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SUPREME COURT

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

HAL D. FRIEDMAN

APPELLANT

v.

On Discretionary Review from the Kentucky Court of Appeals
Case No. 2011-CA-001849-MR

Appeal from the Jefferson Circuit Court, Family Division
Honorable Stephen M. George, Presiding
Case No. 2000-FC-002319

SUSAN E. LEA

APPELLEE

REPLY BRIEF ON BEHALF OF APPELLANT HAL D. FRIEDMAN

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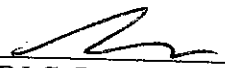
CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of August 2013, ten (10) originals of this brief were served via Federal Express upon Hon. Susan Stokley Clary, Clerk of the Supreme Court, Room 209, 700 Capital Ave., Frankfort, Kentucky 40601 with one (1) copy served by regular mail on the following: William Hoge, III, First Trust Centre, Suite 400 South, 200 South 5th Street, Louisville, Kentucky 40202; Hon. Stephen M. George, Judge, Jefferson Family Court, Division Nine, 700 West Jefferson Street, Louisville, Kentucky 40202, and Hon. Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601.



KEVIN C. BURKE

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INTRODUCTION

If a party seeks modification of an existing above-the-guidelines child support order, must the movant plead and prove that the child has unmet needs to justify an increase? Appellee says no. Kentucky law says otherwise.

An increase in child support that is already above the guidelines must be based "***primarily on the child's needs***" as set forth in specific findings. *Downing v. Downing*, 45 S.W.3d 449, 456 (Ky. App. 2001)(Emphasis added). Otherwise, the court abuses its discretion. *See id.*

Here, Appellee's motion for an increase in above-the-guidelines support fails to mention any unmet need of the child.[1] It was Appellee's burden to plead and prove this extraordinary reason for additional above-the guidelines support under KRS 403.211. The family court should have denied Appellee's motion for that reason alone. The court also abused its discretion by failing to consider the parties nearly equal time-sharing arrangement where the parties' combined income is above the guidelines. *See Dudgeon v. Dudgeon*, 318 S.W.3d 106, 107 (Ky. App. 2010); *see also Plattner v. Plattner*, 228 S.W.3d 577 (Ky. App. 2007). Finally, the family court failed to evaluate and specifically find "the reasonable and realistic needs" specific to the parties' child, Matthew. This too was an abuse of discretion. *Downing, supra* at 457 (it is an abuse of discretion for the court not to make "specific supportive findings" of a child's "reasonable and realistic needs under the circumstances").

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[1] See Appellant's Brief, Exhibit 7: Lea's Motion for Increase of Child Support Obligation and Supporting Affidavit. See also Record ("R.") at 314.

Appellee does not challenge controlling case law or argue for a change in the law. Appellee simply ignores the appropriate legal standard, and then ignores the family court's improper methodology for increasing "above the guidelines" support.

Appellee's incomplete arguments nonetheless highlight why reversal and remand is appropriate here.

REBUTTAL

I. Contrary to Appellee's arguments, the child's "needs" are a threshold consideration for an increase in above-the-guidelines child support.

Appellee omits key factual, procedural, and legal points in her brief, but Appellee concedes or at least does not dispute several important points:

First, Appellee admits that the parties had a combined gross income of $230,000 per year in 2009. (Appellee's brief, p 6). Therefore, at the time of the April 2009 support order, the parties had a combined monthly gross income of $19,166.67. That amount exceeds the uppermost guidelines limit in KRS 403.212 ($15,000). In fact, in April 2009, the parties agreed that child support was "outside of the child support guidelines" and "in the best interests of their minor child Matthew." [2]

Second, Appellee does not dispute that the May 13, 2011 motion fails to identify any "need" of the child unmet by the April 2009 support order. The sole basis for the motion is Appellant's increased income.[3] The motion references a single $6.3 million verdict for a client represented by Appellant's law firm.[4] Nowhere in the May 13, 2011 motion, or the accompanying affidavit, does Appellee allege that the child's needs have changed. Indeed, in her deposition and at the hearing, Appellee admitted that the April

[2] Appellant's Brief, Exhibit 9: Agreed Order for Support of Minor Child. R. at 254.
[3] Appellant's Brief, Exhibit 7: Motion for Increase in Child Support Obligation. R. at 314.
[4] Id.

2009 support order met the child's needs.[5] Appellee does not dispute that it was her burden to establish the unmet needs of the child or some other extraordinary reason when seeking additional above-the guidelines support under KRS 403.211.

Third, Appellee does not take issue with *Downing* and progeny. Appellee instead argues that above-the-guidelines support should increase ***whether or not the needs of the child are considered.*** Appellee argues: "[n]owhere 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." (Appellee's Brief, p. 8). Under Appellee's interpretation of *Downing*, a court may entertain a request for above-the-guidelines child support increase based solely on one party's increased income. However, if the child's needs are irrelevant—how can the child's needs be the "primary" consideration as required by *Downing*? Appellee cannot answer this question because a candid answer eviscerates her argument.

Finally, Appellee relies on KRS 403.213 to justify "deviating from the Guidelines." (Appellee's Brief, p. 5, 6). KRS 403.213 and its rebuttable presumption provisions apply ***only if*** the guidelines in KRS 403.212 apply. *See Dudgeon, supra* at 111-112. The guidelines did not apply in April 2009, because the parties' income and support were already above the guidelines at that point, and the guidelines did not apply when Appellee filed the May 13, 2011 motion for modification. Appellee does not dispute this. Under the circumstances, KRS 403.211(3)(e) allows courts to deviate from the uppermost guideline amount in KRS 403.212—but the standard for any deviation is governed by *Downing*.

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[5] Video Record ("VR") 8/16/11 at 2:18:07.

Downing directs that any deviation must be based primarily on the needs of the child. Because Appellee failed to allege (much less prove) that Matthew's needs were unmet by the April 2009 above-the-guidelines support order, the family court abused its discretion in granting Appellee's motion.

II. The family court abused its discretion by failing to consider the parties' nearly equal time-sharing arrangement.

Appellee initially quarrels with the notion that Appellant spends "equal" time with his son. Appellee argues that Appellant only "exercises parenting time six days out of fourteen." (Appellee's Brief, p. 10). Appellee again ignores the law. In an above-the-guidelines situation, the family court abuses its discretion by failing to take into account the parties ***"nearly equal"*** parenting time. *See Dudgeon v. Dudgeon*, 318 S.W.3d 106, 107 (Ky. App. 2010)(finding abuse of discretion where parties had "nearly equal" parenting time: the children spend three weekdays with mother, two weekdays with father, and alternate weekends); *see also Plattner v. Plattner*, 228 S.W.3d 577, 579 (Ky.App.2007)(abuse of discretion found).

Appellee then claims the family court appropriately disregarded the parties' time-sharing arrangement because the mere "disparity in income is so significant that...Appellee's child support obligation is far more burdensome than Appellant's." (Appellee's Brief, p. 10). Appellee's analysis is devoid of logic and precedent.

First, Appellee does not explain how Appellant's increased income burdens Appellee—particularly where Appellant is already paying above-the-guidelines child support. Appellee does not appear to seek child support, but rather maintenance.

Second, there is no explanation (or proof) as to how Appellant's increased income allegedly "burdens" Appellee in such a way as to create additional unmet "needs" for

Matthew—the standard under *Downing*. The proof shows that Appellee's new household expenses increased ***because Appellee moved to a house with a high wage earner, her new husband.***[6] Indeed, Appellee's financial contribution ***actually decreased in comparison to her expenses as a single person at the time of the April 2009 support order.***[7] In other words, Appellee successfully extracted money because of Appellant's increased income—and used household expenses Appellee would not have but for her remarriage to a high wage earner to do it. Such a result is inequitable and unprecedented.

Third, and most importantly, no case suggests that disparity in the parties' income allows the court to ignore nearly equal physical custody of the child when the support obligation is already above the highest guideline amount. It is an abuse of discretion if the court fails to consider same. *Dudgeon, supra.* The rule makes sense. The guidelines, based on the "income shares" model—and any extrapolation from the guidelines for that matter— assumes that one party is the primary custodian of the child and the other is not (usually the higher wage earner). The guidelines do not contemplate shared custody. *Plattner supra* at 579 (Ky.App.2007)(the child support guidelines found in KRS 403.212 "do not contemplate ... a shared custody arrangement" between parents). However, where the parties' combined income is already above the guidelines—as it was at the time of the 2009 support order—it is an abuse of discretion for the court not to consider shared custody as the basis for an increase. *Dudgeon supra* at 107 (Ky. App. 2010)(finding abuse of discretion based, in part, on court's failure to consider the parties "nearly equal"

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[6] Appellant's Brief, Exhibit 1: Opinion of the Court of Appeals at 9.

[7] See VR 8/16/11 at 2:07:42-2:08:50; VR 8/16/11 at 1:16:18:-1:16:29; VR 8/16/11 at 1:17:41-1:18:15; VR 8/16/11 at 1:45:56-1:46:56.

shared custody arrangement in above-the-guidelines scenario). The family court abused its discretion for this reason as well.

III. The family court abused its discretion by ordering an increase in support based on generalized household expenses—expenses Appellee incurs jointly with her new high-wage warning husband—rather than the "reasonable and realistic needs" of the child.

Finally, Appellee concedes, as she must, that that family court miscalculated the household expenses used as the basis to increase support. (Appellee's Brief, p. 11). Appellee labels these errors "harmless." *Id.* Harmless error is "any error or defect in the proceeding which does not affect the substantial rights of the parties." CR 61.01. Here, Appellant is paying significantly more in child support ***as a direct result of the family court errors and analysis***. It is unclear how such errors are less than substantial. Not surprisingly, Appellee fails to cite a single case finding harmless error where a clear miscalculation of support causes a real and continuing detriment to the obligor.

While Appellee focuses on relatively minor errors—errors that are not harmless in any event—Appellee ignores the larger problem. Specifically, the family court increased support based on the expenses of an average full-time resident at Appellee's new household, a household Appellee has only because of her high wage-earning husband. In contrast, Kentucky law requires the family court to make ***"specific supportive of findings"*** of ***"the standard of living which satisfies the child's reasonable and realistic needs under the circumstances."*** *Downing,* 45 S.W.3d at 457 (Emphasis added). Calculating above-the-guidelines support based on average expenses assigned to a hypothetical full-time resident of a two-income household is not what *Downing* requires. Tellingly, Appellee does not even address this issue in her brief.

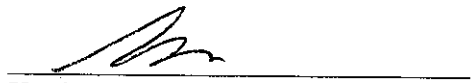
Again, after Appellee's marriage to a high wage earner, Appellee's contribution to household expenses ***actually decreased***. Moreover, Matthew resided in Appellee's new household only about half the time. He was not a full-time resident. Matthew spent nearly an equal amount of time with Appellant. Therefore, the family court erred in assigning one-fifth of Appellee's new household expenses to Matthew (based erroneously on five full-time residents of Appellee's household) to arrive at a base support figure. In any event, there were certainly no findings that these expenses were "***reasonable and realistic needs***" specific to Matthew as required by *Downing*.

In short, average expenses are not actual expenses, and actual expenses do not rise to the level of "reasonable and realistic needs" as required by *Downing*. Accordingly, the family court abused its discretion in calculating above-the-guidelines support in this case.

CONCLUSION

WHEREFORE, based on the arguments in his opening brief and this reply brief, Appellant, Hal D. Friedman, respectfully requests that this Court reverse the Opinion of the Court of Appeals and the Orders of the Jefferson Circuit Court, Family Division and remand for proceedings consistent with this Court's Opinion.

Respectfully submitted:



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