

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-000899-ME

DONNA JOHNSON WALSH

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE DOLLY W. BERRY, JUDGE  
ACTION NO. 05-CI-500698

THOMAS E. WALSH

APPELLEE

OPINION  
AFFIRMING

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BEFORE: TAYLOR, CHIEF JUDGE; DIXON, JUDGE; ISAAC,<sup>1</sup> SENIOR JUDGE.

DIXON, JUDGE: Donna Johnson Walsh appeals a Jefferson Circuit Court order reducing the monthly child support obligation of her former husband, Thomas E. Walsh. Finding no error by the trial court, we affirm.

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<sup>1</sup> Senior Judge Sheila R. Isaac 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 parties divorced in August 2005, and pursuant to a marital settlement agreement, Tom agreed to pay Donna \$2,500.00 per month in child support for their three children. Tom earned a lucrative salary working for AEGON in the field of corporate finance; however, his position was terminated in May 2009. Unable to find comparable employment, Tom started his own investment advisory firm in November 2009.

In January 2010, Tom filed a motion to reduce his child support obligation based on his decreased income. Tom's motion also advised the court that the parties enjoyed equal timesharing with the children; consequently, he paid the children's expenses when they were in his care. Donna vehemently opposed a reduction in child support, contending that Tom was voluntarily underemployed.

The court held an evidentiary hearing on March 9, 2010. The evidence showed that Tom's salary had ranged from \$294,000 to \$475,000 during his final years at AEGON. Tom testified that he expected to earn approximately \$30,000.00 from his investment firm in 2010. Tom explained that, upon his departure from AEGON, he had utilized job placement services and had contacted several companies regarding jobs in corporate finance, all without success. Tom testified that he ultimately decided to start his own investment firm, and he explained his plan to steadily grow the firm over a five year period. Donna also testified at the hearing, stating that she earned approximately \$20,092 annually as a real estate appraiser.

The circuit court rendered an order on March 15, 2010, granting Tom's motion to reduce child support. The court imputed to Tom an annual income of \$80,000, a figure that included deferred compensation payments, and it set Donna's income at \$20,092. The court chose to deviate from the child support guidelines due to the parties' equal timesharing schedule, and the court reduced Tom's child support obligation to \$784.00 per month. Both Donna and Tom filed timely motions to alter, amend or vacate the court's order. The court denied both post-judgment motions, and Donna now appeals to this Court.

We are mindful that "the establishment, modification, and enforcement of child support is generally prescribed by statute and largely left, within the statutory parameters, to the sound discretion of the trial court." *McKinney v. McKinney*, 257 S.W.3d 130, 133 (Ky. App. 2008) (citation omitted). As a reviewing court, we defer to the trial court's discretion as long as its decision was not "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001).

KRS 403.213(2) creates a rebuttable presumption that a material change in circumstances exists if there is a 15% difference in the amount of support a parent pays and the amount actually due pursuant to the guidelines. However, pursuant to KRS 403.211(2), a court may deviate from the guidelines where the court finds applying the guidelines would be unjust or inappropriate. "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). If the court determines that the

guidelines are inappropriate, “the proper standard for modification of child support is found in KRS 403.213(1) and simply requires a ‘showing of a material change in circumstances that is substantial and continuing.’” *Dudgeon v. Dudgeon*, 318 S.W.3d 106, 112 (Ky. App. 2010).

Donna’s first argument relates to the court’s decision to deviate from the guidelines pursuant to KRS 403.211(3)(g), which allows deviation where circumstances of an extraordinary nature would render application of the guidelines inappropriate. On this issue, the trial court found as follows:

As previously stated, the parties share equal parenting time – 50% of the time the children are with Donna and 50% of the time they are with Tom. The Court considers this an extraordinary circumstance justifying a deviation from the guidelines. As each parent has possession of the children an equal amount of time, it would be unjust to establish child support based on the more traditional “primary parent/weekend visitation” arrangement.

Donna asserts that, since the equal timesharing arrangement had existed for five years prior to Tom’s motion to reduce child support, the court erred by finding that it was an extraordinary circumstance justifying deviation from the guidelines. We disagree.

We reiterate that the trial court had broad discretion when considering whether to deviate from the child support guidelines. *Rainwater*, 930 S.W.2d at 407. Although the timesharing arrangement was in place before Tom sought modification, the court was entitled to consider the circumstances of the parties at the time modification was sought. *See* KRS 403.213(2). The testimony showed

that, when he sought to reduce his obligation, Tom had lost substantial income and was building a new career, while parenting the children 50% of the time. This Court has stated, “The period of time during which the children reside with each parent may be considered in determining child support, and a relatively equal division of physical custody may constitute valid grounds for deviating from the guidelines.” *Plattner v. Plattner*, 228 S.W.3d 577, 579 (Ky. App. 2007 ). Despite Donna’s argument to the contrary, we find no abuse of discretion in the court’s decision.

Donna next contends that the court abused its discretion because Tom failed to satisfy the evidentiary burden set forth in KRS 403.213(1), which requires a “showing of a material change in circumstances that is substantial and continuing.” We also note Donna characterizes Tom’s decreased income as voluntary, and she believes the court should have imputed income to Tom in the range of his AEGON salary. The trial court addressed these issues in its order denying post-judgment relief:

The Court found that Tom made all reasonable attempts to obtain a comparable position. Given the current state of the economy and the mass layoffs that are bringing litigants back to court everyday [sic], there simply are not many positions available in Louisville at the present time that pay what Tom’s previous job paid, and Tom testified that he made numerous contacts in his efforts to find another job. There is no requirement that he apply for positions in other large cities or that he “exhaust all possible avenues.” Just as Donna testified that she chose her current employment to allow her to be available to the parties’ children, Tom’s desire to stay in Louisville to allow him to actively parent his children is

no less important. Donna's argument that the Court should [...] impute his previous income level to him is unrealistic.

Tom testified that starting his own business is his best opportunity to regain anything near his previous level of income. His investment advisory company currently manages one million in assets and is expected to grow to twenty million in assets in about five years. Donna argues that his business expenses, such as his office rent, represent funds that should be allocated to the children. The Court believes that most legitimate investors would be reticent to turn sizable assets over to the control of someone "working out of their home," as Donna suggested. If Tom's attempts to grow this business succeed, everyone will benefit. The imputation of \$80,000 to Tom for this first year is not an insignificant amount.

A review of the hearing indicates that Tom was a compelling witness, and we are mindful of the trial court's authority to assess the credibility of the testimony and evidence presented. CR 52.01. Quite simply, the Court was not persuaded by Donna's interpretation of the evidence, and the court concluded that the significant decrease in Tom's income warranted a reduction in his child support obligation. After careful review, we conclude the court did not abuse its discretion.

For the reasons stated herein, we affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Marcia L. Sparks  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Diana L. Skaggs  
Louisville, Kentucky