

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON FEBRUARY 1999 SESSION

MARGARET ANNE MAYHALL)
BROWN,)

SHELBY CIRCUIT

Plaintiff/Appellee)
00309)

Appeal No. 02A01-9712-CV-

v.)

JOSEPH GARLAND BROWN,)

FILED

March 05, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

APPEAL FROM THE CIRCUIT COURT OF SHELBY COUNTY
AT MEMPHIS
THE HONORABLE JAMES F. RUSSELL, JUDGE

For the Appellant:

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Memphis, TN 38103

For the Appellee:

Warner Hodges, III
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REMANDED

WILLIAM H. INMAN, Senior Judge

CONCUR:

W. FRANK CRAWFORD, JUDGE

DAVID R. FARMER, JUDGE

A divorce decree was entered August 12, 1996. Joint custody of two children was awarded, with Mother having primary custody. Father's support obligation was fixed at \$1,400.00 monthly in accordance with the Guidelines.

On August 28, 1996, Father filed a Motion to Alter or Amend. He sought to clarify custodial time and to set his support obligation consistent with the clarified visitation.

On November 22, 1996, the court entered an order approving a custody agreement and visitation schedule, which provided that the Father, who is the appellant, would exercise custody/visitation approximately 47% of the time.

On March 11, 1997, Father filed a petition to modify the decree by reducing his support obligation to an amount consistent with the Guidelines. This petition was heard by a Referee on August 13, 1997, and denied, because Father's "income was 2-1/2 times that of his wife." The Referee's judgment was affirmed by the trial judge, who ruled that Father had failed to prove a material change of circumstances.

Father appeals. Our review of the findings of fact made by the trial Court is *de novo* upon the record of the trial Court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. TENN. R. APP. P., RULE 13(d); *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26 (Tenn. 1996).

The Guidelines presumptively 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, two weeks in the summer and two weeks during holidays.

In situations where overnight time is divided more equally, a case-by-case determination of support is required.

Father's custodial time is 171 days per year, as contrasted to the presumptive period. Nothing else appearing, he would be entitled to a proportional adjustment. But mother argues that the Father's circumstances never changed at any stage of the proceedings, because at the initial determination of the custody/visitation issue the trial judge awarded the father the "most liberal visitation available." She argues that this award of visitation is at least equatable to the 47% - 53% arrangement, and since it was ordered concurrently with the support obligation of \$1,400.00 monthly, there is no change of circumstances. Entering into the equation was the fact that Father's income is about 2-1/2 times that of the Wife.

Whether a change in material circumstances was shown is dealt with in a hyper-technical manner. The record does not adequately reveal, in our judgment, that the Father's support obligation was determined concurrently with a visitation/custodial schedule of 47 - 53%; to the contrary, we hold that the \$1,400.00 monthly support obligation was determined from the Guidelines, before the precise custody/visitation arrangement was approved and ordered. Hence, the Father's petition to modify in accordance with the Guidelines should have been considered. The judgment, in effect, requires the Father to pay nearly double the amount recommended by the Guidelines, which is not justified by the evidence.¹

The judgment is vacated, and the case is remanded to the trial court for a determination of Father's support obligation based on shared physical custody in accordance herewith. Costs are assessed to the parties equally.

William H. Inman, Senior Judge

¹Reference was repeatedly made to the trial judge and in the briefs that the Father's income was 2.5 times that of Wife. This is generally irrelevant.

CONCUR:

W. Frank Crawford, Judge

David R. Farmer, Judge