IN THE COURT OF APPEALS OF TENNESSEE

BEVERLY SUE SHELL,	)	C/A NO. 03A01-9608-CV-00251
	)	WASHINGTON COUNTY CIRCUIT COURT
Plaintiff-Appellant,	)	
	)	
	)	
	)	
	)	
v.	)	APPEAL AS OF RIGHT FROM THE
	)	WASHINGTON COUNTY CIRCUIT COURT
	)	
	)	
	)	
	)	
WILLIAM A. LAW,	)	
	)	HONORABLE G. RICHARD JOHNSON,
Defendant-Appellee.	)	CHANCELLOR, By Interchange

For Appellant

JOHN S. TAYLOR
McKinnon, Fowler, Fox & Taylor
Johnson City, Tennessee

For Appellee

TIMOTHY R. WILKERSON
R. WAYNE CULBERTSON
Kingsport, Tennessee

O P I N I O N

AFFIRMED IN PART
VACATED IN PART
REMANDED

Susano, J.

In its present posture, this is a child support case. At an earlier time, the trial court entered judgment[1] on a jury verdict finding that the defendant William A. Law (Father) is the biological father of Adam C. Law.[2] We affirmed the judgment establishing paternity, and the Supreme Court denied permission to appeal.[3] On remand, the trial court addressed issues that it had reserved in the earlier judgment. The court decreed, among other things, that Father was liable to Beverly Sue Shell (Mother) for back child support in the amount of $12,992.18. It also set child support prospectively at $631 per month. Mother appealed, raising issues that present the following questions for our review:

> 1. Did the trial court utilize the proper methodology in establishing Father's child support obligations?
>
> 2. Did the trial court set future child support at the correct amount?
>
> 3. Did the trial court award the appropriate amount of back child support?

Father contends, by way of an additional issue, that future child support was set "too high in view of [his] existing support obligations" for the two children of his failed marriage.

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[1]The earlier judgment was entered pursuant to Rule 54.02, Tenn.R.Civ.P.

[2]The earlier judgment changed the child's surname to Law.

[3]***Beverly Sue Shell v. William A. Law***, 935 S.W.2d 402 (Tenn. 1996).

I. *Facts*

A brief review of the background[4] of this paternity action will be helpful in addressing the issues raised on this appeal.

Mother married Glen L. Edmondson (Edmondson) in 1984. They were married when she gave birth to her son, Adam, on August 4, 1985.

Mother and Edmondson were divorced on December 19, 1989. Edmondson testified in the instant case that he and Mother lived together for approximately a year and a half during the period beginning with Adam's birth and ending with their divorce.

While Mother and Edmondson both worked during the marriage, their joint income tax returns[5] reflect below-poverty-level income:

	Gross Income		
	1987	1988	1989
Mother	$9,524	$3,680	$3,247
Edmondson	2,001	615	3,587
	$11,525	$4,295	$6,834

Mother and Edmondson entered into a marital dissolution agreement that was approved by the judge in their divorce case.

[4]For additional facts, see our earlier opinion, cited in footnote 3 to this opinion.

[5]The 1984, 1985, and 1986 tax returns were not produced.

Mother was awarded custody of Adam and Edmondson was ordered to pay $200 per month as child support and $25 per month for Adams's medical insurance.

In August, 1993, Edmondson filed a proceeding to terminate his parental rights based on DNA tests dated April 12, 1993, which tests indicated that there is a 99.97% probability that Father, rather than Edmondson, is the biological father of Adam. On September 15, 1993, the court granted Edmondson's request that his parental rights be terminated. That court also terminated Edmondson's child support obligations and awarded him a judgment against Mother for $2,400 representing monies paid by Edmondson as general child support during 1990. The court refused to award him any relief with respect to payments made after 1990, apparently finding that, with respect to these later payments, he was a volunteer.[6]

II. *Law*

Paternity proceedings are addressed in Chapter 2 of Title 36 of the Code.[7] T.C.A. § 36-2-102 provides that "[t]he father of a child born out of wedlock is liable for . . . [t]he necessary support and education of the child; . . ." T.C.A. § 36-2-108 states, among other things, that if the defendant is found to be the father of the child, the court "shall also

[6]This finding of the divorce court is mentioned in Chancellor Johnson's opinion in the instant case. The rationale for that ruling does not appear in the record before us.

[7]T.C.A. § 36-2-101, *et seq.*

provide ... for the support of the child prior to the making of the order of paternity and support."

A trial court's authority in setting back child support is addressed in the leading Supreme Court case of ***State ex rel. Coleman v. Clay***, 805 S.W.2d 752 (Tenn. 1991), wherein Justice Daugherty, speaking for the court, opined as follows:

> . . . the father's responsibility for support of a child of his born out of wedlock arises at the date of the child's birth. Because the statute also permits the [trial court] to make a retroactive award for expenses incurred in the support of the child prior to the entry of the paternity decree, such an award can be made back to the date of the child's birth, under appropriate circumstances. Obviously, the [trial court] has broad discretion to determine the amount of such a retroactive award, as well as the manner in which it is to be paid.

Id. at 755.

In setting prospective child support in paternity cases, a trial court is bound to following the mandates of T.C.A. § 36-5-101(e), and the Child Support Guidelines (Guidelines) promulgated by the Department of Human Services and adopted by the General Assembly. *See* T.C.A. § 36-2-108(d). *See also* Tenn.Comp.R. & Regs., ch. 1240-2-4-.02(3). ("These guidelines shall be applicable in any action brought to establish or modify child support, whether temporary or permanent."). *Cf.* ***Barabas v. Rogers***, 868 S.W.2d 283, 288 n.5 (Tenn. App. 1993). The Guidelines have the force of law. ***Nash v. Mulle***, 846 S.W.2d 803, 804 (Tenn. 1993) ("Hence, the purposes, premises, guidelines for

compliance, and criteria for deviation from the guidelines carry what amounts to a legislative mandate.")

In the unreported case of ***Kirchner v. Pritchett***, C/A No. 01A01-9503-JV-00092, 1995 WL 714279 (Court of Appeals at Nashville, December 6, 1995), perm. app. not requested, a panel of the Middle Section of this court differentiated between the setting of *prospective* child support and *back* child support in paternity cases:

> Child support decisions in paternity cases are controlled by the same principles governing similar decisions in divorce cases. Tenn. Code Ann. § 36-2-108(d) (Supp. 1995). Since child support decisions in divorce cases must be made in accordance with the child support guidelines, Tenn. Code Ann. § 36-5-101(e)(1) (Supp. 1995), decisions involving prospective child support in paternity cases must also be consistent with the guidelines (citations omitted).
>
> * * *
>
> Unlike awards for prospective child support, awards for expenses arising between the child's birth and the filing of a paternity petition are discretionary decisions based on the facts of the particular case (citations omitted).

Id. 1995 WL 714279 at *4-5. We agree with our brethren in the Middle Section. The "broad discretion" recognized by the Supreme Court in ***State ex rel. Coleman***, 805 S.W.2d at 755, is inconsistent with a requirement that the Guidelines be strictly adhered to in computing *back* child support in paternity cases. This is not to say that a trial court, in the exercise of its broad but sound discretion, could not award child support back to the date of the child's birth in an amount calculated in strict

adherence to the formula set forth in Tenn.Comp.R. & Regs., ch. 1240-2-4-.03. Clearly, it could in an appropriate case; but it is also just as clear that a trial court's broad discretion permits it to award back child support in an amount other than the amount calculated in strict compliance with the Guidelines. As the Supreme Court said in ***State ex rel. Coleman***:

> . . . the statute gives the juvenile court the discretion to order a retroactive support award back to . . . [the] date [of the child's birth], the amount and method of payment to be determined by the [trial judge] in light of the circumstances of the case and consistent with the standards which normally govern the issuance of child support orders. (citation omitted).

Id. 805 S.W.2d at 755.

With these principles in mind, we now explore the issues raised by the parties.

III. *Analysis*

We find no error in the trial court's calculation of the base, minimum monthly child support to be paid by Father prospectively. That support was set at $631 per month, the same amount that had been decreed by the court as temporary child support in March, 1995, prior to the appeal of the paternity judgment.

In making this award, the trial court alluded to the fact that Father had recently gone through a divorce. In that

divorce judgment, which was rendered in February, 1995, Father had been ordered to pay $1,414 per month as support for his two minor children of that marriage. Under the Guidelines, support of $1,414 for two children extrapolates to a net income of $53,025 per year.[8] Father's net income for the most recent years for which his tax returns were available, 1993 and 1994, was, respectively, $41,111 and $27,206.[9] The trial court opted for the highest of these three figures--$53,025. We cannot say that the evidence preponderates against the use of this net income figure to calculate the base child support to which Mother is entitled prospectively.

Starting from a net *monthly* income figure of $4,418.75,[10] the trial court deducted Father's court-ordered child support for his two other minor children. This deduction of $1,414 was appropriate. *See* Tenn.Comp.R. & Regs., ch. 1240-2-4-.03(4). The balance is $3,004.75. Applying the percentage for one child, i.e., 21%, the Guidelines-calculated child support is $631.00, the amount awarded by the trial court. Contrary to Father's contention, there is no basis for a downward deviation. None of the "types of situations" contemplated by Tenn.Comp.R. & Regs., ch. 1240-2-4-.04 are present in this case. *See* ***Jones v. Jones***, 930 S.W.2d 541, 545 (Tenn. 1996).

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[8] $1,414 ÷ 32% = $4,418.75 per month x 12 months = $53,025.

[9] Mother complains that these net income figures were not computed in accordance with the Guidelines. We disagree. In each case, net income was determined by deducting from Father's gross income, his self-employment tax, income tax for a single person, and his reasonable business expenses.

[10] $53,025 ÷ 12 months = $4,418.75 per month.

The trial court employed the correct methodology in calculating the base child support to be paid prospectively.

Despite Mother's request that it do so, the trial court refused to increase the base award to reflect the fact that Father does not visit with Adam. In rejecting Mother's request, the trial court said as follows:

> The Court has considered the plaintiff's argument that there should be an upward deviation from the child support guidelines because the defendant exercises child visitation less than provided in the *Child Support Guidelines*, Chapter 1240-2-4-.04(b). Special circumstances exist in this case which should not prejudice the defendant's future relationship with the subject child. The defendant has appealed the jury and Court finding of his paternity in this cause. The defendant just recently (February 1995) was divorced. The defendant has never visited or, perhaps, seen the subject child. The defendant has had no relationship with the subject child, much less bonded with the child. It would not be in the subject child's best interest for the Court to force visitation, so as to be in exact compliance with the guidelines. The circumstances of the subject child's birth and finding of paternity have not lent themselves to visitation. The Court finds it would be in the subject child's manifest long-term best interest to develop a healthy and wholesome relationship with his father because of a desire for such a relationship, on the part of both of them, without Court interference. Therefore, after the legal dust has settled from this cause, or within a reasonable time, if the defendant does not commence visitation with his son, then the Court would consider an upward deviation, for lack of visitation.

We cannot agree that the trial court's commendable desire to foster an atmosphere conducive to visitation is at odds with

Mother's request for additional child support to compensate for Father's missed visitation.

As the trial court noted, the Guidelines recognize that an upward deviation is appropriate where, as here, the non-custodial father is not exercising *any* visitation time with the child. Tenn.Comp.R & Regs., ch. 1240-2-4-.04(1)(b). An upward deviation is appropriate "to compensate the [custodial parent] for the cost of providing care for the child(ren) for the amount of time during the average visitation period that the child(ren) is/are not with the [non-custodial parent]." *Id*. *See also* our unreported case of ***Hawk v. Hawk***, C/A No. 03A01-9407-GS-00249, 1994 WL 706895 (Court of Appeals at Knoxville, December 20, 1994) perm. app. not requested. The "average visitation period" under the Guidelines is approximately 80 days per year. Tenn.Comp.R. & Regs., ch. 1240-2-4-.02(6).

Mother is entitled to additional child support in recognition of the fact that she is supporting Adam for some 80 days when the child, under normal circumstances, would be in the care of his father. If this situation changes in the future, the trial court is available to entertain a modification petition; but the onus to seek a modification should be on Father, the one who is not exercising visitation, rather than on Mother, the one who has the additional burden of supporting Adam during the periods when visitation is not being exercised.

On remand, the trial court will add an appropriate amount to Mother's base child support to compensate for Father's

lack of visitation, said additional monthly amount to be effective retroactively to April 22, 1996, the date of entry of the trial court's most recent support order.

The trial court awarded back child support of $12,992.18 and gave Father 30 days to pay the award in full. He refused to award any support for any period prior to September 15, 1993, the date of the order terminating Edmondson's support obligation. In refusing to award any support for the period beginning with the child birth on August 4, 1985, and ending September 15, 1993, the trial court advanced the following rationale:

> The child was born on August 4, 1985. The child was supported by his mother and her husband to the date that the Court terminated Mr. Edmondson's support obligation, i.e., September, 1993. The intent and purpose of the child support statutes are to assure the reasonable support of a child consistent with the financial resources and ability to pay of those responsible for supporting the child. There is no proof in this cause to the effect that all of the child's needs were not met from the date of its birth through September 1993. The preponderance of the evidence is that the child was appropriately supported from its birth through September 1993.
>
> To permit the plaintiff to recover support for the child from the defendant before September 1993 would be unfair and inequitable, otherwise the plaintiff would again recover the child support that Mr. Edmondson has paid. Furthermore, to permit the plaintiff to collect child support from the defendant for the pre-September 1993 period, would be paying the plaintiff for her child support contributions. *Child Support Guidelines* 1240-2-4-.03(2). It appears that a cause of action, if any, against the defendant for support of the child from birth through September 1993 would belong to Mr. Edmondson.

> For all of the above-stated reasons, the Court finds it would be inequitable, unjust and inappropriate to commence the child support on the date of the child's birth. The defendant's child support obligation commences on September 15, 1993, the date Mr. Edmondson's child support obligation and parental rights were terminated. The best interest of the child is unaffected, as the child had proper and appropriate support through September 15, 1993.

We find that the evidence preponderates against the trial court's findings. We also believe that the trial court's refusal to grant *any* back child support for the period in question fails to recognize one of the "major goals in the development of [the] guidelines," i.e., "to the extent that either parent enjoys a higher standard of living, the child(ren) share(s) in that higher standard." Tenn.Comp.R. & Regs., ch. 1240-2-4-.02(2)(e).

Edmondson was an itinerant musician. During the four years and four months immediately prior to their divorce,[11] Edmondson lived with Mother and Adam for approximately a year and a half. While Mother apparently worked for the better part of the marriage, her income was extremely modest. It is clear that Edmondson contributed little to the support of Adam. This can be gleaned from his trial testimony:

> Q. Now I'll get a little more background here. Where were you and Ms. Shell living at the time that the child was born?
>
> A. At the time the child was born, she was living with her parents and I was living with mine.

[11]This is the period from Adam's birth on August 4, 1985, to the entry of the divorce judgment on December 19, 1989.

Q. Now what was your occupation?

A. Mine?

Q. Yes.

A. I was still with -- playing music.

Q. When did you first see the child?

A. She -- her parents didn't want me to see the child, so she sneaked out one day and I met her over in Kingsport and saw the child.

Q. I'm talking about though after the birth?

A. Oh, after the birth I saw it that day that it was born. Because I went to the hospital in Johnson City.

* * *

Q. How long did you continue to live in Nashville?

A. I lived there about -- '86, '87 -I may have been there a little while in '88. But I know it was '86 and '87 I lived in Nashville for sure.

* * *

Q. Oh! Well where did Ms. [Shell] and the child stay?

A. Oh, you mean with my -- I thought you was talking about my parents. No -- yeah, she lived there with me.

Q. And were you working at that time?

A. Yeah, off and on. It was -- when I'd, you know, get a gig or a job I would. But I was mostly on the road at the time.

* * *

Q. Why did you move to Nashville?

A. To better my career.

Q. Where do [sic] you all move to? Do you recall?

A. You mean the place? We lived on Trinity Lane.

> Q. How were your family's -- that meaning you and Ms. Shell and Adam -- how were your family's living expenses handled at that time during the course of your marriage?
>
> A. What do you mean?
>
> Q. How were the bills paid?
>
> A. How were they paid?
>
> Q. Yes.
>
> A. Well, what bills we had, she basically paid them.
>
> Q. And what happened to your income?
>
> A. Well, whatever I was making, I took care of whatever I could. But I didn't -- I wasn't making really enough to -- from what I can remember, I didn't make really enough to take care of very much.
>
> * * *
>
> Q. And what would you do with your money then?
>
> A. What would I do with my money? Well, I'd spend it. Yeah. I guess that's what you do with money, isn't it, spend it?
>
> Q. Right. Did you bring it home?
>
> A. Did I bring it home? Well, I'd say I did. Whatever I had.

The evidence preponderates against the trial court's finding that Adam "had proper and appropriate support through September 15, 1993." Obviously, "proper and appropriate support" is a relative concept; but, even at that, the evidence clearly indicates in this case that prior to the Shell/Edmondson divorce there was very little income to support this three-person family unit. After the divorce, Edmondson did contribute some support, but he was awarded a judgment against Mother, reimbursing him for

some of his payments. The preponderance of the evidence is that he contributed little to Adam's support.

While a trial court has "broad discretion" in setting back child support in paternity cases, that discretion is not unbridled. As the Supreme Court has pointed out, a court

> lacks . . . discretion to limit the father's liability for child support in an arbitrary fashion that is not consistent with the provisions in T.C.A. § 36-2-102 and § 36-2-108.

State ex rel. Coleman, 805 S.W.2d at 755.

We find that the trial court abused its discretion in refusing to award *any* child support prior to September 15, 1993. That decision was based on findings of fact that are unsupported in the record. That decision also ignores the fact that Adam, the son of an attorney who earned significant income, lived for years in a sub-poverty-level environment.

We believe this is an appropriate case for remand to the trial court. On remand, in addition to addressing the issue of an increase in prospective child support for missed visitation, the trial court is directed to revisit the question of back child support "consistent with the provisions in T.C.A. § 36-2-102 and § 36-2-108." ***State ex rel. Coleman***, 805 S.W.2d at 755. That decision should be made "in light of the circumstances of the case and consistent with the standards which normally govern the issuance of child support orders." *Id*.

We do not agree with Mother that a trial court in a paternity case on the question of back child support is bound by the holding in ***Jones v. Jones***, 930 S.W.2d 541 (Tenn. 1996). ***Jones*** is a post-divorce case. As we have previously indicated, the setting of back child support in a paternity case is a matter that addresses itself to the broad discretion of the trial court. A trial court's authority in the context of a divorce or post-divorce proceeding is much more limited. *See* ***Jones***, 930 S.W.2d at 545. ***Jones*** is simply not applicable to the issue of back child support in a paternity case.

The trial court's judgment awarding back child support of $12,992.18 and denying Mother's request for an increase in prospective child support due to Father's lack of visitation is hereby vacated. In all other respects, the judgment is affirmed. This case is remanded for further proceedings consistent with this opinion. Costs on appeal are taxed to appellee.

_____
Charles D. Susano, Jr., J.

CONCUR:

_____
Don T. McMurray, J.

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William H. Inman, Sr.J.