COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2010-CA-001343-MR
2011-SC-610

JOSEPH WAYNE MCFELIA — APPELLANT

V.

APPEAL FROM THE LARUE CIRCUIT COURT
CIVIL ACTION NO. 09-CI-00112

DORINDA MCFELIA — APPELLEE

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BRIEF FOR APPELLANT

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Submitted by:

FULTON HUBBARD & HUBBARD

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and accurate copy of the foregoing Brief for Appellant, on this the 4 day of February, 2013, to Hon. John David Seay, Judge, Larue Circuit Court and to the Larue Circuit Clerk, P.O. Box 191, Hodgenville, KY 42748; and to the Hon. Caleb T. Bland, Birdwhistell Law, PSC, 2825 Ring Road, Elizabethtown, Kentucky 42701. I further certify that the record was not removed from the Clerk's Office during the preparation of this brief.

JASON P. FLOYD

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

I. THE APPELLANT'S TIME WITH THE CHILDREN IS SUFFICIENTLY EQUAL TO REQUIRE DEVIATION FROM THE CHILD SUPPORT GUIDELINES.

This case is illustrative of two inherent problems that require review by the Kentucky Supreme Court: (1) A case in which the Trial Court made insufficient findings of fact with regard to the actual amount of time with the children spent by the Appellant, such that the Appellee spends time in her brief asserting facts that are not contained in the record; and (2) Several of Court of Appeals cases dealing with trial court discretion on deviation from the child support guidelines that provide mixed results when it comes to the application of KRS 403.211(3)(g) and KRS 403.211(4).

What is beyond cavil is that Kentucky law currently holds that the child support guidelines contained in KRS 403.211 do not adequately address the situation of "shared parenting time" as that term has been defined by this Court's decision in Pennington v. Marcum, Ky. 266 S.W.3d 759 (2008), and are not sufficiently tailored to address the modern realities of shared parenting time.

In this case, the Appellee first admits that the testimony under oath before the trial court by the Appellant was that he had the children "forty-five percent (45%) of the time." (See Appellee's Brief, at p. 4) The trial court failed to make specific findings in its final findings of fact, conclusions of law and judgment, regarding the percentage of time the children spent with each parent. Nevertheless, the Appellee, in her brief, spends significant time trying to convince this Court that what the Appellant actually had was thirty percent (30%) of the time

with the children. The Appellant again notes that the trial court did not make this finding, and the Appellee's numbers are merely self serving hyperbole contained in her responsive brief. However, a careful examination of her numbers on pages 3 and 4 of her brief reveal that the manner in which she calculates the time schedule is by assigning all of the school related time to her, and only assigning time to the Appellant following the pick up order. The Appellee cannot have it both ways, either the school related time before a pick up order belongs to her, or the school related time after a pick up order belongs to her, but she cannot have both. If the school related time is properly allocated to the parent before a pick up order (as the local rules of the Larue/Nelson Circuit Court establish), then the Appellant clearly has at least forty-five percent (45%) of the time with the children.

This was the testimony at trial. Unfortunately, the trial court did not put a specific percentage upon the shared parenting time in its Final Order.

The Appellee then cites to all four of the cases that were cited in the Appellant's brief and opines as to why each one is inapplicable, or claims that the case at bar is distinguishable. In Downey v. Downey, Ky. App., 847 S.W.2d 63 (1993), the Court of Appeals first recognized that under KRS 403.211(3)(g) the trial court's consideration of the amount of time a child support paying party spent with the children could be a "extraordinary" circumstance by which deviation from the guidelines was appropriate. Four years later, in Brown v. Brown, Ky. App., 952 S.W.2d 707 (1997), the Court of Appeals held that a party who spent forty percent (40%) of the time with the parties' children should be entitled to a deviation from the child support guidelines pursuant to KRS 403.211(3)(g) as an "extraordinary" circumstance. The Appellant would again note that the facts of Brown are not dissimilar to the present case, and Brown has

never been overruled.

Then, in Plattner v. Plattner, Ky. App., 228 S.W.3d 577 (2007), the Court of Appeals held that deviation from the child support guidelines was "required" when the parties spent equal time with the children. As the Appellee notes, the Plattner case did distinguish itself from the Downey case in that in Downey the father had entered into a temporary *pendente lite* agreed order to pay a higher amount of child support.

The Appellant asks this Court to consider the ramifications of establishing a rule of law in which a party's entry into an agreed *pendente lite* order forecloses their ability, at trial, to argue for a deviation of the guidelines under KRS 403.211(3)(g). The Appellant does not believe that the notation of that circumstance in either Plattner or Downey was dispositive, but was instead merely dicta. If the Court were to establish that as a rule of law, no party would consider entering into agreed *pendente lite* orders for child support for fear of waiving their legal right to claim deviation at a later time under KRS 403.211(3)(g). The Appellant does not believe that this makes sound precedent, and that it may lead to further animosity between parties, as well as additional exhaustion of judicial resources. Simply put, Mr. McFelia should not be foreclosed from claiming deviation under KRS 403.211(3)(g) merely because he had the foresight to avoid contentious temporary hearings and entering into a temporary *pendente lite* agreed order in this case.

Finally, the Appellee addressed the Appellant's citation to Dudgeon v. Dudgeon, Ky. App., 318 S.W.3d 106 (2010), which was not cited by the trial court level. Nevertheless, the Dudgeon standard is clear that when parties spend "nearly" equal amounts of physical time with the children, the deviation from the guidelines under KRS 403.211(3)(b) "mandates application."

In other words, the trial court's failure to address this particular fact constituted abuse of discretion under KRS 403.211(4).

We believe that it is time for the Kentucky Supreme Court to address and settle this area of the law. The Court system with regard to family matters and domestic relations has progressed since KRS 403.211 was enacted by our legislature, and gone are the days where it is a foregone conclusion that one party has "primary" custody and the other party spends a minimal time of physical custody with the children and pays a full amount of child support. We believe the decision in the Brown case, *supra*, correctly predicted these facts almost sixteen years ago, and that the decision in that case was sound and made cogent law.

CONCLUSION

Where one party has the children for amounts of time in excess of forty percent (40%), deviation from the guidelines under KRS 403.211(3)(g) should be required. Accordingly, we are asking that the Court remand this matter to the trial court with a finding that deviation from the guidelines under KRS 403.211(3)(g) is mandatory in this case, and that child support should be recalculated accordingly.

Respectfully submitted,

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