

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED
April 21, 1997
Cecil Crowson, Jr.
Appellate Court Clerk

DEBBIE PROFFITT RAY

Plaintiff - Appellee

v.

DAVID ANTHONY RAY

Defendant - Appellant

) KNOX COUNTY
) 03A01-9608-CH-00260

) HON. BILL SWANN,
) JUDGE

) AFFIRMED IN PART; MODIFIED
) IN PART; and REMANDED

TOM MCFARLAND OF KINGSTON and VIVIAN CRANDALL OF OAK RIDGE FOR APPELLANT

ROBERT R. SIMPSON OF KNOXVILLE FOR APPELLEE

O P I N I O N

Goddard, P. J.

In this post-divorce proceeding, David Anthony Ray appeals the Knox County Circuit Court's granting of Debbie Proffitt Ray's petition for a modification of Mr. Ray's child support payments.

Mr. Ray raises five issues on appeal, the first three of which can be combined into one issue. Mr. Ray first contends

that the Trial Court erred by failing to find that he rebutted the presumption of the application of the Child Support Guidelines provided for in the Tennessee Divorce Statute. He further contends that the Trial Court erred in not following the Local Rules of Court for the Knox County Circuit Court which he contends require the obligee of child support payments to submit financial information showing the needs of the child. Finally, Mr. Ray insists that the Trial Court improperly determined his income for the purposes of determining child support and improperly applied the Guidelines.

The parties were married on June 27, 1978. They were divorced by final decree entered on March 25, 1985. At the time of the divorce, the parties had one minor child, a son who was four years. The property settlement, which was incorporated in the divorce decree, provided that Mr. Ray would have physical and legal custody of their son, and Mr. Ray would pay child support in the amount of \$500.00 per month.

Mr. Ray filed the petition presently on appeal to modify the child support on November 29, 1994, on the grounds that there were substantial and material changes in circumstances warranting a modification. After a hearing before the Child Support Referee, the Knox County Circuit Court granted Mr. Ray's petition, applied the Child Support Guidelines, and increased Mr. Ray's child support payments to \$855.00 per month.

At the time of the divorce, Mr. Ray was a partner in a dentistry practice, earning \$59,460 in 1985. However, his practice filed bankruptcy, and he was forced to open a dentistry practice as a sole practitioner. In 1994, he filed a federal income tax form reporting \$61,344.00 in gross income. The Trial Court added \$8,000 to his reported gross income for application to the Child Support Guidelines to account for the average amount of money in Mr. Ray's bank account for the year.

Mr. Ray first argues, as already noted, that the Trial Court erred in failing to find that he adequately rebutted the presumption of application of the Child Support Guidelines as set out in the Tennessee Divorce Statute. T. C. A. 36-5-101(e)(1) states:

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.

Mr. Ray insists that he met the burden of rebutting the presumption of the application of the Child Support Guidelines since the application of the Guidelines would be unjust, would

not be in the best interest of the child, and would not be equitable to the parties.

Mr. Ray makes a number of arguments to support his position. He first asserts that it would be unjust to require him to increase his child support payments from \$500 per month to \$855 per month when his annual gross income had only increased \$1,884 over a ten-year period. He also asserts that Mr. Ray failed to show a substantial and material change in circumstances to warrant a modification of the payments. Mr. Ray argues that an application of the Guidelines would not be in the best interest of the child since if he were required to pay the increase, he would not have the opportunity to spend money on his son on activities that the son and father participate in together. He makes a final argument that an application of the Child Support Guidelines would be inequitable to the parties since Mr. Ray allegedly pays the same percentage of his net income for the child as Mr. Ray does. Mr. Ray relies on no case law to support his position.

It would be neither unjust, nor inequitable, but, instead, in the best interest of the child for Mr. Ray to pay the amount required by the Guidelines since he has been paying an amount much lower than that required by the Guidelines for a number of years and since the record supports Mr. Ray's position that there has been a substantial change in circumstances since the original decree of 1985.

The Guidelines had not yet been promulgated in 1985 when the parties entered into the original divorce settlement.¹ Had the Guidelines been in effect in 1985, Mr. Ray would have been required to pay approximately \$739.00 per month, instead of \$500.00 per month, based on his gross income at that time. Therefore, Mr. Ray has paid a substantial amount less than the after adopted Guidelines required. It is irrelevant that Mr. Ray's income has not substantially increased in the past ten years since he was paying well below the Guidelines standard in the first place. T.C.A. 36-5-101(a)(1) states that in

cases involving child support, upon application of either party, the court shall decree an increase or decrease of such allowance when there is found to be a significant variance, as defined in the child support guidelines established by subsection (e), between the guidelines and the amount of support currently ordered unless the variance has resulted from a previously court-ordered deviation from the guidelines and the circumstances which caused the deviation have not changed.

In Hannah v. Lipps, an unpublished opinion filed in Knoxville January 11, 1996, this Court held that, absent an appropriate reason to deviate from the Guidelines, the Trial Court may modify an award of child support and apply the Guidelines if the petitioning party can show that the child support is 15% less than the child support would have been had the Guidelines been applied.

¹ The Child Support Guidelines became effective on October, 13, 1989. Jones v. Jones, 930 S.W.2d 541 (Tenn.1996).

Additionally, the record supports M. Ray's assertions that the boy's food, transportation, clothing, and recreational needs had increased since the original divorce decree. The record reflects that unforeseeable expenses were necessary to send the child to military school and obtain the child a tutor and biofeed back due to the child's learning disabilities. In Ragan v. Ragan, 858 S.W2d 332, 333 (Tenn.App.1993), this Court faced a similar situation in which the Trial Court determined that there was a material change in circumstances since the "child wore larger clothes, ate more, and participated in more activities." This Court reasoned that the changes "translate into dollars" and ordered a modification of the child support payments. The record in this case supports M. Ray's factual allegation that there was material change in the circumstances from the time the child was four to the time of this petition when the child was a teenager to warrant a modification of the payments.

The Tennessee Supreme Court has stated the trial courts have "limited discretion to deviate from the guidelines." Jones v. Jones, 930 S.W2d 541 (Tenn.1996). Therefore, we conclude that the Trial Court did not abuse its discretion in its modification of and application of the Child Support Guidelines to set M. Ray's child support payments. We hold that M. Ray failed to carry his burden of rebutting the presumption of the application of the Child Support Guidelines since it would not be

unjust nor inequitable, nor in the best interest of the child to deviate from the Child Support Guidelines.

The second issue that Mr. Ray raises on appeal is that the Referee erred by not requiring Ms. Ray to provide information of her gross income, pursuant to Rule 9 of the 4th Circuit of Knox County Rules of Court which requires "Financial affidavits of income, expenses, debts, and assets shall be filed by counsel at or before all hearings in which financial matters are at issue." However, the Referee relied on Rule 8 of the Local Rules of Practice of Knox County Referee, which only requires both parties, the obligor and obligee of child support payments, to provide financial information when there is a dispute as to which party should be paying support. Rule 8 states:

The party paying child support is required to provide a financial affidavit of current gross income and expenses, a tax return for the preceding year, and a current year-to-date check stub or income statement on or before the hearing date. In hearings for modification of previous child support orders, the same information must be provided for the time at which the most recent Order setting or modifying child support was entered. If the parties are disputing which of them should be paying child support, then both parties must submit the financial information.

The Rules of Practice for the Referee clearly address the issue of which party or parties should submit financial information in a modification hearing, the obligor of the payments.

Mr. Ray relies on Rule 2 of the Referee's Rules of Practice for Knox County for his argument that the Circuit Court Rules of Court should take precedence in this situation. Rule 2 states, "Additional matters not addressed by any of these or the above Order and Rules may be addressed by the Local Rules of the Knox County Chancery Court or the Local Rules of the Knox County Fourth Circuit Court." Mr. Ray argues that the issue of whether the obligee of the child support payments should have to submit financial information is not addressed in the Referee's Rules, so Rule 9 of the 4th Circuit Court should apply. However, we disagree with Mr. Ray's argument and hold that Rule 8 of the Referee's Rules does address the issue of who should provide information in the modification hearing, the obligor, and therefore Rule 9 of the Circuit Court's Rules is inapplicable in this situation. The Referee did not err by requiring only Mr. Ray to provide financial information at the modification hearing.

The final issue that Mr. Ray raises on appeal is that the Trial Court improperly determined his annual gross income and then incorrectly determined the amount of support that he was required to pay under the Guidelines.

The Child Support Guidelines explicitly describe the manner in which the trial court is to determine the monthly child support. The first determination that the trial court must make is the obligor's gross income. The Guidelines define gross income as, "income from any source (before taxes and other

deductions), whether earned or unearned.” Mr. Ray utilizes a cash-based tax method for his self-employed dentist practice. On his 1995 tax return, he reported a gross income of \$61,344, and there is nothing in the record to suggest that his gross income was anything different from that figure. However, the Trial Court determined that his annual gross income was \$69,344. The Trial Court added \$8,000 to Mr. Ray’s reported gross income since he held a monthly average of \$8,000 in a bank account. However, there is nothing in the record to suggest that this additional cash was additional income. The mere fact that there was money in a bank account does not render it income. Therefore, we conclude that the Trial Court erred in its determination that Mr. Ray’s annual income was \$69,344. The accurate reflection of Mr. Ray’s gross income for the purposes of applying the Guidelines should have been \$61,344.

Mr. Ray next insists that the Trial Court erred in its application of his gross income to the Child Support Guidelines. The Referee utilized the chart entitled “Tennessee Child Support From Monthly Income” of the Child Support Guidelines to determine what monthly child support Mr. Ray should pay based on his gross income. However, the Referee should not have used this chart since the chart specifically states that it is calculated based on a FICA rate for employed persons. The heading to the chart states, “Child support awards for the self-employed will have to be calculated separately as the FICA rate for that group is 15.3%” Therefore, since Mr. Ray is self-employed, the Trial

Court incorrectly used this chart in determining how much monthly child support that he was required to pay.

Since the chart that the Referee used is inapplicable to Mr. Ray's situation as a self-employed dentist, the Trial Court must turn to the Guidelines themselves to set the child support payments. Chapter 1240-2-4-.03 (Amendment 1994) of the Child Support Guidelines provides that the obligor's net income must first be determined, and a percentage of that net income is used to determine how much child support is to be paid, depending on the number of children. For one child, the obligor must pay 21% of his net income in child support. The method for determining net income is stated as follows:

Net income is calculated by subtracting from gross income of the obligor's FICA (6.2% Social Security + 1.45 % Medicare for regular wage earners and **12.4% Social Security + 2.9% Medicare for self-employed**, as of 1991, or any amount subsequently set by federal law as FICA tax), the amount of withholding tax deducted for a single wage earner claiming one withholding allowance (copies of appropriate table will be provided to courts with guidelines), and the amount of child support ordered pursuant to a previous order of child support for other children. (emphasis supplied)

Child Support Guidelines 1240-2-4-.03(4)(Amendment 1994).

Following this formula and using the Circular E, Employer's tax guide, for withholding tax of a self-employed worker as advised by the chart, we determine that the amount that Mr. Ray is

required to pay under the Guidelines with a gross income of \$61,344 is \$696 per month.²

For the foregoing reasons, we affirm the Trial Court's granting M. Ray's petition for modification of M. Ray's child support payments to follow the Child Support Guidelines.

However, we modify its determination as to the amount and order that M. Ray pay \$696 per month in child support beginning on May 28, 1996, the date the Circuit Court confirmed the Referee's findings and recommendations.

The cause is remanded for such further proceedings as may be necessary and collection of costs below. Costs of appeal are adjudged one-half against M. Ray and one-half against M. Ray and his sureties.

² This amount is determined by taking Mr. Ray's annual gross income of \$61,344 and reducing by the annual withholding allowance for a self-employed worker of \$2550, his self-employment tax of \$8656, and his income tax of \$12,912 (p.35, Table 7 of Circular E), resulting in an annual net income of \$39,775. This amount, multiplied by 21% for child support for one child and dividing by twelve, works out to \$696 per month in child support.

Houston M Goddard, P. J.

CONCUR:

Herschel P. Franks, J.

Don T. Murray, J.