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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000200-ME

STEFAN STAMM APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LUCINDA CRONIN MASTERTON, JUDGE
ACTION NO. 11-CI-05380

DOMINIQUE MICHELE FRANCOISE OLBERT APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, DIXON AND STUMBO, JUDGES.

STUMBO, JUDGE: Stefan Stamm appeals from an order of child support in the amount of $620 per month. Mr. Stamm's primary argument is that both parties have almost equal time with their children, possess high incomes, and share in necessary expenses; therefore, it is unreasonable for him to pay Dominique Olbert child support. We agree and reverse and remand.

Mr. Stamm and Ms. Olbert were married on January 29, 2004. They have two minor children. Ms. Olbert filed for divorce in October of 2011. On November 14, 2011, Ms. Olbert filed a motion for temporary joint custody, defined timesharing, temporary child support, and exclusive use of the marital home. A month later, the parties executed a property settlement agreement in which the issues of timesharing and child support were reserved. On January 5, 2012, Ms. Olbert filed a motion for child support. The motion was passed and not ruled upon. On September 10, 2012, Ms. Olbert renewed her motion for child support. On September 26, 2012, Ms. Olbert filed with the court a list of the monthly expenses for the children. Those monthly expenses included the following: $533 for a math tutor; $125 for swimming at the Signature Club; $10 for ice skating lessons; $167 for entertainment; $30 for birthday gifts for the children's friends; $50 for birthday and Hanukah gifts for the children and other holiday expenses; $542 for therapy sessions for both children; $30 for school supplies; $167 for children's toys, books, games, etc.; $40 for swimming lessons at Transylvania University; $38 for fall swim lessons; $32 for swim supplies; $80 for tennis lessons; and $200 for children's clothing. These expenses totaled $2,044.

Mr. Stamm filed a response objecting to these expenses. He noted that he had the children 43%[1] of the time, but only a third of the combined monthly income of the parties. Ms. Olbert has a monthly income of $28,274 and Mr.

[1] The parties entered into a joint custody arrangement where the children spend 6 of every 14 nights with Mr. Stamm and 8 of every 14 nights with Ms. Olbert.

Stamm has a monthly income of $9,470. In addition, Mr. Stamm stated that when the children are with him, he provides for their care. He also provides the children's health insurance and a personal fitness trainer.

A hearing was held on November 20, 2012. Both parties testified at the hearing. Ms. Olbert testified as to the above expenses and Mr. Stamm testified as to his objections. Other relevant evidence from the hearing includes: Ms. Olbert has the family home and Mr. Stamm bought a 3 bedroom house within walking distance to Ms. Olbert's home; both parties provide food, clothing, shelter, and entertainment for the children; Mr. Stamm did not approve of the math tutor Ms. Olbert provided and wanted to tutor the children himself; both children are in therapy[2] and Ms. Olbert insists on paying cash for those sessions even though Mr. Stamm's insurance would cover the sessions; and Mr. Stamm believes the children are overscheduled and does not approve of all the activities Ms. Olbert involves the children in.

At the conclusion of the hearing, the trial court awarded Ms. Olbert $620 in child support. The court reduced two of Ms. Olbert's expenses. The court reduced the amount for the children's therapy by half because only one child was currently enrolled in therapy. Also, the court removed the math tutor expense because Mr. Stamm could provide his own tutoring. This appeal followed.

> Kentucky trial courts have been given broad discretion in considering a parent's assets and setting correspondingly appropriate child support. A reviewing

[2] At the time of the filing for child support, both children were in therapy. At the time of the hearing, only one child remained in therapy.

> 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).

> In determining the reasonable needs of the children, the trial court should also take into consideration the standard of living which the children enjoyed during and after the marriage. The fundamental premise of the income shares model is that a child's standard of living should be altered as little as possible by the dissolution of the family. Consequently, the concept of "reasonable needs" is flexible and may vary depending upon the standard of living to which they have become accustomed.
>
> Any assessment of the child's reasonable needs should also be based upon the parents' financial ability to meet those needs. Factors which should be considered when setting child support include the financial circumstances of the parties, their station in life, their age and physical condition, and expenses in educating the children. The focus of this inquiry does not concern the lifestyle which the parents could afford to provide the child, but rather it is the standard of living which satisfies the child's reasonable and realistic needs under the circumstances. Thus, while a trial court may take a parent's additional resources into account, a large income does not require a noncustodial parent to support a lifestyle for his children of which he does not approve.

Id. at 456-457 (citations and footnotes omitted).

In the case at hand, the parties' adjusted parental gross income exceeds the guidelines set forth in KRS 403.212; therefore, the amount of child support is

within the discretion of the trial court. KRS 403.212(5). Mr. Stamm argues that the trial court abused its discretion in awarding child support in this case. He cites to the cases of *Plattner v. Plattner*, 228 S.W.3d 577 (Ky. App. 2007), and *Dudgeon v. Dudgeon*, 318 S.W.3d 106 (Ky. App. 2010), as support. We agree with Mr. Stamm and find that the court abused its discretion in awarding Ms. Olbert child support.

In *Plattner*, *supra*, Stephen Plattner and Jacqueline Levoir (formerly Plattner) were awarded joint custody of their minor children at the time of their divorce. Ms. Levoir was designated the primary residential custodian. Mr. Plattner was ordered to pay Ms. Levoir $1,072.38 per month in child support. Eventually a shared parenting arrangement was entered into by the parties by an agreed order. The arrangement had neither party being designated as the primary residential custodian. Furthermore, the children began residing with Ms. Levoir on Wednesdays, Thursdays, and each alternating Friday, Saturday, and Sunday. Mr. Plattner had the children the rest of the time. Mr. Plattner was also ordered to pay Ms. Levoir $1,103.63 per month in child support.

Around six months later, Mr. Plattner moved to significantly reduce his child support because Ms. Levoir's annual earnings had increased considerably and the parties shared equal physical and legal custody of the children. Mr. Plattner's child support was reduced to $884.55. Plattner appealed to another panel of this Court. He argued that

> [b]ecause the parties earn nearly the same income and participate in an alternating, continuous physical custody arrangement . . . he should not be ordered to pay to Levoir any part of his child support obligation. He essentially claim[ed] that they are in a wholly equalized financial posture with respect to the children, a fact that renders his payment of child support inequitable.

Plattner, 228 S.W.3d at 579.

This Court stated:

> While Kentucky's child support guidelines do not contemplate such a shared custody arrangement, they do reflect the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes. They also provide a measure of flexibility that is particularly relevant in this case. Under the provisions of KRS 403.211(2) and (3), a trial court may deviate from the child support guidelines when it finds that their application would be unjust or inappropriate. 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. *Brown v. Brown,* 952 S.W.2d 707 (Ky. App. 1997); *Downey v. Rogers,* 847 S.W.2d 63 (Ky. App. 1993).

Id.

The Court went on to find that:

> The parties were awarded joint custody of the children, and neither of them was designated as the primary residential custodian. 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.

> The statutory guidelines offer sufficient flexibility to allow the trial court to fashion appropriate and just child support orders. Under the unique circumstances of this case, we conclude that the trial court erred by awarding child support to Levoir.

Id. at 580.

In *Dudgeon*, *supra*, Michael and Laurie Dudgeon had two minor children at the time of their divorce. Mr. Dudgeon initially was ordered to pay child support to Ms. Dudgeon. Mr. Dudgeon moved to modify his child support because Ms. Dudgeon's income had increased. That same motion requested that the parties' time sharing arrangement be entered into the record. That arrangement had the children spending three weekday nights per week with Ms. Dudgeon and two weekday nights per week with Mr. Dudgeon. The parents would then have alternate weekends. The family court denied Mr. Dudgeon's motion to modify his child support. Around 8 months later, Mr. Dudgeon again moved for a modification in child support on the grounds that Ms. Dudgeon's income had increased again. That motion was also denied.

On appeal to a previous panel of this Court, the Court found that at the time Mr. Dudgeon requested a child support modification

> [Ms. Dudgeon] earned 45.6 percent ($96,000) of the parties' combined annual income, and [Mr. Dudgeon] earned 54.4 percent ($114,300). As to timesharing, [Ms. Dudgeon] enjoyed physical custody of the children approximately 53.6 percent of the time in a two-week period, and [Mr. Dudgeon] enjoyed physical custody of the children about 46.4 percent of the time in a two-week period. The difference in the amount of custodial time

> between the parties was attributed to [Ms. Dudgeon] having the children one extra night in a two-week period. Essentially, the parties' custodial arrangement resulted in a nearly equal division of physical time between [Ms. Dudgeon] and [Mr. Dudgeon], the actual difference constituting a mere night every two weeks. The evidence also established that each party, likewise, almost equally shared other expenses associated with the children.

Dudgeon, 318 S.W.3d at 108.

The Court ultimately held that

> [u]nder the unique familial circumstances of this case, [Mr. Dudgeon] and [Ms. Dudgeon] earn nearly equal incomes and, concomitantly, exercise nearly equal physical custody of the children. Also, they share almost equally other expenses associated with the children. These three particular circumstances are of an extraordinary nature under KRS 403.211(3)(g). Indeed, it is manifestly unjust and inequitable to require [Mr. Dudgeon] to pay [Ms. Dudgeon] $950 per month in child support when each earns nearly equal income, exercises nearly equal physical custody of the children, and shares nearly equal expenses associated with the children. It is beyond cavil that such inequitable result was ever intended by the General Assembly. While a determination of extraordinary circumstances is generally within the discretion of the circuit court, the circumstances of this case mandate such a result and serve as an apotheosis of extraordinary circumstances as contemplated under KRS 403.211(3)(g). *See* KRS 403.211(4). Thus, in this case, we conclude that application of the child support guidelines would be unjust per KRS 403.211(3)(g).

Id. at 111.

The case at hand is almost identical to *Plattner* and *Dudgeon*. Both parties have nearly equal physical custody of the children and bear identical day-to-day expenses as it relates to food, clothing, shelter, and entertainment for the children.

Ms. Olbert does possess additional expenses for the extracurricular activities of the children as discussed previously, but Mr. Stamm also has extra expenses in the form of health insurance and a personal fitness trainer for the children. It is also worth noting that while both parents have high incomes, Ms. Olbert has a monthly income almost three times larger than that of Mr. Stamm. Lastly, Mr. Stamm fundamentally objects to the number of activities Ms. Olbert schedules for the children. *See Downing v. Downing*, *supra* (a large income does not require a noncustodial parent to support a lifestyle for his children of which he does not approve). We therefore find that the award of child support was unreasonable and an abuse of discretion.

We note from the record that the child support award was made retroactive to November 14, 2011. It is unclear from the record whether there was a time when the parties did not have equal physical custody of the children. Since Ms. Olbert retained the marital residence, it is conceivable that at some point she may have had primary physical custody of the children. If such is the case, on remand, the trial court may need to determine if child support is appropriate for that period of time.

Based on the foregoing, we reverse and remand as to the award of child support.

DIXON, JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, DISSENTING: I respectfully dissent. The income of the parties exceeded the child support guidelines and, therefore, the child support award was in the discretion of the trial court. I do not believe that the trial court exceeded its discretion. I would affirm.

BRIEFS FOR APPELLANT:

Shea Chaney
Lexington, Kentucky

BRIEF FOR APPELLEE:

Carl D. Devine
Anna L. Dominick
Lexington, Kentucky