

RENDERED: OCTOBER 17, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001972-ME

SHANNON L. GRIGNON

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE PATRICIA WALKER FITZGERALD, JUDGE
ACTION NO. 11-CI-504023

PAUL C. GRIGNON

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, MOORE AND NICKELL, JUDGES.

DIXON, JUDGE: Shannon Grignon appeals from a judgment of the Jefferson Circuit Court denying her motion to modify the child support obligation of Paul C. Grignon. Finding no error, we affirm.

Shannon and Paul divorced in February 2012. Pursuant to a marital settlement agreement, the parties agreed to share equal parenting time with their

two children and to equally divide all of the children's expenses, including private school tuition. The parties specifically agreed to deviate from the statutory child support guidelines and included a provision stipulating that neither parent "shall be required to pay the other any sum denominated as child support and both parties shall have an equal duty to provide for the children's well-being." In July 2012, the parties entered into an agreed order to modify the parenting schedule. Pursuant to the agreed order, Paul would have parenting time on alternating weekends and overnight on Wednesday. The agreed order specifically recognized that "this change in schedule shall not be used by other party as a means to obtain a modification in child support and both parties agree that neither will pay child support to the other."

In April 2013, Paul filed a motion to modify the settlement agreement to eliminate his obligation to pay private school tuition for the children. Paul alleged that he had lost his job and that he was unable to pay his portion of the children's expenses. The court held a hearing on the motion and granted a continuance for the parties to attend mediation. In July 2013, Shannon filed a motion to modify child support pursuant to the guidelines. At a subsequent evidentiary hearing, Paul withdrew his still-pending motion to modify the agreement because he had obtained employment and was able to pay the children's expenses. The court heard testimony from both parties and rendered a detailed judgment denying Shannon's motion to modify child support. The court stated, in relevant part:

The children are still in the same schools. Tuition is \$331.42 per month for one child for ten months. School lunches are around \$50.00 a month. The children wear school uniforms. Generally, each party provides uniforms for one child pursuant to the Agreement of July 2012. [Shannon] has paid one-half the tuition for August and September and [Paul] has as well.

[Paul] believes he can now pay the current school tuition if not paying child support. He states he cannot pay both the tuition expense and child support and asks that the parties abide by the terms of their agreement. [Shannon] is requesting the Court to enter a child support order as well as require [Paul] to maintain paying his equal portion of the children's school tuition.

Since the time of the parties' divorce and Marital Settlement Agreement [Shannon's] yearly income has increased by about \$47,000.00 while [Paul's] income has decreased by about \$25,000.00. At the time of the divorce, [Paul] earned about \$13,664.00 more than [Shannon]. Now, [Shannon] earns two times as much as [Paul].

Application of the Kentucky Child Support Guidelines to the parents' income yields the following results: Their combined adjusted income is \$13,805.00 per month. [Shannon] earns 68 percent while [Paul] earns 32 percent. The child support guidelines for this amount for two children establishes a joint base child support obligation of \$1,765.00 per month. Adding child care costs, \$258.00 a month, and health insurance, \$95.25 per month, brings the total support obligation to \$2,118.25. As [Paul] earns 32 percent of the income, he would be responsible for the same percentage of the total obligation, which is \$677.84 per month.

In its order, the trial court went on to recite the provisions of the settlement agreement and the subsequent agreed order regarding the parties' stipulations that neither party would be obligated to pay child support. The trial court pointed out

that Shannon's motion only anticipated a change in circumstances, as it was based on Paul's earlier request to be relieved of the tuition obligation; however, the anticipated change in circumstances never materialized because Paul found new employment and continued paying tuition. The court noted the expenses Paul paid on a monthly basis pursuant to the settlement agreement, concluding that the parties' agreement to divide tuition and expenses was an appropriate deviation from the child support guidelines. Shannon now appeals the court's order denying her motion to modify child support.

Pursuant to KRS 403.180(1), the parties to a dissolution proceeding are free to enter into a settlement agreement. The court, however, is not bound by the terms of an agreement as to "the custody, support, and visitation of children[.]" KRS 403.180(2). Further, "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). In *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001), this Court explained, "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." *Id.* "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.*

A party may seek modification of child support “only upon a showing of a material change in circumstances that is substantial and continuing.” KRS 403.213(1). “The child support guidelines set out in KRS 403.212 serve as a rebuttable presumption for the establishment or modification of the amount of child support.” *Downing*, 45 S.W.3d at 454. Pursuant to KRS 403.211(2), a court may deviate from the guidelines if it makes a specific finding that applying the guidelines would be unjust or inappropriate.

Shannon argues the trial court abused its discretion by relying on the terms of the parties’ settlement agreement to support a deviation from the child support guidelines. Shannon contends the July 2012 agreed order, which changed the parenting-time arrangement, warranted a modification of child support because she began caring for the children the majority of the time.

The trial court addressed these issues in its order denying post-judgment relief:

[A]t the time of their divorce, the parties agreed that ‘[t]he children will attend private school’ and that each parent would pay one-half the cost of the tuition. They further agreed to divide equally the children’s expenses, including school expenses, cost of extracurricular activities, health insurance, and extraordinary medical expenses. The parties acknowledged recognition of the Child Support Guidelines and nonetheless agreed to deviate therefrom, including their agreement that ‘neither parent shall be required to pay the other any sum denominated as child support and both parties shall have an equal duty to provide for the children’s well-being.’ Marital Settlement Agreement filed January 31, 2012. While the parties at the time of their agreement enjoyed a 50/50 parenting schedule with the children, they changed

the parenting schedule significantly by Agreed Order entered August 2, 2012, pursuant to which [Paul] has the children only on alternate weekends and one night during the week. Even so, the parties reaffirmed their agreement as to support of the children and specifically agreed that the modified parenting schedule 'shall not be used' as grounds to modify child support and reiterated their agreement that 'neither will pay support to the other.'

In *McFelia v. McFelia*, 406 S.W.3d 838, 840 (Ky. 2013), the Kentucky Supreme Court explained,

KRS 403.211 provides that a trial court may deviate from the guidelines, in a written finding, based on several factors such as agreement of the parties, extraordinary needs of the child, a parent's extraordinary needs, the child's own financial resources, income beyond the guidelines, or other things of an extraordinary nature that would make applying the guidelines inappropriate.

During the hearing, both parties indicated that they wanted the children to remain enrolled in private school. Paul testified as to his financial circumstances, his expenditures on behalf of the children, and his willingness to continue paying tuition and expenses as outlined in the settlement agreement and agreed order. We are mindful the trial court was in the best position to assess the credibility of the witnesses and determine the weight of the evidence. *Buddenberg v. Buddenberg*, 304 S.W.3d 717, 720 (Ky. App. 2010).

Our review indicates the trial court found the testimony and evidence presented by Paul to be the most persuasive. The court noted that, although not denominated as child support, Paul was already paying monthly expenses on behalf of the children pursuant to the settlement agreement. The trial court clearly

considered all of the evidence and determined that applying the child support guidelines was inappropriate, in light of the parties' agreement that they would split tuition and expenses and that neither party would pay child support to the other. We conclude the court acted within its discretion and therefore, its denial of the motion to modify child support was proper.

Finally, Shannon takes issue with the court's calculation of Paul's gross income. The court excluded Paul's one-third interest in the retained earnings of a small-production microbrewery that Paul opened with two business partners in May 2012. For the 2012 tax year, the company held approximately \$65,000 in retained earnings. Paul explained that, in order to grow the business, the retained earnings were re-invested in the company. Along with his partners, Paul earned a wage of \$10.00 per hour, and Paul worked approximately ten hours per week at the brewery.

KRS 403.212(2)(c) addresses income derived from a jointly-owned partnership or closely held corporation, stating, in part,

Income and expenses from self-employment or operation of a business shall be carefully reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support obligation.

Paul's wages from the brewery were included in the calculation of his gross income; however, the court excluded Paul's share of retained earnings from the calculation. The trial court's order reflects that it found Paul's testimony to be credible, noting that the retained earnings were not excessive. The court reasoned

that, since the funds were re-invested in the company as operating capital, it would not include those funds in Paul's gross income calculation. Despite Shannon's argument to the contrary, the trial court was in the best position to assess the evidence to determine the gross income available to Paul. Substantial evidence supported the court's finding that the retained earnings were not "available" to Paul, as the funds were re-invested in the company rather than distributed to the individual partners. We find no error in the court's decision.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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