

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2005-CA-000905-MR

PHILIP G. FIELDS

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT  
HONORABLE KEVIN L. GARVEY, JUDGE  
CIVIL ACTION NO. 92-FD-001288

THERESE KEELING (now D'EUFEMIA)

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JOHNSON AND TAYLOR, JUDGES; HUDDLESTON,<sup>1</sup> SENIOR JUDGE.

HUDDLESTON, SENIOR JUDGE: Philip G. Fields, a physician, and  
Therese Keeling (now D'Eufemia), a psychiatrist, were married in  
Louisville, Kentucky, in March 1990. Just over two years later,  
in June 1992, Fields filed a petition seeking dissolution of the  
parties' marriage; and in December of that year, their marriage  
was dissolved.

Prior to the dissolution, Fields and Keeling entered  
into a voluntary agreement resolving the issue of custody of

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<sup>1</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of  
the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution  
and KRS 21.580.

their only child, Carol Elaine Fields, born October 12, 1990. Fields and Keeling agreed to joint custody of Carol with Fields having physical custody of Carol for six consecutive nights and Keeling having physical custody of the child for the next eight consecutive nights. For all practical purposes, Keeling acted as the child's primary residential custodian. Fields and Keeling also agreed that neither would pay child support but that each party would be responsible for supporting Carol during their respective parenting time.

In April 2004, Fields moved to modify the custody arrangement by naming him primary residential custodian and permitting him to take Carol with him if he were to move from Louisville. In an affidavit accompanying his motion, Fields stated that he had received a prestigious two-year fellowship from Rush-Presbyterian-St. Luke's Medical Center in Chicago, Illinois, and would be moving to that city. Later, Fields withdrew his motion.

On June 8, 2004, Keeling filed a motion with Jefferson Family Court seeking child support from Fields. In a January 11, 2005, order, Fields was ordered to pay child support to Keeling. In doing so, the family court noted that by taking the fellowship, Fields' income dropped from over \$100,000.00 a year to \$47,000.00 a year. However, instead of using Fields' new, lower income to calculate child support, the court took the

average of Fields' income from the previous five years, 1999 to 2003, \$157,867.00 or \$13,155.00 per month. The court determined that Keeling's annual gross income was \$194,771.00 or \$16,230.00 per month. According to Keeling, Carol's reasonable monthly living expenses were \$4,672.00. The family court rejected this amount and determined that the child's monthly living expenses were \$1,982.00, including \$542.00 for Carol's tuition. The court found that Fields was responsible for 44.77% of Carol's monthly living expenses or \$887.34. Fields was ordered to pay \$887.34 in monthly child support beginning June 8, 2004, the date Keeling filed the motion seeking child support.

On January 21, 2005, Fields moved the court, pursuant to Kentucky Rules of Civil Procedure (CR) 59.05, to amend its order. Fields argued that the family court had abused its discretion when it ordered him to begin making child support payments on June 8, 2004, because he had physical custody of Carol during most of the month of June. And, although he had moved to Chicago by July 1, 2004, he argued that the court should have ordered support payments to begin on August 1, 2004, because he and Keeling had a long history of sharing custody. Fields also argued that the court abused its discretion when it used the five-year average of his income to calculate his child support obligation. According to Fields, the family court should have used his new income of \$47,000.00.

Fields contended that Carol's monthly expenses of \$1,982.00 appeared to include a pro-rata share of the mortgage payments that Keeling owed on two different homes. Arguing that the inclusion of Keeling's mortgage payments was unjust, Fields insisted that his monthly child support payments should be reduced by \$250.00. Furthermore, Fields insisted, he should not have to contribute to Carol's monthly tuition expenses because his annual income would be \$47,000.00 for the next two years, while Keeling's income was higher than his and because he had paid Carol's tuition from third grade to the eighth grade.

Although the family court did reduce Fields' monthly child support payments from \$887.34 to \$820.19, it denied the balance of his motion to alter or amend its previous order.

On appeal, Fields argues that Jefferson Family Court abused its discretion when it ordered him to begin making child support payments as of June 8, 2004. Fields insists that the court was not required to use the date that Keeling filed her motion and that using the June date was unfair because Keeling's motion was premature in that she filed it before he moved to Chicago. In addition, since he had physical custody of Carol during most of June 2004 and given that the parties had a long history of sharing custody, Fields contends that his support obligation should have been effective as of August 1, 2004.

Family courts have broad discretion to consider a non-custodial parent's income and assets when fixing a child support obligation.<sup>2</sup> On appeal, we give great deference to the family court in such matters and will not disturb the court's decision as long as it is in accord with the guidelines found in Kentucky Revised statutes (KRS) 403.212.<sup>3</sup> If, however, the court deviated from the guidelines, we will still affirm if it adequately justified the deviation in writing.<sup>4</sup> Despite this, the family court's discretion is not unlimited. If the decision is arbitrary, unreasonable, unfair or unsupported by sound legal principles, the court has abused its discretion and we will reverse its order.<sup>5</sup>

While Fields makes it abundantly clear that he believes that the family court's entire order was unfair, he fails to demonstrate that the decision ordering his child support payments to begin on June 8, 2004 was arbitrary, unreasonable, unfair or unsupported by sound legal principles.

Fields also insists that the family court abused its discretion when it used a five-year average of his income to determine his child support obligation. According to Fields,

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<sup>2</sup> *Downing v. Downing*, 34 S.W.3d 449, 454 (Ky.App. 2001).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

child support could have accrued only from July 2004, after he had moved to Chicago. In addition, Fields insists that the family court abused its discretion when it considered his entire gross income for the year 2000. According to Fields, while he earned approximately \$308,000.00 in 2000, \$231,000.00 of that amount represented capital gains. Fields claims that such capital gains will never be repeated; thus, he reasons, the court should not have factored in such income. In addition, Fields claims that 75% of his current income is spent on housing. Thus, he insists, the child support obligation fixed by the court is unreasonable. In short, he insists, he cannot afford to pay the amount set by the court.

According to KRS 403.212(2)(d), if a parent is voluntarily underemployed, then the family court may calculate his child support obligation by ascertaining his potential income by considering his probable earnings level based on his recent work history, his occupational qualifications, the prevailing job opportunities in the community and the earning levels in the community.<sup>6</sup> Fields voluntarily chose to accept the fellowship in Chicago knowing he would earn less money, so he was voluntarily underemployed as defined by KRS 403.212(2)(d). Accordingly, the family court did not abuse its discretion by using the five-year average of Fields' income in fixing his

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<sup>6</sup> *Id.*

child support obligation. Nor did the family court abuse its discretion by factoring in Fields' capital gains since gross income, as defined by KRS 403.212(2)(b), specifically includes capital gains.

The family court found that Carol's reasonable monthly expenses were \$1,920.00. According to Fields, in determining this amount, the court included the monthly mortgage payment Keeling owes on a piece of investment property, an amount that was unreasonable to include when it calculated Carol's monthly living expenses.

If a child's parents have a combined monthly income in excess of the guidelines found in KRS 403.212 and the family court specifically makes such a finding, then it may deviate from the guidelines.<sup>7</sup> In the present case, there is no dispute that the parties combined monthly income exceeds the maximum monthly income set forth in the guidelines, so the court did not abuse its discretion when it deviated from the guidelines. When the family court deviates from the guidelines, it must consider the reasonable needs of the child<sup>8</sup> and must set support in an amount that is reasonably and realistically related to the child's needs.<sup>9</sup> In determining the child's reasonable needs, the

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<sup>7</sup> *Id.* at 454.

<sup>8</sup> *Id.* at 455.

<sup>9</sup> *Id.* at 456.

court must consider the standard of living that the child enjoyed both during the marriage and after the dissolution.<sup>10</sup> The court should also take into account the parties' financial circumstances, their station in life, their age, their physical condition and the cost of educating their child.<sup>11</sup> Despite Fields' insistence to the contrary, the court considered these factors in setting his support obligation. Simply because Fields disagrees with the determination does not mean that the court abused its considerable discretion.

Keeling insisted below that Carol's reasonable monthly expenses were \$4,672.00 which included \$600.00 for two mortgage payments she owed. However, the family court rejected Keeling's estimate and found that Carol's reasonable monthly expenses were \$1,920.00. There is no indication that the court took into account Keeling's mortgage payments when it calculated Carol's monthly expenses. Fields has failed to demonstrate that the court abused its discretion.

Lastly, Fields argues that the family court abused its discretion when it included the cost of Carol's tuition expenses. Fields says that including Carol's tuition was inequitable because for the previous five years he paid her entire tuition and thus has contributed enough to Carol's

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<sup>10</sup> *Id.* at 457.

<sup>11</sup> *Id.*



education. In any event, because Keeling earns more money, she can easily afford to pay Carol's entire tuition.

In determining a child's reasonable monthly living expenses, the family court is to consider "expenses in educating the children."<sup>12</sup> Jefferson Family Court considered Carol's educational expenses as required by this Court in *Downing v. Downing*; thus, it did not abuse its discretion.

The order from which this appeal is prosecuted is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Victoria Ann Ogden  
OGDEN & OGDEN  
Louisville, Kentucky

BRIEF FOR APPELLEE:

William L. Hoge, III  
Louisville, Kentucky

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<sup>12</sup> *Id.* at 457.