

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-000978-MR

WILLIAM BRADLEY KING

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE KATHLEEN VOOR MONTANO, JUDGE
ACTION NO. 96-FC-005110

VALERIE SUSAN KING

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ABRAMSON, ACREE, AND WINE, JUDGES.

WINE, JUDGE: William Bradley King (Bill) appeals an order from the trial court awarding \$4,057.98 per month in child support on the basis that such an award is excessive and inconsistent with Kentucky law. Bill further appeals the trial court's denial of a new trial based on extenuating circumstances. For the following reasons, we affirm.

The parties do not dispute the facts of this case. The trial court entered a decree dissolving the marriage of Bill and Valerie Susan King (Valerie) on September 13, 1996. During the marriage, the parties had three children: Kelsey Lynne King, born May

25, 1990; Kayla Ellen King, born June 1, 1992; and Kylie Alexander King, born August 7, 1995. The decree incorporated a settlement agreement, filed January 21, 1998, which called for Bill to pay Valerie \$2,750.00 per month in child support.

On Bill's motion, the trial court reduced his child support obligation to \$2,223.00 per month in an order entered April 27, 1999. Thereafter, on October, 1, 2001, Valerie moved for an increase in child support. The trial court ordered the parties to mediation but the mediation proved unsuccessful as the parties were unable to reach an agreement. The trial court decided not to modify the child support in a final and appealable order entered December 26, 2001.

There were other motions before the trial court with regard to parenting and custody before the case was finally transferred to family court on July 24, 2003. On August 20, 2003, Valerie again filed a motion to increase child support. On June 1, 2004, the trial court awarded Valerie an increase in support to \$4,057.98 per month. Bill immediately filed a motion to alter and amend the trial court's order which was denied on January 28, 2005. Thereafter, on February 3, 2005, Bill moved for a new trial and sought relief from clerical mistakes found in the trial court's June 1 order. The trial court denied his motion for a new trial but granted his motion to correct a clerical error in the order. This appeal followed.

Bill first argues that the trial court erred in increasing his child support to \$4,057.98 per month as it is well in excess of the \$15,000.00 top level of the Kentucky Child Support Guidelines. The child support guidelines set out in KRS 403.212 serve as

a rebuttable presumption for the establishment or modification of the amount of child support. However, courts may deviate from the guidelines when they make specific findings that application of the guidelines would not be just or appropriate. KRS 403.211(2). The trial court may use its judicial discretion to determine child support in circumstances where combined adjusted parental gross income exceeds the uppermost level of the guidelines. KRS 403.212(5). *See Downing v. Downing*, 45 S.W.3d 449 (Ky.App. 2001).

In this case, the trial court used the gross income of Bill and Valerie without adjustment for taxes. The trial court determined the combined monthly parental gross income of the parties at \$29,752.00, but did not include either parent's growth on their investments. Valerie earns 23% of the \$29,752.00, while Bill earns 77%. Since this amount clearly exceeds the uppermost level of the guidelines, which currently tops out at \$15,000.00 per month, deviation from the guidelines is appropriate in this case. KRS 403.211(3)(e).

The trial courts in Kentucky have been given broad discretion in considering what circumstances are relevant and what settings correspond in determining appropriate child support. *Redmon v. Redmon*, 823 S.W.2d 463 (Ky.App. 1992). Whenever possible, a reviewing court should defer to the lower court's discretion in determining child support cases. *See Pegler v. Pegler*, 895 S.W.2d 580 (Ky.App. 1995). As long as the trial court's discretion is compliant with the guidelines, or its deviation is

adequately established in writing, we will not disturb the trial court's findings.

Commonwealth v. Marshall, 15 S.W.3d 396, 400-01 (Ky.App. 2000).

Here, the trial court relied on *Downing, supra*, in setting the child support based on the children's needs and the lifestyle they would have enjoyed had the parties continued to stay married. The trial court considered the monthly expense list that Valerie presented for herself and the children at the hearing on November 18, 2003. Valerie testified that a great deal of her monthly expenses are connected to the children's sports costs. Valerie indicated that she spends an estimated \$647.00 per month in sports related fees, including equipment costs, fees, clothing, travel, gas and motel rooms. Valerie also testified that grocery expenses have increased dramatically since the children have gotten older. The children now carry cell phones which is another expense that did not exist when child support was last calculated in 2001 and 2002. Valerie noted that it is very expensive to put three children through the Anchorage School District, but she explained that both parties had agreed it was important to have the children continue to attend there. Valerie testified that 80% of the clothing expense itemized on her exhibit was for the children's clothing.

Bill argues that the evidence presented by Valerie and relied on by the trial court illustrates that Valerie's decisions in raising the children are similar to the "three pony rule" articulated by this Court in *Downing*. We disagree. In *Downing*, this Court emphasized that child support "must be rationally related to the realistic needs of the children," and is not intended merely to transfer wealth or provide the children with an

extravagant lifestyle. *Downing*, 45 S.W.3d at 456. Or as explained in the “three pony rule,” “no child, no matter how wealthy the parents, needs to be provided more than three ponies.” *Id.*, citing *Matter of Marriage of Patterson*, 920 P.2d 450, 455 (Kan. App. 1996). In this case, there is no evidence to suggest that the children’s expenses are extravagant. As noted above, *Downing* supports the notion that the children should continue to live at the standard of living to which they had grown accustomed prior to the parents’ divorce. *Id.* at 456-57. The *Downing* Court further reasoned that the needs of the children should be based on the parents’ financial ability to meet those needs. The trial court properly considered the reasonable day-to-day needs of the children and the parties’ ability to pay and determined an appropriate child support amount. We find no error.

Bill also claims that the trial court erred when it failed to consider his undisputed evidence proving Valerie’s claims that her increased expenses were false. Specifically, Bill points out that Valerie submitted a monthly budget amount for her LG&E bill that was not consistent with her testimony. However, Valerie testified that Bill’s calculations were only based on nine months, not twelve, and were missing the three most expensive winter months. Bill further challenged Valerie’s monthly estimate of \$158.12 for water/sewage when in fact Valerie testified that water/sewage was a bi-monthly expense. Valerie admitted her calculation was wrong on this one. Bill further asserts Valerie listed amounts for the children’s dental and health costs even though Bill pays for the children’s insurance. Finally, Bill points to what he considers an inflated

escrow expense which Valerie testified she used to pay property taxes. Significantly, though, Valerie's expense list was admitted with no objection from Bill at the time of the hearing. Further, Valerie testified that there were purchases for the children she made that were not reflected on her ledger because she often paid cash for a variety of items. We conclude that Valerie's testimony and the documentation she provided was sufficient for the trial court to make a determination to increase the child support.

Bill cites *Makar v. Makar*, 643 So. 2d 1378 (Ala. Civ. App. 1994), to support his position that the trial court should have denied her claim for an increase in child support because Valerie failed to produce receipts or canceled checks. However, unlike in *Makar* where the mother had no explanation for the increase in expenses, *id.* at 1378, Valerie provided testimony and some documentation explaining the increased expenses for the children.

Bill's third argument is that the trial court made findings of fact that were not in the record. Bill concludes that the trial court found on its own that, "it is logical that the expenses of raising children continue to increase, both as a result of the normal growth of prices over time, as well as the larger needs of older children." However, as noted above, Valerie testified on more than one occasion that since the children had aged, the cost to care for them had dramatically increased. Thus, the trial court's finding on this point was supported by evidence of record.

Bill further asserts that the trial court erred when it determined *sua sponte* what percentage of Valerie's mortgage, escrow payment, house maintenance, LG&E, cell

phone, Internet, and other various expenses were attributable to the children. Bill contests the trial court's percentage determinations as being without precedent and clearly erroneous. However, as noted in *Downing*, it is well within the trial court's discretion to determine child support when the parental gross income is more than the uppermost level of the guidelines. *Downing*, 45 S.W.3d at 454. *See also* KRS 403.212(5). Thus, we find no error in the trial court's apportionment of these expenses.

Bill also contends the trial court erred in including health and dental costs in the children's monthly expenses because he already pays the children's health and dental insurance. However, the additional \$45.00 per month is attributable to prescription medication costs for the children. These are out-of-pocket expenses that are not covered by Bill's medical group. We find no error.

Bill next argues that the trial court erred in calculating the combined parental gross income. The trial court opted to exclude investment income from its calculation of the parties' income. Bill argues Valerie's investments of \$124,000.00 should have been considered in the trial court's calculations of her income. The trial court indicated that it omitted Valerie's investment income as it was set aside as college tuition for the children and Valerie's retirement. But the trial court also omitted from the income calculation any growth in Bill's pension fund. On the whole, we cannot say that the court's treatment of this income unfairly skewed the child support percentages assigned to either party.

Bill also claims that the money Valerie received from her parents for a new automobile should have been considered as income. However, Valerie testified that the automobile was not a gift, but a loan from her parents that she intends to pay off over time. The trial court found that the money for the automobile was in fact a one-time loan and thus, the trial court properly did not consider the loan as income to Valerie.

Regardless of Bill's assertion otherwise, the trial court did not err in its division of the parties' gross monthly income. Specifically, Bill contends that the trial court should have relied on KRS 403.211(3)(g), which allows a court to make adjustments to a child support award when it would otherwise have an unjust result. The trial court attributed 23% of the parties' gross monthly income to Valerie while Bill earns the remaining 77%. Bill suggests that the trial court did not adequately take into consideration his ability to pay child support of \$4,057.98 since he is in the highest tax bracket, paying 42% of his gross income to taxes. Further, of the \$275,962.00 Bill grossed in 2005, after deductions for his pension in the amount of \$28,000.00, insurance, continuing education, medical license dues, and taxes, Bill was left with only \$11,413.57 per month for expenses. But, on the other hand, Valerie's monthly income on disability is \$6,752.00 and she has the primary responsibility of raising the parties' three children. Based on these factors, we disagree with Bill that the trial court rendered a child support award that was wholly unfair.

Bill argues the trial court committed error when it awarded Valerie attorney fees pursuant to KRS 403.220. Bill states that the court neglected to follow the statute

when it awarded Valerie the fees without first considering the financial resources of both parties. However, the trial court awarded attorney fees on June 1, 2004. The case began in 1996 and the trial court was well versed in the history of this case and well aware of the disparity in the incomes of the parties for which KRS 403.220 allows the court discretion in determining whether to have one party pay some portion of the other's attorney fees. Again, Valerie is a disabled mother receiving disability benefits while Bill is a practicing physician. We find no error in the trial court's decision to have Bill pay a portion of Valerie's attorney fees.

Finally, Bill argues he is entitled to a new trial for two reasons. First, he asserts that there were procedural irregularities at the trial level. Specifically, Bill argues there were too many judges involved in the case and therefore, all the rulings were not based on the judges having heard original evidence. This case was first assigned to Judge George. The case was reassigned to Judge Montano, who had to recuse herself due to a brief encounter with Bill, then an emergency room doctor at Baptist East Hospital. The case was then assigned to Senior Judge Whittinghill who ruled on Bill's motion to alter, amend or vacate the court's June 1 order. And, finally, Judge Sherlock ruled on Bill's motion for a new trial and relief from a clerical mistake. Bill argues because Senior Judge Whittinghill came in after Judge Montano recused, she did not hear "original evidence" but was only able to listen to the taped proceedings. In such "exceptional circumstances," he argues that the trial court erred in not granting him a new trial under CR 59.01(a).

We find no merit to this argument. As this case demonstrates, judges are frequently reassigned to pending litigation for various reasons. While the number of judges who were involved in this case is somewhat unusual, it does not implicate Bill's due process rights. Furthermore, Judge Montano recused herself on Bill's motion. Finally, when reviewing a video recording, the trial judge can observe the witness as if he/she were testifying live. Bill has no basis to complain that the matter was then decided by a different judge.

Bill further claims that he is entitled to a new trial because the ruling was not supported by sufficient evidence. Again, Bill argues that Valerie did not submit sufficient evidence to support her claim that her expenses for the children had increased. We already found this argument to be without merit.

Thus, for the reasons stated herein, the Jefferson Family Court's orders entered April 19, 2005, January 28, 2005, and June 1, 2004, are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Louis P. Winner
Louisville, Kentucky

BRIEF FOR APPELLEE:

Douglas S. Haynes
Louisville, Kentucky