support and what part were attributable to preservation and increase of the husband's equity in the home.

It must be conceded that the contributions to expenses of the residence had a content of child support even though its amount cannot be ascertained. Also, the joint custody and extensive visitation with the father, even though not evaluated, was a factor in the amount of the \$750.00 monthly payment agreed upon by the parties. The reference to compliance with the guidelines is not deemed to be a stipulation that the various contributions totaled the exact

amount of support required by the guidelines. Its import is that the provisions satisfied the guidelines, or were not less than the guidelines. The agreement does not establish that the total contributions were exactly the amount required by the guidelines, or that the termination of one or more contributions would require additional award of support.

The increase in earnings of the father is sufficient to justify an increase in child support. §1240-2-4.02 - Child Support Guidelines.

Appellant's argument appears to be based upon a theory that where parties agree to a combination of several forms of support as sufficient under the guidelines, the discontinuance of one of the forms of support must be followed by the substitution of another form of support of equal value. This Court does not agree. Where a Court is called upon to set a new rate of child support, it is not bound by previous agreements of the parties or its previous orders.

Moreover, upon determination of changes of circumstances, the Trial Court is not bound to grant an increase in the exact amount indicated by a single change of circumstance, but from a re-examination of all relevant circumstances. From such examination, the Trial Court determined that "the application of the guidelines would be inappropriate" due to factors enumerated in the judgment.

Upon review of this judgment *de novo* upon the record, T.R.A.P. Rule 13d, this Court finds that the evidence does not preponderate against the findings of the Trial Court upon which he determined that the strict application of the guidelines was inappropriate, and the amount of increase in child support.

Appellant complains of the failure of the Trial Court to award attorney's fees to her. Children are entitled to have their father pay reasonable counsel fees incurred in their behalf,

on petition by the mother to require the father to contribute to their support and maintenance. *Dalton v. Dalton*, Tenn. App. 1993, 858 S.W.2d 324; *Graham v. Graham*, 140 Tenn. 328, 204 S.W. 987 (1918). However, the award of attorney's fees in divorce cases rests in the sound discretion of the Trial Court. *Koch v. Koch*, Tenn. App. 1993, 874 S.W.2d 571; *McCarty v. McCarty*, Tenn. App. 1992; 863 S.W.2d 716, under the circumstances of the present case, the Trial Court did not err in failing to award attorney's fees.

The judgment of the Trial Court is affirmed. Costs of this appeal are taxed against the appellant. The cause is remanded to the Trial Court for any necessary further proceedings.

Affirmed and Remanded.

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HENRY F. TODD  
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

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SAMUEL L. LEWIS, JUDGE

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BEN H. CANTRELL, JUDGE