KATHERYN MALLON GUESS,	)	
	)	Davidson Circuit
Plaintiff/Appellant,	)	No. 89D-4429
	)	
VS.	)	
	)	
CAROL WINFRED (C.W.) GUESS, M.D.	)	Appeal No.
	)	01A01-9601-CV-00048
Defendant/Appellee.	)	

IN THE CIRCUIT COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE CIRCUIT COURT OF DAVIDSON COUNTY

AT NASHVILLE, TENNESSEE

HONORABLE MURIEL ROBINSON, JUDGE

Mary Francis Lyle
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Nashville, Tennessee
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MARY ARLINE EVANS
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REMAND ON SUPPORT

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

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

KATHRYN MALLON GUESS,	)	
	)	
Plaintiff/Appellant,	)	
	)	Davidson Circuit
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O P I N I O N

In this post-divorce proceeding, the Plaintiff-ex-wife-mother has appealed from an unsatisfactory disposition of issues between the parties regarding child support and visitation.

On March 23, 1990, the parties were divorced by decree which incorporated their agreement for joint custody, visitation and support for one female child, aged 3.

On June 18, 1991, a further order was entered providing meticulous details of visitation and telephone calls.

On July 1, 1994, an agreed order was entered modifying visitation and increasing child support to $1,309.00 per month in conformity with guidelines promulgated by the Department of Human Services.

The present proceeding was commenced on May 15, 1995, when the Father petitioned for enlarged visitation and for an injunction to prevent the removal of the child from Nashville, Tennessee. The Mother filed an answer and counter petition for increase in child support and modification of visitation.

The Trial Court entered an order modifying the visitation schedule and increasing child

support to $1,600 per month for all months except June and July during which child support was reduced to $1,000 per month.

On appeal, the mother has presented three issues, of which the first is:

> 1. Whether the trial court erred in awarding Husband visitation for all of June (after school lets out) and July, effectively precluding Wife's chance to celebrate her daughter's birthday with her.

Both parties have remarried. The Mother resides in Springfield, Missouri, and the Father resides in Gulfport, Miss. Air travel between these two cities requires from 3 hours 55 minutes to 5 hours 5 minutes, depending upon route and connections.

The latest visitation order terminated previous alternate week end visitation, substituted one week end per month during September through May, and modified summer visitation to a period from two days after end of school year until July 31. The order expressly excluded any visitation during August.

As to birthday visitation, the order provided:

> It is further ORDERED, ADJUDGED and DECREED that the parties shall alternate the minor child's June birthday so that the Mother can go where the child is and in one year she can celebrate the eve before, and the Father celebrates on the child's birthday; and in alternate years, the Father celebrates on the eve of the child's birthday and the Mother celebrates on the birthday. This shall not effect (SIC) The Mother's middle weekend visitation during June and July.

The Mother relies upon the principle of *res judica* to resist any change in previous visitation orders. The best "interest of the child overcomes any restraint of *res judica*. TCA § 36-6-101(a) authorizes changes in custody and visitation as the exigencies of the case may require." Exigencies of the case" includes continuing concern for the welfare of the child, *Malone v. Malone*, Tenn App. 1994, 844 S.W.2d 621. Recognition of an undesirable effect of a

previous visitation order is such an exigency.

The alternate week end visitation at such great distance was patently a strain upon a child of tender years, and needed to be revised. The summer visitation, involving one round trip, was a suitable substitute for the terminated week end visits.

The Mother complains that she is deprived of the privilege of celebrating the child's birthday at her home in Springfield, but is required to travel to Gulfport for the celebration. It is regrettable that all of the pleasures of a unified family cannot be enjoyed by those who have separated and found other mates. However, such cannot be provided by human means, and the parties should adjust themselves to this reality.

There is no reason why this child should not enjoy two birthday celebrations - one in June with her Father and another in August with her Mother.

No error is found in the schedule of summer visitation.

The second issue presented by the Mother is:

> 2. Whether the trial court erred in requiring child visitation to be routed through Nashville, although one party lives in south western Missouri and the other in southern Mississippi.

The order of the Trial Court provides:

> The Father, Carol W. Guess, M.D., shall have visitation with the one (1) minor child of the parties on the third (3rd) weekend of each month, from September through May each year, when the minor child shall fly from her new home in Springfield, Missouri to Nashville, Tennessee, at the Father's expense. If the Mother elects to fly with the minor child, or have someone fly with her, that shall be at the Mother's expense. The Father or his agent shall pick up the minor child in Nashville and he can go to Mississippi or Kentucky or wherever his plans are.

The Mother complains that routing the child through Nashville entails a change of planes and a longer travel time between Springfield and Gulfport. The routing through Nashville contemplated that the Father would meet the child in Nashville and thereafter take her to his home in Gulfport by air or automobile or travel with her to Kentucky for a visit with his parents. No error is found in permitting this travel arrangement which does not exclude other reasonable travel arrangements which may be agreed upon by the parties.

The third and last issue presented by the Mother is:

> 3. Whether the court erred in capping child support at $1,600 per month for ten months and $1,000 per month for two months, when the Father's salary exceeds $240,000 annually.

TCA § 36-5-101(e)(1)(2) and (3) provides in part as follows:

> (e)(1) In making its determination concerning the amount of support of any minor child or children of the parties, the court shall apply as a rebuttable presumption the child support guidelines as provided in this subsection. If the court finds that evidence is sufficient to rebut this presumption, the court shall make a written finding that the application of the child support guidelines would be unjust or inappropriate in that particular case, in order to provide for the best interest of the child(ren) or the equity between the parties. Findings that the application of the guidelines would be unjust or inappropriate shall state the amount of support that would have been ordered under the child support guidelines and a justification for the variance from the guidelines.
>
> (2) Beginning October 13, 1989, the child support guidelines promulgated by the department pursuant to the rulemaking provisions of the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, shall be the guidelines that courts shall apply as a rebuttable presumption in child support cases.
>
> (3) Child support guidelines shall be reviewed at least every four (4) years from the date of promulgation and revised, if necessary, to ensure that the application of the guidelines results in the determination of appropriate child support award amounts.

Prior to December, 1984, the guidelines read in pertinent part as follows:

> (8) These guidelines shall be applied as a rebuttable

presumption in all child support cases beginning October 13, 1989. If the court finds that the evidence is sufficient to rebut the presumption that the application of the guidelines is the correct amount to be awarded, then the court must make a written finding that the application of the child support guidelines would be unjust or inappropriate in that particular case.

(1) For clarity, the parent with whom the child(ren) live primarily will be referred to as the obligee and the parent with whom the child(ren) do not primarily live will be referred to as the obligor.

(2) The child support award is based on a flat percentage of the net income (as defined in paragraph 4 below) of the obligor depending on the number of children to be supported. This formula presumes that the obligee will be expending at least an equal percentage of net income for the support of children from whom support is sought.

(5) After determining the net income of the obligor, that amount is to be round up to the next dollar. That amount is then multiplied by the percentage below that corresponds to the number of children to be supported. The percentages are:

# of children	1	-	-	-	
# of income		21%	-	-	-

After this calculation is made, if there are no additions to be made pursuant to paragraph 1240-2-4-.04 below, then this is the amount of the child support award.

(2) There are other cases where guidelines are neither appropriate nor equitable when a court so finds. Guidelines are inappropriate in cases including but not limited to, the following:

(a) In cases where the net income of the obligor as calculated In the above rule exceeds $6,250 per month. These cases may require such things as the establishment of educational Or other trust funds for the benefit of the child(ren) or other provisions as may be determined by the court. (Emphasis supplied)

On January 19, 1993, the Supreme Court announced its decision in the case of *Nash v. Mulle,* Tenn 1993, 846 S.W.2d 803 wherein the Court held:

Among the "unique cases" specifically anticipated in the guidelines are those cases in which the income of the parent paying support exceeds $6,250.00 per month." In the criteria

for deviation the guidelines provide that among the "cases where guidelines are neither appropriate nor equitable" are those in which "the net income of the obligor exceeds $6,250 per month." In the present case, the Juvenile Court calculated Charles Mulle's net monthly income to be $14,726.98, a figure well above the $6,250.00 figure justifying deviation from the guidelines. Yet the total award of $3,093 ordered by the trial judge is exactly 21 percent of Mulle's monthly income.

Obviously, to treat the monthly income figure of $6,250.00 as a cap and automatically to limit the award to 21 percent of that amount for a child whose non-custodial parent makes over $6,250.00 may be "neither appropriate nor equitable." Such an automatic limit fails to take into consideration the extremely high standard of living of a parent such as Charles Mulle, and thus fails to reflect one of the primary goals of the guidelines, *i.e.*, to allow the child of a well-to-do parent to share in that very high standard of living. On the other hand, automatic application of the 21 percent multiplier to every dollar in excess of $6,250.00 would be equally unfair.

We conclude that the trial court should retain the discretion to determine--as the guidelines provide, "on a case-by-case basis"-- the appropriate amount of child support to be paid when an obligor's net income exceeds $6,250.00 per month, balancing both the child's need and the parents' means.

The guidelines' very latitude reflects this need for an exercise of discretion. Twenty-one percent of an enormous monthly income may provide far more money than most reasonable, wealthy parents would allot for the support of one child. However, it would also be unfair to require a custodial parent to prove a specific need before the court will increase an award beyond $1,312.00. At such high income levels, parents are unlikely to be able to "itemize" the cost of living. Moreover, most parents living within their means would not be able to present lists of expenditures made in the mere anticipation of more child support. Until the guidelines more specifically address support awards for the children of high-income parents, we are content to rely on the judgment of the trial courts within the bounds provided them by those guidelines. In this case, although the child support award may be appropriate, we think it expedient to remand this case to the Juvenile Court, thus providing the trial judge an opportunity to reconsider his opinion in light of the fact that he is not limited to the $1,312.00 cap imposed by the Court of Appeals, nor is he bound to award 21 percent of Charles Mulle's full net income, but may exercise his discretion as the facts warrant.

When a large award given to a custodial parent with a much lower income would result in a windfall to the custodial parent, a trust fund helps to ensure that money earmarked for the child actually inures to the child's benefit. Thus, the trust fund is

> properly used to minimize unintended benefits to the custodial parent.
>
> In light of the guidelines' explicit provision for the use of trusts in cases involving high-income parents, the goals promoted by the use of a trust in this instance, and the use of a trust in this instance, and the reasoned support of other state courts and legislatures, we find the use of an education trust in this case to be proper. As noted in Section I, however, there remains noted in Section I, however, there remains the question of the level at which the trust should be funded in this case. We therefore reverse the judgment of the Court of Appeals, and remand the case to the Juvenile Court for calculation of an award in accordance with this opinion. (Emphasis supplied)

In December, 1994, the Department of Human Services amended Rule 1240-2-4-.04(3) to read as follows:

> (3) 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.

Nothing is found in *Nash v. Malle* to require a court to require a parent to create a trust fund to provide for an adult child out of the income of the obligor in excess of $6,250 per month. The language of that opinion is permissive, not mandatory. The holding of the Supreme Court appears to be that the trial courts have the discretion to allow a percentage of part or all of the excess of $6,250 where to do so is not found to be inequitable.

Whether the statutory authority to promulgate presumptive guidelines delegates the power of the legislature to the Department of Human Services to compel the courts to award the guideline percentages of income above $6,250 per month need not be discussed or decided in this appeal.

For purposes of this appeal, it is sufficient to hold that, by statute, the courts are bound to consider the guidelines and to follow them unless their strict application is expressly found to be inequitable under the facts of the case.

In the present case the child support exceeds 21% of $6,250 per month. The Mother insists that, in one form or another, it be increased to 21% of the total net income of the Father. Under the rule of *Nash v. Mulle* it was and is the duty of the Trial Court to establish that level of support which will provide a standard of living commensurate with the income of the Father. If the Mother is willing to and actually does expend all support received in providing that scale of living for the child, then this is the proper measure of child support (to be paid by the Father). On the other hand, it would be inequitable to require the Father to pay to the Mother more than she would actually use in the support of the child, thereby realizing a windfall which *Nash v. Mulle* disapproves.

The same dangers of a windfall should be avoided in requiring contributions to a trust fund. A parent has no legal duty to provide an endowment or inheritance to a child who is not disabled. *Nash v. Mulle* recognizes an equitable duty of a parent to fund his or her professed interest in the education or training in accordance with the financial standing of the parent, but nothing is found in that opinion to authorize a Trial Court to require the accumulation of cash to be paid to the child or retained by the obligee parent if not used for the purposes stated.

In keeping with the foregoing, the issue of child support is remanded to the Trial Court for reconsideration and redetermination consistent with the principles discussed herein. Until such redetermination the judgment of the Trial Court will be controlling.

Subject to such remand and redetermination, the judgment of the Trial Court is affirmed. Costs of this appeal are adjudged equally, that is each party shall pay one half. The cause is

remanded to the Trial Court for further proceedings.

Affirmed subject to redetermination.

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