IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED

May 22, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

CAROL WAGGONER BROWDER	)	ROANE COUNTY
	)	03A01-9510-CH-00353
Plaintiff-Appellant	)	
	)	
	)	
v.	)	HON. FRANK V. WILLIAMS, III,
	)	CHANCELLOR
	)	
RHEA R. BROWDER	)	
	)	
Defendant-Appellee	)	AFFIRMED AND REMANDED

DAVID W. BLANKENSHIP OF KINGSPORT FOR APPELLANT

J. POLK COOLEY OF ROCKWOOD FOR APPELLEE

OPINION

Goddard, P.J.

Carol Waggoner Browder, former wife of Rhea R. Browder, filed a post-divorce petition seeking an increase of child support for the parties' older son, Anker, and their younger son, Christopher. The Trial Court found that she had not carried the burden of showing a change in circumstance, justifying an increase in the child support award.

Ms. Browder appeals, insisting that the Trial Court should have recused himself, and with regard to child support as to Christopher,[1] raises the following two issues:

> II. The Trial Court erred in failing to modify the child support and to affirmatively find that the child support would be a specific amount based on the defendant's income and that the deviation from the Guidelines was appropriate for specific reasons.
>
> III. Specifically, the Trial Court should have made a finding of the exact amount of the child support to be paid, the amount that was actually being paid and the reasons for the deviation from the child support guidelines. Since the Court did not, this matter must be sent back to the Trial Court for those specific findings.

Before addressing the merits of this appeal, we note that both parties have filed motions asking us to consider post-judgment facts. The facts sought to be made a part of the appellate record do not, in our view, meet the requirements of Rule 14 of the Tennessee Rules of Appellate Procedure. All motions of the parties relative thereto are denied.

As to the first issue, Ms. Browder introduced an affidavit containing the following statements:

> 4. I believe that this Court is biased against me, based upon statements that my former husband has made to me.

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[1] The older child, Anker, had attained his 18th birthday at the time of the hearing below, and, although Ms. Browder's petition did seek an increase in his child support until he reached that age, it appears her appeal is directed only to the action insofar as the younger child, Christopher, is concerned.

5. My former husband, Rhea Browder, defendant in the pending action told me that he (Browder) holds the Court in his hand and that for the judge to go against a Browder would be to literally commit political suicide, as Rhea Browder told me that he contributed heavily to Judge Williams' political campaign for judge.

6. Mr. Browder told me that Judge Williams knew better than to go against a Browder.

7. On another occasion, Mr. Browder told me that he had the Court "in his pocket".

8. Mr. Browder has also made statements to me that Judge Williams would not allow Rhea Browder to lose his home.

9. I believe on personal knowledge and information that Rhea Browder's attorney, Polk Cooley, was the former law partner of Judge Williams.

10. My former attorney, Robert Simpson, told me that I could expect this Court to be biased against me in the handling of my case.

Mr. Browder filed an affidavit denying all the statements attributed to him, except one relative to a contribution to the Chancellor's campaign about which Mr. Browder stated the following:

Your affiant avers that to the best of his knowledge and recollection, he has never before met Chancellor Frank V. Williams, III until affiant appeared in Court before Chancellor Williams on May 7, 1993, the day that his divorce trial was scheduled, at which time a settlement was announced to the Court. He has not seen the Chancellor on any other occasion since, except in Court on motions in the trial of this case.

Affiant believes that to the best of his recollection, someone, who was soliciting campaign funds for Chancellor Williams on his first political campaign for the office of Chancellor in 1984, called defendant's office and solicited campaign donations to

which defendant mailed a donation of not more than $100.00.

Defendant has never had any dealings on any matters with Chancellor Williams except to appear in his Court in this case at times required.

The Chancellor, after a colloquy with counsel for Ms. Browder, resolved the issue against her, stating the following:

MR. BLANKENSHIP: Basically, with all due respect to the Court, the thrust of my affidavit is based upon statements that the respondent in this case, Mr. Rhea Browder, has made over the course of these proceedings to my client. And her concern is not based on anything the Court has actually said or done but rather statements Mr. Browder has made to her. The thrust of our motion is to remove any appearance whatsoever of impropriety, as I understand the rules, judicial conduct, as well as professional responsibility.

THE COURT: But could I be responsible for what other people go around saying about me or their relationship with me, regardless of the accuracy of it? I mean, if people go around -- assuming that Mr. Browder has said the things that you have set out in your motion here, what would that do? I mean, if I had to step aside every time somebody went out and made claims like that.

MR. BLANKENSHIP: Well, I don't think -- to answer your first question, I don't think the Court is responsible for other statements that are made by other people. I think that the rules of conduct, however, is there is an appearance of an impropriety, then the Court --

THE COURT: What's the appearance? What have I done?

MR. BLANKENSHIP: Well, she perceives it as an appearance, and that's the thrust of her affidavit. I'm not saying the Court did anything, but what I'm saying is that she has, throughout these proceedings, had these statements made to her and believes that because of that she cannot get a fair trial here. And I'm bound to bring that to the attention of the Court.

> THE COURT: Well, I appreciate that and I understand your responsibility to do that. I'm going to deny the motion and state for the record that there is absolutely nothing whatsoever about this family or these parties that would cause me to be biased one way or the other. As I recall, they entered into a settlement. Wasn't this case resolved by way of a settlement?
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> MR. BLANKENSHIP: It was at one time, Your Honor.

We agree with the observations of the Chancellor relative to statements made by one party to a lawsuit to the other, and conclude that upon employing the test to be used in these matters, the Chancellor did not abuse his discretion in declining to recuse himself. Ellison v. Alley, 902 S.W.2d 415 (Tenn. App. 1995).

As to the remaining two issues, the Chancellor refused to re-examine the basis of the settlement agreed to by the parties, but did allow proof to show any change in circumstance from the entry of the original order to the date of trial, which would justify increasing child support.

The parties were divorced by decree entered on June 14, 1993, which provided as to child support the following:

> (3) **Child Support**. The Defendant's child support obligation for the two (2) minor children shall be satisfied through the income from two (2) existing trusts known as the Anker Browder Trust Agreement and the Rhea Christopher Browder Trust Agreement which will be funded as follows:
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> (a) Each trust currently has a principal sum of Eighty Thousand Dollars ($80,000.00).

(b) The Defendant owns thirty-two thousand twenty (32,020) shares of Union Planters Bank stock, the value of Six Hundred Thousand Dollars ($600,000.00) of which will be set aside for the Plaintiff as provided otherwise in this agreement. The balance of the stock shall be divided between the two (2) minor children with two-thirds (2/3) of the stock to be placed into the trust for Rhea Christopher Browder and one-third (1/3) of the remaining stock to be placed into the trust for Edward Carmack (Anker) Browder.

(c) The proceeds of the Heritage Federal Savings Bank Account No. 6225369 shall be divided equally between the two (2) minor children and placed into their respective trust accounts.

The Trustee of the Anker Browder Trust and the Rhea Christopher Browder Trust shall be an institutional trustee who shall be selected by counsel for Plaintiff.

The Trustee of the Anker Browder Trust and the Rhea Christopher Browder Trust shall pay out the income from the trusts monthly to the Plaintiff for the support of the two (2) minor children until each child reaches majority pursuant to T.C.A. § 34-11-102. At such time as the minor children reach the age of majority pursuant to T.C.A. § 34-11-102, the terms of the trusts which are in existence regarding the distribution of the corpus of the trust shall remain in effect.

The Plaintiff shall receive for the support of the children the social security benefits received by each child during the minor child's minority as defined by T.C.A. § 34-11-102.

The child support payment in this Order is the amount set forth in current published Tennessee Child Support Guidelines, and the payor of child support is providing health insurance coverage for the children and the amount of co-parenting time of the payor with the children is normal under the guideline regulations.

The parties hereto affirmatively acknowledge that no action by the parties will be effective to reduce child support after the due date of each payment, and they understand that court approval must be obtained before child support can be reduced or modified, unless such payments are automatically reduced or terminated under the terms of this Agreement or by operation of law.

. . . .

> (8) **Life Insurance**. The Defendant currently owns a Chubb whole life insurance policy in the amount of Two Hundred Thousand Dollars ($200,000.00). The Defendant shall maintain that policy for the remainder of his life and shall name the Plaintiff as a fifty percent (50%) beneficiary of the policy and shall name each minor child as a twenty-five percent (25%) beneficiary of the policy. If the trusts for the benefit of the children of the parties are still in existence at the time of the Defendant's death, the benefits pursuant to the Chubb whole life insurance policy payable to the children shall be paid into that child's trust.

In an earlier post-divorce proceedings Mrs. Browder sought to have this judgment set aside under Rule 59 or Rule 60 of the Tennessee Rules of Civil Procedure. The Trial Court found adversely to her contention as to that suit which was affirmed by this Court in an opinion entered on April 20, 1995.

The proof in connection with the present appeal shows that a trust was established for both children from monies which were already in their name by reason of Social Security benefits they drew incident to Mr. Browder's entitlement, plus certain funds supplied by both parents, but principally from the sale of stock of Union Planters National Bank.

When the trust was established for Christopher, copy of which was not made an exhibit to this proceeding, it totaled approximately $196,000. One-eighth of this amount was placed in non-income-producing growth assets as a hedge against inflation, and the balance in various other investments, which provided for most of the period after its establishment to the date of the

hearing below, $969 per month in income. In addition to that the trust continued to receive the Social Security benefits to which Christopher was entitled in the amount of $805 per month, which the testimony shows will continue until he reaches the age of 18.

Income supplied to Christopher has been for the most part $1774 per month during the school year and an additional $378 per month for private school tuition which Mr. Browder has voluntarily paid.

Ms. Browder insists that notwithstanding her agreement in the divorce decree that the amount set up for child support was proper and met the child support guidelines then in effect, the Trial Court did not make a determination of Mr. Browder's income, or the amount above the $1365 per month maximum set out in the guidelines that Mr. Browder should pay.

Although Mr. Browder's testimony is somewhat confusing --he was 81 years old at the time of trial--we think a fair reading of his testimony shows, as found by the Chancellor, that his income had declined since the date of the original order. Moreover, there is no proof that Christopher's expenses have increased; thus, we find the evidence does not preponderate against the Chancellor's finding relative to change of circumstance.

Moreover, the trustee of Christopher's trust testified that the balance of the trust at the time of the hearing below was $170,582[2] and should it be converted to cash and an annuity purchased it would pay Christopher for the balance of his minority (six years and five months) a minimum of $1300 to $1400 per month. The trustee recognized that this is a rough figure and probably on the low side. We suspect he is correct in that should the trust be converted to cash, and paid to Christopher in monthly installments until he reaches the age of 18, he would receive $2215 per month. This, coupled with his Social Security benefits of $805 and school tuition which we presume Mr. Browder would want to continue to pay, would give Christopher an income of $3398 per month during the school year, and $3020 for the months he was not in school. Additionally, although the dollar amount is not shown in the record, Christopher has the benefit of health insurance coverage supplied by Mr. Browder.

In conclusion, we note Nash v. Mulle, 846 S.W.2d 803 (Tenn. 1993), which addresses the guidelines as it relates to wealthy parents with "an enormous monthly income." In that case our Supreme Court concludes that the trial court retains discretion on a case-by-case basis to make an appropriate award beyond the guideline maximum where the obligor's net income exceeds $6250 per month upon balancing both the child's needs and the parent's means. Nash was decided on January 19, 1993, some

[2] Ms. Browder withdrew approximately $25,000 from Christopher's trust to reimburse herself for taxes she paid incident to the sale of the Union Planter Bank stock.

five months before the agreement as to child support was made in this case and, presumably, was considered by the parties and counsel prior to the agreement.

For the foregoing reasons the judgment of the Trial Court is affirmed and the cause remanded for such further proceedings, if any, as may be necessary and collection of costs below. Costs of appeal are adjudged against Ms. Browder and her surety.

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Houston M. Goddard, P.J.

CONCUR:

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Herschel P. Franks, J.

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Don T. McMurray, J.