

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-000020-ME

FIDEL SIMMONS

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE ELEANORE GARBER, JUDGE  
ACTION NO. 07-CI-501242

SHANTE TERRY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, JUDGE; HENRY AND ISAAC,<sup>1</sup> SENIOR JUDGES.

HENRY, SENIOR JUDGE: Fidel Simmons appeals from a ruling of the Jefferson Circuit Court which ordered him to pay \$210 monthly in base child support to his former wife, Shante Terry. He argues that the trial court abused its discretion in arriving at this amount because it failed to give sufficient weight to evidence that the parents have substantially similar incomes and share equal parenting time.

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<sup>1</sup> Senior Judges Michael L. Henry and Sheila R. Isaac sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Fidel and Shante have one child, a daughter, who was born in 2005. Their marriage was dissolved on August 3, 2007. Under the terms of the judgment which dissolved the marriage, Fidel and Shante were awarded joint custody. Because the child was dividing her time equally between the parents, and their monthly incomes were nearly equal (\$2,140 for Fidel and \$2080 for Shante), neither party was required to pay child support. Fidel has paid for the child's health insurance since her birth.

On June 26, 2008, the Jefferson County Attorney, acting on behalf of the Cabinet for Health and Family Services, filed a paternity complaint on behalf of Shante. Allegedly, Shante had applied for and received K-TAP (Kentucky Transitional Assistance Program) benefits by representing that her child was born out of wedlock and had no insurance benefits. Fidel filed an answer to the complaint to which he attached documentary evidence that the child was born in wedlock, that child support issues were addressed in the dissolution decree, and that he had provided health insurance for the child since her birth. He moved the court to dismiss the paternity complaint, and to hold Shante in contempt of court for fraudulently representing that the child was born out of wedlock and had no insurance coverage.

The Cabinet filed for leave to intervene in the dissolution action on behalf of Shante in order to establish child support, as a means of obtaining reimbursement for Title IV-D child support services that Shante had received from the state. The

family court granted the Cabinet's motion to intervene, and a hearing on the Cabinet's motion, and on Fidel's motion to hold Shante in contempt of court was held on June 23, 2009, and continued to September 8, 2009.

On October 26, 2009, the family court entered an order awarding Shante \$210 per month in child support. It found that Fidel earns 55 percent (\$2,153) and Shante earns 45 percent (\$1,733) of their combined monthly income of \$3,886. The court observed that if the parties had a standard parenting schedule with the child residing primarily with Shante, Fidel would have to pay monthly child support in the amount of \$306.35 under the guidelines. Because the parties have an equal parenting schedule, however, the family court set Fidel's base monthly child support at \$210 per month. Fidel also pays \$137 per month for the child's health and dental insurance and \$152 per month for child care costs. The court ordered Shante's 45 percent share of the responsibility for these costs (\$130) to be deducted from the base amount, resulting in a total of \$80. Fidel was ordered to pay this amount of \$80 per month effective on March 24, 2009 (the date the Cabinet filed its motion to intervene).

The court further noted that there had been recent changes in Shante's weekly income and in the cost of child care. Specifically, Shante had testified that her work hours had been reduced from 40 hours per week to 37.5 hours per week effective August 3, 2009, and Fidel had provided proof that child care costs had increased to \$272 per month. The court concluded that the reduction in Shante's income was insufficient to meet the 15 percent change necessary to modify child

support under Kentucky Revised Statutes (KRS) 403.213(2). It further ruled that Shante's contribution to the child care costs would have to rise to \$122. Effective August 19, 2009, therefore, Fidel was ordered to pay \$26 in child support, which reflected the deduction for Shante's 45 percent portion of the child's insurance premiums and child care costs from the base amount of \$210.

Shante filed a motion to reconsider which was denied. Fidel filed his notice of appeal on December 30, 2009. On January 6, 2010, the Cabinet filed a motion to withdraw as a party from the action on the grounds that Shante was no longer receiving TANF (Temporary Assistance for Needy Families) benefits for the child, and that the Commonwealth was closing the case because the debt owed to the Cabinet for reimbursement of those benefits was less than \$500. The Cabinet was dismissed as a party to the appeal by order of this Court on July 12, 2010.

On appeal, Fidel argues that because the Cabinet initiated the child support action, and has withdrawn, the terms of the original dissolution judgment, under which he was not required to pay child support, should be reinstated. But the Cabinet withdrew from this case long after the entry of the family court's order setting child support, and the filing of the notice of appeal. The fact that the Cabinet is no longer a party to this appeal does not render the child support order moot. It is still binding on Shante and Fidel, the remaining parties to the action.

Fidel next argues that the award of child support was an abuse of discretion because the family court failed to give sufficient weight to the fact that he and Shante share equal residential custody.

Kentucky trial courts have been given broad discretion in considering a parent's assets and setting correspondingly appropriate child support. A reviewing court should defer to the lower court's discretion in child support matters whenever possible. As long as the trial court's discretion comports with the guidelines, or any deviation is adequately justified in writing, this Court will not disturb the trial court's ruling in this regard. However, a trial court's discretion is not unlimited. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

*Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001) (citations omitted).

Fidel argues that in calculating the award, the court unfairly used as its starting point the amount Fidel would have to pay under the child support guidelines if he were the noncustodial parent. He points out that if the court had treated Shante as the noncustodial parent, she would have to pay Fidel monthly support in the amount of \$250.56. But the family court did not use this guideline amount as its starting point in calculating child support. Its order clearly states that the parties do not have a standard parenting schedule, and that it would consequently deviate from the guidelines.

Fidel further argues that the court arrived at the amount of \$210 by using half the difference in the parties' gross incomes, a means of calculation which he contends is a clear abuse of discretion. As support for his argument, he relies on *Plattner v. Plattner*, 228 S.W.3d 577 (Ky. App. 2007). In *Plattner*, this Court found it unreasonable for the father to pay any child support in a situation where the parents' incomes were roughly equivalent (the division was 53 percent to 47 percent), they shared equal residential time, and they both incurred the expenses

necessary to provide a home for the children. In addressing Fidel's motion to reconsider, the trial court distinguished the factual circumstances by pointing out that in *Plattner*, both parties had significant earning capacity (\$6,838 and \$6,175), whereas Shante's \$1,733 monthly income is close to the poverty line. The court further noted that there was a wider disparity between the incomes of Fidel and Shante (10 percent) than between the Plattners (6 percent). We find no abuse of discretion in the trial court's analysis nor in its statement "that the court must be conscious of how a deviation from the child support guidelines or an award of no support affects the well being of the child."

Finally, Fidel argues that the trial court should have employed the split custody calculation method set forth in KRS 403.212(6). Under this method, support calculations under the guidelines are prepared for each parent, and then the parent with the greater obligation pays the other the difference in the two amounts. Under Fidel's calculations, this would result in a monthly obligation for him of \$55.70.

During the course of one of the hearings in this case, the trial judge suggested that she might employ the split custody method to calculate child support, but ultimately chose not to do so in her final order. The court was not bound by its statements at the hearing. "[A] court of record speaks only through its records, . . . and an oral pronouncement is not a judgment until it is reduced to writing[.]" *Holland v. Holland* 290 S.W.3d 671, 675 (Ky. App. 2009) (citations and internal quotation marks omitted).

KRS 403.211(2) provides that the “[c]ourts may deviate from the guidelines where their application would be unjust or inappropriate.” The trial court was not bound to follow any of the methods for calculating child support outlined in KRS 403.212 if it specifically identified an extraordinary factor which would make the application of the guidelines inappropriate. KRS 403.211(3)(g). In this case, the extraordinary factors identified by the court were Shante’s low income, the 10 percent difference between the parties’ incomes and concerns for the child’s well-being. The trial court acted within its discretion in ruling that these were extraordinary factors that justified deviating from the guidelines.

The order of the Jefferson Circuit Court setting child support at \$210 is therefore affirmed.

ACREE, JUDGE, CONCURS.

ISAAC, SENIOR JUDGE, DISSENTS AND FILES SEPARATE  
OPINION.

ISAAC, SENIOR JUDGE, DISSENTING: Respectfully, I dissent. Although this is an unusual situation because neither parent was designated the primary residential custodian, the trial court is not permitted to simply devise its own method of child support calculation without respect to the evidence and without presenting reviewable findings. *See McKinney v. McKinney*, 257 S.W.3d 130, 133 (Ky. App. 2008) (trial court’s findings must be supported by substantial evidence). Therefore, the trial court abused its discretion because it based its formulation on the premise that Fidel was the non-residential parent, which is not

supported by the uncontroverted facts in the record. I would remand to the trial court for a reasonable calculation based upon the evidence. The trial court's earlier statement in June 2009 that it would calculate the amount by determining the amount of support each party would provide the other under the guidelines to support the child full time and then offset the amounts and with the appropriate percentage reimbursements on daycare and health insurance, is a reasonable calculation.

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