

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-000797-MR  
&  
NO. 2003-CA-000978-MR

DEBRA JEAN SHIPLEY,  
NOW WYATT

APPELLANT

v. APPEAL FROM HENRY CIRCUIT COURT  
HONORABLE KAREN A. CONRAD, JUDGE  
ACTION NO. 00-CI-00216

MICHAEL DAVID SHIPLEY

APPELLEE

### OPINION

### AFFIRMING

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BEFORE: DYCHE, KNOPF, AND MINTON, JUDGES.

DYCHE, JUDGE: When Michael and Debra Shipley divorced in 1991, Michael was named primary custodian of their two children. Both parties have since remarried, and Debra has moved to Tennessee, where she is a school bus driver. After Michael and his second wife, Cindy, separated and then divorced in 2001, Cindy and Debra united against Michael. Upon Cindy's urging, Debra moved

to change primary custody, alleging that Michael had a substance abuse problem and was physically abusive.

The Calloway Circuit Court, which had jurisdiction during the dissolution proceedings, granted Debra temporary custody, but the matter was later transferred to Henry County, where Michael and the children had resided for many years. The Henry Circuit Court ultimately ruled that the children reside with Debra, but sanctioned Debra by means of a reduction in child support plus allocated tax exemptions and attorney fees to Michael.

Debra appeals those sanctions. She insists that the evidence did not support the trial court's findings regarding "Debra's manipulation and abuse of the parties' children and misuse of the Court system."

Michael has not filed a brief. "If the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case." CR 76.12(8)(c). We "accept [Debra's] statement of the facts and issues as correct."

However, we cannot agree with Debra that the trial court's findings were not supported by sufficient evidence. The record is replete with evidence to support the finding of Debra's manipulation and misuse of the system. The decision on whether to deviate from the child support guidelines is within the trial court's discretion. Rainwater v. Williams, 930 S.W.2d 405 (Ky.App. 1996). The trial court also has the discretion to award attorney fees (Tucker v. Hill, 763 S.W.2d 144 (Ky.App. 1998)), as well the allocation of tax exemptions (Beckner v. Beckner, 903 S.W.2d 528 (Ky.App. 1995)). We cannot discern an abuse of that discretion in the case before us. Brown v. Brown, 952 S.W.2d 707 (Ky.App. 1997).

The judgment of the Henry Circuit Court is affirmed.

MINTON, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS IN PART AND DISSENTS IN PART AND FILES SEPARATE OPINION.

KNOPF, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: This is a very troubling case. On the one hand, the trial court found that Debra has inflicted emotional abuse on the children by poisoning their relationship with their father, and she has manipulated and misused the legal system to obtain custody. On the other hand, the trial court also found that returning the children to Michael's custody would be detrimental to the children's best interests. Although I question the trial

court's decision to allow Debra to keep custody of the children under the circumstances, I appreciate that the trial court attempted to resolve this quandary as best as it could. Moreover, the trial court's custody decision is not raised in this appeal.

However, the trial court went on to sanction Debra's behavior by deviating from the child-support guidelines. While a court has considerable discretion to deviate from the child-support guidelines, that discretion is not unlimited. Keplinger v. Keplinger, 839 S.W.2d 566, 568 (Ky.App. 1992). Our Legislature has created general guidelines and presumptions, and the trial court may only deviate from these parameters if it gives appropriate written reasons. Commonwealth ex rel. Marshall v. Marshall, 15 S.W.3d 396, 400 (Ky.App. 2000). KRS 403.211(3) requires a trial court to make a written finding that application of the guidelines would be unjust or inappropriate in a particular case and it lists seven situations justifying deviation. Misconduct by either party is not listed as a ground for deviating from the guidelines.

Admittedly, KRS 403.211(3)(g) allows a court to deviate from the guidelines for "[a]ny *similar* factor of an extraordinary nature specifically identified by the court which would make application of the guidelines inappropriate". (*Emphasis added*). The trial court apparently relied on this

ground. However, the legislature's use of the term "similar factor" does not suggest that the statute would allow deviation from the guidelines for a non-economic reason such as was present in this case.

Although I do not condone Debra's conduct in this action, I cannot agree that the trial court was authorized to reduce Michael's child-support obligation. Child support exists for the child's benefit and should not be reduced merely as a sanction for the bad behavior of a parent. While the trial court properly assessed attorney fees against Debra, KRS 403.220, and was within its discretion to allocate the dependent tax exemptions to Michael, I would find that the trial court abused its discretion by deviating from the child-support guidelines.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

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