

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-000834-ME

SCOTT ENDRES

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE DONNA DELAHANTY, JUDGE
ACTION NO. 06-CI-500551

JULIE ENDRES (NOW BLACK)

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MOORE, NICKELL AND THOMPSON, JUDGES.

MOORE, JUDGE: Scott Endres appeals from a Jefferson Family Court order which granted his former wife's motion to modify child support, and the family court's order denying his subsequent motion to alter, amend or vacate. After a careful review of the record, we affirm because the trial court did not abuse its discretion in ordering a modification in the amount of child support.

I. FACTUAL AND PROCEDURAL BACKGROUND

Scott Endres and Julie Endres (now Black) were married on July 11, 1987, and one child was born of the marriage on August 24, 1999. Both parties are employed as teachers. A decree dissolving the marriage was entered on February 10, 2006. The parties entered into a property settlement and child custody agreement on May 30, 2006. The agreement provided that Scott and Julie would share joint care, custody and control of their child. Because their parenting time was equally divided, they agreed to deviate from the total base child support guidelines amount of \$908.90. At that time, Scott earned 59 percent and Julie earned 41 percent of their combined income. Scott agreed to pay Julie a total of \$240.30 per month. This amount comprised the following: \$77.44 as base child support; \$61.44 for child care (59 percent of the total obligation of \$105.00); and \$101.42 for Erich's health insurance (59 percent of the total obligation of \$173.33). The parties agreed to share equally the cost of Erich's private school tuition and extracurricular activities.

About two years later, Julie filed a motion to increase child support on the grounds that she had changed her employment and was now earning less than before. The trial court held a hearing, at which it was established that Julie's annual income was \$38,129.00 and Scott's annual income was \$62,472.00. The trial court calculated that Julie earned 37.9 percent and Scott earned 62.1 percent of their combined gross income. The trial court applied the statutory child support

guidelines found in KRS¹ 403.212 and ordered Scott to pay \$637.00 per month in child support. Scott filed a motion to alter, amend or vacate which was denied. This appeal followed.

II. STANDARD OF REVIEW

“As are most other aspects of domestic relations law, the establishment, modification, and enforcement of child support are prescribed in their general contours by statute and are largely left, within the statutory parameters, to the sound discretion of the trial court.” *VanMeter v. Smith*, 14 S.W.3d 569, 572 (Ky. App. 2000). “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 (Ky. App. 2001).

III. ANALYSIS

Scott argues that this Court should hold, as a matter of law, that the child support guidelines are inapplicable when the parents share equal parenting time. In the alternative, he argues that it is an abuse of discretion for the trial court not to deviate from the guidelines in equal parenting cases. Finally, he argues that, even if we affirm the application of the guidelines and make no provision for an exception for equal parenting situations, the order in this case should nonetheless be reversed because there was no showing of a change in circumstances as required under KRS 403.213(1).

¹ Kentucky Revised Statute.

A. Applicability of the guidelines in equal parenting situations

Scott argues that the child support guidelines are based on an outdated familial model which presumes that there will be a custodial and non-custodial parent. He argues that the trial court's decision to treat Scott as the non-custodial obligor, who must pay full child support under the guidelines, is arbitrary as a matter of law because the parties share equal parenting time. He urges this Court to state unequivocally that the full guidelines amounts do not apply in equal parenting situations.

Under KRS 403.211(3), the trial court is provided with the discretion to deviate from the guidelines for a variety of reasons, such as the extraordinary medical or educational expenses of the child or the parent. Deviation is also permitted when there is a finding of any "factor of an extraordinary nature specifically identified by the court which would make application of the guidelines inappropriate." KRS 403.211(3)(g). Scott's argument would in effect remove this discretion from the trial court in cases where the parents share equal parenting time.

In *Dudgeon v. Dudgeon*, 318 S.W.3d 106 (Ky. App. 2010), a panel of this Court recognized that "the modern complexities of family life have resulted in myriad and unique familial circumstances[,] and that "[s]trict application of the child support guidelines . . . to these myriad and unique familial circumstances often leads to unjust results." *Dudgeon*, 318 S.W.3d at 111. The *Dudgeon* Court expressly stated that KRS 403.211(3) provides the courts with a mechanism to

recognize and give credence to these unique circumstances. *Id.* We decline to hold that the guidelines are inapplicable as a matter of law in joint parenting situations, because KRS 403.211(3) reserves to the trial court the discretion to make such a determination.

B. Did the trial court abuse its discretion in refusing to deviate from the guidelines?

Scott contends that the trial court abused its discretion in applying the guidelines in this case. Scott's argument is based on his assumption that, aside from gender, there is no factual basis on which to differentiate the parties. But Scott does not dispute that his income is more than \$24,000.00 higher than Julie's, or that he makes 24 percent more of the parties' combined income. In *Plattner v. Plattner*, 228 S.W.3d 577 (Ky. App. 2007), it was held that a trial court abused its discretion in awarding child support under the guidelines when the parents shared almost equal physical custody of the children and there was no significant disparity in income.

Because physical custody of the children is evenly divided between the parents, they bear an almost identical responsibility for the day-to-day expenses associated with their care. And since there is no significant disparity between the parties' annual income, the expenses necessary to provide a home for the children (even when they are not in residence) are also incurred by each party in equal proportion.

Plattner, 228 S.W.3d at 580.

Similarly, in *Dudgeon*, the guidelines were held to be inapplicable when three particular circumstances of an "extraordinary nature" were present: "nearly

equal physical time with the children, nearly equal income, and nearly equal expenditures for child-related expenses.” *Dudgeon*, 318 S.W.3d at 111.

Scott and Julie’s situation is distinguishable because there is a considerable disparity in their annual incomes; hence, the expenses associated with raising the child are not incurred by each party in equal proportion. The trial court did not abuse its discretion in regarding the difference in income as sufficiently substantial not to warrant deviating from the guidelines.

C. Finding of a material change in circumstances

Under KRS 403.213(1), a party seeking a modification of child support must show a “substantial and continuing change in circumstances.” Scott argues that a comparison of the parties’ situation in 2006 and 2010 reveals no such change because their parenting schedule, their educational background, training and occupations, and their incomes remained the same.

KRS 403.213(2) provides as follows:

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.

In this case, the base amount originally paid by Scott was \$77.44. With the additional amounts for child care and health insurance, the total amount paid was

\$240.30. The amount of \$637.00 ordered by the trial court under the guidelines clearly constitutes a fifteen percent change in the amount of support due.

Scott contends that there was not a fifteen percent change between what he would have owed under the guidelines in 2006 and what he has now been ordered to pay. But the fifteen percent is calculated from the existing, actual obligation, not what he hypothetically could have been ordered to pay at the time of dissolution.

KRS 403.213 does not require there to be a change in either party's income before a trial court may modify an existing child support award. Instead, in a situation such as the one here, where there was at least a 15% discrepancy between the guidelines and the noncustodial parent's **existing child support obligation**, the existence of this fact standing alone creates a rebuttable presumption that there is a material change in circumstances pursuant to KRS 403.213(2). Any refusal to order an increase in support in a situation such as the one here, therefore, is required to be accompanied by findings which specify the reasons for a deviation from the guidelines pursuant to KRS 403.211(3), just as would be required in cases involving initial awards of child support.

Wiegand v. Wiegand, 862 S.W.2d 336, 337 (Ky.App. 1993) (emphasis supplied).

Thus, the rebuttable presumption of a material change in circumstances was met in this case.

IV. CONCLUSION

For the foregoing reasons, the Jefferson Family Court's orders modifying child support and denying the motion to alter, amend or vacate are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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