

RENDERED: August 29, 2003; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2002-CA-001162-MR

MONICA MACKEY

APPELLANTS

v. APPEAL FROM JEFFERSON FAMILY COURT  
HONORABLE STEPHEN M. GEORGE, JUDGE  
ACTION NO. 00-FC-007271

JAMES A. MACKEY, JR.

APPELLEE

OPINION  
REVERSING AND REMANDING  
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BEFORE: BARBER, COMBS, AND KNOPF, JUDGES.

KNOPF, JUDGE: Monica Mackey appeals from an order of the Jefferson Family Court which terminated the formal child-support obligation of James Mackey, Jr., and ordered the parties to equally divide the children's direct expenses. Because we agree with Monica that the trial court failed to make sufficient findings to justify such a significant deviation from the child-support guidelines, we reverse and remand.

Although both parties include a number of extraneous details in their briefs, the relevant facts of this action are

not in dispute. Monica and James were married in 1991 and they separated in April of 2000. Two children were born of the marriage. On October 2, 2000, Monica filed a petition for dissolution of the marriage. On November 30, 2000, the trial court ordered James to pay temporary child support of \$446.34 per month, plus a percentage of the children's extraordinary medical and dental expenses.

The trial court entered a decree dissolving the marriage on November 9, 2001, reserving the issues of custody, child support and visitation for later adjudication. Prior to entry of the decree, Monica had moved the court to increase James's child support, and James had moved the court to reduce or eliminate his child support. Furthermore, while the parties agreed that they would have joint custody of the children, they were not able to agree on a parenting schedule due to problems with their irregular work schedules. Monica is employed as a registered nurse, working three days a week and every third weekend from 7:00 a.m. to 7:00 p.m. James works as a laboratory technician on the third shift (10:00 p.m. to 6:00 a.m.) four days a week and every other weekend.

The court conducted a hearing on these and other issues, and on December 3, 2001, the court entered findings of fact, conclusions of law and a judgment on the disputed issues. Among other things, the trial court gave exclusive possession

and use of the former marital residence to Monica, where she and the children continue to reside. On the days that Monica works, James picks up the children at 6:30 a.m. and is responsible for them until 7:00 p.m. James also has the children alternate weekends, as well as any weekend which Monica has to work. In addition to his weekend visitation, James keeps the children overnight on Sundays when Monica is scheduled to work on Monday. The trial court also set out a specific visitation schedule for holidays, birthdays and summer visitation. Neither Monica nor James objects to this schedule.

Monica does take issue with the trial court's orders regarding child support. The court noted that Monica earns somewhat more than James, and that under the court's schedule, they exercise "substantially equal parenting time" with the children. Consequently, the trial court found that a deviation from the child support guidelines is warranted. In essence, the trial court terminated James's formal child support payments, but it ordered both parties to equally divide all of the children's direct expenses (e.g.; education, day-care, medical insurance, and uninsured medical expenses). Monica filed a motion to amend the portions of the judgment relating to child support. The trial court denied this motion on April 26, 2002, and this appeal followed.

Monica argues that the trial court abused its discretion by terminating James's formal child-support obligation. She contends that the trial court failed to make sufficient findings to warrant its deviation from the guidelines. Monica also asserts that, because she maintains the primary residence for the children, she is entitled to receive child support from James. Furthermore, she argues that the parties' relatively equal time with the children, which she disputes, does not justify terminating child support.

We begin our analysis with KRS 403.211(2) and (3), which specifically provides that:

(2) At the time of initial establishment of a child support order, whether temporary or permanent, or in any proceeding to modify a support order, the child support guidelines in KRS 403.211 shall serve as a rebuttable presumption for the establishment or modification of the amount of child support. Courts may deviate from the guidelines where their application would be unjust or inappropriate. Any deviation shall be accompanied by a written finding or a specific finding on the record by the court, specifying the reason for the deviation.

(3) A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption and allow for an appropriate adjustment of the guideline award if based upon one (1) or more of the following criteria:

(a) A child's extraordinary medical or dental needs;

(b) A child's extraordinary education, job training, or special needs;

- (c) Either parent's own extraordinary needs, such as medical expenses;
- (d) The independent financial resources, if any, of the child or children;
- (e) Combined monthly adjusted parental gross income in excess of the Kentucky child support guidelines;
- (f) The parents of the child, having demonstrated knowledge of the amount of child support established by the Kentucky child support guidelines, have agreed to child support different from the guideline amount. However, no such agreement shall be the basis of any deviation if public assistance is being paid on behalf of a child under the provisions of Part D of Title IV of the Federal Social Security Act; and
- (g) Any similar factor of an extraordinary nature specifically identified by the court which would make application of the guidelines inappropriate.

Within these statutory parameters, the trial court has broad discretion and flexibility in establishing child support and determining whether to follow the child support guidelines or to deviate from them. While this discretion is far from unlimited, generally, as long as the trial court gives due consideration to the parties' financial circumstances and the child's needs, and either conforms to the statutory prescriptions or adequately justifies deviating therefrom, this Court will not disturb its ruling.<sup>1</sup>

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<sup>1</sup> VanMeter v. Smith, Ky. App., 14 S.W.3d 569, 572 (2000). See also Commonwealth ex rel. Marshall v. Marshall, Ky. App., 15 S.W.3d 396, 400 (2000).

Nevertheless, we agree with Monica that the trial court failed to make sufficient findings to justify its deviation from the guidelines. The trial court made detailed findings concerning the parenting schedule. However, the court then inferred from this schedule that the parties will enjoy substantially equal parenting time, and after noting that Monica's income is somewhat greater than James's, concluded that James should pay no child support under the guidelines. These findings, standing alone, were not sufficient to warrant such a significant deviation from the child support guidelines.

In Downey v. Rogers,<sup>2</sup> this Court held that KRS 403.211(3)(g) allows the trial court to consider the period of time the children reside with each parent in determining child support and as a basis for deviating from the guidelines.<sup>3</sup> However, the Court also noted that the child-support guidelines do not contemplate that the children will be shuffled back and forth between residences. Indeed, few families could find such an arrangement workable. Rather, in nearly all cases, the children will reside primarily in one household, regardless of whether legal custody is joint or solely reposed in one parent. Furthermore, while expenses for daily, necessary items are

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<sup>2</sup> Ky. App., 847 S.W.2d 63, 64 (1993).

<sup>3</sup> Id. at 63.

substantially reduced for the parent without possession of the children, many of these expenses continue throughout the month, regardless of where the children reside. Consequently, the Court in Downey rejected the contention that no support should be ordered where the parties have equal physical possession of the children.<sup>4</sup>

Contrary to this broad statement in Downey, we believe that there may be situations involving truly shared custody where the parties could properly be ordered to equally divide the expenses without the imposition of a formal support order. But in the absence of an agreement between the parents, the trial court would have to make detailed findings before it could impose such an arrangement upon the parties. First, the trial court's direction to equally divide the children's expenses between the parents requires that each of the parties regularly exchange bills, come to an agreement over which expenses are appropriate, and then pay the expenses (or reimburse the other parent for previously paid expenses) in a timely manner. This plan requires a considerable degree of cooperation between the parents in order to work effectively. Unless the court finds that the parents are able to cooperate in this manner, the

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<sup>4</sup> Id. at 62.

court's order merely invites prolonged conflict. In this case, the trial court made no such findings.

Moreover, as noted above, Downey does not allow a trial court to dispense with child support merely because the parties have relatively equal time with the children. Rather, Downey focuses on the degree to which the parents equally share the children's living expenses. Similarly, in Brown v. Brown,<sup>5</sup> the mother who had the children 40 percent of the time was directed to pay the father 60 percent of the amount listed as her child support obligation under the guidelines, but the father was not ordered to pay the mother any counterbalancing child support. This Court affirmed the trial court's decision, recognizing the father's ongoing obligation to provide a permanent residence for the children regardless of how much time they spent with the mother. The continual nature of household maintenance expenses was a legitimate consideration for the trial court in Brown to refuse to order counterbalancing support by the father to the mother for the 40% of the time they spent with her.<sup>6</sup>

Despite the parties' negative characterizations of each other, the trial court was convinced that both Monica and

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<sup>5</sup> Ky. App., 952 S.W.2d 707 (1997).

<sup>6</sup> Id. at 708.

James are fit parents, and that both desire to be actively involved in their children's lives. Likewise, the trial court found that the parenting schedule which the parties have worked out continues to serve the children's best interests. Since neither Monica nor James challenges the trial court's custody or visitation orders, the disparaging remarks in both of their briefs are irrelevant to this appeal. It is clear from the record that James has the children a substantial amount of time, and that both parties have an approximately equal involvement in the children's lives. Consequently, the trial court would have been justified in adjusting James's child-support obligation to reflect this degree of involvement.

However, in reaching its decision to entirely dispense with formal child support, the trial court focused on the amount of time which the children spent with each parent. The court did not consider whether James and Monica each incur an equal portion of the children's living expenses. But as Monica points out, and James essentially concedes, she maintains the children's primary residence and those household expenses continue regardless of how much time the children spend with James.

Consequently, we hold that the trial court's findings were not sufficient to justify its deviation from the guidelines or its order terminating James's formal child support

obligation. To support such an order, the trial court must make additional findings with respect to whether the parties incur an equal portion of the children's living expenses. If the court so finds, then, it may reinstate its prior order. Otherwise, the trial court must set child support according to the guidelines, but it may adjust the amount to recognize James's substantial involvement with the children.

Accordingly, the judgment of the Jefferson Family court is reversed, and this matter is remanded for further factual findings and entry of a new child-support order as set out in this opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Julia B. Barry  
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BRIEF FOR APPELLEE:

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