Pursuant to Court order

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COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2013-SC-000010

HAL D. FRIEDMAN APPELLANT

v.

BRIEF OF APPELLEE

SUSAN E. LEA APPELLEE

ON DISCRETIONARY REVIEW FROM THE KENTUCKY COURT OF APPEALS, CASE NO. 2011-CA-001849-MR ON APPEAL FROM JEFFERSON CIRCUIT COURT, FAMILY DIVISION 9, CIVIL ACTION NO. 00-FC-02319, styled *HAL D. FRIEDMAN v. SUSAN E. LEA*

*** *** ***

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to CR 76.12 (6), the undersigned hereby certifies that true copies of this Brief of Appellee have been served in accordance with CR 5.02 and CR 5.03 by mail upon the following parties: Hon. Susan Stokley Clary, Clerk of the Supreme Court, Room 209, 700 Capital Ave., Frankfort, Kentucky 40601, Hon. Stephen M. George, Jefferson Circuit Court Judge, Family Division Nine, 700 West Jefferson Street, Louisville, Kentucky 40202, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601, Wendi Swinson Wagner, 222 East Witherspoon Street, Suite 401 Louisville, Kentucky 40202, and Kevin C. Burke, 125 South Seventh Street, Louisville, Kentucky 40202 on this 1 day of August, 2013. I further certify that the record on appeal was not withdrawn from the Family Court by the undersigned or the party on whose behalf this brief is filed.

WILLIAM L. HOGE, III

STATEMENT CONCERNING ORAL ARGUMENT

The Appellee submits that the Orders and record in this matter are clear and an oral argument would not assist the Court in deciding the issues presented.

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COUNTERSTATEMENT OF THE CASE

Appellee does not accept Appellant's Statement of the Case and provides the following Counterstatement of the Case.

Hal Friedman and Susan Lea (hereinafter Appellant and Appellee, respectively) are the parents and joint custodians of one minor child, Matthew, age twelve years. Record at 565. On May 2, 2003 the trial court entered an Agreed Order between the parties in which Appellant agreed to pay child support in the amount of $625 per month. Record at 87-93. In November, 2004, Appellee agreed to a $125.00 decrease in the amount of child support due to Appellant's formation of a new law firm. Record at 320. On April 30, 2009, the trial court entered an Agreed Order in which the Appellant's child support obligation was increased to $700.00 per month. Record at 254-255. At the time of the agreement in April, 2009, the parties stipulated that they did not exchange any financial information. Record at 592. The Appellant and Appellee have a long history of litigation with regard to the minor child; however, for purposes of this appeal, only the following additional procedural history is relevant.

On August, 11, 2011, the trial court entered an order granting Appellant's motion to modify the parenting schedule. Record at 566. Prior to this order, Appellant's parenting schedule amounted to a having the child five nights out of every fourteen nights. Record at 565. Due to the minor child starting middle school and a resulting loss of parenting time to the Appellant, the trial court granted the Appellant an additional night. Record at 595-597.

On May 13, 2011, Appellee filed a Motion for Increase of Child Support Obligation. Record at 314-336. Appellant subsequently filed a Motion to Dismiss. A hearing on Appellee's motion was held on August 16, 2011. Record at 592. Evidence was submitted

demonstrating the Appellee's annual income had increased by $8,136 since 2009 and Appellant's annual income had increased by $249,165 since 2009, based on the parties' tax returns. Record at 593 (V.R. No. 125: 08/16/2011; 1:19:40 and 01:22:01). At the hearing, Appellee submitted documentation that Appellee's monthly expenses for Matthew significantly exceeded the amount of child support Appellee received from Appellant. Record at 593 and 632-633. (V.R. No. 125: 08/16/2011; 1:14:16). Despite the gross disparity in income between the parties, Appellee had the majority of the financial burden of supporting Matthew in her home and Matthew's expenses have increased as his needs have changed. (V.R. No. 125: 08/16/2011; 1:45:37). Appellee also testified she had not been reimbursed by Appellant for additional expenses for Matthew. (V.R. No. 125: 08/16/2011; 1:36:05).

Appellant did not provide the trial court with any evidence of Matthew's needs or Appellant's expenses in raising Matthew. Record at 593. However, Appellant testified that Matthew lives a lifestyle in Appellant's home that is equivalent to Appellee's home and described the lifestyle as extravagant. (V.R. No. 125: 08/16/2011; 2:15:20 and 2:18:06).

The trial court entered an order on August 31, 2011 granting Appellee's motion and increasing Appellant's child support obligation. Record at 592-595. The trial court found a substantial and continuing change of circumstances had occurred. Record at 593. Based on the parties' respective incomes in excess of the Kentucky Child Support Guidelines (hereinafter "the Guidelines"), the trial court deviated from the Guidelines. *Id.* The trial court considered Appellee's expenses for the child and the testimony of the parties and, after making some adjustments to Matthew's reasonable needs, found Matthew's total living expenses to be $3,800. Record at 593-594. The trial court assigned each party their pro-rata

share of child support based upon the respective incomes of the parties and credited Appellant for the amount of Matthew's living expenses he incurs at home. Record at 594. In total, Appellant's child support obligation was increased to $1,292 per month. *Id.* The trial court assigned each party their pro-rata share of the child's extraordinary medical expenses. *Id.* The trial court denied Appellant's motion to dismiss Appellee's motion for increase of child support. *Id.*

Appellant subsequently filed a motion to alter, amend or vacate the judgment of the trial court and for a directed verdict. Record at 598-629. The trial court denied Appellant's motion for a directed verdict, denied Appellant's motion to alter amend or vacate, but granted Appellant's motion for additional findings of fact. Record at 632-634. The trial court made additional findings of fact, which included some corrections and adjustments to the trial court's findings on Matthew's reasonable needs. Record at 632-633.

The Appellant appealed to the Kentucky Court of Appeals. The Court of Appeals held the trial court did not abuse its discretion in modifying and increasing Appellant's child support obligation. The Court of Appeals found there was "ample evidence of a probative value evidencing a substantial and continuing change in circumstances justifying modification of child support under KRS 403.213 when considering the parties' combined monthly income of $40,619 and the child's reasonable needs.

STANDARD OF REVIEW

Trial courts have been given broad discretion in considering a parent's assets and setting correspondingly appropriate child support. *Redmon v. Redmon*, 823 S.W.2d 463 (Ky. App. 1992). A reviewing court should defer to the lower court's discretion in child support matters whenever possible. See *Pegler v. Pegler*, 895 S.W.2d 580 (Ky. App. 1995). A trial court may use its discretion to determine child support in circumstances where combined adjusted parental gross income exceeds the uppermost level of the Guidelines table. KRS 403.212(5). As long as the trial court's discretion comports with the Guidelines, or any deviation is adequately justified in writing, a reviewing court will not disturb the trial court's ruling. *Downing v. Downing*, 45 S.W.3d 449 (Ky. App. 2001). The test for abuse of discretion is whether the trial court's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles. *Id.* A trial court's findings of fact cannot be set aside unless they are clearly erroneous. CR 52.01

ARGUMENT

I. THE TRIAL COURT WAS PROPERLY WITHIN ITS DISCRETION IN CALCULATING THE CHILD SUPPORT OBLIGATION OF MR. FRIEDMAN.

a. The trial court correctly applied Kentucky law in modifying Mr. Friedman's child support obligation and deviating from the Child Support Guidelines.

A custodial parent may periodically request a court to modify a child support obligation upon a showing of a material change in circumstances that is substantial and continuing. KRS 403.213(1). If application of the Guidelines at the time of the motion to modify the existing child support order would result in a greater than or equal to fifteen percent change in the amount of support due per month, a rebuttable presumption of a material change in circumstances is created mandating modification. KRS 403.213(2). Where the Guidelines are inapplicable, the standard for modification of child support is found in KRS 403.213(1).

Further, a court may deviate from the Guidelines where their application would be unjust or inappropriate. KRS 403.211(2) "Any deviation shall be accompanied by a written finding or specific finding on the record by the court, specifying the reason for the deviation." *Id.* KRS 403.211(3)(e) and KRS 403.212(5) give the trial court leave to deviate from the Guidelines and the discretion to determine child support if the parties' combined monthly adjusted gross income is in excess of the Guidelines.

In the instant case, the trial court correctly found grounds to modify the existing child support obligation based on a material change in circumstances that was substantial and continuing. The court made findings regarding the gross income of the parties at the time of the previous child support order entered in 2009. Record at 593. Specifically, the court

found the parties' combined gross income was $230,000 in 2009, based on the parties' tax returns. *Id.* In addition, the court found the parties' current combined annual gross income was $487,424. *Id.*

Based on the increase in the parties' combined gross income and the reasonable needs of the child, the trial court appropriately found a substantial and continuing material change of circumstances existed. *Id.* Moreover, based on the court's findings of the reasonable needs of the child of $3,800 per month and the apportionment of the support obligation based on the parties'changed incomes, the Appellee met her burden to show substantial and continuing material change in circumstances occurred. Record at 593-594. Appellee previously received $700 per month under the Order entered April 30, 2009. The Appellee testified Matthew's expenses have increased as his needs have changed. (V.R. No. 125: 08/16/2011; 1:45:37). The Appellee also testified she had not been reimbursed by Appellant for additional expenses for Matthew. (V.R. No. 125: 08/16/2011; 1:36:05). The trial court properly found Appellant's child support obligation should be increased to $1,292. Record at 594.

Additionally, the trial court was within its discretion in deviating from the Guidelines based on the monthly income of the parties and properly made written findings to support the court's decision to deviate. The court found the combined annual gross income of the parties to be $487,424. Record at 593. An annual income of $487,424 is equal to a monthly income of $40,618.67. Therefore, the parties' monthly income is $25,618.67 greater than the uppermost limit of the Guidelines as set forth in KRS 403.212. The trial court properly deviated from the Guidelines under KRS 403.212(5). Record at 593. This was the only deviation made by the trial court.

b. The trial court made adequate written findings of fact regarding the child's reasonable needs and properly determined the amount of child support.

When determining an amount of child support in excess of the Guidelines, the trial court must base the amount primarily on the child's reasonable needs, as set out in specific supporting findings. *Downing v. Downing*, 45 S.W.3d 449, 456 (Ky. App. 2001). In *Downing*, the court held that a trial court may not substitute a mechanical calculation for the exercise of its discretion in setting child support above the Guidelines. *Id.* The *Downing* court provided a number of factors for the trial court to consider in setting child support above the Guidelines, including the realistic and reasonable needs of the child as well as any increase in the cost of living for the child. *Id.* at 457. The trial court in *Downing* had abused its discretion by merely extrapolating from the Guidelines rather than making specific findings of the children's reasonable needs. *Id.* at 456.

Another case has subsequently held it is an abuse of discretion for a trial court to increase a child support obligation without specific findings of the child's reasonable needs. *Bell v. Cartwright*, 277 S.W.3d 631, 633 (Ky. App 2009). In *Bell*, the trial court failed to make specific supporting findings of the reasonable needs of the child in awarding an increase in child support. *Id.* The court noted the child's mother's testimony regarding the needs of the child were speculative as opposed to actual. *Id.*

Here, Appellee presented evidence and testimony of the child's reasonable needs including the actual expenses she incurs on the child's behalf and the court made specific findings regarding the reasonable needs of the child. Appellee provided both testimony and evidence documenting the expenses she incurred on the child's behalf. Record at 593. Unlike *Bell*, these expenses were actual and not speculative. In addition, in compliance with *Downing*, the trial court made specific findings regarding the reasonableness of the child's

needs and in doing so, specifically excluded several of Appellee's expenses from its determination of the child support obligation. Record at 593 and 632-633.

Moreover, the trial court based its determination of the child support amount solely on the reasonable needs of the child. The court specifically utilized the list of expenses submitted by Appellee and the testimony of both parties to determine the child's reasonable needs. Record at 593-594 and 632-633; (V.R. No. 125: 08/16/2011; 1:14:16). The Appellant failed to produce any evidence of the child's needs. Record at 633. However, Appellant testified that Matthew lives a lifestyle in Appellant's home that is equivalent to Appellee's home and described the lifestyle as extravagant. (V.R. No. 125: 08/16/2011; 2:15:20 and 2:18:06). Accordingly, the trial court correctly found the base child support amount to be $3,800 per month. Record at 594. The court further reviewed the evidence and expanded its findings utilized in calculating the base support amount of $3,800. Record at 632-633.

Appellant clearly misapplies the law in *Downing*. Appellant erroneously contends that a trial court must make a finding that specific reasonable needs of the child are not being met as threshold requirement before modification is justified. Appellant cites *Downing* in support of this contention. Nowhere in *Downing* does the court require a trial court to first determine a child's reasonable need is not being met prior to modifying child support.

Appellant erroneously argues the trial court utilized an arbitrary mathematical formula in the form of an extrapolation of the Guidelines. Appellant misinterprets the term "extrapolation", as described in *Downing*. Appellant mistakenly presumes the pro rata apportionment of the support obligation of each party by income after the court has already determined the base support amount is an "extrapolation" of the Guidelines. Rather, an

extrapolation, as described in *Downing*, occurs when a trial court calculates a base child support amount by taking a percent of combined gross income.

Here, the trial court did not determine the base child support amount by taking a percentage of the parties' combined gross income. Nor did the trial court use a mathematical formula equivalent to an extrapolation as disallowed by *Downing*. Instead, the trial court correctly determined the base child support amount by making specific findings as to the child's reasonable needs and apportioning the base child support based on the respective incomes of the parties. Record at 593-594 and 632-633.

II. THE APPELLANT ERRONEOUSLY PRESUMES HE WAS ENTITLED TO A DEVIATION BASED ON SHARED PARENTING AND MISINTERPRETS CONTROLLING CASE LAW.

A trial court may deviate from the Guidelines when it finds that their application would be unjust or inappropriate. KRS 403.211(2) and (3). When the parties have implemented a shared parenting schedule in which the child has equal or near equal time with each parent, the trial court may deviate from the Guidelines. *Plattner v. Plattner*, 228 S.W.3d 577 (Ky. App. 2007). In *Plattner*, the court found that where the parties had equal parenting time, near equal gross incomes, and near equal expenses for the children, a trial court should deviate from the Guidelines in determining the child support amount. *Id.* at 579-580.

However, if a disparity exists in the parties' respective gross incomes, a parenting schedule of equal or near equal time with the child is insufficient grounds for deviating from the Guidelines. *Plattner v. Plattner*, 228 S.W.3d 577, 579-580 (Ky. App. 2007); *Downey v. Rogers*, 847 S.W.2d 63 (Ky. App. 1993). In *Plattner*, the parties earned the same amount of money, had equal parenting time with the children, and bore equal expenses of the

children. *Plattner* at 580. However, in *Downey*, while the parties shared equal physical custody of the children, the children's father made twice as much income as the mother. *Downey* at 65. The trial court was held to have been within its discretion to award child support and refrain from deviating from the Guidelines. *Id.* The *Downey* court noted that due to the disparity in the parties' income, the mother's share of the children's expenses was proportionately more cumbersome. *Id.*

The trial court in the instant case was well within its discretion to refrain from deviating from the Guidelines based on the parties' parenting schedule. The instant case is distinguishable from *Plattner* for two reasons. First, unlike *Plattner*, there is a great disparity in the respective income of the parties. Record at 593 Appellant earns $408,425 per year and Appellee earns $79,000 per year. *Id.* The disparity in income is so significant that, as Appellee testified at the hearing, Appellee's child support obligation is far more burdensome than Appellant's.(V.R. No. 125: 08/16/2011; 1:45:37)

Second, the Appellant and Appellee do not share equal parenting time. Appellant erroneously argues the instant case is factually similar to *Plattner* due to his shared parenting schedule, which Appellant consistently claims is "equal." Record at 337-365. However, until five days before the August 16, 2011 hearing on child support, the trial court found Appellant only exercised five days out of every fourteen. Record at 565. In addition, the trial court modified the parenting schedule such that Appellant now exercises parenting time six days out of every fourteen. Record at 567. Six days out of every fourteen is not equal parenting time. The trial court was within its discretion to refrain from a further deviation from the Guidelines based on the parties' parenting schedule and the disparity in the parties' incomes.

The instant case is more factually similar to *Downey*. Like *Downey*, the parties have a significant disparity in income in which Appellant earns five times as much income as the Appellee. Record at 593. In addition, the instant case is even less appropriate to warrant a deviation based upon the parenting schedule than *Downey* due to the lack of an equal parenting time schedule. Record at 565. The trial court was well within its discretion in its decision not to deviate from the Guidelines based on the parties' parenting schedule.

III. THE TRIAL COURT'S MATHEMATICAL CALCULATIONS WERE HARMLESS ERROR AS THE TRIAL COURT CONSIDERED MORE EVIDENCE THAN JUST APPELLEE'S LIST OF EXPENSES.

A trial court's findings of fact cannot be set aside unless they are clearly erroneous. CR 52.01. In its order entered August 31, 2011, the trial court made findings of fact regarding the reasonable needs of the minor child. Record at 593-594. The trial court modified and expanded its findings of fact in its order entered September 21, 2011. Record at 632-634.

The trial court weighed several factors to determine the reasonable needs of the minor child, including the list of expenses submitted by Appellee, Appellee's testimony and Appellant's testimony. Record at 632-634. Appellee testified she had made some errors on the expense sheet due in part to her recent marriage and recent combining of households with her new husband and step-children. (V.R. No. 125: 08/16/2011; 1:15:13 and 1:48:24). Appellee also testified that, based on a recent review of receipts, some of her expenses were greater than reported on the list of expenses. (V.R. No. 125: 08/16/2011; 1:48:24). In addition, Appellant testified that his costs were "equivalent" and that the child lived a relatively extravagant lifestyle. (V.R. No. 125: 08/16/2011; 2:15:20 and 2:18:06).

Based on the above-described evidence and testimony, the trial court made findings of fact with regard to the child's reasonable needs which were not clearly erroneous. The trial court specifically considered, and Appellee admitted to, mathematical errors on her list expenses. Record at 632. The trial court addressed Appellee's mathematical errors. *Id.* Moreover, the trial court believed some of Appellee's expenses were overstated and either excluded or adjusted these items. Record at 593 and 632-633.

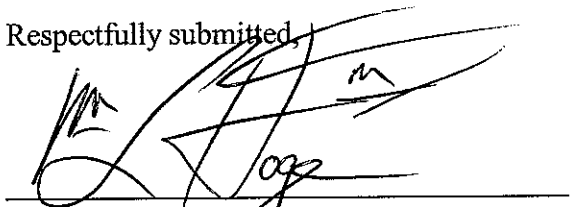
The trial court did not list every item it adjusted or excluded, as evidenced by its order entered September 21, 2011 in which the trial court reduced Appellee's reasonable needs of the child by $568.80, but only specifically described $386.60 in reductions. Record at 632-633. Appellant ignores the trial court's consideration of the testimony given by Appellee that some of her expenses were greater and Appellant's own testimony that the child lives a relatively extravagant lifestyle. (V.R. No. 125: 08/16/2011; 1:48:24 and 2:15:20 and 2:18:06).

Even if the trial court made a mathematical error, given the trial court's discretion in determining child support in excess of the Guidelines, the error is harmless. The trial court clearly considered errors made by the Appellee in her list of expenses. Record at 632. Moreover, a reviewing court can always instruct the trial court to correct minor mathematical errors and then consider whether such a correction changes the trial court's modified award of child support.

CONCLUSION

In summary, the trial court adhered to Kentucky law and was within its discretion to deviate from the Guidelines in calculating Appellant's child support. The trial court correctly calculated child support by considering the reasonable needs of the child and the income of the parties. Any mathematical error made by the trial court is harmless as the trial court has great discretion in determining child support in excess of the Guidelines.

Respectfully submitted,



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