

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
April 2, 2001 Session

**STATE OF TENNESSEE, ET AL. v. MARY FREEMAN**

**Appeal from the Juvenile Court for Dickson County  
No. 11-98-529-D A. Andrew Jackson, Judge**

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**No. M2000-02750-COA-R3-JV - Filed May 4, 2001**

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The Juvenile Court of Dickson County ordered the adoptive mother of a child the court had placed in State custody to refund the special needs adoption subsidy she receives from the State. The mother insists on appeal that the subsidy should have been accounted for by using it as part of her gross income in calculating her child support obligation under the support guidelines. We affirm the order of the juvenile court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court  
Affirmed and Remanded**

BEN H. CANTRELL, P.J., M.S., delivered the opinion of the court, in which HOUSTON M. GODDARD and WILLIAM B. CAIN, JJ., joined.

Jennifer Davis Roberts, Dickson, Tennessee, for the appellant, Mary Freeman.

Paul G. Summers, Attorney General & Reporter, Kim Beals, Assistant Attorney General, for the appellee, State of Tennessee, Department of Children's Services, ex rel. R.P.

**OPINION**

**I.**

From the meager record in this case we deduce that the appellant and her husband adopted a child with special needs. The appellant now receives a \$549.00 monthly subsidy from the State for the child's support. At some point the Juvenile Court of Dickson County placed the child in the custody of the Tennessee Department of Children's Services. On December 9, 1998, the juvenile court ordered the parents to pay \$35.70 each to the State for the temporary support of the child. The court set a hearing for December 30, 1998, to fix a permanent support amount. After a hearing on that date the court set Ms. Freeman's support payment at \$70.00 each week, plus a 5% statutory fee.

The next entry in the record is an August 23, 2000, order entered after a hearing on July 12. This order continued the support payments at \$73.50 per week and also ordered Ms. Freeman to repay the \$549.00 per month subsidy by making weekly payments of \$126.71 (including the 5% clerk's fee). In addition the court ordered Ms. Freeman to repay \$3,843 in subsidy payments she had collected since December of 1999. The \$3,843 repayment could be paid in weekly installments also, and the installments would not be due until the child was released from State custody. The court also set the matter for further review on August 30, 2000.

On August 30 Ms. Freeman filed a motion asking the court to reconsider its prior order and consider the State subsidy as income and apply the child support guidelines to calculate the amount of her support payments. After the hearing on August 30, the trial judge entered an order finding that the subsidy was a reason to deviate upward from the guideline amount. The court accordingly reiterated its prior order but recited that its terms were in accordance with the guidelines. As it now stands Ms. Freeman is required to repay the subsidy in weekly installments and will have to repay the arrearage by making weekly installment payments when the child is released from State custody.

## II.

Ms. Freeman argues that Tenn. Code Ann. § 37-1-151(b)(4)(A) requires that her support payments be set in accordance with the child support guidelines. We agree, but we think the guidelines also authorize the court to take the action it took in this case. For clarity, we reproduce Tenn. Code Ann. § 37-1-151(b)(4)(A) in its entirety:

At any hearing at which support is ordered, the court shall set child support as the evidence demonstrates is appropriate and in accordance with the child support guidelines established pursuant to § 36-5-101(e), and the court shall order the parents to pay the premium for health insurance for the child if the insurance is available at a reasonable cost, or the court shall order the parents to pay a reasonable portion of the child's medical costs. The order for support and for medical care shall be retroactive to the date that custody of the child was placed with the state by any order of the court.

The guidelines set a support level based on the obligor parent's income, but the guidelines allow the court to deviate upward for any of the following reasons:

- (b) If the child(ren) is/are not staying overnight with the obligor for the average visitation period of every other weekend from Friday evening to Sunday evening, two weeks during the summer and two weeks during holiday periods throughout the year, then an amount shall be added to the percentage calculated in the above rule to compensate the obligee 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 obligor [reference

1240-2-4.02(6)]. The court may consider a downward deviation from the guidelines if the obligor demonstrates that he/she is consistently providing more care and supervision for the children than contemplated in the rule.

- (c) Extraordinary educational expenses and extraordinary medical expenses not covered by insurance shall be added to the percentage calculated in the above rule.
- (d) Any other extraordinary expenses for the child(ren) may justify increasing the support calculated in the above rule if the court finds that equity requires it.

Tenn. Comp. R. & Regs. 1240-2-4-.04(1)(b),(c) & (d).

As the juvenile judge said in the hearing on August 30, 2000:

[I]t just doesn't make good sense that the State would pay an adoption subsidy to someone to take care of a special needs child and then while the child's in custody of the state and the state's providing all the services that that person continue to get that subsidy for those purposes. It's just not equitable.

We think the guidelines give the trial court the power to order Ms. Freeman to reimburse the State for the special needs subsidy it pays to her while the child is in state custody.<sup>1</sup>

### III.

Ms. Freeman also asserts that in August of 2000 when the court ordered her to pay the arrearage accrued from December of 1999, the court retroactively modified a child support order in violation of Tenn. Code Ann. § 36-5-101(a)(5). We think, however, that the juvenile court's order does not fall under the prohibition contained in Tenn. Code Ann. § 36-5-101(a)(5), because as we have noted, the provision requiring parents of children placed in state custody to pay child support is found in Tenn. Code Ann. § 37-1-151, a part of the Juvenile Code. Tenn. Code Ann. § 36-5-101 governs spousal and child support in divorce cases. Subsection (b)(4)(A) of § 37-1-151 refers only to the child support guidelines established pursuant to subsection (e) of Tenn. Code Ann. § 36-5-101. It does not purport to incorporate any of that Code section. Therefore, the prohibition found in Tenn. Code Ann. § 36-5-101(a)(5) does not apply to this case. Since Tenn. Code Ann. § 37-1-151 does refer to the guidelines, we have looked for a similar prohibition therein. And we do not find any provision in the guidelines similar to the prohibition against retroactive modification contained in Tenn. Code Ann. § 36-5-101(a)(5). Therefore, we think the juvenile court had the power to order a parent to reimburse the state for the special needs subsidy she had received while the child was in state custody, and which had accrued while she was paying support under a court order.

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<sup>1</sup>One may ask, as we did at oral argument, why the State continues to pay the subsidy. For reasons that are not entirely clear involving the federal/state relationship, the Department of Children's Services is not comfortable unilaterally terminating the benefit.

The appellant has also argued that the proceedings below violated her due process rights. We do not see where that issue was raised in the juvenile court, and since this court's jurisdiction is appellate only, Tenn. Code Ann. § 16-4-108(a)(1), it cannot be raised here for the first time. *Irvin v. Binkley*, 577 S.W.2d 677, 679 (Tenn. Ct. App. 1978).

Ms. Freeman also argued that the juvenile court's order makes her repay the subsidy plus 5% as the clerk's fee. We have reviewed the figures in the court's order and find that they do not penalize Ms. Freeman.

The judgment of the trial court is affirmed and the cause remanded to the Juvenile Court of Dickson County for an further proceedings necessary. Tax the costs on appeal to the appellant, Mary Freeman.

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BEN H. CANTRELL, PRESIDING JUDGE, M.S.