

**IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT NASHVILLE**

BARBARA ANDREWS PIPER,)	
)	
Plaintiff/Appellant,)	Sumner Law No. 6498-C
)	
v.)	
)	
DONALD McLEAN ANDREWS,)	Appeal No. 01A01-9612-CV-00570
)	
Defendant/Appellee,)	

APPEAL FROM THE CIRCUIT COURT OF SUMNER COUNTY
AT GALLATIN, TENNESSEE

THE HONORABLE TOM E. GRAY, JUDGE

FILED

December 17, 1997

Cecil W. Crowson
Appellate Court Clerk

For the Plaintiff/Appellant: _____ For the Defendant/Appellee: _____

Thomas F. Bloom
Nashville, Tennessee

John R. Phillips Jr.
Gallatin, Tennessee

**AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED**

HOLLY KIRBY LILLARD, J.

CONCURS:

DAVID R. FARMER, J.

SAMUEL L. LEWIS, J.

OPINION

This is a post-divorce action in which the mother seeks an increase in child support. The mother sought an increase based on the father's income from the closely-held corporation of which he is the sole shareholder, as well as on the fact that the father's visitation was less than the standard under the child support guidelines. The trial court granted the mother an increase in an amount less than the she sought. We affirm in part, reverse in part, and remand.

Appellant Barbara Andrews Piper ("Mother") and Appellee Donald Andrews ("Father") were divorced in 1989, and Mother was awarded custody of the couple's two minor children. Father was ordered to pay \$600.00 a month in child support. Father now lives in Texas and Mother lives in Tennessee.

In 1995, Mother petitioned for an increase in child support based on Father's increased income and the fact that Father exercised visitation rights less than the standard under the child support guidelines. Since the divorce, Father had become the sole shareholder of a closely-held corporation. Mother argued that, because all of the corporation's income would inevitably come to Father, the trial court should set child support based on his increased salary and compensation package plus the corporation's annual income.

The trial court held a hearing on Mother's petition. The trial court heard testimony regarding Father's income from both parties as well as expert testimony from certified public accountants for both parties.

It is undisputed that, since 1985, Father has been employed by Mobile Sports Medicine Systems, Inc., a Texas company. In 1993, when he became sole shareholder of the corporation, Father received a salary of \$45,000 and a bonus of \$15,000. When added to his other benefits, his total compensation for that year was \$80,650. In 1994, Father received a salary of \$48,000 and a bonus of \$12,000. Combined with other benefits, his total compensation for 1994 was \$72,000. In 1995, the year Mother filed her claim for additional child support, Father received a salary of \$48,000 and a bonus of \$1,000. His total compensation for 1995 was \$59,800.

Both parties presented expert testimony on the issue of the corporation's retained earnings. Mother's expert, Robert Jennings, testified that the corporation's retained earnings benefited the sole shareholder, Father, by reducing his overall tax burden. Jennings compared Father's circumstances to those of a sole proprietor, and noted that the use of the corporate entity in this situation reduced his tax burden, because there were two taxable entities, each in a lower tax bracket. Jennings

acknowledged that, in reviewing the corporation's financial documents, he found nothing "improper or unusual," and admitted that the corporation's cash reserves were not "excessive."

The corporation's accountant, Barbara May, testified on behalf of Father. May testified that the corporation's retained earnings were reasonable and consistent with prudent business practice. She stated that Father had never requested her to manipulate the corporation's finances to decrease his income. She acknowledged that the retained earnings benefitted the sole shareholder, Father.

Regarding visitation with the children, Father noted that the parties were separated by a distance of six hundred miles. He testified that it was not practical financially or physically for him to see the children every other weekend, and that he paid all the transportation costs for the children's visits.

After the hearing, the trial court issued an oral ruling. The trial court increased the child support to \$1,133 per month, based on the admitted increase in Father's salary. The trial court declined to include the corporation's retained earnings in its calculation of Father's income:

This isn't a sole proprietorship. We do have a corporate entity. We have an employer/ employee. Mr. Andrews is an employee of the corporation. If it were a sole proprietorship, or in looking at [a] sole proprietorship, The Court would have to state that things would be managed somewhat differently. Even in a sole proprietorship we do not set the child support based upon gross income of the sole proprietorship. We consider the expenses of doing business. In this matter, The Court does not find that the corporation is merely a sham or a shield or that the sole shareholder reaches into the corporation for payment of personal expenses, which would have been income to him. The Court sees no reason to disregard the corporate entity.

The child support award was calculated based on an income of \$59,800, Father's total income for 1995. The trial court apparently did not consider Father's bonus history in its calculations, nor did it indicate a reason for declining to deviate upward on the child support in light of the less-than-standard overnight visitation exercised by Father. From this decision, Mother now appeals.

On appeal, Mother argues that the trial court erred in failing to consider the retained earnings of Father's closely-held corporation, Father's entire compensation package, and his bonus compensation in his total income figure. Mother also maintains that the trial court erred by failing to deviate upward from the child support guidelines because Father exercises less-than-standard visitation rights. Lastly, Mother seeks an award of attorney's fees and the costs of this appeal.

We review this case in accordance with Rule 13(d) Tenn. R.App. P., which mandates a *de novo* review accompanied by a presumption of correctness in the trial court's findings of fact, unless the evidence preponderates otherwise. *Hass v. Knighton*, 676 S.W.2d 554, 555 (Tenn. App. 1984); *Lancaster v. Lancaster*, 671 S.W.2d 501, 502 (Tenn. App. 1984). There is no presumption of correctness in the trial court's conclusion of law. *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995).

Mother argues first that the trial court erred in failing to consider the retained earnings of Father's corporation in determining the appropriate amount of child support. Mother emphasizes the undisputed testimony at trial that retaining earnings in the corporation benefits the sole shareholder and reduces his tax burden. Mother argues that Father was in sole control of whether corporate earnings were retained or paid to Father as profits.

In effect, Mother seeks to "pierce the corporate veil" and allocate the corporation's income to Father. The separate identity of a corporation may be disregarded upon a showing that it is "a sham, or dummy or where necessary to accomplish justice." *Muroll Gesellschaft M.B.H. v. Tennessee Tape, Inc.*, 908 S.W.2d 211, 213 (Tenn. App. 1995). The matter is "particularly within the province of the Trial Court." *Id.* (citing *Electric Power Bd. of Chattanooga v. St. Joseph Valley Structural Steel Corp.*, 691 S.W.2d 522 (Tenn. 1985)).

The decision must turn, in part, on the trial court's perception of the witnesses' candor and truthfulness. In *Weaver v. Nelms*, 750 S.W.2d 158 (Tenn. App. 1987), the court stated:

The weight, faith, and credit to be given to any witness' testimony lies in the first instance with the trier of fact who has the opportunity to observe the manner and demeanor of the witnesses as they testify. The credibility accorded by the trier of fact will be given great weight by the appellate court.

Id. at 160 (citations omitted). In this case, the trial court observed the testimony of Mother, Father and their accountants and assessed their credibility. Father's accountant, May, testified that the amount of earnings retained by the corporation was consistent with prudent business practice and that she had never been asked to manipulate the finances to decrease Father's income. Even Mother's accountant acknowledged that he found nothing "improper or unusual" about the corporation's finances and that its cash reserves were not "excessive." Viewing the record as a whole, we do not find that the evidence preponderates against the trial court's decision not to include

the corporation's retained earnings in the determination of Father's income. *See Koch v. Koch*, 874 S.W.2d 571, 575 (Tenn. App. 1993).

Mother also argues that the trial court erred in failing to consider Father's bonus history in its determination of the amount of child support. She contends that the testimony established that Father controls the size of his yearly bonus and that he dramatically reduced the amount of his 1995 bonus from that of previous years in order to lower his income, hoping to minimize the amount of child support he might have to pay. She maintains that the corporate minutes establish that the 1995 bonus was determined after she filed her petition to increase child support. Consequently, she argues that the trial court should have at least considered Father's bonus history in its calculations.

Mother also points to the child support guidelines promulgated by the Tennessee Department of Human Services, pursuant to Tennessee Code Annotated § 36-5-101(e)(2) (1996 and 1997 Supp.). Under the guidelines, child support obligations should normally be based on a flat percentage of the obligor's net income. Tenn. Comp. R. & Regs., ch. 1240-2-4-.03(2) (1994). Net income is calculated by subtracting appropriate deductions from gross income. Tenn. Comp. R. & Regs., ch. 1240-2-4-.03(4) (1994). "Gross income" is defined as "all income from any source," including salaries, bonuses, dividends, interest, and annuities. The guidelines specify that if bonuses, commissions, overtime pay, dividends, etc., are variable, the amounts should be averaged and added to the obligor's fixed salary. Tenn. Comp. R. & Regs., ch. 1240-2-4-.03(3)(a) & (b) (1994). These guidelines are applied as a rebuttable presumption in child support cases. If the trial court determines that the evidence is sufficient to rebut this presumption, it must make a "written or specific" finding of the amount that would be required under the guidelines and the reasons why application of the child support guidelines would be unjust or inappropriate in this particular case. Tenn. Comp. R. & Regs., ch. 1240-2-4-.02(7) (1994).

In this case, there is some evidence in the record from which the trial court could have concluded that Father's bonus history should not be considered. For example, Father testified that the higher bonus in 1993 was a "one time pay back" for the "initial investment." However, the trial court failed to state in the record its reasons for declining to consider Father's bonus history in its calculation of child support. As noted above, this is required in the guidelines. *See* Tenn. Comp. R. & Regs., ch. 1240-2-4-.03(3)(a) & (b) (1994); ch. 1240-2-4-.02(7) (1994), discussed *supra*. Consequently, on this issue, the decision of the trial court must be reversed and remanded for the

trial court to either include Father's bonus history in its calculation of the award of child support or state in the record the amount that would be required under the guidelines and its reasons for determining that inclusion of Father's bonus history would be unjust or inappropriate.

Mother next asserts that the trial court erred in failing to deviate upward from the child support guidelines, based on the less-than-standard overnight visitation exercised by Father. Father lives and works in Fort Worth, Texas. He testified that, although he spends as much time with his daughters as he can, it is financially and physically impractical for the children to spend the standard visitation of at least eighty nights a year with him. The child support guidelines provide a minimum base for determining child support obligations, and apply to situations where children are living primarily with one parent but stay overnight with the other parent at least as often as every other weekend from Friday to Sunday, two weeks in the summer and two weeks during holidays throughout the year. Tenn. Comp. R. & Regs. tit. 10, ch. 1240-2-4-.02(6) & (7) (1994). Here, Father testified that, at most, he has twenty-four overnight visitations with the children a year.

In *Dwight v. Dwight*, 936 S.W.2d 945 (Tenn. App. 1996), this court discussed the issue of less-than-standard visitation:

“Whatever the reasons may be that Husband does not see his children for significant periods, the fact remains that the children need to be supported. If the children are constantly in the care of Wife, the amount of child support Wife receives should reflect the true state of affairs.”

Id. at 949 (citing Tenn. Comp. R. & Regs. tit. 10, ch. 1240-2-4-.04 (1)(b)). The regulations provide that if the children do not stay overnight with the non-custodial parent for the average visitation period, the trial court “shall” increase the award. Tenn. Comp. R. & Regs., ch. 1240-2-4-.04(1)(b)(1994)). As with consideration of Father's bonus history, this is a rebuttable presumption. If the trial court finds the evidence sufficient to rebut the presumption, it must make a written finding of the amount that would be required under the guidelines and the reasons why application of the guidelines would be unjust or inappropriate. Tenn. Comp. R. & Regs., ch.1240-2-4-.02(7)(1994).

In this case, there is evidence in the record which could support a conclusion that a deviation upward is inappropriate in this case. For example, both parties acknowledge that Father pays all of the children's transportation costs for visitation. However, in light of the trial court's failure to make the required written findings, we must reverse the trial court's decision on this issue. The cause is remanded for the trial court to either deviate upward in setting the amount of child support, in view

of Father's less-than-standard visitation, or to make a written finding of the amount that would have been required under the guidelines and the reasons why application of the guidelines in this case would be unjust or inappropriate.

Finally, Mother seeks her attorney's fees for this appeal. The decision to award attorney's fees in a divorce action is in the discretion of the court. *Fox v. Fox*, 657 S.W.2d 747, 749 (Tenn. 1983); *Threadgill v. Threadgill*, 740 S.W.2d 419, 426 (Tenn. App. 1987); *Seal v. Seal*, 802 S.W.2d 617, 623 (Tenn. App. 1990). If the wife has adequate funds for her needs as well as the payment of her attorney's needs, an award of attorney's fees is not mandatory. *Franklin v. Franklin*, 746 S.W.2d 715, 719 (Tenn. App. 1987). Tennessee Code Annotated § 36-5-103(c) (1996) allows a custodial spouse to recover legal fees incurred in enforcing or pursuing an action for alimony and/or child support. In this case, on some issues the decision of the trial court has been affirmed, and in other respects it has been reversed. Mother has pointed to nothing which indicates that she is unable to pay her attorney's fees. Under the circumstances, Mother's request for attorney's fees is denied.

In sum, the trial court's decision not to consider Father's corporation's retained earnings in calculating child support is affirmed. The trial court's apparent decision not to consider Father's bonus history is reversed. The trial court's decision not to deviate upward in light of Father's less-than-standard visitation is also reversed. On the issues regarding the bonus history and the visitation, the cause is remanded to the trial court for either an award in accordance with the guidelines or, in the alternative, a finding of the amount that would be awarded under the guidelines and a statement of the reasons why application of the guidelines would be inappropriate or unjust. Mother's request for attorney's fees on appeal is denied.

The decision of the trial court is affirmed in part, reversed in part and remanded for proceedings consistent with this Opinion. Costs are taxed equally to Appellant and Appellee, for

which execution may issue if necessary.

HOLLY KIRBY LILLARD, J.

CONCUR:

DAVID R. FARMER, J.

SAMUEL L. LEWIS, J.