

Commonwealth Of Kentucky
Court of Appeals

NO. 2007-CA-000572-MR

WILLIAM P. DOUGHTY

APPELLANT

v. APPEAL FROM MERCER CIRCUIT COURT
HONORABLE DOUGLAS BRUCE PETRIE, JUDGE
ACTION NO. 99-CI-00015

RACHEL LYNN DOUGHTY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: ACREE, KELLER, AND MOORE, JUDGES.

KELLER, JUDGE: William P. Doughty has appealed from the order of the Mercer Circuit Court denying his motion to vacate, set aside, alter and/or amend its February 15, 2007, order awarding child support to his former wife, Rachel Lynn Doughty, and releasing funds in a blocked account to her. We affirm.

This case has a lengthy and complicated procedural history, most of which was set out in great detail in a 2005 opinion of this Court. *Doughty v. Doughty*, 2005 WL 3001919

(Ky.App. 2005).¹ We shall not repeat that history here, except to note that William and Rachel were married in 1992, are the parents of two sons, born in 1992 and 1996, and were legally separated in 1999. The marriage was dissolved by decree entered in 2000. Pursuant to their separation agreement, William and Rachel agreed to "share joint custody of the minor children." Neither parent was named as the primary residential custodian, nor was any child support to be paid to either parent. Later, Rachel requested child support from William. The circuit court's award of child support, and rulings intrinsically related to that award, formed the basis for the first set of appeals as well as the current appeal.

In the earlier appeals, a three-judge panel of this Court addressed the issues raised by William in his direct appeals and by Rachel in her cross-appeals. We shall summarize those issues and rulings below.

A) William's direct appeals

William first argued that the circuit court erred in failing to grant his motion to name him as the primary physical or residential custodian of the children. The Court held that there was insufficient evidence of a change in circumstances to support the modification of a joint custody decree, thereby

¹ This opinion represents a review of four separate appeals: two direct appeals by William (No. 2003-CA-002385-MR and No. 2004-CA-001400-MR) and two cross-appeals by Rachel (No. 2003-CA-002466-MR and No. 2004-CA-001502-MR). These appeals were eventually consolidated, and this Court rendered one opinion addressing the consolidated cases.

affirming the circuit court's refusal to name William as the primary residential custodian.

William next argued that the circuit court erred when it ordered him to pay child support by disregarding Kentucky statutes and instead applying foreign law. The Court noted that the circuit court found that the child custody arrangement was, in fact, for shared custody, and then utilized the Colorado method to calculate child support, which method is to be used only in cases where there has been a shifting of expenses. The Court then reviewed the law regarding setting and modifying child support and noted that a court has discretion to deviate from the child support guidelines, but must make a specific finding on the record justifying such a deviation. The Court ultimately held:

The circuit court in this case made no findings, written or otherwise, concerning the application of the statutory child support guidelines, or the reasons for its deviation from said guidelines in awarding child support to Ms. Doughty. Consequently, since the court's child support order fails to comply with statutorily-mandated requirements, we are compelled to vacate and to remand for additional findings of fact as to why deviation was appropriate.

Id. at *4.

B) Rachel's cross-appeals

Rachel first argued that the circuit court erred in failing to find that a split custody arrangement existed. The

Court looked to the definition of a split custody arrangement in KRS 403.212(2) (h), which addresses a joint custody situation where one or more of the children spend most of their time in one household, while other children spend most of their time in the other household. The Court held that this definition did not apply in the present case, thereby affirming the circuit court's conclusion that a shared custody arrangement exists in this case.

Rachel next argued that the circuit court erred in not ordering child support to begin on September 1, 2002, the date Rachel initially filed her motion for child support. However, the Court disagreed and affirmed the circuit court's decision.

Finally, Rachel argued that the circuit court erred in allowing William to supersede the child support order by permitting him to deposit funds into a blocked bank account during the appeal. The Court affirmed the ruling so far as it pertained to the arrearage portion of the child support award, but reversed it to the extent that it permitted the payment of current and accruing child support into the account.

At the conclusion of the opinion, the Court summarized its holding as follows:

On the direct appeals, we affirm the decision of the trial court denying "primary physical custodian" or "residential custodian" status to the appellant, and we vacate the court's child support order and remand for findings of fact as set out above. On the cross-appeals, we affirm the trial court's ruling that this case involves a "shared custody arrangement" rather than a

"split custody arrangement"; we affirm the ruling that support payments became effective April 7, 2003; and we affirm the order of the trial court permitting the payment of past-due child support into a blocked escrow account during the pendency of the appeal; but we reverse that order to the extent that it would permit the payment of any current or accruing support into such an account. We remand the case for further proceedings and for entry of orders consistent with this opinion.

Id. at *7. The opinion became final upon the Supreme Court's denial of Rachel's motion for discretionary review in May 2006.

On remand, the circuit court adopted its previous findings, reaffirmed its decision that the application of the child support guidelines would be inappropriate in this case, and opted to deviate from the guidelines. The circuit court then calculated the monthly child support to equal \$493.00 commencing April 7, 2003, making the total arrearage \$22,867.77, and released the \$20,000.00 held in the blocked account. The circuit court denied William's motion to vacate, set aside, alter and/or amend that ruling, and this appeal followed.

On appeal, William has raised several issues related to the payment of child support and whether the circuit court followed the directives of this Court on remand. In her brief, Rachel asserts that the circuit court indeed followed the directives of the Court of Appeals on remand and did not abuse its discretion in its award of child support. We agree with Rachel.

At this juncture, it will be useful to more extensively set out some of the procedural history of this matter in order to explain the actions of both this Court and the circuit court. We recognize that this will be difficult to follow, but this recitation will serve to explain how complicated the procedural history of this case truly was.

In its September 4, 2003, order awarding Rachel child support, the circuit court ruled that the parties had a split custody arrangement. It then calculated that the child support William would ordinarily pay to Rachel would be \$1,023.00 per month and that Rachel would ordinarily pay William \$217.00 per month, a difference of \$806.00 per month or \$186.00 per week payable to Rachel.

William filed a motion to alter, amend, or vacate that order, and included alternative motions to designate him as the primary physical custodian, to supplement proof and submit corrected evidence in the form of a revised calculation reflecting the percentage of responsibility each parent has for the children, and to pay child support into the court. By order entered October 21, 2003, the circuit court granted William's motion to alter, amend or vacate, and found that a shared custody arrangement existed. The circuit court then recalculated child support and ordered William to pay Rachel \$493.00 per month. In doing so, the circuit court used the Colorado method of calculation, noting that this method had been

adopted by local rule by the Jefferson County Family Courts.²

The circuit court explained:

This method determines the support obligation based on the percentage of time the child(ren) spends with each parent. This method is only to be employed where the Court first finds that there has been an actual shifting of expenses between the parties during the time the child(ren) is in their care. Based upon the proof in the record, the Court so finds in this case.

This calculation was based upon proof in the record that the children spent 56% of their time with William and 44% of their

² We were unable to locate this particular local rule of the Jefferson County Family Courts. However, we were able to locate the applicable Colorado statute, C.R.S.A. § 14-10-115(8) (b):

Because shared physical care presumes that certain basic expenses for the children will be duplicated, an adjustment for shared physical care is made by multiplying the basic child support obligation by one and fifty hundredths (1.50). In cases of shared physical care, each parent's adjusted basic child support obligation obtained by application of paragraph (b) of subsection (7) of this section shall first be divided between the parents in proportion to their respective adjusted gross incomes. Each parent's share of the adjusted basic child support obligation shall then be multiplied by the percentages of time the children spend with the other parent to determine the theoretical basic child support obligation owed to the other parent. To these amounts shall be added each parent's proportionate share of work-related net child care costs, extraordinary medical expenses, and extraordinary adjustments to the schedule of basic child support obligations. The parent owing the greater amount of child support shall owe the difference between the two amounts as a child support order minus any ordered direct payments made on behalf of the children for work-related net child care costs, extraordinary medical expenses, or extraordinary adjustments to the schedule of basic child support obligations. In no case, however, shall the amount of child support ordered to be paid exceed the amount of child support that would otherwise be ordered to be paid if the parents did not share physical custody.

time with Rachel. The circuit court did not address William's alternative motions in the October 21, 2003, order.

Apparently dissatisfied with the October order, on November 4, 2003, William moved the circuit court for supplemental findings regarding the actual shifting of expenses. He also requested that the circuit court rule on the remaining pending motions (the alternative motions in his motion to alter, amend, or vacate), seeking designation as the primary physical custodian, asking to supplement the proof and submit corrected evidence, and requesting permission to pay ordered child support into escrow pending an appeal. On November 5th, William filed a notice of appeal of the October 21, 2003, order, followed by Rachel's notice of cross-appeal on November 18th (the 2003 appeals).

After the 2003 appeals were filed, the circuit court held a hearing on all remaining issues. Although the hearing was held on November 25, 2003, the order ruling on William's November 4th motion and the other remaining issues was not entered until June 15, 2004. In that order, the circuit court first made findings concerning the actual shifting of expenses, pursuant to William's November 4th motion:³

1. The Court having found in its Order entered October 21, 2003, that there had been an actual shifting of expenses between the parties during the time the children are in their care, and Petitioner having moved the Court to make additional findings of

³ We note that the Court of Appeals did not mention the findings in this paragraph in its 2005 opinion, nor did it mention William's motion for supplemental findings.

fact as would identify the specific facts on which the Court concluded that an actual shifting of expenses had occurred, the Court does now further find that based on the Respondent's testimony given in her deposition on July 31, 2003, specifically including pp. 15, 21, and 22, that Respondent has incurred expenses while the children are in her care and that Respondent has taken on additional expenses as a result of the children being in her care including extra food, the KESP college fund, obtaining housing which provides adequate provision for her children, and the costs of transporting the children to and from daycare and school while the children are in her care, which are independent expenses resulting from the Respondent's taking care of the children.

The circuit court then denied William's motion to be designated as the primary physical custodian; granted his motion to supplement proof and submit corrected evidence; and denied his motion to permit him to pay child support into the Clerk of the Court to be held in escrow, but permitted him to either post a supersedeas bond or establish a blocked bank account with a balance of \$20,000.00. Furthermore, the circuit court denied Rachel's motions to find William in contempt for his failure to pay child support, to require William to pay accrued child support in a lump sum within thirty days, and for a wage assignment; and deferred its ruling on her motion for an award of attorney's fees. It is from this order that William filed his second notice of appeal on July 14, 2004, and Rachel filed her second cross-appeal on July 26, 2004 (the 2004 appeals).

Meanwhile, the 2003 appeals proceeded in this Court. On June 28, 2004, prior to the filing of the 2004 appeals,

William (as the appellant) filed a motion to supplement the record of the 2003 appeals with the June 15, 2004, order. This Court granted that motion on July 20, 2004, and the supplemental record was certified on July 21, 2004. We note that these two steps took place AFTER William filed his 2004 direct appeal on July 14th. On August 6, 2004, William moved to consolidate his 2003 direct appeal with Rachel's 2003 cross-appeal. Later that month, the Court issued show cause orders in Rachel's 2003 and 2004 cross-appeals for her failure to file a cross-appellant brief in the 2003 cross-appeal and for her failure to file a prehearing statement in the 2004 cross-appeal. The matter went before a three-judge motion panel, which issued an order on November 29, 2004. In that order, the Court determined that Rachel had shown sufficient cause, permitted both cross-appeals to proceed, and ordered that her tendered brief for the 2003 appeals and her tendered prehearing statement for the 2004 cross-appeal be filed. The Court then in effect consolidated the 2003 and 2004 appeals and ordered that the briefs filed in the 2003 appeals would also be filed in the 2004 appeals. The consolidated appeals were then submitted to a three-judge merits panel, which issued its opinion on November 10, 2005. We have detailed the holdings of that opinion above.

We have included this detailed procedural history to highlight the confusion inherent in the consolidated appeals. We believe some of this confusion might have stemmed from William moving to supplement the record of the 2003 appeals with

the June 15, 2004, order that became the basis for the 2004 appeals. We note that said order necessarily would have been included in the certified record for the 2004 appeals. Adding to the confusion was William's motion to consolidate, which only addressed the 2003 direct and cross-appeals, not the 2004 appeals. We note that, by operation of the Civil Rules, direct and cross-appeals are automatically combined. Here, the 2003 direct and cross-appeals would automatically have been combined, and in fact the notices were appropriately captioned as an appeal and a cross-appeal from the same order.

Having made sense of this procedural tangle, the Court of Appeals rendered the 2005 opinion, in which it, for the most part, affirmed the circuit court's decision. However, it remanded the case for findings to support the decision to deviate from the child support guidelines.

We shall now turn to the circuit court's action on remand when it was directed to make "additional findings of fact as to why deviation was appropriate." *Doughty*, at *4. We note that in remanding the case, this Court stated:

In reaching this conclusion, however, we are in no way commenting on the actual propriety of deviating from the child support guidelines in awarding child support in this case,⁴ and we again recognize that trial courts are afforded considerable discretion in fashioning an appropriate child support order when they concluded, and

⁴ Indeed, "it is clear that the trial court could take into consideration the period of time the children reside with each parent in fixing support, and could deviate from the guidelines . . . if convinced their application would be unjust." *Downey v. Downey*, 847 S.W.2d 63, 65 (Ky.App. 1993). (Footnote 3 in original.)

give reasons why, deviation from the guidelines is appropriate. See KRS 403.211(2); *Rainwater* [v. *Williams*, 930 S.W.2d 405, 407 (Ky.App. 1996)], citing *Redmon v. Redmon*, 823 S.W.2d 463 (Ky.App. 1992); *Keplinger v. Keplinger*, 839 S.W.2d 566 (Ky.App. 1992). We also note for the benefit of the trial court and the parties that this court has previously declined to find that the circuit court abused its discretion in awarding child support where the parties have joint custody and share equal or almost equal physical possession of their child, which appears to be the case here. See *Downey v. Rogers*, 845 S.W.2d 63, 64-65 (Ky.App. 1993).

Doughty, at *5.

The law in this Commonwealth concerning an award or modification of child support is extensive. The procedure in child support actions is set forth in KRS 403.211. Such an action "may be initiated by the parent, custodian, or agency substantially contributing to the support of the child." KRS 403.211(1).

[T]he child support guidelines in KRS 403.212 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 specific finding on the record by the court, stating the reason for the deviation.

KRS 403.211(2). The statute then lists seven different criteria, at least one of which must be present in order to justify a deviation, including any extraordinary needs of the child or parent, the child's independent financial resources, a combined monthly adjusted parental gross income in excess of the

child support guidelines, an agreement of the parents, or "[a]ny similar factor of an extraordinary nature specifically identified by the court which would make application of the guidelines inappropriate." KRS 403.211(3)(g).

This Court has recognized that "[o]ur statutory scheme for setting child support does not address every possible situation in which divorcing parents find themselves." *Downey v. Rogers*, 847 S.W.2d 63, 64 (Ky.App. 1993). However, the Court went on to state that "we believe the statute provides sufficient flexibility to allow our trial courts to fashion appropriate orders." *Id.* In *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky.App. 2001), this Court further addressed the ability of a trial court to set appropriate child support amounts:

Kentucky trial courts have been given broad discretion in considering a parent's assets and setting correspondingly appropriate child support. A reviewing court should defer to the lower court's discretion in child support matters whenever possible. As long as the trial court's discretion comports with the guidelines, or any deviation is adequately justified in writing, this Court will not disturb the trial court's ruling in this regard. However, a trial court's discretion is not unlimited. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. (Footnotes omitted).

See also Plattner v. Plattner, 228 S.W.3d 577 (Ky.App. 2007); *Van Meter v. Smith*, 14 S.W.3d 569 (Ky.App. 2000).

Our review of the record reveals that the circuit court decided to deviate from the child support guidelines after

determining that a shared custody arrangement existed and that there had been an actual shifting of expenses between the parties. See Order, October 21, 2003. In response to William's motion, the circuit court then detailed the evidence from the record which supported its conclusion that a shifting of expenses had occurred. See Order, June 15, 2004. What the second order did not explicitly state was that the findings regarding the shifting of expenses related back to its decision to deviate from the child support guidelines and to utilize the Colorado method to calculate the appropriate amount of child support. In its February 15, 2007, order entered on remand, the circuit court spent considerable time explaining its "concern that the Court of Appeals may have overlooked these findings as a result of the delay of the [June 15, 2004,] Order being placed into the record." The circuit court went on to state:

As previously stated, the sole purpose of the Petitioner's request to "supplement the record" at the hearing held on November 25, 2003 was for the Court to "identify specific facts on which the Court concluded that an actual shifting of expenses occurred during the times that the children are in their respective care." To be certain, the supplemental specific findings the Court was asked to make, and did make, addressed themselves to the determination of the "shifting of expenses" between the parties. As such, the language of the resultant written Order did not specifically set forth that the purpose of the Court making such a finding was to support the Court's departure from the Child Support Guidelines in this case. Therefore, in concert with the Court's determination that this is a shared custody case, the Court now adopts these findings of November 25, 2003 as the

additional factual bases upon which the Court relied and relies in determining that application of the guidelines in this case [is] wholly inappropriate.⁵

Earlier in the order, the circuit court expressed the opinion that both parties were substantially contributing to the children's support in the shared custody arrangement and that:

[T]he fact that the parties are exercising a shared custody arrangement certainly must be a factor to be considered when determining the applicability of the child support guidelines to a particular case. Indeed, it would appear that this fact may *alone* serve as the basis for deviating from the guidelines. Simply put, deviation of some fashion is not only acceptable but required in this case because it concerns a **shared** custody arrangement where **both** parties may rightfully claim that they are "primary" residential parents. (Emphasis in original.)

With this added explanation of its previous rulings and the explicit relation of its factual findings to its decision to deviate from the child support guidelines, we hold that the circuit court complied with the direction of this Court to make additional findings. We further hold that those findings concerning the actual shifting of expenses are supported by the record and that the circuit court did not abuse its discretion in deviating from the child support guidelines. The combination of the shared custody arrangement and the finding that an actual shifting of expenses had occurred constitutes a "factor of an

⁵ As an aside, we note that the circuit court incorrectly equated William's previous request to supplement the record with its identification of facts to support its conclusion that a shifting of expenses occurred. However, this mistake is of no consequence, as the order encompassed rulings on both matters; the circuit court granted William's motion to supplement the record AND included specific facts upon which it based its conclusion on the shifting of expenses.

extraordinary nature" that "would make application of the guidelines inappropriate." KRS 403.211(3)(g).

As to the circuit court's decision to use the Colorado method to calculate child support, we have recognized that trial courts have wide discretion to fashion appropriate child support awards. *Plattner*, 228 S.W.3d at 580. Although we would prefer that the Legislature either accept or decline to adopt this method, we nevertheless hold that, based on the specific facts of this case and our flexible statutory guidelines, the circuit court did not abuse its discretion in utilizing this method. Pursuant to the law of this case, the parties had a shared custody arrangement. Accordingly, both had to maintain a home and incur expenses as if a primary residential parent, and the Colorado method takes these factors into account.

Our only hesitation in this case has to do with the circuit court's ruling in which it permitted William to introduce new evidence regarding the percentage of time the children spend with each parent. This new calculation showed that William was responsible for the children 60% of the time, while Rachel was responsible for them 40% of the time. Although the circuit court permitted this to be introduced, it nevertheless retained the previously established split of 56%/44% when it reaffirmed its child support award. We shall presume that the circuit court was aware of this information but believed in favor of the earlier evidence regarding the

percentage of time the children spent as the responsibility of each parent.

Based upon the above holdings and the holdings in the 2005 opinion, we need not address any further issues William raised.

For the foregoing reasons, the judgment of the Mercer Circuit Court is affirmed.

ALL CONCUR.

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