IN THE COURT OF APPEALS

FILED

August 28, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

DEBORAH LORRAINE BROOKS,	)	POLK CIRCUIT
	)	C/A NO. 03A01-9703-CV-00087
Plaintiff-Appellant	)	
	)	
	)	
	)	
v.	)	HON. EARLE G. MURPHY
	)	JUDGE
	)	
	)	
	)	
RICKEY LAMAR BROOKS,	)	
	)	AFFIRMED AS MODIFIED
Defendant-Appellee	)	REMANDED

BARRETT T. PAINTER, Bell & Associates, P.C., Cleveland, for Appellant.

D. MITCHELL BRYANT, Jenne, Scott & Bryant, Cleveland, for Appellee.

OPINION

McMurray, Judge

In this post divorce proceeding, Deborah Lorraine Brooks (mother) filed a petition to increase child support and to modify the visitation schedule as set out in the final decree of divorce. Defendant Rickey Lamar Brooks (father) filed a counter petition asking that the mother be required to pay one-half of the cost of

their child's private schooling and for increased visitation. The trial court denied the mother's petition for increased child support, required the father to continue paying for the child's education, and made minor adjustments in the visitation schedule. The mother appealed. We modify the judgment and affirm as modified.

The wife's issues in this case are: whether the court erred by refusing to increase child support; whether the court erred in deviating downward from the amount of child support required by the Child Support Guidelines; and whether the wife is entitled to increased child support because of the father's higher standard of living, greater assets and financial resources. The husband questions the court's action in requiring the husband to pay school expenses and asks for an award of attorney's fees for this appeal.

The parties were divorced on August 24, 1990. At that time, the mother was awarded, among other things, the parties' residence and two office buildings which the parties owned. The father was awarded various items of personal property, his IRA account, two vehicles and $175,000 in cash. The parties shared joint legal custody of their son, who was then four years old. The father was granted visitation one night a week, on alternate weekends and alternate major holidays. The court later modified the visitation schedule to allow the father to have visitation for two months in

the summer. The parties agreed, and the court ordered, that the father would pay $400 per month child support and maintain a health insurance policy on the child.

In 1991, the mother sold the residence and used part of the proceeds to finance her law school education. The father bought some property in Benton, in 1991, using, among other things, the money he was awarded in the divorce. He built a Conoco gas station and convenience store on part of the property. The store was successful and the father sold the store in 1994 and made a substantial profit from the sale.

The father's adjusted gross annual income in 1992 was $60,966.00, and $100,795.00 in 1993. In 1994, he engaged in several profitable real estate transactions, and sold part of the property he had purchased, including the Conoco store. As a result, his adjusted gross annual income for 1994 was $435,880.

After he sold the store, the father devoted his time to farming his 172-acre property, which, by virtue of his 1994 income, he then owned debt-free. He testified that he wants to get into the registered Angus cattle business and has been working to build such a business.

First, we note that the father's income for the years 1991 through March 27, 1995 (the date the petition for an increase was filed) is not susceptible to being used as the basis for increased child support for those years. T.C.A. § 36-5-101(a)(5) provides in pertinent part as follows:

> Any order for child support shall be a judgment entitled to be enforced as any other judgment of a court of this state and shall be entitled to full faith and credit in this state and in any other state. Such judgment shall not be subject to modification as to any time prior or any amounts due prior to the date that an action for modification is filed and notice of the action has been mailed to the last known address of the opposing parties. (Emphasis added)

* * * *

It seems clear from the above provisions that any increase in child support that might have otherwise been available to the mother has been lost for the years 1991 through March 27, 1995, the date of the filing of the petition. Child support is modifiable, however, from the filing of the petition provided there has been demonstrated a significant variance, as defined in the child support guidelines. The child support guidelines (1994 revised) at Rule 1240-2-4-.02(3) define a significant variance as "at least 15% if the current support is $100.00 or greater per month ...." It is, therefore, incumbent upon the courts to ascertain the obligor's income at the time the petition is filed or at the time of the

hearing and apply the guidelines to that income. There is an exception, however. Rule 1240-2-4-.03(3)(d) provides as follows:

> If an obligor is willfully unemployed or under employed, child support shall be calculated based on a determination of potential income, as evidenced by educational level and/or previous work experience.

In this case, the father is a college graduate and was self-employed both at the time the petition was filed and the hearing was held. At the time of the hearing, the father testified that he was employed as a farmer and trying to build a successful business. As of July 10, 1995, he had revenues of $18,838.57 from interest on approximately $500,000 he has in the bank. He claimed farming expenses of $12,735.19. Accepting the farming losses as accurate, his gross income is reduced to $6,103.38.[1]

Under the peculiar circumstances of this case and after due consideration of the father's education, past work experience and income, we believe that the father is voluntarily under employed and is clearly capable of earning a substantial income. We must now determine the amount to which the child support guidelines must be applied.

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[1]We note that the only evidence in the record relating to farming expenses is contained in the father's testimony and an exhibit prepared by him purporting to itemize the expenses. There are no actual bills nor receipts for any farm expenses.

Rule 1240-2-4-.03(3)(f) provides that "when cases with established orders are reviewed for adjustment and the obligor fails to produce evidence of income (such as tax returns for prior years, check stubs, or other information for determining current ability to support in prior years), and the court has no other reliable evidence of the obligor's income or income potential, the court should enter an order to increase the child support obligation by an increment not to exceed ten percent (10%) per year for each year since the support order was entered or last modified."[2] We believe that under the peculiar circumstances of this case, the father's present income has not been reliably established and that Rule 1240-2-4-.03(3)(f) should be called into play and child support calculated accordingly. At the time of the entry of the prior order of support (October 1990), the father was, among other things, ordered to pay $400.00 per month child support. Unfortunately, we do not have the factual basis upon which the trial court based its original award. In any event the trial court was under a duty to examine stipulations and negotiated settlements to ascertain that the child support ordered was in accordance with the guidelines or otherwise give his reasons for allowing a deviation. We are not at liberty to presume, even in the absence of an express ruling, that the trial court overlooked a viable

[2]We have before us the father's income tax returns for the years 1991 through 1995. Since, however, the income earned during these years is atypical because of non-recurring income and one-time capital gains, the returns are of little assistance in establishing obligor's income or income potential.

issue or failed to do his duty in the case. A public official, in the absence of proof to the contrary, is presumed to do his duty. See State ex rel. Biggs v. Barclay, 188 Tenn. 26, 216 S.W.2d 711 (Tenn. 1948). Therefore, we must presume that the trial judge correctly and adequately considered all issues properly presented and that, absent a showing to the contrary, the judgment is complete in every respect. Richards v. Taylor, 926 S.W.2d 569 (Tenn. App. 1996). Under the mandates of the child support guidelines in effect at the time of the previous order, the trial court was under a duty to use the guidelines in reviewing the adequacy of the child support. Thus we presume that the child support of $400.00 per month ordered in the original decree was correct. Reviewing the guidelines (October 1989 revised), the gross income that would yield $400.00 per month would be approximately $2,500.00 per month.

Invoking Rule 1240-2-4-.03(3)(f) (1994 revised) and increasing the child support payments at a rate of ten percent (10%) per year for each year since the support order, the maximum increase in child support would be fifty percent (50%). Applying the fifty percent increase to the 1990 award of $400.00, the child support would be increased to $600.00 per month (if the increases were compounded, child support would be increased to 645.00). The trial court did not choose to increase the monthly child support award in cash but did order the father to pay the child's tuition at a

private school. The tuition is approximately $3,000.00. Since we consider the private school tuition to be child support, the total support ordered by the court was $7,800.00, per year. Extrapolating gross income from the guidelines (1994 revised), child support of $7,800.00 per year or $650.00 per month would result from a gross monthly income of approximately $4,300.00. We consider this amount of income to be within the earning potential of the father.

As noted above, the mother sought increased child support based upon the father's under employment, higher standard of living, and greater assets and financial resources. The father responds to this argument by noting that the child support guidelines, Tenn. Comp. R. & Regs., ch. 1240-2-4-.03, which govern the analysis of this case, (see T.C.A. § 36-5-101(a)(1) & (e)(1)), provide that child support payments of $400 per month correspond to a yearly gross income that is considerably higher than his demonstrated present gross income.

The mother counters by asserting that the trial court should have taken into consideration the father's substantial assets, i.e., his debt-free farm and bank account of some $500,000, in setting an appropriate child support amount. In support of this argument, the mother cites the following principle recently

enunciated by our Supreme Court in Nash v. Mulle, 846 S.W.2d 803, 804 (Tenn. 1993):

> One major goal expressed in the guidelines is "[t]o insure that when parents live separately, the economic impact on the child(ren) is minimized and to the extent that either parent enjoys a higher standard of living, the child(ren) share(s) in that higher standard." Tenn. Comp. R. and Regs. ch. 1240-2-4-.02(2)(e). This goal becomes significant when, as here, one parent has vastly greater financial resources than the other. It reminds us that Tennessee does not define a child's needs literally, but rather requires an award to reflect both parents' financial circumstances.

Id. at 805.

The mother argues in her brief that "[d]efendant's assets are vastly greater than [hers]." We do not think the facts in the record bear out this assertion. Even if true, however, child support is not calculated from post marital assets but from income. It appears that the wife seeks to have post divorce appreciation of the husband's property, not yet realized as income, included in the calculation of child support. There is no provision in the guidelines requiring or permitting unrealized income from post divorce appreciation of assets to be includable in an obligor's gross or net income. The mother misconstrues Nash v. Mulle.

The child support guidelines (1994 revised), do permit the court to take into account in determining child support, valuable assets and resources such as an expensive home or automobile that

seem inappropriate for the income claimed by the obligor. Tenn. Comp. R & Regs., ch. 1240-2-4-.04(1)(f). We are of the opinion, as was the trial court, that under the facts of this case, equity does not require an upward adjustment in the amount of child support based upon this provision. The evidence in the record does not establish sufficient facts to bring the rule into play. Conversely, the record does establish that the husband is living in a 456 square foot renovated dairy barn.

Finally, the mother complains that in July of 1995, the father bought their son a pair of tennis shoes for $85.00, and subtracted that amount from his July child support payment. We agree that the deduction was unauthorized and inappropriate. Accordingly, the father shall be required to pay to the wife the sum of $85.00 to compensate for the deduction in the July child support payment.

We find no deviation downward from the child support mandated by the Child Support Guidelines. We find no merit in any other issues presented by the appellant mother relating to child support.

The father complains that he should not be required to bear the full expenses of the child's private school tuition. We note that both parties were agreeable to the child's attendance in a private school. In view of our opinions expressed above, we find

that the requirement that the husband pay the full tuition is justified in all respects. We find no merit in this issue.

Lastly, the parties each argue that they should be awarded attorney fees for this appeal. The mother's argument is that the father should be held liable for her attorney's fees and expenses on appeal, based on the disparity in the parties' incomes and financial resources. The father, for his part, argues that this is a frivolous appeal and seeks attorney's fees and costs on appeal. We find that this is not a frivolous appeal and that both parties are capable of paying, and should pay, their own attorney's fees.

We modify the trial court's judgment to require the father to pay the sum of $85.00 to the mother for the inappropriate deduction from child support for the costs of a pair of shoes for the child. In all other respects the trial court's judgment is affirmed.

In our discretion, we assess the costs equally between the parties. This case is remanded to the trial court for an entry of a judgment in accordance with this opinion.

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Don T. McMurray, Judge

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Houston M. Goddard, Presiding Judge

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Charles D. Susano, Jr., Judge

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	)	JUDGE
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RICKEY LAMAR BROOKS,	)	
	)	AFFIRMED AS MODIFIED
Defendant-Appellee	)	REMANDED

JUDGMENT

This appeal came on to be heard upon the record from the Circuit Court of Polk County, briefs and argument of counsel. Upon consideration thereof, this Court is of the opinion that there was error in the trial court.

We modify the trial court's judgment to require the father to pay the sum of $85.00 to the mother for the inappropriate deduction from child support for the costs of a pair of shoes for the child. In all other respects the trial court's judgment is affirmed.

In our discretion, we assess the costs equally between the parties. This case is remanded to the trial court for an entry of a judgment in accordance with this opinion.

PER CURIAM