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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2005-CA-000261-ME

AMY HAGAN PAGE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE PATRICIA WALKER FITZGERALD, JUDGE
ACTION NO. 97-FC-002631

JOHN D. HAGAN, III — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; HENRY AND SCHRODER, JUDGES.

COMBS, CHIEF JUDGE: Amy Hagan Page appeals from an order of the Jefferson Circuit Court, Family Division, that modified the amount of the child support obligation of the appellee, John D. Hagan, III, for the support of the parties' minor child. Page contends that the trial court erred in deviating from the child support guidelines in setting the amount of Hagan's support obligation. Finding no error, we affirm.

The facts are not in dispute. The parties were married in 1993 and divorced in 1997. Amy and John agreed to

share joint custody of their only child, Joshua, who was born on August 29, 1995. They also agreed as to the amount of time that Joshua would spend with each of them. The parenting schedule has essentially remained unchanged during the eight years since their separation. Pursuant to that schedule, Joshua spends five nights out of every two weeks with John and the remaining nights with Amy.

However, the parties were not able to reach an agreement on child support. In its order of August 1, 1997, the Family Court found sufficient grounds to deviate from the child support guidelines due to the parties' nearly equal arrangement for sharing time with Joshua. It ordered John to pay child support in the amount of $75 per month as well as 54% of all child care costs and uninsured medical expenses.

In May 2004, Amy filed a motion seeking an increase in child support. Following a hearing, the court entered an order on January 5, 2005, which increased John's monthly support obligation to $90. The court reasoned as follows:

> Application of the Kentucky Child Support Guidelines to the current circumstances of the parties would result in a monthly child support obligation for Mr. Hagan in the amount of $347.06. Pursuant to the order entered in this action on August 5, 1997 Mr. Hagan now pays the sum of $75.00 per month as child support for Josh. This amount is a deviation from the amount that Mr. Hagan would have paid pursuant to the Kentucky Child Support Guidelines at the

time his child support obligation was last determined; deviation was granted due to the time sharing arrangement of the parties, in that Mr. Hagan had Josh about 43% of the time. Mr. Hagan continues to have the same number of overnights with Josh that he had when child support was previously calculated. Each party provides a home for Josh a substantial percentage of the time. Both parties buy clothing for Josh and contribute to his regular expenses. Mr. Hagan asks that he again be granted a deviation pursuant to the Kentucky Child support Guidelines.

. . .

Under KRS[1] 403.211(3)(g), the court may consider the nearly equal distribution of parenting time between the non-custodial and custodial parents as a circumstance of an "extraordinary nature" and may "deviate from the guidelines. . if convinced their application would be unjust." *Downey v. Rogers,* 847 S.W.2d 63, 65 (Ky.App. 1993). A twenty-five percent change in parenting time was found to be a substantial change which rendered a child support payment pursuant to a settlement agreement unconscionable. See, *Adkins v. Adkins,* 574 S.W.2d 898, 900 (Ky.App. 1978). With regard to the sharing of expenses when parenting time is relatively equal, the Kentucky Court of Appeals has observed:

> Many, if not most, expenses necessary to provide a home continue throughout the month regardless of where the children reside. However, we recognize that where actual physical custody is fairly equal, expenses for items consumed on a daily basis, such as food, are substantially reduced for the parent without possession. Downey, supra, at p. 64.

In light of the significant amount of time that Mr. Hagan has the parties' child,

[1] Kentucky Revised Statutes.

> this Court finds that the sharing of parenting time and resultant shift in expenses is a factor of an extraordinary nature which would make application of the guidelines inappropriate, and that accordingly, Mr. Hagan is entitled to a deviation from the Kentucky Child Support Guidelines. As a starting point for deviation from the child support guidelines and in light of the fact that expenses in a shared custody arrangement are greater for the noncustodial parent than are anticipated by the guidelines, this Court calculated 1.5 times the amount of support indicated by the guidelines, attributed the cost to each party based upon the percentage of time that Josh is with each parent, and credited Mr. Hagan's payment of health insurance for Josh. Under this calculation, Mr. Hagan should pay to Mrs. Page the sum of $90.00 per month as child support for Josh. The cost of extraordinary medical expenses shall be divided according to the parties' proportionate share of their combined joint income; petitioner [John] shall pay 53% and the respondent [Amy] shall pay 47%.

(Family court's order of January 5, 2005, at pp. 6-8.)

Following the entry of this order, Amy appealed to this court. We note at the outset that Amy's brief fails to comply with CR[2] 76.12(4)(c)(v), which requires that the appellant's brief contain "a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." See, Skaggs v. Assad, 712 S.W.2d 947 (Ky. 1986) and Elwell v. Stone, 799 S.W.2d 46 (Ky.App. 1990). Despite the omissions, we have nonetheless

[2] Kentucky Rules of Civil Procedure.

examined the entire record in order to consider the merits of the appeal.

Amy argues that the court's decision to deviate from the child support guidelines constitutes an abuse of discretion. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles." Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000). We cannot conclude that the judgment reflects any abuse of the court's exercise of discretion; on the contrary, the order reflects meticulous reasoning tailored to every specific detail involved in the child support obligation at issue.

In support of her argument, Amy first contends that the court's math is incorrect. She argues that she and John do not share time with Joshua on a "nearly equal" basis -- a contention at variance with the court's finding. According to her own calculations, she has Joshua 61.5% of the time and John has him only 38.5% of the time.

Although the court referenced its previous order which had found that Joshua spent 43% of his time with John, it did not make a new finding as to the exact amount of time that Joshua currently resides in each parent's home. Instead, it found in more general language that Joshua spent a "significant amount of time" with his father, an amount which it

characterized as “nearly equal” to that spent with Amy. It also found that the amount of time spent with John resulted in the shifting to him of expenses related to Joshua’s care that would normally be borne by the primary custodian. Whether the exact division of parenting time is 57%/43% or 61.5%/38.5%, we disagree that the court was either arbitrary or unreasonable in characterizing the time Joshua spends with each parent as being “nearly equal.”

Under KRS 403.211(2),(3) and (4), a court is empowered to exercise discretion and to deviate from the guidelines when it finds that application of the guidelines would be “unjust or inappropriate.” In this case, the court carefully addressed the issue and made a direct finding that the parenting schedule and the resulting shift in expenses for Joshua’s care justified a deviation. An array of evidence supported this finding: both parents provide Joshua with a home; both share his expenses on a nearly equal basis for items such as clothes, food, school supplies, extra-curricular activities, hair cuts, and vacations. In light of the evidence of record, we have no basis to say that the court abused its discretion in deviating from the child support guidelines. Downey v. Rogers, supra; Downing v. Downing, 45 S.W.3d 449 (Ky.App. 2001).

Amy also argues that “the record is unrebutted that [she] pays virtually 100% of the costs for [Joshua’s] organized

extracurricular activities." (Appellant's brief at p. 8.) In support of this statement, she refers to a document introduced at the hearing which itemizes the expenses she has incurred on Joshua's behalf since 1997. However, a review of all of the evidence presented to the family court reveals that John, too, has financed many of his son's extracurricular activities. Thus, the finding that such expenses are shared is not clearly erroneous.

Finally, Amy argues that in determining the proper amount of John's child support obligation, the court failed to take into consideration the fact that she pays **all** of Joshua's private school tuition. The evidence was undisputed that it was Amy's desire that Joshua attend the private school. It was also undisputed that the parties agreed that Joshua could enroll in the school with the proviso that Amy would pay the entire tuition. Under these circumstances, we agree with John that the court did not err in refusing to consider Amy's voluntary payment of private school tuition in determining the appropriate amount of his child support obligation. See, Miller v. Miller, 459 S.W.2d 81 (Ky. 1970); and Smith v. Smith, 845 S.W.2d 25, 26 (Ky.App. 1992).

The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

B. Mark Mulloy
Louisville, KY

BRIEF FOR APPELLEE:

Melanie Straw-Boone
Louisville, KY