

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

**FILED**  
January 11, 1996  
Cecil Crowson, Jr.  
Appellate Court Clerk

PATRICIA ANNETTE LIPPS HANNAH )

Plaintiff - Appellant )

v. )

GARY LYNN LIPPS )

Defendant - Appellee )

BRADLEY COUNTY )  
03A01-9504-CV-00114 )

HON. EARLE G. MURPHY,  
JUDGE )

VACATED AND REMANDED )

B. PRINCE MILLER, JR., OF CLEVELAND FOR APPELLANT

NO BRIEF FILED BY THE APPELLEE

O P I N I O N

Goddard, P. J.

In this post-divorce proceeding, Patricia Annette Hannah, formerly Lipps, appeals dismissal of her petition seeking an increase in child support. Although she raises three issues on appeal, we find the first one to be dispositive:

1. THAT THE TRIAL COURT ERRED IN DENYING THE PETITION TO INCREASE CHILD SUPPORT TO AN AMOUNT SET BY THE

TENNESSEE UNIFORM CHILD SUPPORT GUIDELINES PURSUANT TO  
T. C. A. §36-5-101(e).

The final judgment of divorce, which was entered November 29, 1990, provided, in accordance with the agreement of the parties, that Mr. Lipps would pay the sum of \$40 per week, plus the Clerk's commission, as child support.

The petition giving rise to the judgment now on appeal seeking an increase in child support was filed on August 1, 1994, and after an evidentiary hearing the Trial Court denied the petition.

At the time of the hearing both parties had remarried. Neither spouse was employed. The parties had two children by their marriage: a daughter age 13 and a son age 10. At the time of the original decree the husband was earning \$9.72 per hour, and \$10.84 at the time of the hearing on the petition to increase child support.

Mr. Lipps is paid weekly and a current check stub was made an exhibit. (See appendix.) This stub showed his gross earnings to be \$552.48 per week, which included an item known as flexdollars of \$117.29. This is paid to an employee in partial reimbursement for a \$124.66 insurance premium which is deducted from his wages and exceeds his reimbursement by \$7.30.

In addition to this deduction there is deducted (1) \$62.90 for income and FICA taxes, (2) \$142, which represents \$100 on payments of Mr. Lipps' debts through a Chapter 13 proceeding in the Bankruptcy Court and \$42 for child support and clerk's fee previously ordered, and (3) two 401K deductions of \$42.88 and \$26.01 which, according to Mr. Lipps, was for "share purchase investment." Thus, his net take-home pay was \$150.46 per week.

According to the guidelines, which only contemplates income tax and FICA deductions, Mr. Lipps, whose monthly salary was \$1878.93, should be paying \$484.12 monthly, or \$111.72 weekly.

The Trial Court was of the opinion that it had no authority to modify the \$40 per week child support previously ordered and, unless Ms. Hannah could show an increase of as much as 15 percent in Mr. Lipps' earnings,<sup>1</sup> she could not prevail. In this we believe the Trial Court was mistaken. Our Supreme Court held, in Jones v. Jones, 870 S.W2d 281 (Tenn.1994), that the Child Support Guidelines are applicable even though the original judgment was entered prior to the effective date of the guidelines. It would seem to follow that this Rule would be

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<sup>1</sup> The Child Support Guidelines were amended by Chapter 1240-2-4-.02-(3) to provide a significant variance shall be "at least 15% and \$15 per month" if the current support is \$100 or greater per month, and at least \$15.00 if the current support is less than \$100 per month. The Trial Court mistakenly applied the percentage to the increase in the earnings of Mr. Lipps rather than the child support previously ordered which in this case did not meet the guidelines then in effect. We also point out that it is arguable, although not determinative of this appeal, that the amended guidelines do not apply given the fact that they became effective on December 14, 1994, and the judgment was pronounced from the bench on November 22, 1994, and the order which was dated December 16 was not entered until December 21.

equally true where the original judgment was entered after the effective date of the guidelines. Certainly it could not be contended that \$20 per week for each child is sufficient support. Indeed, Ms. Hannah testified, and we think her testimony is accurate, that \$20 per week is hardly sufficient to purchase their food.

Even though the amount originally awarded is insufficient, we recognize that with a net income of \$150 it would be impossible for Mr. Lipps to pay the guidelines amount. However, upon eliminating deductions for his retirement and the purchase of what we assume to be corporate stock and obtaining some relief in the bankruptcy court as to the amount he is paying to retire prior indebtednesses, we believe that Mr. Lipps would be in a position to pay a sum more nearly meeting the children's needs. Both children are spending considerable time with Mr. Lipps, which is an appropriate reason to deviate from the Child Support Guidelines. Gray v. Gray, 885 S.W.2d 353 (Tenn.App.1994). In light of this and the whole record we conclude that the sum of \$80 per week, retroactive to December 21, 1994, the date the order appealed from was entered below, would be an appropriate increase in this case.

One other matter needs to be addressed. Ms. Hannah insists she is entitled to attorney fees incident to the prosecution of this appeal. Given Mr. Lipps' financial circumstances and the fact that under our disposition of this

appeal he will be burdened with considerable arrears in child support, we--in the exercise of our discretion--decline to make such an award.

For the foregoing reasons the judgment of the Trial Court is vacated and the cause remanded for an entry of a judgment consistent with our determination. Costs of appeal are adjudged against M. Lipps.

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Houston M Goddard, P. J.

CONCUR:

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Herschel P. Franks, J.

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Don T. McMurray, J.