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SUPREME COURT

SUPREME COURT OF KENTUCKY
2011-SC-000610-D
(2010-CA-001343)

JOSEPH WAYNE MCFELIA — MOVANT

V.

LARUE CIRCUIT COURT
CASE NO. 2009-CI-00112

DORINDA MCFELIA — RESPONDENT

* * * * *

BRIEF IN SUPPORT OF MOTION FOR DISCRETIONARY REVIEW

* * * * *

Submitted by,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon the Hon. Caleb Tyler Bland, 2825 Ring Road, Elizabethtown, Kentucky 42702, Counsel for Respondent; Hon. John David Seay, Judge, Larue Circuit Court, 209 West High Street, Hodgenville, Kentucky 42748; Court of Appeals, 360 Democrat Drive, Frankfort, Kentucy 40601, on this the 13th day of November, 2012.

INTRODUCTION

This is an appeal from that portion of the final judgment of Larue Circuit Court establishing, *inter alia*, Movant's child support obligation to be $696 for two children with no corresponding amount set for the Appellee, or corresponding credit to Movant despite the fact that Movant had the children with him in excess of 45% of the time. Movant asserts that the trial court erred in not deviating from the child support guidelines in setting his child support obligation. The motion is important because the case presents a conflict, unresolved at the Appeals Court level, between the Child Support Guidelines and reality of modern time sharing.

STATEMENT CONCERNING ORAL ARGUMENT

Movant does not believe that oral arguments would be necessary in this case and would not serve to assist the Court beyond the briefs that are being filed herein, as the Dudgeon case provides clarity on this issue.

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STATEMENT OF THE CASE

Movant, Joseph Wayne McFelia ("Wayne"), and Appellee, Dorinda McFelia ("Dorinda"), were married on May 14, 1994. Their marriage produced two children, Olivia Grace McFelia, born November 24, 1998 and Claire Marie McFelia, born December 16, 2005.

During the pendency of this action, a temporary *pendente lite* child support order was entered requiring Wayne to pay Dorinda $696 per month as child support. A copy of the *pendente lite* order and the child support worksheet are attached to this brief as a part of the Appendix.

When the matter came on for final hearing, Wayne had pending a motion to modify his temporary child support obligation on the grounds that he had physical custody of the children 45% of the time and that a deviation from the child support guidelines would be appropriate and fair. A copy of that motion is attached to the Appendix portion of this brief. Despite ample evidence that Wayne had the children with him 45% of the time, the Court, in its final judgment, set child support in the same amount as was set in the temporary *pendente lite* order, i.e. $696 per month. No amount of child support was imposed upon Dorinda. Wayne now appeals from that portion of the Court's final judgment. A copy of the final judgment of Larue Circuit Court as well as the decision of the Court of Appeals in this matter is also attached to this brief in the Appendix portion thereof.

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO DEVIATE FROM THE CHILD SUPPORT GUIDELINES WHEN ESTABLISHING MOVANT'S CHILD SUPPORT OBLIGATION.

KRS 403.211(2) provides that "Courts may deviate from the guidelines where their application would be unjust or inappropriate." Subsection (3)(9) of the same statute allows the Court, with appropriate findings, to deviate from the guidelines for any circumstance of an extra-ordinary nature. As noted in Downey v. Downey, Ky. App., 847 S.W.2d 63 (1993), a trial court could take into consideration the period of time the children reside with each parent in fixing support, and could deviate from the guidelines for reasons advanced by the Movant if convinced their application would be unjust. The Downey decision was followed in the case of Plattner v. Plattner, Ky. App., 228 S.W.3d 577 (2007), wherein it noted,

> ". . . a Trial Court may deviate from the child support guidelines when it finds that their application would be unjust or inappropriate. A 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 deviation from the guidelines."

Also, see Brown v. Brown, Ky. App. 952 S.W.2d 707 (1997).

As noted, the issue of deviation from the child support guidelines by the trial court was preserved since a motion for modification of Wayne's child support obligation was pending when the court made its final decision.

Although Dorinda's monthly gross income is less than that of Wayne's, she still maintained a considerable monthly income from which she could pay a proportionate share of the child support. Whereas, Wayne may still be required to pay a certain amount of child support,

his obligation should be offset by a similar obligation on the part of Dorinda. In the Brown case, *supra*, in the dissenting opinion, the Court suggested a calculation which would be fitting in the present case. It is Wayne's position that that portion of the lower court's judgment establishing child support should be reversed and sent back for a child support obligation based upon an appropriate deviation from the child support guidelines, using the Brown v. Brown dissenting opinion calculation.

The seminal case involving this issue recently occurred in Dudgeon v. Dudgeon, 318 S.W.3d 106 (Ky. App. 2010). In that case, the parties enjoyed shared parenting on a roughly equal basis similar to the time sharing in the case at bar. In addition, while their incomes were not exactly equal, the parties' incomes were both substantial and roughly equal, not altogether unlike the income situation in the case at bar. In that case, the Court of Appeals stated as follows:

> "It must be recognized that the guidelines were intended to apply to a traditional post-dissolution familial model where one parent (usually the mother) was the primary custodial parent and earned substantially less income than the non-custodial parent (usually the father). By contrast, the modern complexities of family life has resulted in a myriad and unique familial circumstances. Strict application of the child support guidelines contained in KRS 403.212 to these myriad and unique familial circumstances often leads to unjust results. To avoid such, our courts must be fully cognizant of and give credence to these myriad and unique familial circumstances when considering child support. KRS 403.211(3) provides our court with such mechanism."

Dudgeon, 318 S.W.3d at 111.

The Dudgeon court then concluded that the presence of the above circumstances

constituted extraordinary circumstances that rendered the application of the child support guidelines unjust. *Id.* at 112.

We have a similar situation in the case at bar. In the present case, Wayne and Dorinda share roughly equal time sharing of their children. Evidence was established at trial that the physical custody of the children was such that Wayne had them approximately 45% of the time. This is not a case in which Dorinda had the overwhelming majority of the time with the children, as is contemplated by the child support guidelines. In addition, the evidence was established that Wayne made somewhat more than Dorinda, but that Dorinda enjoyed a reasonable income by which she could provide child support to the children. Inexplicably, however, the trial court, despite the clear dictates of KRS 403.212, did not attribute any child support calculation to Dorinda, but instead simply established Wayne's child support obligation. We believe that the Dudgeon case, and the previous cases cited *supra*, should have been interpreted so that Wayne was given a credit off of his child support obligation for the amount of time that the children were in his physical custody, and he incurred the concomitant expenses.

Dorinda, in her briefing before the Court of Appeals, argued that because it was not exactly equal time sharing and because the incomes of the parties were not exactly equal, that Wayne should therefore not have been given a credit under KRS 403.212. Indeed, the Court of Appeals in this matter failed to cite to the Dudgeon case at all, and simply stood for the proposition that because Wayne "earns a higher salary than" Dorinda, and had also "conceded his financial circumstances had actually improved in the year following the entry of the temporary agreed order," that Wayne had somehow agreed on a temporary basis to pay full child support

despite the split time sharing arrangement. In essence, the Court of Appeals held that because Wayne had agreed during the pendency of the case to pay child support at that level, that he somehow was foreclosed from making the argument for credit due to the amount of time he had physical custody of the children, at trial. We contend that that holding is unjust, and in fact puts parties and litigants in a position that they are unlikely to enter into any temporary agreed orders during the pendency of litigation if they feel that they are somehow going to be foreclosed from making other arguments at the time of trial. We do not believe this makes sound policy for the justice system in Kentucky.

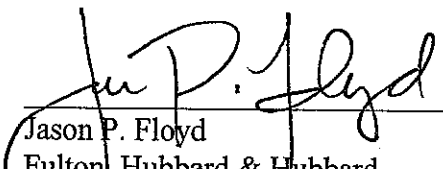
Indeed, in the only decision since the Dudgeon case that addresses whether or not KRS 403.212 requires exactly equal incomes and exactly equal time sharing in order to invoke the "deviation" procedures in the statute, was the case of Light v. Goodman, 2010-CA-002190-ME (Ky. App. August 17, 2012) an unpublished decision of the Court of Appeals that is on all fours with the present matter. In that case, similar to this case, the parties had roughly equal time sharing of their child, though the father had substantially more income than the mother. The Court of Appeals, citing Dudgeon, Downey, and Plattner, held that a party seeking deviation based upon extraordinary circumstances need not established exactly equal incomes, exactly equal physical custody and exactly equal child related expenses. *Id.* at p. 5. The Court went on to state that "nothing in Dudgeon, however, creates a litmus test or require the existence of equal parental incomes to justify deviation. Instead, consideration of a deviation looks to the unique circumstances of each case." *Id.* at pp. 5 and 6. Though this is an unpublished decision, it is the only decision since Dudgeon which interprets Dudgeon where the parties' incomes are not

exactly equal and time sharing not necessarily exactly equal. The Court of Appeals' reasoning in that case was sound that there is no litmus test when there is roughly equal time sharing and the court must decide on a case by case basis based upon evidence of the exact circumstances. Here, the trial court and the Court of Appeals did just the opposite, finding that because Wayne had entered into a temporary agreed order, that he was in fact bound by that by the time the case got to trial.

CONCLUSION

In conclusion, Movant respectfully requests this Court to reverse that portion of the Larue Circuit Court judgment establishing child support at $696 per month for him and remanding this case back to the trial court for establishment of a new child support obligation for Wayne based upon an appropriate deviation from the child support guidelines.

Submitted by:



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APPENDIX

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1. Larue Circuit Court Judgment Appealed from herein.

2. Decision of the Court of Appeals.

3. Motion to Modify Wayne's Child Support Obligation on the Grounds that he has the Children Almost 50% of the Time.

4. *Pendente Lite* Temporary Child Support Order of June 17, 2009.

5. Child Support Worksheet used to Establish *Pendente Lite* Temporary Child Support of June 17, 2009.

6. Unpublished Decision, Light v. Goodman, 2010-CA-002190-ME, (Ky. App. Aug. 17, 2012)