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

BRIEF ON BEHALF OF APPELLANT HAL D. FRIEDMAN

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 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 Captial 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

INTRODUCTION

When combined parental gross income exceeds the child support guidelines, and both parents share roughly equal custody and child-rearing responsibilities, a court must consider the child's *reasonable needs* to justify an increase in child support. Reversal and remand is appropriate because the family court failed to do so in this case.

STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to CR 76.12(4)(c)(ii) of the Kentucky Rules of Civil Procedure, Appellant, Hal D. Friedman, requests the opportunity to present oral argument. The issue can be explained and the error of courts below can be better understood if Appellant is allowed the opportunity to present oral argument.

STATEMENT OF POINTS AND AUTHORITIES

APPENDIX

STATEMENT OF THE CASE

SUMMARY

If combined parental gross income exceeds the child support guidelines, and both parents share roughly equal custody and child-rearing responsibilities, should the higher-income parent's child support obligation increase—even if the child's *needs* do not?

Here, Appellee filed a motion to increase support based solely on Appellant's increased earnings. That motion followed a 2009 court-approved agreed order. In the 2009 order, Appellant's "above the guidelines" child support was set at $700 per month. That amount was determined to be "in the best interests of their minor child" given the parties' significant incomes and assets, as well as their joint custody and time-sharing agreement. Despite the lack of any increased need for the child after 2009, the family court, in 2011, ordered an additional increase—far above $700 per month—merely because Appellant earned more income.

The court then employed a formula to arrive at the increased child support. First, the court added together what the court determined to be the parties' total child-related expenses. Second, the court totaled the parties' income for 2010. Third, the court divided the parties combined income by the total expenses and assigned a percentage of that income against expenses. Fourth, the court assigned a "credit" of sorts to arrive at a new support figure for Appellant.

The court did not determine whether the child's *needs* had changed. The court also did not consider the parties' roughly equal time-sharing arrangement, the Appellee's substantial financial assets, or Appellant's concern that an increase in monetary support would be contrary to the best interests of the child.

FAMILY COURT PROCEEDINGS (2000-2010)

Appellant Hal D. Friedman (Hal) and the Appellee Susan E. Lea (Susan) are the parents of a minor child, Matthew, born on December 20, 1999.[1]

On March 14, 2000, Hal filed a Verified Petition for Child Custody, Time Sharing and Child Support in the Jefferson Circuit Court, Family Division.[2] Under the terms of an agreement reached between the parties, Hal and Susan shared joint custody of Matthew.[3] Hal time-shares only slightly less than Susan. Hal takes care of Matthew three nights and parts of four days each week, including one night and one day every weekend, plus additional time for holidays and vacations as set forth under the parties' joint custody agreement.[4]

It is undisputed that Hal has been a loving and devoted father. Hal pays his child support obligations and reimburses all expenses requested by Susan timely and fully.[5] In addition to his support obligation, Hal pays for numerous activities and events. These include, but are not limited to, day-care expenses, summer camp, karate lessons, soccer lessons, swimming lessons, birthday parties, and field trips at school.[6] Hal also started a college fund for Matthew. He contributes $350 monthly to the fund. The fund now has $35,000 to $40,000.[7] Again, this contribution is voluntary and in addition to Hal's support obligation.

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[1] Exhibit 1: Court of Appeals Opinion at 2.
[2] R. at 1.
[3] Exhibit 1: Court of Appeals Opinion at 2.
[4] R. at 40-51; and Exhibit 6: Affidavit in Opposition at 2. R. at 337. Hal's Affidavit is *uncontested* in the record below. Susan never disputed any of its contents by counter affidavit or in any testimony at hearing. Thus, Hal's Affidavit should be accepted as true. *Winco Block Coal Co. v. Evans*, 256 Ky. 487, 76 S.W.2d 241, 244 (1934).
[5] Exhibit 6: Affidavit in Opposition at 2. R. at 337.
[6] *Id.*
[7] *Id.*

Hal, however, more than once has had to seek court intervention to avoid potential harm to his relationship with Matthew. In one instance, during a March 18, 2004 hearing, the family court found that Susan engaged in what the court described as the "subtle undercurrent" of alienation by explaining to Susan that she should not be telling her Son not to draw pictures of his father at daycare. In another, Susan initiated an unsubstantiated Child Protective Services report.[8]

Since the proceedings resolved in 2008—with Hal retaining joint custody and roughly equal time-sharing of Matthew—Susan filed motions to increase child support.[9] In April 2009, after one such attempt, the parties reached an agreement to increase Hal's support obligation to $700 per month. The Agreed Order, mutually drafted and signed by counsel for both Hal and Susan, contained the following terms:

> The parties agree that the support agreement reflected herein [$700 per month], while it may be outside of the child support guidelines, reflects the parties' incomes, assets, and financial means, and the joint custody and time-sharing arrangement each has with Matthew, and is in the best interests of their minor child Matthew.[10]

Thus, in April 2009, the parties determined, with court approval, that Hal's payment of $700.00 per month was in Matthew's best interests.

As for Hal's income, in 2008 and 2009, Hal made $191,849 and $159,360, respectively. In 2010, Hal's income increased to $408,425, due primarily to the resolution of a single case that his small law firm handled that year.[11] As for Susan, she is a professional speech pathologist, employed with Baptist East Hospital for fifteen years. Her income is steady and consistent. Susan earned nearly $80,000.00 in 2010, which does

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[8] VR 8/16/2011 at 2:27:26-2:28:41 and 2:33:43-2:34:57.
[9] R. at 231, 246.
[10] Exhibit 9: Agreed Order for Support of Minor Child. R. at 254.
[11] Exhibit 1: Opinion of the Court of Appeals at 3.

not include benefits, interest income on investments, or the $8400 she received from Hal in support.[12]

Matthew's parents are fortunate. Both are financially secure and are able to attend to Matthew's every need or want. The parties entered into the April 2009 support agreement based on that understanding, and the understanding that the support order adequately provided for Matthew, as its terms clearly reflect.

FAMILY COURT PROCEEDINGS (2011)

After entry of the April 2009 support order, Susan's financial situation improved dramatically. In May 2011, Susan married a United Parcel Service Airline Pilot and moved with Matthew to an upscale four-bedroom home in the East End of Jefferson County near Anchorage, Kentucky.[13] As a result, many of Matthew's expenses, for example health insurance, no longer existed.[14] Susan's husband owns the marital residence, so Susan no longer pays a mortgage or other household bills directly. Instead, she contributes "anywhere from $1200 to $1500" monthly household expenses (including expenses for Matthew).[15] Susan sold her previous home and put the proceeds from that sale ($72,000.00) in the bank.[16] Before her marriage, Susan had regular expenses associated with being a single, unmarried person. However, after her marriage, she contributes ***only $1500 per month at most***.[17]

Matthew has his own bedroom at the new home along with many toys, computer

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[12] Exhibit 1: Opinion of the Court of Appeals at 3.
[13] *Id.* at 9.
[14] VR 8/16/11 at 2:07:42-2:08:50.
[15] *Id.* at 1:16:18:-1:16:29.
[16] *Id.* at 1:17:41-1:18:15.
[17] *Id.* at 1:45:56-1:46:56.

games and electronic devices.[18] In 2010 and 2011, Susan travelled to Hawaii and the Dominican Republic with her husband, and she took Matthew to Sanibel Island and Daytona Beach in those years.[19] Susan and her husband take Matthew out on their boat during the summer.[20] It is undisputed that there is nothing Matthew needs or wants while with his mother.

In August 2011, at Susan's insistence, Matthew was due to start sixth grade at Crosby Middle School in Louisville, Kentucky. At the time, Hal took Matthew to school five out of every ten school days. Since middle school started earlier than elementary school, and because the school was much farther from Hal's home in Prospect, Kentucky, Hal sought Susan's approval to modify their time-sharing schedule slightly so Hal could still spend mornings with Matthew.[21] Susan refused. This necessitated the filing by Hal of a motion to alter the parties' time-sharing schedule. Susan opposed the proposal. In response, on May 13, 2011, Susan filed another motion to increase child support—the motion that is the subject of this appeal.[22]

After a hearing on July 28, 2011, the family court ordered a modification to the time-sharing arrangement requested by Hal. The court ordered a hearing on Susan's motion for an increase in child support the following month.[23]

Importantly, nowhere in Susan's May 13, 2011 motion for an increase in support, or her accompanying affidavit, does Susan allege that any of Matthew's *needs* have changed. Instead, Susan based the motion solely on Hal's success as a legal professional

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[18] Exhibit 6: Affidavit in Opposition at 11. R. at 337.
[19] VR 8/16/11 at 1:59:39-2:00:56.
[20] Exhibit 6: Affidavit in Opposition at 11. R. at 337.
[21] Exhibit 8: Order Altering Time Sharing Schedule. R. at 374.
[22] Exhibit 7: Motion for Increase in Child Support Obligation. R. at 314.
[23] Exhibit 8: Order Altering Time Sharing Schedule. R. at 374.

and his increased income in 2010.[24] The motion references a $6.3 million verdict for a client represented by Hal's law firm.[25] Susan even highlights that **"[u]nder standard contingent fee arrangements, this would represent $2.5 million for Respondent's firm!"**[26] (emphasis in the original). The word "need" is mentioned nowhere in Susan's motion.

Hal filed a response and affidavit in opposition to the motion on May 18, 2011. Hal disputed Susan's right to additional child support because, among other things, Matthew lived an equivalent lifestyle at both residences, and because Susan failed to allege any need that Matthew had since entry of the April 2009 support order.[27]

The case proceeded to a hearing on August 16, 2011. At the hearing, Susan's proof consisted primarily of a document she and her counsel referred to as a "Usual and Customary Expenses for High Income Families" (or "Expense Worksheet").[28] Susan testified that the Worksheet listed all expenses attributed to Matthew at her new household.[29] However, in order to calculate Matthew's expenses, Susan simply "divided [the total household expenses] by a fifth because there are currently five people, five people living in our house."[30] ***The Worksheet failed to divide the resulting sums***

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[24] Exhibit 7: Motion for Increase in Child Support Obligation. R. at 314.
[25] Exhibit 7: Motion for Increase in Child Support Obligation (Susan obtained this information from the law firm's website as indicated in the motion). R. at 314.
[26] *Id.* Most of the information in the motion was ultimately proven false. For example, Hal's law firm did not earn such a large fee. The case in question settled for far less (under a confidentiality Order) than the amount awarded by the jury due to significant limitations on insurance carried by the defendant. In sum, while Hal did have an extraordinary earning year in 2010, the proof was that he made $408,425 in 2010, nothing akin to the amount alleged in Susan's motion.
[27] Exhibit 6: Affidavit in Opposition at 3. R. at 337.
[28] Exhibit 5: Usual and Customary Expenses Worksheet.
[29] VR 8/16/2011 at 1:14:16-1:14:48.
[30] *Id.* at 1:17:18 – 1:17:40.

attributed to Matthew by half—even though Matthew lived only roughly half the time with his Mother. According to the improperly calculated sums, Susan attributed $2454 per month of the household expenses to Matthew.[31] The remainder of Susan's proof was, essentially, that Hal's income went up since 2009,[32] that he purchased a new house with a pool,[33] that he purchased two cars,[34] and that he had "taken many vacations this year."[35] However, when Susan filed her motion to increase support in May 2011, she had a job that paid over $80,000 plus benefits, and personal assets (stocks, bonds, cash and mutual funds) valued at over $560,000.00.

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[31] Exhibit 5: Usual and Customary Expenses Worksheet at 14 (see Column "For Matthew" (Grand Total)). As the Court will note, the Expense Worksheet is entirely unsupported by receipts, bills, cancelled checks or any documentation whatsoever. It is, as Susan testified, an "estimate" of projected expenses Susan and her husband believed they would incur in the future based on their two months of living together since their marriage. VR 8/16/11 at 1:48:10-1:48:40. Furthermore, the Worksheet contains lines for such alleged monthly expenses as "appliance purchases," "exterior painting," "ground maintenance," "house cleaning," "fresh flowers," "linens," "cable or satellite TV," "mobile telephones," "housewares," general "furnishings," "boat fuel," "camper storage," "camper upkeep," "boat and camper taxes and fees," "pet medications," "toys for pets," "pet litter," "car washing," "visiting family," "vitamins and supplements," "electronic equipment," "child allowances," "hair stylist, colorist and perms," and a host of other similar expenses for which Susan arbitrarily assigned a cost or expense. Susan then assigned one one-fifth of these costs to Matthew (under the far right column "For Matthew") in order to arrive at her conclusion that monthly expenses for Matthew came to $2454.00.

[32] VR 8/16/11 at 1:22:15-1:22:43.

[33] *Id.* at 1:13:03-1:23-18.

[34] *Id.*

[35] Hal explained that he married in December 2008 and assumed the care of his three step daughters. This accounted for the new "larger" home. Further, Hal's affidavit demonstrates that, as a trial lawyer, his income is variable and hard to predict. The unusual increase from 2009, as Hal explained in his pleadings and Affidavit, was due to the settlement of a Section 1983 police beating case by his two-lawyer law firm. However, that case was not finally resolved until January 2011. Therefore, as explained to the family court, resolution of that case in 2011 would artificially inflate Hal's income in 2010 and 2011. Mr. Friedman expected his income in 2012 to be more in line with 2008 and 2009 levels since he had no such significant cases pending at his firm the time of hearing. VR 8/16/11 at 2:24:58-2:26:22 and 2:30:19-2:31:17.

At the conclusion of Susan's evidence, Hal orally moved for dismissal or directed verdict on the basis that Susan had not demonstrated any need of Matthew's that would justify an increase in support beyond already above-the-Guidelines amount agreed upon by the parties. The court took the motion under submission pending review of the remaining proof.

Susan was asked on cross-examination if she agreed to the terms of the April 2009 support order, including Hal's payment of $700.00 per month. She said that she did. Susan also agreed that Hal had essentially the same expenses she had. Susan further conceded that Hal separately funded a college plan for Matthew just as he testified. Importantly, Susan testified as follows:

> Mrs. Wagner: Do you recall Ms. Lea that we asked you in discovery questions specifically in our interrogatory number 8 to identify "every need or item and anything you believe Matthew has been deprived of or anything that you have wanted to provide for Matthew in the past 24 months that was not provided due to financial hardship or inability to pay for it"? Do you remember that question?
>
> Ms. Lea: Yes
>
> Mrs. Wagner: And do you recall that your answer to that question was "my son has not been deprived of any need during the time frame specified"?
>
> Ms. Lea: Yes, because I have worked extra, I have not contributed to my retirement accounts. I drive a 1999 car. I have not purchased a new car, you know I have made concessions in order to buy him the things that I think he needs and wants.[36]

Therefore, the only changes after the April 30, 2009 support order were as follows: (1) Hal made more money, (2) Susan made more money and improved her lifestyle and financial condition, and (3) Susan's actual expenses went down since she

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[36] *Id.* at 2:08:22-2:09:50.

married.[37] Susan confirmed that Matthew had no extraordinary medical, dental, educational or other needs.[38]

Finally, Hal testified about his genuine concern that additional monetary recovery would not be in Matthew's best interests and could create a situation where his mother would continue to spoil him.[39] Hal's specific concern was that Matthew would continue to be given so much that he would be in danger of not learning the value of money or the importance of work.[40]

On August 31, 2011 the family court entered an order increasing Hal's support obligation from $700.00 per month to $1292.00 per month.[41] The court based its decision on the following:

- The parties' combined monthly income exceeds the uppermost limit established by the Kentucky Child Support Guidelines. Thus, the court would deviate from the Guidelines;
- The parties' combined income was $487,424 in 2010, up from $230,000 in 2009 which constituted a "material change in circumstances that is substantial and continuing, justifying modification in accordance with KRS 403.213(1)";
- Matthew's total living expenses at both households is $3800 per month[42]; and

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[37] *Id.* at 2:18:07.
[38] *Id.* at 2:14:41-2:14:50.
[39] *Id.* at 2:33:43-2:34-57.
[40] *Id.*; see also Affidavit in Opposition at 12. R. at 337.
[41] Exhibit 2: Order Granting Motion for Increase in Child Support. R. at 592. The Order also increased Hal's responsibility for Matthew's uninsured medical expenses to 84%.
[42] The family court assumed that Matthew lived full-time in Susan's new house (i.e. Matthew accounted for "one-fifth" of the total household expenses). However, it is clear that Matthew only spent half his time with his Mother because he spent the other half of his time with his Father. Moreover, Hal "did not submit a list of expenses that he pays for Matthew, but testified that his costs were comparable." (Exhibit 2, p.3). Again, Hal's expenses would be comparable to Susan's expenses ***if Susan's expenses were properly calculated***. As explained in Hal's motion to alter, amend, or vacate, even if the family court had the right to utilize the arbitrary mathematical formula, the most Hal's child

- Because Mr. Friedman earns 84% of the parties' combined income, but provides only $1900 worth of care at his home, he has a "balance due" of $1292.00 per month.

The court made no finding that Matthew's needs were unmet under the April 30, 2009 support order. The court gave no consideration to the parties' joint custody arrangement, the roughly equal time-sharing and co-parenting situation, the totality of the parents' financial circumstances, Matthew's best interests, Hal's concerns about Matthew's extravagant lifestyle, or any other similar consideration. Rather, the court found "at the time of the current child support order, the parties had a combined income of just over $230,000. Currently their combined income is $487,424. The Court finds that this constitutes a material change in circumstances that is substantial and continuing which justifies a modification of child support in accordance with KRS 403.213(1)."

On September 9, 2001 Hal filed a motion to alter, amend or vacate and for other relief pursuant to the Court of Appeals' decisions in *Downing v. Downing*, 45 S.W.3d 449 (Ky. App. 2001), *Plattner v. Plattner*, 228 S.W.3d 577 (Ky. App. 2007) and *Bell v. Cartwright*, 277 S.W.3d 631 (Ky. App. 2009). The cases reject the use a mathematical formula, like the one used by the family court, to increase "above the guidelines" child support. The cases also require a family court to enter affirmative findings of increased need on the part of the child, and for the court to give specific consideration to certain factors including time-sharing and joint custody.

On September 21, 2011, the court entered a subsequent order denying Hal's motion for the most part, but included some minor additional findings that Matthew's

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support could be after accounting for Matthew's true expenses at both households, and considering the actual time Matthew spends at both households, is $517.13—or $182.87 less than the April 2009 support order. R. at 598.

monthly expenses did not include the costs of maintaining Susan's husband's boat, his car, maid service, and some items of home décor. The court also partially modified the language of the August 11, 2011 Order to, for the first time, include the term "reasonable needs" in lieu of the term "expenses." Otherwise, the court overruled the motion.

THE APPEAL (2011-PRESENT)

Hal appealed. On December 7, 2012, the Court of Appeals affirmed the family court. In so doing, the Court of Appeals found no error in the family court's consideration of Matthew's "expenses" as submitted by Susan, even without a finding that Matthew's needs were unmet by the April 2009 order. The Court failed to follow controlling precedent in *Bell v. Cartwright*, 277 S.W.3d 631 (Ky. App. 2009), *Plattner v. Plattner*, 228 S.W.3d 577 (Ky. App. 2007), and *Downing v. Downing*, 45 S.W.3d 449 (Ky. App. 2001).

Hal filed a motion for discretionary review. This Court granted the Motion on March 13, 2013.

ARGUMENT

I. THE ABUSE OF DISCRETION STANDARD

The child support guidelines in KRS 403.212 establish a rebuttable presumption for an original award or modification of child support. Within statutory parameters, the establishment, modification, and enforcement of child support are matters left to the sound discretion of the trial court. *Van Meter v. Smith,* 14 S.W.3d 569 (Ky.App. 2000). When the combined parental adjusted gross income exceeds the uppermost level of the statutory guidelines, the family court also has discretion. KRS 403.212(5). However, the court's discretion is no longer guided by the "income shares" model of the statutory guidelines. *Downing v. Downing,* 45 S.W.3d 449 (Ky.App.2001). As explained in *Downing*, an "above the guidelines" child support increase requires *specific findings that the child's needs are unmet by the current support obligation.* "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* Given controlling case law and the legal standards announced in *Downing* and progeny, the family court abused its discretion because it looked to increased income to increase child support without any finding that the child's needs were unmet under the existing support order.

II. THE FAMILY COURT ABUSED ITS DISCRETION BY INCREASING ABOVE-THE-GUIDELINES CHILD SUPPORT BASED ON PARENTAL INCOME AND ERRONEOUS "EXPENSES" —RATHER THAN THE CHILD'S "NEEDS"

This issue was argued in the circuit court in written pleadings and at the August 16, 2011 hearing in this case,[43] and was the subject of briefing in the Court of Appeals. It is therefore preserved for review.

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[43] R. at 337, 598 and VR 8/16/2011 at 1:11:15-2:45:36.

In its August 31, 2011 order, the family court determined that, because the parties' combined monthly income exceeded the uppermost limits imposed by the Kentucky Child Support Guidelines, the court would deviate from the guidelines as permitted by KRS 403.212(5). The parties previously agreed that Matthew's needs were met by an above-the-guidelines child support amount reflected in an Agreed Order dated April 30, 2009.[44] In cases where the family court deviates from the support guidelines, the family court has discretion to determine child support. KRS 403.212(5). However, such discretion has limits. Discretion is abused if the court increases support without a finding that the child's needs are unmet.

In this case, the family court simply calculated an increase in Hal's support based on the difference between the parties' combined income in April 2009 and the time Susan filed her motion. ***Hal's income was the sole "trigger" for an increase in the support obligation.***[45] The court then applied a mathematical formula to arrive at the increased support obligation: $3800 (Matthew's alleged total monthly "expenses") x .84% (Hal's total share of the parties' combined monthly income) = $3192.00 (Matthew's "total costs") - $1900 (the amount of Hal's "total care at his home") = $1292.00, representing the "balance due" to Susan in monthly support payments.[46] in monthly support payments.[47]

Similarly, the Kentucky Child Support Guidelines use a "combined monthly adjusted gross parental income" with a "percentage of combined monthly income" of

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[44] Exhibit 9: Agreed Order for Support of Minor Child. R. at 254. In fact, the order specifically stated that the terms were in "Matthew's best interests."
[45] Exhibit 2: Order Granting Motion to Increase Support at 2. R. at 592.
[46] *Id.* at 3.
[47] *Id.* at 3.

each parent to calculate the support obligation. *See* KRS 403.212(a)-(d). Although ostensibly rejecting the guideline approach as inapplicable, the family court nonetheless combined Hal and Susan's gross incomes to arrive at a combined income of $487,424.00. The court then calculated the percentages of income to conclude that Hal should pay 84% of the total alleged expenses associated with Matthew's care at both residences. In other words, the court extrapolated from the guideline approach, rather than ask whether the child has any need that would justify an increase in support above the guidelines as required by Kentucky case law.

Moreover, as explained in the Statement of the Case, Matthew's alleged monthly expenses were ***not actual expenses, but a per-person "average" for a full-time resident at Susan's household.*** Under the time-sharing arrangement, Matthew only stayed with his Mother ***half of the time***. Therefore, the court's calculation was in error even under its income and expense model. As explained in Hal's motion to alter, amend, or vacate, a proper calculation based solely on "expenses" (an inappropriate standard) would yield a child support obligation for Hal less than even the April 2009 agreed support order.[48]

In any event, increased income and inflated child-care expenses do not justify an increase in child support above the guidelines. Controlling Kentucky precedent requires a court to make a specific finding that the child's needs justify an increase.

In *Downing v. Downing*, 45 S.W.3d 449, 453 (Ky. App. 2001), the Kentucky Court of Appeals specifically rejected a mechanical, income-based extrapolation where the parties combined income exceeds the guidelines. The *Downing* Court held that "any

[48] As further explained in Hal's motion to alter, amend, or vacate, the actual expenses claimed by Susan never added up to $3800 so the base figure of $3800 is incorrect in any event. R.at 598.

decision to set child support above the child support guidelines must be ***based primarily on the child's needs, as set out in specific supportive findings***." *Id.* at 456 (emphasis added). *Downing* properly recognized that, although to some degree children have the right to share in each parent's standard of living, above-the-guidelines child support must be set in an amount reasonably and rationally related to the realistic needs of children. In other words, no child, no matter how wealthy the parents, needs to have more than "three ponies." *Id.* When setting support outside the guidelines a family court errs if it utilizes a "mathematical extrapolation of the guidelines" in calculating the appropriate level of support. *Downing* specifically rejected such an approach, holding:

> An increase in child support ***above the child's reasonable needs primarily accrues to the benefit of the custodial parent rather than the child***. In addition, ***the approach effectively transfers most of the discretionary spending on children to the custodial parent. . . Beyond a certain point, additional child support serves no purpose but to provide extravagance and unwarranted transfer of wealth***. While to some degree children have a right to share in each parent's standard of living, child support must be set in an amount related to the realistic needs of the children.

Id. at 456 (emphasis added).

The reasoning in *Downing* makes sense: child support should not result in wealth transfer or a financial windfall. Similarly, any model based on household "expenses" rather than the child's "needs" creates a similar windfall.

In this case, although her salary remained the same, Susan's financial obligation substantially ***decreased*** upon re-marriage (to no more than $1500) and she moved to a more expensive residence with her new husband. The new household's "expenses" went well beyond what Susan could afford if she owned her own house and cared only for

Matthew. Nonetheless, because the family court calculated "expenses" attributed to Matthew based on the new household's expenses—expenses of a high-wage earning ***two-income family***—the family court effectively penalized Hal for Susan's decision to marry a high-wage earning spouse who spends in kind.

For example, assume Susan marries a multi-billionaire, and the combined household "expenses" of their mansion is $1 million per month. Under the family court's analysis, the court simply divides that number by the total number of occupants (in this case five) to arrive at $200,000 attributed to Matthew. Hal would then be responsible for 84% (or $168,000) because Hal, ironically, is the high wage-earning party and Hal's percentage of Susan and Hal's combined gross income is still 84%. Since the family court assumed Matthew's expenses would be the same at Hal's residence, because Matthew spends roughly 50% of the time with Hal, the base value assessed by the family court ("total expenses" attributed to Matthew) would be $336,000. Hal would be responsible for a "balance due" of $282,240 each month, allegedly representing "reasonable" monthly expenses for Matthew. Simply, overall household "expenses"—especially household expenses of a spouse who re-marries a high-wage earner—has little if any relationship to a child's actual "reasonable needs."

While a child's "reasonable needs" can vary with the "circumstances and the resources of the parties"—the court ***must*** initially find that the child has "reasonable needs" that are not met. *Id.* at 455. The court can then consider:

- First and foremost, the child's needs as set out in specific supportive findings
- The standard of living which the child enjoys or to which he or she has become accustomed, and which satisfies the child's reasonable and realistic needs under the totality of the circumstances

- The financial circumstances of the parties
- The parents' "additional resources"
- A parent's desire to avoid creating or supporting a lifestyle for the child of which he does not approve
- The period of time that the child resides with each parent; and,
- Any other factors which "affect the reasonable needs of the child under the circumstances."

Downing, 45 S.W.3d at 456-457.

The family court considered none of these factors. Rather, the family court decided to increase support based on an improper "trigger"—Hal's increased income.[49] Regarding the *Downing* factors, the undisputed evidence mitigated against an increase in Hal's support because:

- Susan agreed that there was no need of Matthew's that had not been met since the April 30, 2009 order setting the child support above the guidelines.
- Matthew's standard of living at both residences did not change, or at least did not deteriorate since the April 30, 2009 support order.
- The parties' financial circumstances both improved. While it is true that Hal made substantially more than Susan in 2010 (an unusual year for Hal), Susan has a stable income, lives in a similarly sized residence, and is married to a high-wage earner.
- As to the fourth factor, Susan's "additional resources" are considerable. She has almost $600,000 in personal assets, has no personal debt, and has very little in the way of personal expenses given her new living situation. Hal has about the same assets and more debt.
- Hal testified that he was worried that Matthew could become spoiled, and that Matthew was not learning the value of money or work due to his Mother's influence. Hal's testimony went unopposed.

[49] Due to a single extraordinary earning year.

- Hal and Susan both take active roles in Matthew's upbringing. Matthew is with Hal three nights and parts of four days every week. Hal takes Matthew to school and picks him up half of the time. Hal takes Matthew on regular vacations and spends additional time with him every opportunity he can. In sum, Hal assumes roughly equal parenting obligations with Susan.

- As to the totality of the circumstances, the undisputed testimony reveals that Matthew has virtually every kind of toy, electronic device, game, clothing, and other comfort a boy of his age could ever need or want at both residences. He is deprived of nothing. Matthew currently attends public school, is an "A" student, and has no extraordinary medical, educational or other needs. His father has funded a considerable college fund for him separate and apart from the child support he pays, and regularly pays for many extras like sports activities and vacations; and

- With regard to "other factors," the parties acknowledged as recently as April 30, 2009 that the support order was in Matthew's "best interests". Susan presented nothing at the August 16, 2011 hearing to suggest that Matthew's "best interests" had changed in any way. On the other hand, Hal testified that an alteration in child support would not be in his son's interests for several specific reasons.[50]

Simply, every one of the factors identified in *Downing* mitigates against an increase in support. The family court considered none, and the order did not even cite to *Downing* or the standards enunciated therein.

Another case, *Plattner v. Plattner*, 228 S.W.3d 577 (Ky. App. 2007), addressed similar issues, but in the context of a roughly equal time-sharing arrangement by the parents. After examining the totality of the record consistent with the directives in *Downing*, the Court in *Plattner* concluded that the family court should have considered the joint parenting arrangement to reach a "fair" and "reasonable" decision "supported by sound legal principals." *Id.* at 579. Again, the family court here failed to account for Hal

[50] Although the best interests of the child is not a factor ***specifically*** identified in *Downing*, the *Downing* Court held that "other factors" which affect the child should be considered when setting support above the guidelines. Certainly, the best interests of the minor child is one such factor.

and Susan's roughly equal time-sharing in direct contravention of *Plattner*. Perhaps the best evidence of the omission is the family court's consideration of Matthew's estimated "expenses," as prepared by Susan, which were greatly inflated because the expenses were calculated as if Matthew resided with Susan full-time. [51]

The most recent published opinion is *Bell v. Cartwright*, 277 S.W.3d 631 (Ky. App. 2009). *Bell* involved similar facts but, unlike this case, there was no joint custody or time-sharing arrangement.. In *Bell*, the family court granted the mother's request and increased the father's support obligation from $1225 to $4000 per month. The father appealed. Like Hal, the father in *Bell* (a football player who earned $1,300,000) testified that his future income was uncertain due to the unpredictable nature of his career.[52] The mother's evidence was that she wished to purchase a home for her and her child; she wanted to send the child to private school; she wanted to take the child on vacation; and, she wanted to send him to sports camp. The mother estimated various costs and expenses to accomplish each of these goals but she did not offer documentation to support, for example, the cost of private school. *Id.* at 632.

On appeal, the Court in *Bell* reversed the support award. Citing *Downing*, the Court noted that "any decision to set child support above the guidelines ***must*** be based

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[51] As part of its mathematical formula, the family court gave Hal a "credit" of sorts for expenses the court arbitrarily determined Hal had already paid at his residence. Regardless, the family court did not account for the reality of the parties' time-sharing arrangement in the order. The proof was that Matthew stayed with his mother and father about the same amount of time. Thus, even assuming that a mathematical formula based income and expenses is an appropriate method of calculating above-the-guidelines support (which it is not), the family court would still need to discount the total costs by around 50% under its own analysis.

[52] Hal testified that he sets substantial sums aside each month for taxes ($150,000.00 in 2010 alone). VR 8/16/2011 at 2:30:26-2:31:18.

primarily on the child's needs, as set out in specific findings." *Bell*, 277 S.W.3d 631, 632 (emphasis added). Without a specific finding as to the child's needs, the Court determined that the lower court chose, "in direct contravention of our holding in *Downing*", to apply a "share the wealth" model and thus "abused its discretion in arbitrarily increasing [the father's] child support obligation solely based on his increased income without supportive evidence of an increase in Brayden's reasonable needs." *Id.* at 633. The *Bell* opinion concludes with this clear pronouncement:

> We accordingly vacate and remand the order of the lower court with instructions to address the motion to modify child support under the proper standards set forth in Downing, ***requiring specific supportive evidence of an increase in the reasonable needs of the minor child.***

Id. (emphasis added).

The approach in controlling Kentucky case law is consistent with other states. New York has substantially the same rule and requires the moving party to demonstrate increased need by a minor child since the last support order. *Cassano v. Cassano*, 628 N.Y.S.2d 10, 651 N.E.2d 878 (1995) (court should consider child's actual needs). In Illinois, the primary consideration is the child's needs, and the petitioning party is required to show a substantial change in need. *See In re Marriage of Bush*, 191 Ill. App. 3d 249, 547 N.E.2d 590 (4th Dist. 1989). The Courts in Minnesota take a similar view: "above the guidelines' support requires a finding of increased needs by the child. *State v. Hall*, 418 N.W.2d 187 (Minn. Ct. App. 1988)(frugal but wealthy father who had not lived with child not required to pay more than highest guideline amount). Alabama, Louisiana, North Dakota, and Washington are in accord. *See Ex parte Dyas*, 683 So. 2d 974 (Ala. 1996); *Serrate v. Serrate*, 684 So. 2d 1128 (La. Ct. App. 1st Cir. 1996); *Montgomery v.*

Montgomery, 481 N.W.2d 234 (N.D. 1992); *In re Marriage of Sievers*, 78 Wash. App. 287, 897 P.2d 388 (Div. 1 1995); *see also* Graham & Keller, 16 Ky. Prac. Domestic Relations L. § 24:31 (2012-2013 ed.) (collecting cases from other states that require a finding of need to justify "above the guidelines" support like *Downing, Plattner,* and *Bell* and reject the method used by the family court in this case).

The Court of Appeals in this case incorrectly concluded that "Susan presented evidence regarding [Matthew's] needs by introducing an exhaustive list of expenses she regularly incurs on the child's behalf."[53] The Court of Appeals committed the same error as the family court. A list of household "expenses" divided by five (erroneously assuming five full-time residents of the household) is not the same as evidence of an "***increase in the reasonable needs of the minor child***." A review of Susan's "Usual and Customary Expenses for High Income Families" worksheet demonstrates this.

The first column (Column 1) is entitled "Monthly Average Amount Spent." This includes all general family or household expenses for Susan, her husband, and the husband's two stepdaughters (e.g. mortgage payments, property taxes, installment payments on furniture, home cleaning, mobile phones, fresh flowers, linens, boat and camper expenses, pet expenses, auto expenses, and the like). It also includes specific items attributed solely to Matthew (e.g., haircuts, eye-glasses, shoes, toys and video games).

The second column (Column 2) is entitled "For Matthew (1/5)." To arrive at the figures in Column 2 Appellee first transferred, on a dollar-for-dollar basis, the expenses specific to Matthew from Column 1 to Column 2 (e.g., the expense for eye glasses

[53] Exhibit 1: Opinion of the Court of Appeals at 5.

appears in Column 1 as a $30.00 entry, also appears in Column 2 as a $30.00 entry). Then, Appellee divided all other family and household expenses in Column 1 by five because five people lived in her new household. The one-fifth figure for each expense was then entered in Column 2 as Matthew's share of the general family and household expense for a particular line item. All of the expenses in Column 2, Appellee represented, were supposed to add up to $2454.00.

However, the Worksheet assigns an unreasonable "one fifth share" of all items in the household to Matthew, because indisputably Matthew did not live full-time with his Mother. The Worksheet also includes such things as: (1) $35 per month for "maid services"; (2) $40.00 per month for "fresh flowers"; (3) $18.00 per month for "household painting"; (4) $7.00 per month for a "plumber"; (5) $2.00 per month for "filters for AC system"; (6) $38.00 for mobile telephones; and, (7) $45.00 per month for "furniture replacement." The Worksheet also contains recurring monthly expenses attributable to Matthew for mortgage payments on the husband's home, the husband's automobile, his boat, his automobile insurance, and numerous other expenses.

The family court accepted Susan's estimates and failed to consider whether actual as opposed to estimated expenses in fact ***related to Matthew***. Thus, the Court of Appeals' determination that the family court considered evidence of Matthew's "reasonable needs" is necessarily in error because the family court did not even consider the *actual household expenses* attributed to Matthew. In any event, there was certainly no evidence of any need that was not satisfied after the April 2009 order. Therefore, the family court abused its discretion by increasing Hal's support obligation based, first, on Hal's increased income, second, inflated and erroneous expenses and, third, the absence of any

finding that Matthew's needs increased or changed after the April 2009 order sufficient to justify an increase in Hal's existing above-the-guidelines $700 per month support obligation.

Accordingly, because the family court abused its discretion under *Downing* and progeny, reversal and remand is necessary.

CONCLUSION

WHEREFORE, 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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