

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2014-CA-001458-ME

COMMONWEALTH OF KENTUCKY, *EX REL.*  
BETHANY PRICE

APPELLANT

v. APPEAL FROM LARUE CIRCUIT COURT  
HONORABLE JOHN DAVID SEAY, JUDGE  
ACTION NO. 04-CI-00086

CHRISTOPHER THOMPSON

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: J. LAMBERT, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Commonwealth of Kentucky, *ex rel.* Bethany Price (Bethany) appeals from an order of the Larue Circuit Court establishing child support owed by Christopher Thompson in an amount less than that set forth in Kentucky Revised Statutes (KRS) 403.212, the Kentucky child support guidelines. Bethany maintains the trial court abused its discretion when it deviated from the

guidelines based on its findings that she is voluntarily underemployed and Christopher's financial circumstances are extraordinary. We agree.

Bethany and Christopher were married on March 15, 1997, and divorced on September 10, 2004. In accordance with a separation agreement incorporated into the dissolution decree, Christopher was required to pay \$1,029.17 per month child support for the parties' twins who were then three years of age and their one-year-old child.

On June 18, 2008, Bethany and Christopher entered into an agreed order decreasing child support to \$877.89 per month. The child support worksheet attached to the agreed order stated Bethany's income at that time was \$600 per month and Christopher's income was \$3,026.

Six years later, on June 24, 2014, the Commonwealth of Kentucky, by and through the Larue County Attorney's Office, filed a motion to increase child support. An attached affidavit stated Bethany was now earning \$1,908 per month and Christopher was earning \$6,614 per month. Based on Bethany's and Christopher's respective incomes and the child support guidelines, Christopher's child support obligation was requested to be established at \$1,452.94 per month.

A hearing was held on August 18, 2014. A case worker with the Larue County Attorney's Office testified that after the motion was filed, more accurate information concerning Christopher's health insurance expenses for the children and his income was obtained. Christopher's actual monthly income was \$6,485.16 and his monthly health insurance expense for the children was \$253.29.

The Commonwealth submitted that according to the guidelines, child support should be established at \$1,325 per month.

Christopher did not dispute the accuracy of the figures but argued Bethany was underemployed and because his monthly expenses exceeded his income, his child support should be reduced below the guideline amount.

Bethany testified that she is currently employed with Lincoln National Bank and earns \$1,098 per month, or \$11.00 per hour. Prior to her employment with Lincoln National Bank, she worked for Amerigas where she earned \$11.43 per hour but voluntarily left that employment in 2006. Bethany admitted that had she remained employed at Amerigas, she would have been subject to future wage increases. She left her employment because day care expenses for the parties' young children were equivalent to, and sometimes exceeded, her income.

Regarding the children's current expenses, Bethany testified that when the June 2008 agreed order decreasing child support was entered the children were nine and five years old. The twins are now fourteen and the youngest child is eleven. She explained that the children's clothes and shoes are now more expensive and their participation in extra-curricular activities has increased their expenses. Although the children receive reduced price school lunches, their monthly food expense has also increased.

Christopher provided a list of expenses revealing that his current monthly expenses are \$8,029.83, including \$487 per month for a loan on a boat purchased for \$55,000 three years ago and he currently owes \$47,500. He also has

eight credit cards and pays \$1,000 per month on those cards as the minimum payment. Christopher testified that he recently added a \$20,000 detached garage to his property which increased his mortgage payment by \$498. He also makes combined monthly payments of \$800 on three vehicles. Additionally, he purchased a timeshare for \$10,000 five months prior to the hearing.

Christopher's monthly expenses exceed his monthly income by approximately \$1,200. He testified that it was not feasible to sell some assets, including the boat, because of the amount owed. Because he previously filed bankruptcy, filing again was not a current option.

Bethany and Christopher each pay half of the children's orthodontal expenses. That amount is currently \$283.37.

The trial court issued its findings of fact, conclusions of law, judgment and order. Although it increased Christopher's child support obligation, the trial court found deviation from the guidelines appropriate stating as follows:

[Bethany] requests for an increase of more than 50% of the prior ongoing child support obligation: however, [Bethany] herein has further admitted that she previously voluntarily quit a job that would have allowed for her to be subject to pay increases from her prior pay of \$11.43 per hour. Said income was already more than what [Bethany] earns at her current job, without consideration given to any pay increases she would have received had she not voluntarily quit said employment. Furthermore, [Christopher] has demonstrated financial circumstances of an extraordinary nature, some of which was incurred as an effort to foster a relationship with his children herein and other[s] to also financially support his children herein based upon their need, such as orthodontal care for the children. Therefore, based upon

these circumstances the court shall award an increase of no more the 30%; but will not set child support pursuant to the guidelines in that [Bethany's] requested increase would make application of the guidelines unjust.

Christopher was ordered to pay child support in the amount of \$1,150 per month and found to be in arrears in the amount of \$447.11 and ordered to pay \$50 per month until paid.

Bethany argues the trial court's decision to deviate from the guidelines was an abuse of discretion and based on erroneous findings that she is voluntarily underemployed and that Christopher has extraordinary financial circumstances justifying a deviation.

By enacting the Kentucky child support guidelines, the legislature created “a rebuttable presumption that the guideline amount is the appropriate amount of support in determining child support.” *Clary v. Clary*, 54 S.W.3d 568, 570 (Ky.App. 2001). The guidelines apply to original awards as well as modification of child support “upon a showing of a material change in circumstances that is substantial and continuing.” KRS 403.213(1). KRS 403.211(2) provides:

[T]he child support guidelines in KRS 403.212 shall serve as a rebuttable presumption for the establishment or modification of the amount of child support. Courts may deviate from the guidelines where their application would be unjust or inappropriate. Any deviation shall be accompanied by a written finding or specific finding on the record by the court, specifying the reason for the deviation.

After enactment of the guidelines, this Court recognized that “setting an appropriate amount of child support is an art rather than a science. Nevertheless, it is an art as to which the Legislature has every right to make prescriptions and set limitations.” *Keplinger v. Keplinger*, 839 S.W.2d 566, 568 (Ky.App. 1992).

While the legislature used the term “guidelines,” KRS 403.211(3) directs that any deviation must be based on one or more of the following factual findings:

- (a) A child’s extraordinary medical or dental needs;
- (b) A child’s extraordinary educational, job training, or special needs;
- (c) Either parent’s own extraordinary needs, such as medical expenses;
- (d) The independent financial resources, if any, of the child or children;
- (e) Combined monthly adjusted parental gross income in excess of the Kentucky child support guidelines;
- (f) The parents of the child, having demonstrated knowledge of the amount of child support established by the Kentucky child support guidelines, have agreed to child support different from the guideline amount. However, no such agreement shall be the basis of any deviation if public assistance is being paid on behalf of a child under the provisions of Part D of Title IV of the Federal Social Security Act; and
- (g) Any similar factor of an extraordinary nature specifically identified by the court which would make application of the guidelines inappropriate.

While a downward or upward deviation is within the discretion of the trial court, “a trial court does *not* have the discretion to deviate from the

guidelines simply because it thinks the Legislature erred in setting the appropriate levels. Nor does it have the discretion to ignore the guidelines because it feels that important factors were ignored by the Legislature.” *Keplinger*, 839 S.W.2d at 568. Cautioning that the trial court’s discretion in setting child support is not as broad as in other domestic relations matters, in *McFelia v. McFelia*, 406 S.W.3d 838, 841 (Ky. 2013), our Supreme Court concisely instructed the trial courts as follows:

The bottom line is that the legislature has provided child support guidelines that are presumptively appropriate, and if there is to be a deviation, the moving party must convince the trial court that the guidelines amount is unjust or inappropriate, either initially or on modification. The trial court must weigh the evidence in support of this claim, and exercise sound discretion in granting or denying a requested deviation. If there is a deviation, the trial court must make written findings as to why the guidelines amount is unjust or inappropriate. Unless there is a preponderance of the evidence to support the trial court’s deviation, the guidelines amount controls as a matter of law.

With the recognition of the trial court’s discretion to deviate from the guidelines but also recognizing that discretion is limited by statute, we review the trial court’s downward deviation from the guidelines.

The undisputed child support worksheet reflected a 51% increase from the amount Christopher was obligated to pay under the 2008 agreed child support order and that currently owed under the guidelines. The trial court did not specifically find that a material change of circumstances existed but implicitly did so when it modified Christopher’s child support by increasing it to \$1,150 per month. Although Christopher suggests that a material change in circumstances did

not exist, he did not file a cross-appeal challenging the modification. Moreover, application of the guidelines would result in much more than a 15% increase in Christopher's child support obligation and, therefore, a material change of circumstance is presumed. KRS 403.213(2). We begin from the premise that an increase in child support was proper and address whether deviation from the guidelines was appropriate.

The trial court concluded a deviation from the guidelines was warranted because Bethany is voluntarily underemployed and Christopher's monthly expenses exceed his income by \$1,200. We first address the trial court's finding that Bethany is voluntarily underemployed.

KRS 403.212(2)(a) and (d) provide the standard for imputing income to a parent who is underemployed for purposes of the child support guidelines. KRS 403.212 (2)(a) defines "income" as "actual gross income of the parent if employed to full capacity or potential income if unemployed or underemployed." KRS 403.212(2)(d) provides:

If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income, except that a determination of potential income shall not be made for a parent who is physically or mentally incapacitated or is caring for a very young child, age three (3) or younger, for whom the parents owe a joint legal responsibility. Potential income shall be determined based upon employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community. A court may find a parent to be voluntarily unemployed or



underemployed without finding that the parent intended to avoid or reduce the child support obligation.

As stated in *Gripshover v. Gripshover*, 246 S.W.3d 460, 469 (Ky. 2008), “income should not be imputed to [Bethany] without due consideration of all of the statutory factors.”

The only evidence presented regarding Bethany’s employment was that in 2006, she voluntarily quit a job earning \$11.43 per hour because day care for the parties’ young children was equal to or exceeded her income. She is now employed and earns .43 less per hour than she did in 2006, a meager decrease.

There is no evidence regarding Bethany’s occupational qualifications, current employment opportunities or her earning capacity in the community. KRS 403.212(2)(d). There is not even a hint in the evidence as to the income that could be imputed to Bethany and the trial court’s order is completely silent as to the amount imputed. Speculation that Bethany may have received an unspecified wage increase had she continued working for Amerigas is not substantial evidence to support a finding she is voluntarily underemployed. On that basis alone, we are compelled to reverse. However, further discussion is required regarding the trial court’s downward deviation from the guidelines based on Christopher’s “financial circumstances of an extraordinary nature.”

Christopher points out that he pays one-half of the children’s orthodontal expense. While true, that alone cannot be the basis for the deviation. KRS 403.211(9) is clear in its requirement that “[t]he cost of extraordinary medical

expenses shall be allocated between the parties in proportion to their combined monthly adjusted parental gross income.” Orthodontal expenses are specifically included as extraordinary medical expenses. *Id.* Based on Bethany’s income proportionate to Christopher’s income, Christopher’s contribution to the children’s orthodontal expenses should be much more than one-half and, therefore, his equal payment cannot justify a \$175 monthly deviation from the guidelines.

The evidence established that Christopher’s “extraordinary” financial circumstances were created by his consumer debt and not by misfortune or other circumstances beyond his control. Since the dissolution of the parties’ marriage, Christopher has purchased a boat and a timeshare, added a garage to his home, incurred substantial credit card debt, and pays multiple car loans. Such indulgences and their financial consequences are not a basis for deviation from the guidelines. As stated in *Downey v. Rogers*, 847 S.W.2d 63, 65 (Ky.App. 1993): “[s]upport of one’s children is a fundamental commitment which takes precedence over debts to one’s creditors. In short, it is not the children of divorce who must suffer the consequences of their parents’ folly of living beyond their means.”

We can find no evidence in the record to support the trial court’s conclusion that these children are not entitled to the financial support of their parents as set forth in the guidelines. The evidence does not support the findings that Bethany is voluntarily underemployed or that Christopher’s financial circumstances fall within the exceptions to the guidelines set forth in KRS 403.211(3). We conclude

that the evidence presented was insufficient to support the trial court's factual findings and its decision to deviate from the guidelines was an abuse of discretion.

Based on the forgoing, the case is reversed and remanded for an order setting child support in accordance with the Kentucky child support guidelines.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dale M. Morris  
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BRIEF FOR APPELLEE:

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