IN THE COURT OF APPEALS OF TENNESSEE, WESTERN SECTION AT JACKSON

MARGARET SCHINDLER HAAS,	)	Shelby County Circuit Court
	)	No. 141090-IV R.D.
Plaintiff/Appellant.	)	
VS.	)	C. A. NO. 02A01-9604-CV-00073
MICHAEL LEE HAAS,	)	
Defendant/Appellee.	)	

From the Circuit Court of Shelby County at Memphis.
Honorable James E. Swearengen, Judge

FILED

April 22, 1997

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Appellate Court Clerk

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OPINION FILED:

REVERSED AND REMANDED

FARMER, J.

CRAWFORD, P.J., W.S. : (Concurs)
LILLARD, J. : (Concurs)

Appellant, Margaret Schindler Haas (Mother), appeals from the final judgment of the trial court reducing the monthly child support obligation of the appellee, Michael Lee Haas (Father). For reasons hereinafter set forth, we reverse and remand.

Mother and Father were divorced by final decree entered May 12, 1993. The decree incorporates by reference a marital dissolution agreement (MDA) executed by the parties pertaining, in part, to the care and custody of their two minor children. The decree provides that the MDA "makes adequate and sufficient provision . . . for the care, custody and control of the . . . children." Pursuant to the MDA, the parties share joint custody of the children, but Mother is the primary custodial parent. The MDA obligates Father to pay $2,000 per month as child support based upon his "current annual income of approximately $75,000." Father is further obligated to provide health insurance for the children and pay all their uncovered medical expenses.[1]

The record does not indicate that either party appealed from the final divorce decree. In March 1994, however, Father filed a "Petition for Relief from Final Decree of Absolute Divorce" wherein he asserts, ***inter alia***, that a reduction in the amount of child support is warranted. Father contends that at the time of the divorce, he, unlike Mother, was not represented by counsel. He asserts that he only agreed to pay the $2,000 per month in child support after being informed by Mother that he was responsible for payment of child support in accordance with the child support guidelines which set the amount of support at $2,000 per month for someone with a monthly gross income of $6,250. Father acknowledges that at the time of the divorce, his annual gross income was $75,000, but contends that it was only after hiring his own attorney in January 1994 that he discovered that the guideline child support for a monthly gross income of $6,250 was approximately $1,400 and not $2,000 per month. Father argues that he is entitled to relief from the judgment

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[1]The agreement was amended to comply with the provisions of T.C.A. § 36-5-101(h). That section states:

> Nothing in this section shall be construed to prevent the affirmation, ratification and incorporation in a decree of an agreement between the parties as to support and maintenance of a party or as to child support. In any such agreement, the parties must affirmatively acknowledge that no action by the parties will be effective to reduce child support after the due date of each payment, and that they understand that court approval must be obtained before child support can be reduced, unless such payments are automatically reduced or terminated under the terms of the agreement.

pursuant to Rule 60.02 T.R.C.P., in part, "due to the mistake, inadvertence and misrepresentation of the correct amount of guideline child support for one having an income of $75,000 per year, . . ." Father also contends that a material change in circumstances exists to warrant a decrease in the amount of child support awarded.

Father's petition requests that the matter be referred to the divorce referee for hearing and that the decree be "modified and corrected by adjusting the amount of child support . . . in accordance with the child support guidelines presently in effect." The trial judge entered an Order of Reference, referring the matter to the divorce referee. Mother moved to strike the Order which she asserted was obtained ***ex parte*** and, moreover, that a Rule 60.02 motion must be heard by the trial judge. The trial court then amended its order to direct the referee to resolve only certain issues, including whether or not there was a mistake in the calculation of the appropriate amount of child support and/or whether a material change in circumstances existed to warrant a modification of child support. The divorce referee denied Father's petition.

Father then filed a "Motion Appealing Referee's Ruling" and, in February 1995, an "Amended Petition for Relief from Final Decree of Absolute Divorce." In the latter, Father asserts, ***inter alia***, that a "significant variance" exists between the amount of child support that he is currently paying and that which he should pay under the guidelines based upon his income.

After a hearing, the trial judge entered a judgment finding:

> That there exists a significant variance between the Child Support Guideline amount and the current Support Order, said variance greater than fifteen percent as provided in T.C.A. § 36-5-101; this Court finds that pursuant to Exhibit "1" in this hearing, Defendant's wages for 1994 amounted to $74,379.58 which amounts to $6,198.30 each month; pursuant to the Tennessee Department of Human Services Child Support Guidelines, Defendant is to pay to Plaintiff the sum of $1,394.00 each month as child support.

Mother frames the issue on appeal as follows:

> Did the trial court err in reducing Mr. Haas' child support obligation by more than $600.00 per month where the parties had

> previously reached an agreement as to the proper amount of child support under Tennessee's Child Support Guidelines, where the trial court approved such an agreement and incorporated it into the Final Decree of Absolute Divorce, and where the underlying reasons and facts giving rise to the ordered child support have not changed?

In ruling from the bench, the trial court commented as follows:

> On the issue of child support, these parties entered into an agreement. But as I read this code section, ...
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> . . . it does not require those changes of circumstances where child support is concerned, and I'll just read it for the record. . . .
>
> . . . .
>
> In cases involving child support upon advocation of either party, the Court shall decree an increase or decrease of such an allowance when there is found to be a significant variance as defined by the child support guidelines established by subsection --
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> The language seems to be pretty strong in that child support area. And I believe that under this provision, the Court is required to look into the circumstances and make the adjustment where the variance is warranted.

The statute referenced by the trial court is T.C.A. § 36-5-101 which pertains, in part, to the modification of decrees for the support of children. It reads, as here pertinent:

> (a)(1) Whether the marriage is dissolved absolutely, or a perpetual or temporary separation is decreed, the court may make an order and decree for the suitable support and maintenance of either spouse by the other spouse, or out of either spouse's property, and of the children, or any of them, by either spouse or out of such spouse's property, according to the nature of the case and the circumstances of the parties, the order or decree to remain in the court's control; . . . 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),[2] 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.[3]

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[2]Under the child support guidelines, a variance between the guideline amount and the current support order (if the support award is $100 or greater per month) of "at least 15%" is "significant." Tenn. Comp. R. & Regs. title 1240, ch. 2-4-.02(3).

[3]Appellant correctly points out that the guidelines also provide that the court, upon petition, shall increase or decrease the award amount in the event a significant variance exists, in

A literal reading of § 36-5-101(a)(1) finds that a court, upon petition, is required to modify a child support order which significantly varies from the guideline amount "***unless*** the variance has resulted from a previously court-ordered deviation from the guidelines and the circumstances which caused the deviation have not changed." (Emphasis added.) It is Father's position that the exception noted in the statute does not apply to the present case.[4] He reasons that in the initial divorce proceedings, the trial court did not enter written findings of fact setting forth the justifications for deviation as required under § 36-5-101(e)(1) and the child support guidelines. Father submits that "[t]here has been no evidence that the court intended to deviate from the guidelines or was acting with knowledge that the income figure as recited in the [MDA] was [his] gross pay instead of his net."

Based upon its comment from the bench, it appears that the trial court did not fully consider whether the exception applies to this case. We, however, find the record to support its application here. The parties do not dispute that the amount of child support Father was ordered to pay pursuant to the divorce decree exceeds the minimum requirements set forth under the guidelines. The guidelines establish only the minimum requirements for support by a noncustodial parent. Chapter 1240-2-4-.02(5) expressly provides that "[t]hese guidelines are a minimum base for determining child support obligations." It is well established that parties may provide for child support by agreement. T.C.A. § 36-5-101(h); ***Penland v. Penland***, 521 S.W.2d 222 (Tenn. 1975); ***Blackburn v. Blackburn***, 526 S.W.2d 463 (Tenn. 1975). In this regard, nothing prevents the parents from agreeing to a support amount in excess of the required minimum. However, to the extent the agreement exceeds the legal duty of child support over which the court retains the power to modify, it is not merged into the decree and is enforceable as any other contract. W. Walton Garrett, ***Tenn. Divorce, Alimony and Child Custody*** § 14-6 (1996). Thus, any voluntarily assumed obligation exceeding the minimum support required is controlled exclusively by the parties' agreement. ***Boutin***

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accordance with the guidelines, "unless the significant variance occurs due to a previous decision of the court to deviate from the guidelines and the circumstances which caused the deviation have not changed."

[4]We note that the guidelines provide that such variance also does not justify modification where a downward modification is sought and the obligor is willfully and voluntarily unemployed or underemployed. Tenn. Comp. R. & Regs. title 1240, ch 2-4-.02(3). This opinion does not address this exception.

v. Boutin, No. 01A01-9601-CH-00014, slip op. at 4-5 (Tenn. App. December 4, 1996). Here, the agreement provides, in accordance with § 36-5-101(h), that the child support can only be reduced upon court approval.

As noted, any modification by the trial court regarding orders of child support is pursuant to § 36-5-101(a)(1). In this case, we have a previously court-ordered deviation resulting directly from the agreement reached by the parties obligating Father to an amount in excess of the guidelines minimum.[5] We do not find the record to set forth any change in circumstances since entry of the divorce decree. The record does not establish that Father's annual earnings have materially changed.[6] We therefore conclude that the exception noted in § 36-5-101 applies to this case and that no reduction in child support is warranted thereunder.

Father, however, also argues that he is entitled to relief from the child support order pursuant to Rule 60.02 T.R.C.P. due to an alleged error or misrepresentation in the parties' initial calculation of the child support. The trial court made no express ruling thereon. It is therefore necessary to remand this cause to the trial court for a determination of whether Father should be granted relief from the decree in regard to his child support obligation pursuant to Rule 60.02. Additional evidence on the issue may be taken if deemed necessary by the trial court. If it is determined that Father is not entitled to relief under the Rule, the original amount of child support awarded shall be reinstated by the trial court.

The judgment of the trial court is reversed and this cause remanded for further

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[5]Chapter 1240-2-4-.02(4) provides:

> Stipulations presented to the court shall be reviewed by the court before approval. No hearing shall be required. However, the court shall use the guidelines in reviewing the adequacy of child support orders negotiated by the parties. The court shall require that stipulations in which the guidelines are not met must provide a justification for the deviation which takes into consideration the best interest of the child and must state the amount which would have been required under the guidelines.

Such justification for deviation does not apply here as the guidelines minimum was more than net.

[6]Father testified that his annual earnings for 1994 were $74,379. His base salary for the year was $62,876 and his bonus, $11,861. For the year 1995, he "anticipates" an increase of approximately $2,000 in his base pay and a decrease in his bonus.

proceedings consistent with this opinion. Costs are assessed against the appellee, for which execution may issue if necessary.

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FARMER, J.

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CRAWFORD, P.J., W.S. (Concurs)

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LILLARD, J. (Concurs)