RENDERED: JANUARY 16, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000788-ME

SHARON WEITER — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE DOLLY WISMAN BERRY, JUDGE
ACTION NO. 03-CI-504182

ANTHONY WEITER — APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: ACREE AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Sharon Weiter appeals from an order of the Jefferson Family Court reducing Anthony Weiter's child support obligation from $1,000.00 per month to $700.00 per month. She argues that there had been no material change since the prior child support order, and thus a modification was contrary to

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

the requirements of KRS[2] 403.213. She also argues that the trial court erred by implementing the reduction retroactive to the date that Anthony filed his motion for modification. For the reasons stated below, we affirm in part, vacate in part, and remand.

FACTUAL AND PROCEDURAL BACKGROUND

The parties were married on May 18, 1985. They have two children, Casey, born May 6, 1994, and Jordan, born March 2, 1997. On November 12, 2003, Sharon filed a petition for dissolution of marriage.

In connection with the proceedings the parties entered into an agreed order[3] substantially resolving issues relevant to the care and custody of the children. Among other things, the agreement provided that the parties would share joint custody of the children, with Sharon's "home being designated as the children's primary residence." As relevant to the present proceedings the agreed order contained the following terms:

> 2. The Respondent [Anthony] shall exercise parenting time with the children as follows:
>
> a. Every other weekend from Friday after school until Monday morning, when he shall take them to school, or to their mothers [sic] at 3:00 if there is no school on that Monday;
>
> b. On the Mondays following Petitioner's [Sharon] weekend the children will be with the Respondent from the time they are released from

[2] Kentucky Revised Statutes.

[3] The order was entered January 13, 2006.

school until the following morning when he returns them to school;

c. On the Wednesdays following Respondent's weekend, Respondent shall have the children in his possession from the time they are out of school on Wednesday until he returns them to school the following morning. If there is no school in session on those days, Respondent shall have the children from 8:00 a.m. (on the Monday or Wednesday) until either he returns them to school the next morning, or if there is no school to their mother's home at 3:00 p.m.

. . . .

17. During the summer vacation, each of the parties will have a seven (7) day uninterrupted vacation, and each of the parties would advise the other by the April preceding the summer of their scheduled vacations. Other than the seven (7) day period for each parent, the rest of the summer will be as follows:

The children will always be with the Petitioner on Mondays and Tuesdays and with the Respondent on Wednesdays and Thursdays. When the Petitioner has the children for the weekend the Respondent will return the children on Friday morning at 10:00 a.m. When the Respondent has the weekend he will return the children on Thursday evening at 9:00 p.m. and pick them up on Friday evening at 5:00 p.m. At the end of Respondent's weekend he will return the children to the Petitioner by 10:00 a.m. on the Monday morning following his weekend.

. . . .

19. The Respondent will continue to pay child support of $1,000 monthly and maintain the childrens' [sic] medical insurance as long as provided by employer at no cost to Respondent. . . .

. . . .

> 22. The holiday schedule, Paragraph 4 of the Court's Order of June 14, 2004 shall be incorporated herein by reference with new summer schedule unless modified by agreement of the parties or further Order of the Court.

Eventually all matters surrounding the dissolution were resolved and a final decree was entered. On August 8, 2007, Anthony filed a motion seeking to reduce his child support obligation pursuant to KRS 403.213. In support of his motion, Anthony alleged: (1) that he had incurred a reduction in income from $40,000.00 to $18,000.00; (2) a belief that Sharon's income for 2006 was in excess of $42,000.00; (3) "voluntary" payments for the children's school expenses; and (4) "joint and shared custody in that [Anthony] has the children in excess of 42% of the time and circumstances have changed to cause the present child support award to be unconscionable."

As further discussed below, on March 11, 2008, the family court entered an order reducing Anthony's child support obligation from $1,000.00 per month to $700.00 per month. The child support schedule applied to the parties' new incomes reflected that the 15% threshold contained in KRS 402.213(2), which creates a presumption that there has been a material change, was not met in this case (the incomes produced a child support obligation of $855.00 per month under the guideline tables contained in KRS 403.212.) However, the trial court applied the deviation provisions contained in KRS 403.211(2) and (3), and modified child support based upon its written findings that a deviation from the child support

guidelines would be appropriate. The order further provided that the modification was to be effective from the date that Anthony filed his motion for modification and provided a mechanism for recoupment of the overpayments.

Sharon filed a timely motion to alter, amend, or vacate the modification order, which was denied by order entered April 3, 2008. This appeal followed.

MODIFICATION

Sharon contends that the family court erred by reducing Anthony's child support obligation because the evidence failed to demonstrate that there had been a "material change in circumstances that is substantial and continuing" as required by KRS 403.213(1) as a threshold requirement for a child support modification. As previously noted, application of the child support schedule to the parties' current incomes does not produce a 15% change under the child support schedule, and, accordingly, pursuant to 402.213(2), there is a rebuttable presumption that there has not been a material change. The family court's order acknowledged this, but nevertheless concluded that modification was proper pursuant to the deviation provisions contained in KRS 403.211(2) and (3).

We begin our review by setting forth the relevant statutory provisions. KRS 403.313 provides, in relevant part, as follows:

> (1) The Kentucky child support guidelines may be used by the parent, custodian, or agency substantially contributing to the support of the child as the basis for periodic updates of child support obligations and for modification of child support orders for health care. The

> provisions of any decree respecting child support may be modified only as to installments accruing subsequent to the filing of the motion for modification and only upon a showing of a material change in circumstances that is substantial and continuing.
>
> (2) Application of the Kentucky child support guidelines to the circumstances of the parties at the time of the filing of a motion or petition for modification of the child support order which results in equal to or greater than a fifteen percent (15%) change in the amount of support due per month shall be rebuttably presumed to be a material change in circumstances. Application which results in less than a fifteen percent (15%) change in the amount of support due per month shall be rebuttably presumed not to be a material change in circumstances. For the one (1) year period immediately following enactment of this statute, the presumption of material change shall be a twenty-five percent (25%) change in the amount of child support due rather than the fifteen percent (15%) stated above.

KRS 403.211 provides, in relevant part, as follows:

> . . . .
>
> (2) . . . [I]n any proceeding to modify a support order, the child support guidelines in KRS 403.212 shall serve as a rebuttable presumption for the establishment or modification of the amount of child support. Courts may deviate from the guidelines where their application would be unjust or inappropriate. Any deviation shall be accompanied by a written finding or specific finding on the record by the court, specifying the reason for the deviation.
>
> (3) A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption and allow for an appropriate adjustment of the guideline award if based upon one (1) or more of the following criteria:

> (a) A child's extraordinary medical or dental needs;
>
> (b) A child's extraordinary educational, job training, or special needs;
>
> (c) Either parent's own extraordinary needs, such as medical expenses;
>
> (d) The independent financial resources, if any, of the child or children;
>
> (e) Combined monthly adjusted parental gross income in excess of the Kentucky child support guidelines;
>
> (f) The parents of the child, having demonstrated knowledge of the amount of child support established by the Kentucky child support guidelines, have agreed to child support different from the guideline amount. However, no such agreement shall be the basis of any deviation if public assistance is being paid on behalf of a child under the provisions of Part D of Title IV of the Federal Social Security Act [footnote omitted]; and
>
> (g) Any similar factor of an extraordinary nature specifically identified by the court which would make application of the guidelines inappropriate.
>
> (4) "Extraordinary" as used in this section shall be determined by the court in its discretion.

Thus, KRS 403.211 "provides that a court may deviate from the [child support guidelines set forth in KRS 403.212] where their application would be unjust or inappropriate and where the court makes a written finding or specific finding on the record specifying the deviation." *Smith v. Smith*, 845 S.W.2d 25, 26 (Ky. App. 1992). "A decision on whether to deviate from the guidelines is within

the trial court's discretion." *Rainwater v. Williams*, 930 S.W.2d 405, 407 (Ky. App. 1996). However, in order for deviation from the guidelines to be permitted on grounds that applying them would be unjust or inappropriate, the decision must be based upon one of the criteria set forth in KRS 403.211(3). *See Wiegand v. Wiegand*, 862 S.W.2d 336, 337 (Ky. App. 1993).

In its modification order, the family court invoked the "extraordinary nature" provisions of KRS 403.211(3)(g) in justification of its deviation from the child support guidelines. More specifically, the family court made the following findings in support of a deviation:

> In this matter, both parties stipulated that Mr. Weiter spends considerable time with the girls, and he testified that he pays all their expenses during that time in addition to the child support. (He also pays for the girls' private schooling; however, the Court cannot give him "credit" for voluntarily assuming expenses that could not have been ordered.) Having reviewed the parenting schedule submitted by each party, the Court finds that Mr. Weiter has the children in his possession 38% of the time. The Court also specifically finds that this amount of parenting time (and the expenses which necessarily follow) is an "extraordinary circumstance" entitling Mr. Weiter to a deviation from the Kentucky child support guidelines.

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR[4] 52.01. Findings of fact are not clearly erroneous if supported by substantial evidence. *Janakakis-Kostun v. Janakakis,* 6 S.W.3d 843, 852 (Ky. App. 1999). The test for substantiality of evidence is whether when

[4] Kentucky Rules of Civil Procedure.

taken alone, or in the light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable men. *Id.*

Sharon does not challenge the 38% parenting time figure, and, indeed, that appears to be her calculation of Anthony's parenting time. It is elementary that the child support guideline amounts contained in KRS 402.212 take into consideration a typical parenting time schedule for the noncustodial parent and foresees that he will pay for the children's expenses during their time spent together. What is a standard time-sharing arrangement? We believe the following approaches the standard: (1) every other weekend; (2) an evening weekday of parenting time between weekend parenting time; (3) additional and rotating three-day weekend parenting time; (4) alternating spring break parenting time; (5) additional and rotating holiday parenting time; and (6) four weeks of summer parenting time.[5] It is self-evident that the foregoing produces a percentage of parenting time considerably less than the 38% applicable to Anthony. Hence the trial court's determination that Anthony's parenting time vis-à-vis the average for a noncustodial parent is extraordinary is not clearly erroneous.

As previously noted, "a decision on whether to deviate from the guidelines is within the trial court's discretion." *Rainwater*, 930 S.W.2d at 407.

[5] We take judicial notice that the above comports with the Jefferson Family Court's informal (not officially adopted) standard parenting time schedule. For a formally adopted illustrative standard time sharing schedule *see* McCracken Family Court Rules of Court, Rule 7, Appendix D, which is similar to the above. *But see Drury v. Drury*, 32 S.W.2d 521 (Ky. App. 2000) (What constitutes reasonable visitation with children at divorce is a matter which must be decided based upon the circumstances of each parent and the children, rather than any set formula, and, when the trial court decides to award joint custody, an individualized determination of reasonable visitation is even more important.)

"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). In light of the additional parenting-time undertaken by Anthony (and the consequent additional expenses associated therewith) we cannot conclude that the trial court abused its discretion in deviating from the guidelines and establishing Anthony's child support obligation at $700.00 per month.

Sharon argues, however, that Anthony was entitled to parenting time with the children for 38% of the time pursuant to their original agreement and, accordingly, there has been no change at all in this aspect of their arrangement, and thus a finding of extraordinary circumstances is unfounded. In support of her argument she cites us to *Downey v. Rogers*, 847 S.W.2d 63, 65 (Ky. App. 1993). In *Downey* the parties had agreed that the parents would have equal parenting time and that the father would pay $760.00 per month in child support. The father later sought a reduction in support, in part based upon their equal parenting time. In upholding the trial court's denial of a modification based upon equal time-sharing,[6] this Court stated as follows:

> While the Family Support Act does not address or contemplate the arrangement agreed to by these parties, we believe the statute provides sufficient flexibility to allow our trial courts to fashion appropriate orders. *Redmon v. Redmon*, Ky.App., 823 S.W.2d 463 (1992). KRS 403.211(2) specifically provides, "Courts may

[6] The trial court granted a modification based upon a change in the parties' incomes. Upon the mother's cross-appeal this Court reversed the reduction because of the father's failure to show a material change.

> deviate from the guidelines where their application would be unjust or inappropriate." Subsection (3)(g) of the same statute allows the court, with appropriate findings, to deviate from the guidelines for any circumstance of an "extraordinary nature." *Thus, we think it is clear that the trial court could take into consideration the period of time the children reside with each parent in fixing support, and could deviate from the guidelines for reasons advanced by the appellant, if convinced their application would be unjust.*
>
> The trial court in the instant case was not unaware of its discretion in this regard. In its order it recognized the custody arrangement as one creating a "unique situation for the payment of child support." It considered various alternatives but decided to utilize the guidelines without deviating therefrom. We find no abuse of discretion in this regard, particularly in light of the evidence showing appellant's greater ability to pay, and the fact that all expenses are not equally shared by the parties. *Moreover, the parties negotiated the sum of $760 per month as child support at the same time they agreed to share equal possession of the children. In other words, nothing changed since the original agreement concerning custody that would make the payment of support unconscionable or unjust and mandate deviation from the guidelines.* (Emphasis added).

Thus, *Downey* demonstrates that a trial court may deviate from the guidelines based upon extraordinary parenting time (as in the present case), but if child support was originally set based upon the extraordinary time (as claimed by Sharon), then, as would be expected, the extraordinary time may not later serve as an extraordinary circumstance in support of a modification of child support.

At pages 2 - 4, *supra*, we set forth the provisions of the parties' agreement addressing time-sharing of the children. From our review of the provisions it appears that under paragraph 2(a), Anthony has the children 2.5 days

every other weekend for a total of 65 days (2.5 x 26); that under paragraph 2(b) and 2(c), during the 40 nonsummer weeks he has the children for an additional .5 days per week for a total of 20 days (40 x .5); that under paragraph 17, he has the children for an uninterrupted period of 7 days during the summer; that under paragraph 17, during the 12 summer weeks he has the children for an extra 2 days per week for a total of 24 days; and that under paragraph 22, he has the children for approximately 5 days under the holiday schedule. Thus under the agreed schedule he has the children for approximately 121 days, which is 33% of the time (121/365).[7]

Thus it appears that while the parties contemplated a parenting schedule for Anthony in excess of the average schedule for a noncustodial parent, contrary to Sharon's claim, their agreement is for less that the 38% found by the trial court. While this does make for a closer case in comparison with the average visitation schedule as set forth above, we nevertheless remain unpersuaded that the trial court abused its discretion in deviating from the guidelines.

RETROACTIVE RECOUPMENT

The family court's March 11, 2008, order provided that the child support reduction was to be retroactive to the date Anthony filed his motion for modification, August 8, 2007. The recoupment was to be effected "by reducing [Anthony's] obligation $200 monthly until the parties are even." Sharon contends that this is contrary to established case law on the issue.

[7] We note that Sharon does not provide us with calculations contrary to the foregoing. We also note that there may be overlap in our calculations (which would make the percentage less).

It is well established that modifications *increasing* child support may be applied retroactively to the date of the filing of the motion. *Pecoraro v. Pecoraro*, 148 S.W.3d 813 (Ky. App. 2004); *Pretot v. Pretot*, 905 S.W.2d 868 (Ky. App. 1995). Of course the modification at issue here involves a *decrease*, and so those cases are distinguishable.

We note that KRS 403.213(1) provides that "[t]he provisions of *any* decree respecting child support *may* be modified only as to installments accruing subsequent to the filing of the motion for modification[.]" (Emphasis added). Thus it would appear that the statute contemplates that any modification may be retroactive to the day of the filing of the motion - including decreases. We further note that Anthony specifically moved for any modification to be retroactive to the date of his motion.

In a decidedly different context it has been held that "[p]ast due payments for child support and maintenance become vested when due. Each payment is a fixed and liquidated debt which a court has no power to modify." *Pursley v. Pursley*, 144 S.W.3d 820, 828 (Ky. 2004).

> . . . In accord with a majority of the jurisdictions, we hold that unpaid periodical payments for maintenance of children, like that for alimony, become vested when due. The accrued sum of delinquencies is a fixed and liquidated debt, and the court has no power to modify the judgment as to it. . . .

Stewart v. Raikes, 627 S.W.2d 586, 587 (Ky. 1982). *See also Dalton v. Dalton*, 367 S.W.2d 840, 843 (Ky. 1963); *Heisley v. Heisley*, 676 S.W.2d 477 (Ky. App.

1984); *Whitby v. Whitby*, 306 Ky. 355, 208 S.W.2d 68, 69 (1948) ("We perceive that no distinction can be made between a judgment based upon a claim for alimony or maintenance and a judgment based upon any other legal right. After the judgment is entered, although it may be subject to modification at a subsequent date, it is binding and final until modified; and any payments which may have become due previous to such modification constitute a fixed and liquidated debt in favor of the judgment creditor against the judgment debtor.") However, the foregoing authorities apply to situations where the child support obligor has failed to pay child support and the issue involved whether an arrearage may be avoided or retroactively modified – even for an apparently good reason. Thus we believe this line of cases is distinguishable and not dispositive of the issue as presented herein.

Clay v. Clay, 707 S.W.2d 352 (Ky. App. 1986), presents a situation which is somewhat analogous to the present. In *Clay*, in June 2003 the trial court originally set the father's child support at $500.00. On appeal, the judgment of the trial court was vacated and remanded for the trial court to enter a new judgment. On remand, and upon applying the appellate court's mandate, the trial judge ordered the father to pay $300.00 per month in support, but refused to give him a credit (restitution or recoupment) of $200.00 per month for the amount he overpaid since the order of June, 1983. The issue addressed in *Clay* was whether the father was entitled to the recoupment of amounts which were paid under, in effect, an erroneous judgment subsequently corrected by the appellate court.

Quoting the Maryland case, *Rand v. Rand*, 40 Md.App. 550, 392 A.2d 1149, 1151-53 (1978), *Clay* addressed the issue as follows:

> It does not appear that the appellate courts of Maryland have yet addressed the question posed here directly. We find persuasive, however, and therefore adopt, the view expressed on several occasions by the New York courts that a party making child support payments pursuant to a court order has no *right* to restitution or recoupment following a reversal or modification of the award on appeal. The rationale for this rule is that the right to support arises out of the policy of the law and not by contract. [Citations omitted.]
>
> The obligation of a parent to support his (or her) minor child is required by public policy and is expressly imposed by statute. Md.Annot.Code, art. 72A,§ 1. The determination of the amount of support to be paid by a parent, and the fixing of such amount as part of an order of a court having proper jurisdiction, authorized by Md.Annot.Code, art. 16, § 66(a), is an implementation of that public policy, and therefore rests upon a different footing than ordinary judgments representing the adjudication of private claims. Some evidence of this difference is provided in Article III, § 38 of the Maryland Constitution, exempting a valid decree of a court of competent jurisdiction for the support of dependent children from the general prohibition against imprisonment for debt. [Citations omitted.]
>
> The fixing of child support derives from the obligation of the parent to the child, not from one parent to another. It presumably represents the considered judgment of the court as to what the needs of the child are and what the parent subject to the order ought, and can afford, to pay. This, in turn, is necessarily premised upon the assumption that the amounts paid, or to be paid, under the order are not excessive, and will, in fact, be applied exclusively to the ascertained needs of the child, whether directly or indirectly, and not to any extraneous purposes.

At least in the situation where the court entering such an order had jurisdiction to do so, and the order is therefore not void *ab initio*, recognition of a *right* of total recoupment because an appellate court disagrees as to the *amount* of support ordered, and directs the lower court to revise its decree by reducing the support allowance, would run the substantial risk of thwarting the clearly expressed public policy.

Where is the recoupment to come from? If the direct recipient--the custodial parent, usually--has not, in fact, expended the "overpayment" for the support of the child and has it, or its equivalent (in whole or in part), available for repayment, it is only fair and just that the paying parent be able to recover it. Thus, the power of a court to order or permit recoupment should not be denied. But to the extent that such overpayments have been properly expended for the child's support in reliance on the court order, *and* neither they nor their equivalent are available for repayment, the *entitlement* to recoupment would, of necessity, entail a reduction in the amount of future support below even that which the appellate court itself, or the trial court in the implementation of the appellate court's mandate, has found necessary. In other words, in such a situation, the onus of the remedy would fall upon the child, not the receiving parent. The existence of a *right* of recoupment, in that instance, would be entirely inconsistent with the obligation imposed upon the parent by law, because it would require that, during the recoupment period--the interval of time during which the paying parent reduces the periodic payment below the amount last ordered--the child would be receiving less than that found necessary for his or her support; and thus, the recouping parent would not be fulfilling his or her statutory obligation.

Whether, and to what extent, the receiving parent in fact used the "overpayment" for the support of the child and has the funds from which to permit a proper recoupment without depriving the child, is a determination that must necessarily be made by the trial court, exercising its discretion upon the relevant evidence before it. The scope of discretion, and the principles applicable to its

> exercise, with respect to allowing recoupment must be substantially the same as pertain to the fixing of child support in the first instance; and thus, the determination of the court will not be disturbed on appeal unless it is found to be clearly erroneous. (Emphasis in original.)

Id. at 353-54. The *Clay* Court continued as follows:

> In our view, the *Rand* decision clearly demonstrates that restitution or recoupment of excess child support is inappropriate unless there exists an accumulation of benefits not consumed for support. We recognize it would be an exceptional case, indeed, where support payments exceed the requisite amount necessary for support as mandated by the statute. KRS 403.210. Nevertheless, this is a finding addressed to the trial court. Here there was no such finding.

Id. at 354.

We believe the principles concerning recoupment discussed in *Clay* are applicable in the present case. That is, in order for recoupment to be had for previously paid child support, there must be unexpended child support funds from which recoupment can be made. If between the dates that Anthony filed his motion and the issuing of the modification order Sharon expended the $1,000.00 per month she continued to receive in child support on legitimate purposes for the benefit of the children, then where is the recoupment money to come from? According to the order it will come from the $700.00 modified support payment at the rate of $200.00 per month. But what if the full $700.00 is needed to provide for the legitimate needs of the children? Under the family court's order, the recoupment money would be diverted from expenditures for their legitimate needs

to fund Anthony's recoupment. We believe that this is precisely what *Clay* condemns.

There is no finding by the family court concerning whether there are unexpended child support funds from which recoupment may be made without interfering with the children's ongoing needs. We accordingly vacate the family court's order insofar as it awards recoupment, and remand for additional findings upon the issue of whether there are available unexpended child support funds which have been previously made from which recoupment may be made. If so, recoupment should be permitted up to the amount of the unexpended funds. If, however, no such funds are available, no recoupment may be had.

CONCLUSION

For the foregoing reasons the judgment of the Jefferson Family Court is affirmed in part, vacated in part, and remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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