

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001420-ME

DEVIN MCBRIDE

APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 14-CI-503266

AMANDA MCBRIDE

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND D. LAMBERT, JUDGES.

KRAMER, CHIEF JUDGE: Devin McBride appeals the Jefferson Family Court's order denying his motion for additional findings and denying his motion to alter, amend or vacate the court's judgment concerning the amount of child support he is obligated to pay. After a careful review of the record, we affirm because the family court did not abuse its discretion in its allocation of child care expenses or in its application of the child support guidelines.

I. FACTUAL AND PROCEDURAL BACKGROUND

In October 2014, Devin McBride filed a petition for dissolution of his marriage to Amanda McBride. The parties had one minor child together, a daughter, who was one year old at the time Devin filed his petition for dissolution. Amanda's preliminary verified disclosure statement provided that she had another child (a son) living with her who was born of her prior marriage and that child was approximately eight years old in late 2014.

Amanda moved for a temporary parenting schedule, maintenance and child support. Following a hearing, the family court ordered for the parties' daughter to reside primarily with Amanda, and for Devin to have parenting time on Tuesdays and Thursdays from 4:30 p.m. until 6:30 p.m. and each Sunday from 10:00 a.m. until 4:00 p.m. Additionally, Devin was ordered to pay Amanda temporary maintenance of \$500 per month, and child support of \$486.36 per month, or \$112.25 per week, plus 100% of the child's extraordinary medical expenses. Devin was further ordered to pay \$750 toward Amanda's attorney fees and costs. The court reserved final allocation for trial.

A partial agreed order was entered, providing that Devin would pay maintenance to Amanda in the sum of \$500.00 per month for three months, with the first payment due on July 1, 2015, the second payment due on August 1, 2015, and the third payment due on September 1, 2015. It further provided that the parties would have joint custody of their minor child, and that Devin would have, *inter alia*,

parenting time with the child via Skype on Tuesday, Thursday, and Sunday afternoon beginning at 6:00 pm. Devin may also visit with the child in Louisville, Kentucky by agreement of the parties and having given not less than 24 hours' notice of his intent to travel to Louisville for a visit.

The parties agreed to “negotiate a permanent parenting time schedule, including a holiday schedule, with the intention of establishing definite periods of time for Devin to have parenting time with the child at his home in North Carolina.”¹ The parties did not reach an agreement concerning child support and costs concerning the child, and they reserved that issue for adjudication by the family court.

After a hearing, the family court entered its findings of fact, conclusions of law, judgment and decree of dissolution of marriage. The court found that Devin had moved to North Carolina in April 2015; he was living with his mother; and he was searching for employment. During their marriage, Devin worked at PetSmart, earning minimum wage, but he quit his job in January 2015 to attend nursing school. The court noted that Devin planned to resume his education in North Carolina in the fall and that it would take eighteen months for him to earn his LPN license and two years to obtain his Bachelor's Degree. The family court found that Devin's only source of income was his Veterans Administration disability of \$2,033 per month, which would be reduced to approximately \$1,857 once the parties were divorced because Amanda and her son from another relationship would no longer be Devin's dependents.

¹ Devin testified during the hearing in this case that he lived in Kentucky when the petition for dissolution of marriage was filed, but that he had since moved to North Carolina to live with his mother for financial reasons.

The court noted that Amanda attended school full time and that she expected to obtain her Associate's Degree in radiology in May 2017. Amanda previously was employed part time at Hometown Pizza, earning an average of \$130 per week. Before their most recent separation, Devin and Amanda agreed that they would both quit their jobs and return to school full time to complete their education. The court stated that Amanda attended school "year-round, Monday through Friday during normal business hours."

The family court found that the parties' daughter was enrolled in daycare, which cost \$173 per week, or \$750 per month, and that neither party had any family in the area who could assist with child care. It stated Amanda planned to apply for "4C's"² assistance in the fall, which the court opined might greatly reduce her cost of child care.

The court found that Amanda lived in a condominium owned by Devin's mother, that Amanda did not pay rent or utilities, and that Devin paid Amanda's car insurance and cable/internet bill. It noted that the parties' agreed order provided that Amanda would vacate the residence within fourteen days, and the court also noted that Devin would pay Amanda maintenance of \$500 per month for three months, beginning on July 1, 2015.

The court found that neither party was voluntarily unemployed at the time it entered its decision. The court held:

For purposes of child support, [Devin] earns \$1,857 per month, minus his maintenance obligation of \$500 per

² No explanation is provided for what "4C's" means, or what it entails.

month. [Amanda's] only source of income is her maintenance award. [Their daughter's] reasonable school-related child care costs are \$750 per month. She receives health insurance coverage through Medicaid at no cost to either party.

The Kentucky Child Support Guidelines require [Devin] to pay support of \$782.56 per month, or \$180.60 per week. The Court orders him to pay this amount, effective on the date that [Amanda] vacates his mother's condominium. His child support shall increase to \$1,072 per month, or \$247.40 per week, effective October 1, 2015. This adjustment accounts for the elimination of [Amanda's] maintenance award. [Amanda] shall apply for 4C's assistance and immediately notify [Devin] of the outcome of her application so that child support can be adjusted accordingly. Either parent shall obtain health insurance for [their daughter] once it becomes available to him or her at a reasonable cost. To the extent that [their child] has any extraordinary medical expenses, the parties shall divide those in proportion to their income, with [Devin] paying 73% through September 30, 2015 and 100% thereafter.

The court then ordered that the parties' marriage was dissolved, and it incorporated the parties' agreed order into its judgment. Attached to the court's judgment were two calculation sheets for determining Devin's non-custodial obligation. The first sheet reflected Amanda's monthly gross income as \$500 (from the maintenance she received from Devin), and because she had no deductions from that amount, the amount also served as her "combined monthly parental adjusted income." Devin's monthly gross income was listed as \$1,850, with a deduction from that amount of \$500 for his maintenance payment, for a "combined monthly parental adjusted income" of \$1,350. Amanda's \$500 was found to be 27% of the total parental income of \$1,850, and Devin's \$1,350 was

found to be 73% of the total parental income of \$1,850. The court found the base support obligation for one child to be \$322, which was derived from the child support guidelines at KRS³ 403.212(7). It also found additional child care costs to be \$750. Therefore, the total support obligation was determined to be \$1,072 (*i.e.*, \$322 plus \$750). Amanda's 27% obligation of the \$1,072 total was determined to be \$289.44, and Devin's 73% obligation of the \$1,072 total was determined to be \$782.56. Therefore, this was how Devin's obligation was calculated to be \$782.56 per month for the three months that he was paying maintenance.

The second calculation sheet that was attached to the court's judgment pertained to Devin's non-custodial obligation after his three months of paying maintenance ended. That sheet reflected that at that point, Amanda would have no monthly gross income and no "combined monthly parental adjusted income," while Devin's monthly gross income and his "combined monthly parental adjusted income" would be \$1,850. Thus, Amanda's percentage of parental income became 0%, while Devin's became 100%. The sheet continued, again reflecting that the base support obligation for one child is \$322, and that child care costs are \$750, for a total support obligation of \$1,072. Thus, because Devin has 100% of the parental income, he also is required to shoulder 100% of the total support obligation, so his non-custodial obligation was determined to be \$1,072 per month after he stopped making maintenance payments.

³ Kentucky Revised Statute.

Devin moved for further findings of fact to support the court's allocation of child care expenses. He alleged that because neither party was employed, and neither party was voluntarily unemployed, he should not have been required to pay 100% of the child care expenses. Devin further moved to alter or amend the judgment concerning the allocation of child care expenses because the allocation of 100% of the expenses to him consumed almost 60% of his disability income. The family court denied Devin's motion for additional findings and his motion to alter, amend, or vacate the court's judgment.

Devin now appeals, contending that: (a) the family court abused its discretion in setting child support absent findings regarding the reasonableness of the allocation of child care expenses in relation to the parties' income; and (b) the family court abused its discretion when it failed to deviate from the guidelines when the application of the guidelines is unjust or inappropriate. Amanda did not file a brief on appeal.

II. ANALYSIS

We first note that because Amanda failed to file an appellee brief, CR⁴ 76.12(8)(c) provides as follows:

“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.”

⁴ Kentucky Rule of Civil Procedure.

Roberts v. Bucci, 218 S.W.3d 395, 396 (Ky. App. 2007) (quoting CR 76.12(8)(c)).

“The decision as to how to proceed in imposing such penalties is a matter committed to our discretion.” *Id.* (Citation omitted). In the present case, we choose not to apply any of the penalties in CR 76.12(8)(c) because Devin has not filed a motion requesting such and because there is a possibility, considering that Devin had to pay \$750 in the family court for Amanda’s attorney fees and costs, that Amanda did not file an appellate brief for financial reasons.

A. REASONABLENESS OF ALLOCATION OF CHILD CARE EXPENSES

Devin first alleges that the family court abused its discretion in setting child support absent findings regarding the reasonableness of the allocation of child care expenses in relation to the parties’ income. “[T]he establishment, modification, and enforcement of child support is generally prescribed by statute and largely left, within the statutory parameters, to the sound discretion of the trial court.” *McKinney v. McKinney*, 257 S.W.3d 130, 133 (Ky. App. 2008) (citation omitted).

Kentucky trial courts have been given broad discretion in considering a parent’s assets and setting correspondingly appropriate child support. . . . 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.

Id. (Internal quotation marks and citations omitted). Therefore, “the findings of a trial court will not be disturbed by this Court if they are supported by substantial evidence.” *Id.* (Citation omitted).

Pursuant to KRS 403.211(2), when establishing child support, “the child support guidelines in KRS 403.212 shall serve as a rebuttable presumption for the establishment or modification of the amount of child support.” In the present case, the court stated that the base support obligation for the parties’ one child is \$322, which is correct because that is the amount shown in the table at KRS 403.212(7) for one child based upon a combined monthly adjusted parental gross income of \$1,800, which was the parties’ combined monthly adjusted parental gross income in this case.

However, Devin does not challenge that amount. Rather, he claims the family court did not make adequate findings regarding the reasonableness of the allocation of child care expenses in relation to the parties’ income. Pursuant to KRS 403.211(6), “[t]he court shall allocate between the parents, in proportion to their combined monthly adjusted parental gross income, reasonable and necessary child care costs incurred due to employment, job search, or education leading to employment, in addition to the amount ordered under the child support guidelines.”

Contrary to Devin’s allegation, the family court found the child care costs to be reasonable because Amanda was attending school to finish her Associate’s Degree. Specifically, the court held that the child’s “reasonable school-related child care costs are \$750 per month.” It so held after finding, based upon the evidence presented at the hearing, that: Devin had moved away to North Carolina; Amanda attended school year-round, Monday through Friday during normal business hours, in order to complete her Associate’s Degree in radiology;

the parties had agreed prior to their most recent separation to quit working and return to school full-time to complete their education; neither party had any family in the area that could assist with child care; and the child was enrolled in daycare, which cost \$750 per month. Thus, there was substantial evidence to support the family court's finding regarding the reasonableness of the child care costs.

To the extent that Devin challenges the allocation of child care expenses in relation to the parties' income, as previously noted, KRS 403.211(6) requires the court to allocate child care costs "between the parents, in proportion to their combined monthly adjusted parental gross income." The court did exactly this, as explained *supra*. It determined the parties' percentages of the combined monthly parental adjusted income, which was 27% for Amanda and 73% for Devin during the three months that Devin was paying maintenance to Amanda; it became 0% for Amanda and 100% for Devin thereafter. The court then calculated each parent's part of the total support obligation based upon those percentages. The family court did not err in doing so. Consequently, the family court did not abuse its discretion in setting child support in this case based upon the reasonable allocation of child care expenses in relation to the parties' income.

B. GUIDELINES

Devin also alleges that the family court abused its discretion when it failed to deviate from the guidelines when the application of the guidelines was unjust or inappropriate. He contends that in calculating child support, a family court should base an assessment of a child's reasonable needs on the parents'

financial ability to meet those needs, and if the parents cannot meet those needs, then the court should deviate from the guidelines.

Pursuant to KRS 403.211(2),

the 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, specifying the reason for the deviation.

However, KRS 403.211(3) provides as follows:

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 guidelines 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.

In the present case, there were no allegations, nor was there any evidence presented, to support a deviation from the guidelines pursuant to KRS 403.211(3)(a-f). Furthermore, to the extent that Devin contends we should follow the reasoning in *Downing v. Downing*, 45 S.W.3d 449 (Ky. App. 2001), his argument is misplaced. *Downing* is distinguishable from the present case because *Downing* concerned a deviation from the child support guidelines pursuant to KRS 403.211(3)(e), due to the fact that the combined monthly adjusted parental gross income exceeded the child support guidelines amount. *See Downing*, 45 S.W.3d at 454. As noted *supra*, KRS 403.211(3)(e) is inapplicable in this case.

To the extent that Devin asserts that KRS 403.211(3)(g) justifies a deviation from the guideline award in this case, his argument is misplaced. As quoted previously, KRS 403.211(3)(g) states that a court may deviate from a child support guideline award due to “[a]ny similar factor of an extraordinary nature specifically identified by the court which would make application of the guidelines inappropriate.” Further, KRS 403.211(4) provides: “Extraordinary” as used in this section shall be determined by the court in its discretion.” In his argument in support of this claim, Devin contends that he should not be required “to bear 100% of the burden of the \$750.00 monthly child care expense.” However, he appears to

be confusing child care expenses with the child support guideline award. The guideline award was the \$322 that the family court determined was appropriate for the base child support obligation based upon the table in KRS 403.212(7). Devin, on the other hand, is challenging the child care expense that was determined based upon KRS 403.211(6), which is an amount allocated to the parents “in addition to the amount ordered under the child support guidelines.” KRS 403.211(6). Consequently, because we determined previously that the family court did not abuse its discretion in allocating child care expenses in this case, and because Devin does not challenge the \$322 guidelines amount awarded, his claim fails.

Accordingly, the order of the Jefferson Family Court denying Devin’s motion for additional findings and to alter, amend or vacate the court’s judgment is affirmed.⁵

ALL CONCUR.

BRIEF FOR APPELLANT:

Charles D. Brown, Jr.
Louisville, Kentucky

BRIEF FOR APPELLEE:

N/A

⁵ We pause to note that as circumstances change, child support is most certainly reviewable in the family court.