

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 18, 2006 Session

**JESSIE MARCELLA VITTETOE (TEFFT) v.
JOHNNY DWAIN VITTETOE**

**Appeal from the Chancery Court for Union County
No. 4157 Billy Joe White, Chancellor**

No. E2005-02149-COA-R3-CV - FILED AUGUST 29, 2006

This appeal involves a post-divorce dispute between the parents of three minor children. A year after the parties were divorced, the noncustodial father petitioned to modify the final decree to reduce his child support payment, to relieve him from the obligation to reimburse the mother for the children's health insurance premiums, and to claim the children as exemptions on his federal tax return. After a hearing, the chancellor found that there had been no material and substantial change in circumstances and denied the father's requests to modify the decree regarding child support and health insurance premiums, but modified the decree to grant the father the right to claim one child as a tax exemption every year and to claim one child in alternating years. After careful review of the evidence and the applicable law, we hold that because the chancellor found no material and substantial change in father's circumstances, he erred in modifying the final decree of divorce as to the income tax dependency exemptions. Accordingly, we reverse and vacate the decision of the chancellor.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed and
Vacated; Case Remanded**

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P. J., and CHARLES D. SUSANO, JR., J., joined.

William A. Mynatt, Jr., Knoxville, Tennessee, for Appellant, Jessie Marcella Vittetoe (Tefft).

Carl R. Ogle, Jr., Jefferson City, Tennessee, for Appellee, Johnny Dwain Vittetoe.

OPINION

I.

Jessie Marcella Vittetoe (Tefft) (“Mother”) and Johnny Dwain Vittetoe (“Father”) were divorced in April 2002. By agreement of the parties and order of the court, Mother became the primary residential parent of the parties’ three minor children; Father was to pay \$105 per week in child support and to reimburse Mother the amount of the children’s health insurance premiums; and Mother was allowed to claim all three children as tax deductions on her federal tax return.

On April 30, 2003, Father filed a petition to modify the final decree seeking a reduction in the amount of child support, relief from the obligation to pay for health insurance, and permission to deduct the children on his federal tax return. The only proof offered at trial was a financial data sheet prepared by Father which stated his monthly income to be \$1,385.04 and listed monthly expenses totaling \$1,582.59.

The chancellor noted that it was a difficult case, as Mother was raising three children and not “living on easy street,” and Father was “having a very difficult time with his income.” The chancellor found that Father’s support was within the guidelines and declined to alter it or the health insurance requirement, but did grant Father’s request to claim one child every year as a tax deduction and one child in alternating years. Mother appeals the chancellor’s decision.

The issue we address in this appeal is whether, absent a finding of a material and substantial change of circumstances, the trial court erred in modifying the allocation of the dependency exemptions in the final decree.

Our review of this non-jury case is *de novo* upon the record of the proceedings below with a presumption that the trial court’s factual findings are correct. Tenn. R. App. 13(d). We must honor this presumption unless we find that the evidence preponderates against those findings. *Id.*; *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). Conclusions of law made by the chancellor are reviewed *de novo* without a presumption of correctness. *Kendrick v. Shoemake*, 90 S.W.3d 566, 569 (Tenn. 2002); *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996).

II.

Mother claims the chancellor erred in modifying the final decree of divorce, which provided that she could claim the parties’ three minor children for federal income tax purposes. In reviewing a trial court’s decision regarding the right to claim a dependency exemption, this court is mindful that while the allowance of deductions for federal income tax purposes is a federal matter, 26 U.S.C. § 152(e), “[n]othing in the federal law prohibits state courts from exercising their power to order a party to execute the release that would enable the noncustodial

parent to obtain the exemption.”¹ *Barabus v. Rogers*, 868 S.W.2d 283, 289 (Tenn. Ct. App. 1993) (citing *Hooper v. Hooper*, No. 1130, 1988 WL 10082, slip op. at 3 (Tenn. Ct. App. E.S., Feb. 9, 1988)).

After a decree becomes final, it cannot be modified by the trial court unless good cause is shown. *Threadgill v. Threadgill*, 740 S.W.2d 419 (Tenn. Ct. App. 1987). The pleadings and proof must show unanticipated changes in the circumstances surrounding the parties since the decree. *Turner v. Turner*, 776 S.W.2d 88 (Tenn. Ct. App. 1988). Subsequent modification must be based on proof that relevant permanent circumstances have been altered since the decree was granted. *Dodd v. Dodd*, 737 S.W.2d 286 (Tenn. Ct. App. 1987). A trial court has the authority to modify the provisions in a final decree regarding the dependency exemption for children upon a showing of a material and substantial change of circumstances. *Williams v. Williams*, No. E2004-00423-COA-R3-CV, 2005 WL 1219955, slip op. at *7 (Tenn. Ct. App. E.S., May 24, 2005); *Miller v. Miller*, No.02A01-9809-CH-00271, 1999 WL 329777 (Tenn. Ct. App. W.S., May 21, 1999) (existence of a significant variance in income was a substantial and material change of circumstances sufficient to allow a modification of child support and the dependency exemption for minor child).

The only proof offered at trial was a financial data sheet prepared by Father in which he stated his monthly income to be \$1,385.04 and listed monthly expenses totaling \$1,582.59. While a noncustodial parent’s income is generally established by introducing pay stubs, personal tax returns, or other credible records evidencing income, *see Kirchner v. Pritchett*, No. 01A01-9503-JV-00092, 1995 WL 714279, slip op. at *2 (Tenn. Ct. App. M.S., Dec. 6, 1995), no such evidence regarding Father’s financial situation is included in this record. The chancellor determined in this case that Father had not sustained his burden of showing a material and substantial change of circumstances and declined to adjust the child support and health insurance amounts. Father did not appeal this ruling. Rule 13(d) of the Tennessee Rules of Appellate Procedure requires this court to presume that the trial court’s factual findings are correct, unless the evidence in the record preponderates otherwise. Tenn. R. App. P. 13(d). The record before us is very sparse. Father’s income at the time of the divorce was stated in the final decree to be \$400 per week. His income at the time of the hearing was stated to be \$1,385.04 per month. We do not have the benefit of pay stubs or any other documentation showing whether either or both of these amounts are before or after taxes and other allowable deductions. There is simply insufficient information in the record for us to conclude that the evidence preponderates against the chancellor’s conclusion that there had been no substantial and material change of circumstances. It follows then that because there was no substantial and material change in circumstances, the chancellor had no authority to modify the final decree. *See Dillow v. Dillow*, 575 S.W.2d 289, 291 (Tenn. Ct. App. 1978) (change in circumstances not sufficient enough to warrant modifying decree).

Although we have no doubt that the chancellor was attempting to do equity and ease Father’s financial burden, based on the record before us revealing no determination of a material and substantial change in circumstances, we must find that the reallocation of the dependency

¹ The Internal Revenue Code allocates an exemption to the custodial parent unless one of three exceptions applies, one being that the custodial parent has released his or her claim for an exemption. *See* 26 U.S.C. § 152(e)(2).

exemptions was improper. *See Williams v. Williams*, No. E2004-00423-COA-R3-CV, 2005 WL 1219955 (Tenn. Ct. App. E.S., May 24, 2005) (as there was no material change proven, modification of the tax exemption was not proper); *Byrd v. Buhl*, No. M2001-00070-COA-R3-CV, 2001 WL 1216988 (Tenn. Ct. App. W.S., Oct. 12, 2001) (in adjusting child support amount, trial court properly analyzed the resulting tax ramifications and reallocated the tax exemptions). Accordingly, the judgment of the trial court modifying the tax exemptions for the parties' minor children is reversed and vacated. The cause is remanded to the trial court for any necessary further proceedings. We tax the costs of this appeal to the Appellee, Johnny Dwain Vittetoe.

SHARON G. LEE, JUDGE