IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
October 29, 2007 Session

LISA W. PRUETT v. PAUL A. PRUETT

Appeal from the Circuit Court for Hamilton County
No. 02D407 L. Marie Williams, Judge

No. E2007-00349-COA-R3-CV - FILED JANUARY 22, 2008

Lisa W. Pruett ("Mother") and Paul A. Pruett ("Father") were divorced in 2003. The following year, Mother filed a petition to modify and increase Father's child support payment claiming, among other things, that there was a significant variance in the amount of Father's income. The Trial Court referred the matter to a Special Master who concluded that the Child Support Guidelines in effect when Mother filed her petition were applicable. Relying on those guidelines, the Special Master recommended that Father's monthly child support payment be set at $5,000. The Special Master also recommended that an educational trust be established for one of the children. Father filed several objections to the Special Master's report and, following a hearing on those objections, the Trial Court determined that Father had an annual income of $200,000 for purposes of calculating his child support payment. The Trial Court further modified the Special Master's findings, concluding that the Child Support Guidelines effective June 2006 were applicable and that under those guidelines, Father's basic monthly child support payment should be $3,153. Mother appeals the Trial Court's determination that the June 2006 guidelines were applicable. Father appeals the finding that his annual income was $200,000, and the establishment of the educational trust. We affirm in part and vacate in part.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part and Vacated in Part; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and SHARON G. LEE, JJ., joined.

John D. McMahan, Chattanooga, Tennessee, for the Appellant, Lisa W. Pruett.

William H. Horton, Chattanooga, Tennessee, for the Appellee, Paul A. Pruett.

OPINION

Background

Mother filed a complaint for divorce in February of 2002 following a relatively short marriage of approximately 3½ years. The parties have three biological children, a daughter named Grace who currently is seven years old, and twin boys named Carter and Kiefer who are five years old. There were three other minor children involved when this case originally was filed. These children are Andrew, Thompsie, and William. The two boys, Andrew and William, now are 19 and 22 years old, respectively. Thompsie is 21 years old. Father is the biological father of the older children, all three of whom were adopted by Mother during the course of the marriage.

The parties successfully mediated their case and the terms of the mediated settlement were incorporated into a final divorce decree entered in April of 2003. As relevant to this appeal, the parties agreed that Mother was to be designated the primary residential parent for Thompsie, Grace, Carter and Kiefer. Father's child support payment was set at $650 per week, which represented approximately 43% of his monthly income of $6,000.[1]

Mother filed a petition to modify the final decree in September of 2004. Mother claimed:

> (a) Petitioner has reason to believe that Respondent's ability to provide child support for the needs of the children has increased since the Final Judgment of Divorce was entered on April 1, 2003.
>
> (b) The needs of the children have increased and an increase in Respondent's child support obligation is appropriate. Specifically, Petitioner would show that there are special needs of the two parties' youngest children and that an upward deviation of the Tennessee Child Support Guidelines is warranted.
>
> (c) The Respondent does not exercise visitation or parenting time with the parties' younger children so that a Casteel deviation of the Tennessee Child Support Guidelines is warranted.

[1] The Trial Court adopted a Permanent Parenting Plan submitted by the parties which set forth the amount of Father's child support payment, etc. William no longer was a minor when the final decree was entered. The Permanent Parenting Plan provided that Father was to be the primary residential parent of Andrew, who was 14 years old at that time. The Permanent Parenting Plan makes no reference to Mother paying any child support for Andrew, nor does it indicate whether the amount of Father's child support payment took into account the fact that Father was to be Andrew's primary residential parent. Father does not raise this as an issue on appeal, and we further note that Andrew was eighteen years old when the post-divorce final judgment at issue in this appeal was entered.

(d) The Respondent's health insurance has changed drastically since the parties agreed that they should share equally the costs of any uncovered medical expenses.

Father responded to the petition, generally denying the pertinent allegations contained therein. Father filed a counterclaim arguing that the amount of his child support obligation should be reduced because Thompsie had reached the age of 18. Father sought a credit for any overpayments of child support made after Thompsie turned 18.

In August of 2005, the Trial Court entered an order of referral to a Special Master for findings of fact and recommendations. A hearing before the Special Master was conducted on April 12 and 25, 2006. The Special Master's findings of fact and recommendations were filed on June 23, 2006. As relevant to this appeal, the Special Master found that Father was paying $33,800 annually in child support. Father also made a $7,000 charitable contribution to St. Jude Catholic School each year which allowed Grace to be enrolled at that school. Father testified at the hearing that he would continue to make the $7,000 annual contribution to St. Jude so long as he is able to do so.

There was considerable testimony at the hearing addressing the medical needs of the twins. The Special Master noted that both Carter and Kiefer had been diagnosed with autism spectrum disorder, although Carter's degree of autism was more severe. Several physicians and other experts testified that the twins needed immediate special education programs including speech therapy and physical therapy. Two physicians testified to the necessity of both parents receiving training from a therapist who specialized in Applied Behavioral Analysis (ABA) and who could perform home based training and therapy. The Special Master then concluded that because Mother was "not presently employed, although she certainly is a highly educated individual, some adjustment in the uncovered medical expenses should be made." The Special Master recommended that Father be responsible for 75% of any uncovered medical expenses including any deductible, as well as 75% of the costs for the children's ABA therapy. Mother would be responsible for the remaining 25%. Each party would be responsible for his or her own ABA therapy.

The Special Master also decided that Mother's petition to modify child support should be based on the Child Support Guidelines in effect at the time her petition was filed, i.e., September of 2004. After reviewing a significant amount of proof offered at the hearing pertaining to various businesses operated by Father and other aspects of Father's income, the Special Master concluded that Father's monthly adjusted gross income was "in excess of Ten Thousand Dollars ($10,000)" and his child support should be set accordingly. The Special Master then recommended that Father's child support payment be set at 41% of his monthly adjusted gross income, or $4,100 per month. Because of Carter and Kiefer's special medical needs, the Special Master further recommended that Father be ordered to pay an additional $900 per month in child support, thereby bringing the total monthly payment to $5,000. The Special Master then stated:

In addition the Special Master recommends that an educational trust for Grace should be established at the rate of Five

> Hundred Dollars ($500.00) per month which will allow her to accumulate, hopefully, Thirty-Six Thousand Dollars ($36,000) by the time that she has completed the sixth (6th) grade at St. Jude.

Following entry of the Special Master's report, Mother quickly filed a motion requesting that the Trial Court adopt the Special Master's findings and recommendations in toto. Father, on the other hand, filed several objections to the Special Master's report. As pertinent to this appeal, Father claimed that the new income shares guidelines which were revised in June of 2006 should be used to calculate his child support, as opposed to the guidelines that were in effect when Mother filed her petition for modification. Father also claimed the Special Master incorrectly determined that Father's monthly income was in excess of $10,000. While Father did not object to being ordered to pay for Grace's attendance at St. Jude School, he did object to being required to pay an additional $500 per month to fund an educational trust on Grace's behalf.

A hearing was held on Mother's request for the Trial Court to adopt the Special Master's report, as well as Father's objections to the report. The Trial Court resolved the pertinent issues as follows:

> The primary issue of concern is which guidelines are applicable to this cause. The current Child Support Guidelines adopted in June of 2006 clarify the ambiguity of the previous guidelines and state that they shall be applicable " … where a hearing which results in an order establishing, modifying, or enforcing support is held after the effective date of these rules." The evidentiary hearing on which the determination in this case may be based was the Master's hearing conducted on April 12 and April 26, 2006. The motion to confirm the Master's report was filed after the new guidelines were in effect.
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> The rule governing hearings by Masters is Rule 53 of the *Tennessee Rules of Civil Procedure*. The applicable rule in discussing the Master's powers at 53.02 refers to the proceedings in every "**hearing**" before him or her while the provisions of Rule 53.03 addresses the proceedings and speaks in terms of "meetings." Rule 53.04(2) provides that in non-jury actions, the Court **after hearing** may adopt the report or take other action. Therefore, the hearing in this matter either could be construed as being the April 12 and April 25, 2006 dates or the date upon which the Court heard argument on the motion to confirm the Master's Report which in this case was subsequent to the June 2006 applicability date of the new guidelines. The court finds that it is the intent of the Department of Human Services that the hearing resulting in the Order resolving the issues before the Court controls which guidelines apply. In this case, that would be the hearing on the motion to adopt the Special Master's

> Report. Accordingly, the June 2006 Child Support Guidelines are applicable.…
>
> The Court finds the evidence supports a finding that [Father] earns in excess of $200,000.00 per year. He has available to him multiple tax devices which while legal from an IRS standpoint artificially reduce his income for child support purposes. He functions as a sole proprietor while benefitting from a corporate status for tax purposes.
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> Further, [Mother] has demonstrated significant need on behalf of the children. Child support shall be calculated with a monthly income of [Father] of $16,666.66. Special education needs of the children are set as $7,000.00 or the cost of St. Jude's, whichever is greater, for Grace per year …. (emphasis in the original)

The Trial Court then adopted all of the remaining findings of fact and recommendations made by the Special Master that were not altered by the immediately preceding conclusions. In a separate order filed after entry of the Trial Court's order quoted above, the Trial Court clarified its previous order stating that based on Father's monthly income of $16,666.66 and Mother's monthly child care costs of $650.00, the amount of Father's monthly child support payment would be $3,153 "which includes basic child support and child care."

Mother appeals claiming the Trial Court erred when it applied the Child Support Guidelines which became effective in June of 2006. Father appeals claiming the Trial Court erred when it determined his income for purposes of calculating child support should be set at $16,666.66 per month. Father also claims the Trial Court erred when it adopted the Special Master's recommendation that he pay $500 per month into an educational fund for Grace in addition to the $7,000 per year for Grace's attendance at St. Jude School.

Discussion

In *Dalton v. Dalton*, No. W2006-00118-COA-R3-CV, 2006 WL 3804415 (Tenn. Ct. App. Dec. 28, 2006), *no appl. perm. appeal filed*, we discussed the appropriate standard of review in cases involving matters referred to a Special Master. We stated:

> The trial court's order referring certain matters to the Special Master, the Special Master's report, and the trial court's order on the report affect our standard of review on appeal. *See Manis v. Manis*, 49 S.W.3d 295, 301 (Tenn. Ct. App. 2001); *Archer v. Archer*, 907 S.W.2d 412, 415 (Tenn. Ct. App. 1995). Generally, concurrent findings of fact by a special master and a trial court are conclusive and cannot be overturned on appeal. *Manis*, 49 S.W.3d at 301. However, a concurrent finding is not conclusive where it is upon an

> issue not properly referred to a special master, where it is based upon an error of law or a mixed question of fact and law, or where it is not supported by any material evidence. *Id*.
>
> On appeal, we review findings of the trial court which reject or modify a special master's findings under the general standard of Tenn. R. App. P. 13(d). *Parks v. Eslinger*, No. M1999-02027-COA-R3-CV, slip op. at 8 (Tenn. Ct. App. M.S. Feb. 4, 2003). Our review is *de novo* upon the record, with the trial court's findings of fact accompanied by a presumption of correctness unless the evidence preponderates otherwise. *Id*.

Dalton, 2006 WL 3804415, at *3, 4. With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

The first issue we will address is whether the Trial Court erred when it applied the Child Support Guidelines which became effective in June of 2006. The relevant provision of the June 2006 guidelines provides as follows:

> The Child Support Guidelines established by this Chapter shall be applicable in every judicial or administrative action to establish, modify, or enforce child support, whether temporary or permanent, whether the action is filed before or after the effective date of these rules, *where a hearing which results in an order establishing, modifying or enforcing support is held after the effective date of these rules.* (emphasis added)

Tenn. Comp. R. & Regs., ch. 1240-2-4-.01(2)(a) (2006).[2]

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[2] The June 2006 amendments to the guidelines changed when those guidelines would affect a particular case. The version of the guidelines as it existed *prior* to the June 2006 amendment was discussed in *Kaplan v. Bugalla*, 188 S.W.3d 632 (Tenn. 2006). There the Court explained:

> The Child Support Guidelines … were substantially revised, effective January 18, 2005. Tenn. Comp. R. & Regs. 1240-2-4-.01 to .09 (2005). The revised Guidelines, however, provide that they "shall be applicable in any judicial or administrative action *brought … on or after the effective date of these rules*." Tenn. Comp. R. & Regs. 1240-2-4-.01(2)(a) (2005) (emphasis added). Because the pending petition was filed before January 18, 2005, the prior version of the Guidelines … is the pertinent one for purposes of our analysis.

Kaplan, 188 S.W.3d at 637 n.6.

Mother argues that the evidentiary hearing before the Special Master should be deemed the "hearing which results in an order" for purposes of ascertaining which set of guidelines apply. After all, Mother claims, "[a]ll of the arguments relating to the evidence took place at that hearing. That 'hearing' was the equivalent of a trial that took place over two days. All of the substance of the case was presented and decided at those hearings."

Tenn. R. Civ. P. 53.04(2) discusses Special Master reports in "nonjury actions." This Rule provides:

> In an action to be tried without a jury the court shall act upon the report of the master. Within ten (10) days after being served with notice of the filing of the report, any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6.04. The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

The plain language of Tenn. R. Civ. P. 53.04(2) states that once the report of the Special Master is filed, the trial court is required, after a hearing, to take some affirmative action and "act upon the report of the master." This is what happened in the present case when the Trial Court, after a hearing, adopted various provisions of the Special Master's report while modifying other provisions. All of the evidence introduced at the hearing before the Special Master was, therefore, equally as relevant when it was being evaluated by the Trial Court as it was when that same evidence initially was considered by the Special Master. There was a hearing conducted before the Trial Court even though no new evidence was submitted at that hearing. The parties were able to present their arguments pertaining to which version of the Child Support Guidelines was applicable. The evidence presented to the Special Master obviously was considered by the Trial Court given that the order entered by the Trial Court was different from that of the Special Master in at least two key respects: first, the amount of Father's monthly income went from being "in excess of $10,000", to $16,666.66; and second, the Special Master recommended monthly child support payments in the amount of $5,000, but the Trial Court modified that recommendation and ultimately determined that the appropriate monthly amount was $3,153.[3]

We conclude that the Trial Court did not err when it determined that the "hearing which results in an order establishing, modifying or enforcing support" was the hearing conducted before the Trial Court. Finally, we note that if the earlier version of the guidelines did apply, once the Trial Court entered its final order, Father could immediately file a petition to modify his child support payment because of the substantial variance in the amount of his payment under the pre-June

[3] These amounts do not take into account payments for Grace's education or costs associated with the special education of the twins.

2006 guidelines versus the June 2006 guidelines. The parties then would be back at square one. The judgment of the Trial Court that the June 2006 Child Support Guidelines were the appropriate guidelines to be used when determining Father's child support payment is affirmed.

The next issue is Father's claim that the Trial Court erred when it determined that his annual income for purposes of calculating child support was $200,000, which equates to a monthly income of $16,666.66. Mother argues that the Special Master's determination that Father's monthly income was "in excess of $10,000" is a concurrent factual finding with the Trial Court's determination that his monthly income was $16,666.66. Thus, according to Mother, because there are concurrent findings by the Special Master and the Trial Court as to Father's monthly income, this Court must accept those findings as conclusive. *See Dalton*, 2006 WL 3804414, at *3, 4.

We disagree with Mother's assessment of these findings. An income level of $16,666.66 is certainly "more than $10,000"; but so is an income level of $11,000 or $15,000, etc. While the Special Master's finding and that of the Trial Court are not necessarily inconsistent, neither are they concurrent as the Special Master never expressed Father's income in an exact monetary amount. Therefore, when reviewing the Trial Court's factual findings as to Father's income, we will ascertain whether the preponderance of the evidence weighs against the Trial Court's finding. *See* Tenn. R. App. P. 13(d); *Dalton*, 2006 WL 3804414, at *3, 4.

Father testified that his businesses have had cash flow problems in the past. Father described the situation as it existed one year after the marriage as "serious." Father indicated that he had to sell property is order to alleviate the cash flow problems. Father also loaned his various businesses money over the years to help keep them afloat. Fortunately, the financial outlook for Father's various businesses has improved significantly over the past couple of years. According to Father's brief, for tax years ending April 30, 2004, and April 30, 2005, his net annual income averaged $114,303.50, which equates to an average monthly income of $9,525.30.[4]

Mike Costello ("Costello") testified as an expert witness on Father's behalf. Costello is a certified public accountant. Costello testified that Father's income for the past four years averaged $87,221.25. This included 2002 and 2003, both of which were years where Father's various businesses did not do as well. Costello admitted that his calculations did not include any capital gains from Father's sale of a farm and some business property located in Chattanooga. Costello characterized these sales as "isolated" sales that would not be included in income for child support purposes.[5] Costello testified that in the two years after the divorce, Father loaned his

[4] The "tax years" for Father's businesses ended on April 30th of each year. Because the testimony of the expert accounting witnesses also used April 30th as the year end, that is the date we will use in this Opinion.

[5] The farm was sold for $250,000 and the business property in Chattanooga sold for $50,000. The record is unclear on the amount of capital gains realized from these sales. There have been conflicting opinions from this Court as to whether isolated capital gains should be included as income when calculating child support payments. These opinions were recently discussed by our Supreme Court in *Moore v, Moore*, No. E2005-02469-SC-R11-CV,---- S.W.3d
(continued...)

companies an average of $239,056 each year. During that same time, Father took out an average of $152,000.

On cross-examination, Costello admitted that in cases involving closely held corporations, a sole shareholder can manipulate income. Costello testified as follows:

> Q. Will you agree with me that when you have a sole shareholder in a corporation, like we have in this case, that that shareholder can manipulate his income?
>
> A. I'd say a shareholder in a closely-held company has the – and the answer is yes. I mean, a shareholder can manipulate his income to the level that he has cash flow, yes, sir.… That's true in any company.…
>
> Q. But … it's especially true when you have a closely held-corporation?
>
> A. That's what I mean, yes, sir.

Mother called Roger Fitch ("Fitch") as an expert witness at trial. Fitch is a certified public accountant and has been an accountant for thirty-six years. Fitch testified that he was retained by Mother to review information pertaining to Father's various businesses to determine the amount of cash available to Father each year from those businesses. Fitch began by describing the numerous documents he reviewed in an effort to ascertain Father's available cash flow. Fitch testified that, among other things, he and one of his associates:

> [W]e looked at the various tax returns of Mr. Pruett, individual returns, to look at the income that he had from various sources, including wages and, of course, dividends, rental income, sale of assets, operations of sole proprietorships, operations of rental income businesses, and then the corporate entities that he owns, and prepared a schedule that, basically, segregates that information into a period of time where we did not have that complete information.
>
> And then there are two years of information that are immediately prior to the divorce or during the divorce, and then we

[5](...continued)
----, 2007 WL 4326746 (Tenn. Sept. 5, 2007). The Supreme Court in *Moore* resolved the conflict by holding "that under the Child Support Guidelines all capital gains, including those from an isolated transaction, should be considered in calculating gross income for the purpose of setting child support." *Id*. at *3.

> compared that information to the post-divorce years to see what we believe the condition of the companies were post-divorce.

Fitch testified that for 2004, Father had gross income of $250,000, business losses of $129,205, and losses from rental properties of $14,601, for an adjusted gross income of $106,194. For 2005, Father had an adjusted gross income of $96,635. Father's adjusted gross income for other years was as follows: $567,691 in 2000; $146,053 in 2001; $39,638 in 2002; and $44,959 in 2003. The total gross income for these six years is $1,001,170, which equates to an average annual income of $166,861.[6]

Fitch also prepared an analysis of the various businesses owned or operated by Father. These businesses include Refrigeration Equipments Sales, Grand Union, Precision Metal & Refrigeration Systems, Inc., Engineered Refrigeration Systems, Inc., CPN Associates (1/3 interest), and Pruett Land Development, Inc. Fitch created a summary of Father's personal and business income/losses before reduction by any allowable depreciation deductions for the business entities. In summary, Fitch concluded that from the information available to him, Father had "Total Cash Available per 1040 & business entities" of $331,318 for the year ending April 30, 2001. However, some of the information pertaining to Father's businesses was not available for that particular business year.[7] For the year ending April 30, 2002, Father had available cash of $91,447. For year ending April 30, 2003, Father had losses of $24,365. For the year ending April 20, 2004, Father had available cash of $574,743. Finally, for the year ending April 30, 2005, Father had available cash of $344,421. For these last two years, Fitch concluded that the total net income for all of Father's businesses, before depreciation and before repaying any loans to Father, was $288,388 for 2004, and $294,421 for 2005. These figures do not take into account any capital gains from the sale of property.

Fitch acknowledged that in 2003, several of Father's companies were not doing very well and bankruptcy may have been a possibility, but his current analysis "would indicate that these companies are doing very well compared to their April 30th, '03 period." Fitch also discussed the various loans that Father made to the companies. According to Fitch:

> [Father], as an owner of a business, the owner of a business, or the owner of a piece of a rental property, or the owner of a Schedule C, has total control of that business, and has the ability to control the cash flow that comes out to him, and make a determination of whether that cash flow that comes to him is taxable

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[6] In *Alexander v. Alexander*, 34 S.W.3d 456 (Tenn. Ct. App. 2000), the mother sought an increase in child support claiming that there was a significant variance in the amount of the father's income. In an effort to determine the amount of the father's gross income, we concluded that it was necessary in that case to average the father's income over a period of four years.

[7] As stated previously, the $331,318 does not take depreciation deductions into account. The year ending April 30, 2001, is the only year discussed above which had missing information.

> income, and in so doing, controls his tax liability to the Internal Revenue Service.
>
> Having that control, as long as the company owes him money, the company can repay loans to him, as we would refer to, tax free. They're not taxable income to him. They don't show up on his tax return. They don't create a federal income tax liability for him, but yet he still has the cash flow available to him for his particular needs or desires.

There certainly was contradictory evidence offered at trial relevant to Father's income. This subject is made even more complicated because Father operates, controls, or has ownership interests in numerous companies. When the Trial Court found and set Father's income at $200,000 annually, it stated that Father "has available to him multiple tax devices which while legal from an IRS standpoint artificially reduce his income for child support purposes. He functions as a sole proprietor while benefitting from a corporate status for tax purposes."

Given the substantial increase in the profitability of Father's companies in the last two years, we cannot say that the evidence preponderates against the Trial Court's finding that Father's income should be set at $200,000 for purposes of calculating child support. In reaching this conclusion, we are not unmindful that Father can treat money taken in by these companies and paid out to him as a loan repayment of money loaned by him and thereby avoiding any income tax liability. This is perfectly legal. However, this does not mean that none of the money coming in to the businesses and to Father should be considered as income for purposes of calculating child support. For example, assume that Father loans his business $1,000,000. Also assume that: (1) this business is Father's only source of income; and (2) the business is profitable and after paying all necessary expenses, there is remaining profit of $100,000 each year for the next ten years. According to Father, he would have no income whatsoever for purposes of paying child support so long as he repays himself the $100,000 each year in order to pay back the amount of the original loan. Our adoption of Father's position would mean that a parent in the financial situation and control of a business such as Father's could successfully avoid paying any child support by loaning money to his business and then receiving from that business during his children's minority only "loan repayments." Such a result would be untenable.

Additionally, the Trial Court's finding that Father's income is $200,000 per year is further supported by the fact that any capital gains from the sale of the farm and the business property were not included by his expert when calculating Father's income. *Moore* is clear that any such capital gains should have been considered in calculating Father's gross income for purposes of setting his child support. For all these reasons, we conclude that the evidence does not preponderate against the Trial Court's finding that Father's income for purposes of calculating child support is $200,000 per year.

The final issue is whether the Trial Court erred when it required Father to pay for Grace's attendance at St. Jude School *and* that he also be required to pay $500 per month into an educational trust for Grace. Tenn. Comp. R. & Regs., ch. 1240-2-4-.07(2)(d)(1)(i) (2006) provides that extraordinary educational expenses may be added to a presumptive child support order as a deviation. The cost of Grace's attendance at St. Jude School certainly qualifies under this regulation.

In addition to extraordinary educational expenses, the June 2006 and earlier versions of the Child Support Guidelines authorize trial courts to establish educational trusts for children in certain limited situations. The June 2006 guidelines give a trial court discretion to order the creation of an educational trust when the obligor parent's presumptive child support order exceeds a certain threshold level. *See* Tenn. Comp. R. & Regs. 1240-2-4-.07(2)(g)(2)(iii); *Nash v. Mulle*, 846 S.W.2d 803 (Tenn. 1993).[8] This threshold level for an obligor parent with three children is $4,100. Tenn. Comp. R. & Regs. 1240-2-4-.07(2)(g)(1)(iii). If Father's presumptive child support order exceeded $4,100, then the amount in excess of that threshold level could be used for an educational trust. However, Father's presumptive child support order is $3,153, well short of that threshold level. Therefore, we conclude that the Trial Court erred when it ordered Father to fund an educational trust for Grace. The portion of the Trial Court's judgment requiring Father to pay for Grace's attendance at St. Jude School is affirmed. However, the portion of the judgment requiring Father to fund an educational trust for Grace is vacated.

Conclusion

The judgment of the Trial Court requiring Father to fund an educational trust is vacated, and all the remainder of the Trial Court's judgment is affirmed. This cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are taxed one-half to the Appellant, Lisa W. Pruett, and her surety, and one-half to the Appellee, Paul A Pruett.

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D. MICHAEL SWINEY, JUDGE

[8] A trial court's requirement that an obligor parent fund an educational trust would be in addition to any other requirement that the obligor parent also pay for any then existing extraordinary educational expenses described in Tenn. Comp. R. & Regs. 1240-2-4-.07(2)(d)(1).