

SHARON ANNE SMITH,)
)
 Plaintiff/Appellant,)
)
 VS.)
)
 ALAN WAYNE SMITH,)
)
 Defendant/Appellee.)

Appeal No.
01-A-01-9705-CH-00216

Williamson Chancery
No. 22128

FILED

October 29, 1997

Cecil W. Crowson
Appellate Court Clerk

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE CHANCERY COURT OF WILLIAMSON COUNTY
AT FRANKLIN, TENNESSEE

THE HONORABLE HENRY DENMARK BELL, JUDGE

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AFFIRMED IN PART; MODIFIED IN PART;
AND REMANDED

BEN H. CANTRELL, JUDGE

CONCUR:
TODD, P.J., M.S.
KOCH, J.

OPINION

Two years after divorce, the wife filed a petition for an increase in child support. The husband responded with a petition to reduce alimony. After hearing, the trial court did both. We affirm the reduction in alimony, but we agree with the wife that in light of the increase in the husband's income, the amount of additional child support ordered by the trial court was not sufficient to comply with the guidelines.

I.

On August 4, 1994, the trial court granted Sharon Ann Smith and Alan Wayne Smith an absolute divorce, pursuant to Tenn. Code Ann. § 36-4-129. The final decree divided the marital property and gave the wife custody of the parties' two minor children. The court ordered the husband to pay \$1,700 per month alimony for sixty months, to be followed by permanent alimony of \$900 per month. Child support was set in accordance with the guidelines, at \$1,995 per month, based upon the husband's income of \$108,000 per year.

On July 19, 1996, Sharon Smith filed a Petition to Modify Child Support, alleging that there had been a substantial and material change of circumstances, such as would warrant an increase in Mr. Smith's child support obligation. On November 6, 1996, Mr. Smith answered and counter-petitioned, asking the court to reduce his alimony obligation.

The uncontradicted proof showed that the husband's salary as a Vice-President of Comdata Corporation had increased since 1994, and stood at \$113,000 per year at the time of hearing. It was also uncontradicted that Mr. Smith had received additional compensation from his employer between the years 1994 and 1996, in the form of bonuses and commissions. Mr. Smith also accumulated certain stock options, which he exercised in 1995, realizing a capital gain of \$221,180 from the sale of Comdata stock.

The proof also showed that the wife, who had no income of her own at the time of the divorce, was now earning about \$400 per month babysitting, and that she had enrolled the parties' sixteen year old son, Bradley Smith, in public school, rather than re-enrolling him in Brentwood Academy, which he had previously attended.

The trial court ordered that the husband henceforth pay \$2,086 per month in child support, based on his annual salary of \$113,000, and that he additionally pay 32% of any future bonus or commission as child support. The court also found substantial and material changes of circumstances to warrant an immediate decrease in alimony to \$1,200 per month. The court noted the wife's babysitting income, and observed that by not enrolling her son in Brentwood Academy, she had effectively reduced her monthly expenses by \$500. This appeal followed.

II. Child Support

By law, the child support guidelines mandated by our Legislature and promulgated by the Department of Human Services create a rebuttable presumption that the amount of child support determined by reference to the guidelines is the correct amount to be awarded, unless the court makes a written and specific finding that the guidelines would be unjust or inappropriate in a particular case. Tenn. Code Ann. § 36-5-101(e). Tenn. Rules & Regs. 1240-2-4.

Child support under the guidelines is based upon a flat percentage of the obligor's net income. Net income may be calculated by subtracting FICA tax and withholding tax from the obligor's gross income, but in most cases it may also be derived directly from tables prepared by the Department of Human Services expressly for this purpose. Gross income is very broadly defined in the guidelines under Tenn. Rules & Regs. 1240-2-4-.03 (3)

(a) Gross income shall include all income from any source (before taxes and other deductions) whether earned or unearned, and includes but is not limited to, the following: wages, salaries, commissions, bonuses, overtime payments, dividends, severance pay, pensions, interest, trust income, annuities, capital gains . . . 'In kind' remuneration must also be imputed as income, i.e. fringe benefits such as a company car. . . .

(b) Variable income such as commissions, bonuses, overtime pay, dividends, etc. should be averaged and added to the obligor's fixed salary.

In the present case, Mr. Smith's 1994 gross income from Comdata, including bonuses, commissions, car allowance, country club dues and other benefits added up to \$144,027. His 1995 gross income, which included revenue derived from the exercise of his stock options, was \$363,449. His 1996 gross income amounted to \$140,140.

The trial court dealt with the annual variability in Mr. Smith's bonuses and commissions by ordering him to provide the obligee with a copy of his bonus or commission paystub, together with 32% of the net proceeds as additional child support. The trial court did not take Mr. Smith's 1995 capital gain of \$221,180 into account in any way.

In the unpublished case of *Lovan v. Lovan*, Appeal No. 01-A-01-9607-CV-00317 (filed in Nashville, January 17, 1997), the trial court fashioned a nearly identical solution for dealing with a situation where an obligor's income varied considerably from year to year. We reviewed that action, and held as follows:

"We believe that the trial court exceeded its authority in ordering an automatic adjustment in child support based upon a percentage of the husband's future income as determined by his income tax return. While the child support guidelines create a rebuttable presumption as to the correct amount of child support, based upon the obligor's income, Tenn. Code Ann. § 36-5-101(a)(2)(A) only authorizes the courts to provide for the future support of a spouse or of the children ' . . . by fixing some *definite amount* or amounts to be paid in monthly, semimonthly or weekly installments, or otherwise, as circumstances may warrant . . . ' (emphasis added).

“Such a definite obligation provides the dependent children with a predictable amount of support, and enables the obligor to shoulder a known burden. If the obligor’s income should increase or decrease substantially, then either party may apply to the court for a modification of the child support obligation. In view of the existence of a well-established mechanism for adjustment of child support, the court’s action, although well-intentioned, amounts to an extension of its authority beyond the mandate of the legislature.”

It thus appears to us that in the present case too, the trial court should have averaged the commission and bonus amounts in with Mr. Smith’s salary in order to establish a definite amount of child support.

We also believe that in order to conform to the guidelines, the trial court should have factored Mr. Smith’s 1995 capital gains into his child support obligation. Mr. Smith argues that the exercise of his stock options was a one-time event that does not indicate his future earning capacity. He also claims that he was compelled to sell the stock in order to raise cash to comply with the requirements of the marital property division ordered by the trial court. He alleges that his liquidation of his stock holdings triggered certain unanticipated penalties and taxes, and that as a result, he did not really benefit from the stock options.

It appears to us, however, that even after discounting the taxes, penalties and obligations that Mr. Smith alleges, he still realized a significant increase in disposable income as a result of his exercise of the stock options in question. There is also nothing in the record to suggest that Mr. Smith will not be the beneficiary of additional stock options in the future.

We believe that the guidelines do not permit the trial court to ignore capital gains in calculating child support, and despite a somewhat tentative argument to the contrary by Mr. Smith, we see no reason to characterize his income from the stock sale as anything other than capital gains.

We therefore hold that in calculating a definite monthly amount of child support, the trial court must consider Mr. Smith's 1995 capital gains as well as his commissions, bonuses and salary. Since Mr. Smith apparently accumulated his stock options during the entire period of his employment at Comdata, and not just during the year in which he exercised them, it might be equitable to average his capital gains over that entire period, or to prorate them in some way, rather than just averaging them over the three year period that was used for calculating his average salary, commission and bonus. The trial court may take proof on the process by which the options were acquired, in order to make this determination.

We specifically find the cases of *Eubank v. Eubank*, No. 02A01-9110-CV-00242 (filed in Jackson Oct. 10, 1992) and *Hall v. Hall*, No. 03A01-9701-GS-00030 (filed in Knoxville July 27, 1997) to be inapposite. Both cases apparently involved the sale of assets that had been awarded as marital property in the divorce.

III. Alimony

In reducing alimony by \$500 per month, the trial judge looked back at the final divorce hearing, and found that he had originally granted the wife that amount of additional alimony to help her pay for her son's private school tuition at Brentwood Academy. The judge stated that he was reducing alimony, in view of the fact that the child was now enrolled in public school, and the wife was earning \$400 per month in babysitting income.

Mrs. Smith's attorney argues that the minutes of the court contained no indication that the court's original order on alimony was based in any way on the expenses of private school. He asserts that as a court speaks only through its minutes, the order appealed from is accordingly erroneous. Mr. Smith's attorney points out that the transcript of the 1994 proceedings contained extensive testimony

about Bradley Smith's need for private schooling, and asserts that the court has the right to recall the reasoning behind its ruling.

We believe that both parties would concede that Tenn. Code Ann. § 36-5-101(d), which sets out the factors the court must consider in setting alimony, does not specifically mention special educational needs of the children, and that such needs are addressed in the provisions for deviation from the child support guidelines found in Tenn. Rules & Regs. 12-2-4-.04(1)(c).

However this court has said many times that in setting alimony, the most important factors to consider are the obligee's needs and the obligor's ability to pay. *Loyd v. Loyd*, 860 S.W.2d 409, 412 (Tenn. App. 1993); *Hazard v. Hazard*, 833 S.W.2d 911, 917 (Tenn. App. 1991); *Campanali v. Campanali*, 695 S.W.2d 193, 197 (Tenn. App. 1985); *Lancaster v. Lancaster*, 671 S.W.2d 501, 503 (Tenn. App. 1984).

The amount of an alimony award depends on the circumstances of each case, and is largely within the discretion of the trial court. Such an award will not be reversed on appeal except in cases where the court's discretion has been manifestly abused. *Rains v. Rains*, 58 Tenn. App. 214, 228, 428 S.W.2d 650, 657 (1968); *Houghland v. Houghland*, 844 S.W.2d 619, 621 (Tenn. App. 1993). Since the trial court found that Mrs. Smith's needs have been reduced by a decrease in her expenses and an increase in her income, it acted well within its discretion by ordering a reduction in alimony.

IV. Attorney Fees

Mrs. Smith has asked to be awarded her attorney fees on appeal. Our courts have long ago determined that they are endowed with the authority to award legal expenses in child support cases. *Graham v. Graham*, 140 Tenn. 328, 334-35,

204 S.W. 987, 989 (1918). The recovery of attorney fees in child support and custody matters is also authorized by statute. Tenn. Code Ann. § 36-5-103(c). Such an award is within the sound discretion of the court. *Sherrod v. Wix*, 849 S.W.2d 780, 785 (Tenn. App. 1992); *Seal v. Seal*, 802 S.W.2d 617, 623 (Tenn. App. 1990).

We find that insofar as a substantial portion of the attorney fees Mrs. Smith incurred in this appeal were for the purpose of vindicating her right to collect an appropriate amount of support for the benefit of her children, she is entitled to receive one-half of those attorney fees from her former husband.

V.

The order of the trial court is affirmed in part and altered in part. Remand this cause to the Chancery Court of Williamson County for further proceedings consistent with this opinion. Tax the costs on appeal equally between the appellant and the appellee.

BEN H. CANTRELL, JUDGE

CONCUR:

HENRY F. TODD, PRESIDING JUDGE
MIDDLE SECTION

WILLIAM C. KOCH, JR., JUDGE