COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2010-CA-001343-MR
2011-SC-610

JOSEPH WAYNE MCFELIA — APPELLANT

V. APPEAL FROM THE LARUE CIRCUIT COURT
ACTION NO. 09-CI-00112

DORINDA MCFELIA — APPELLEE

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BRIEF FOR APPELLEE, DORINDA McFELIA

Submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and accurate copy of the foregoing Appellee's Brief on this 18th day of January, 2013, to **Hon. John David Seay, Judge, Larue Circuit Court** and to the **Larue Circuit Court Clerk** at P.O. Box 191 Hodgenville, Kentucky 42748; and to **Hon. Larry D. Raikes**, Counsel for Appellant, Joseph Wayne McFelia, at 117 East Stephen Foster Avenue, Bardstown, Kentucky 40004.

I further certify that the record was not removed from the Clerk's office during the preparation of this brief.

CALEB T. BLAND

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INTRODUCTION

This is a case involving the dissolution of marriage and issues related thereto between the Appellant and Appellee. A final hearing was conducted by the Larue Circuit Court on May 21, 2010, and the Trial court entered Findings of Fact, Conclusions of Law, Judgment and Order on June 10, 2010. Appellant subsequently filed an appeal with the Kentucky Court of Appeals, asserting that the Trial Court erred in not deviating from and not finding application of the Kentucky child support guidelines to be unjust or inappropriate when it set Appellant's child support obligation. The Kentucky Court of Appeals affirmed the Trial Court's Order by Opinion rendered September 9, 2011. The Appellant filed a motion for discretionary review, which was granted, and now seeks relief at the Kentucky Supreme Court.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellee does not desire oral argument in the instant case. The facts and issues of this case are clear and articulated in Appellee's brief, but Appellee would gladly participate in oral arguments if the Court determined oral arguments would assist the Court in deciding the issues presented.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The Appellee, Dorinda McFelia (hereinafter "Dorinda"), is the former wife of the Appellant, Joseph Wayne McFelia (hereinafter "Mr. McFelia" and collectively the "parties"). The parties chose to dissolve their marriage, and a final hearing was held before the Larue Circuit Court (hereinafter the "Trial Court") on issues pertaining to the dissolution of the marriage between the parties on May 21, 2010. The parties had previously entered into an agreement formalized by the Temporary *Pendente Lite* Agreed Order entered June 17, 2009, which prescribed both Mr. McFelia's visitation with the parties' minor children. (Attached heretofore as Appendix 1). A Uniform Child Support Order was likewise entered June 17, 2009, which prescribed Mr. McFelia's child support obligation. (Attached heretofore as Appendix 2). The Trial Court entered Findings of Fact, Conclusions of Law, Judgment and Order on June 10, 2010. (Attached heretofore as Appendix 3).

Mr. McFelia appealed the Trial Court's Findings of Fact, Conclusions of Law, Judgment and Order on June 10, 2010, asserting that the parties exercised nearly equal parenting time, a material fact disputed by Dorinda, and that the Trial Court abused its discretion by not finding application of the Kentucky child support guidelines to be unjust or inappropriate. However, the Kentucky Court of Appeals rendered an Opinion on September 9, 2011 affirming the Trial Court's Judgment. (Attached heretofore as Appendix 4).

Mr. McFelia again claims that the parties exercise nearly equal parenting time but now seeks relief at the Supreme Court of Kentucky, asserting that the Kentucky Court of Appeals erred by not finding that the Trial Court abused its discretion.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DID NOT FIND APPLICATION OF THE KENTUCKY CHILD SUPPORT GUIDELINES TO BE UNJUST OR INAPPROPRIATE

As in most other cases, appellate review of this case is confined to CR 52.01, which provides in part, "In all actions tried upon the facts without a jury…Findings of fact shall not be set aside unless clearly erroneous..." CR 52.01. "Findings of fact in a domestic relations case shall not be set aside unless clearly erroneous." Dull v. George, Ky.App., 982 S.W.2d 227, 230 (1998) (citing CR 52.01; Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986)).

Additionally, "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing [court] on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Stevens v. McGinnis, Inc. 82 F.3d 1353, 1355-56 (6th Cir.1996) (citing Concrete Pipe & Prods. v. Construction Laborers Pension Trust, 508 U.S. 602, 622, 113 S.Ct. 2264, 2279, 124 L.Ed.2d 539 (1993) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948)).

KRS 403.211, which pertains to establishing child support, provides in part as follows:

> (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 403.212 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.**

(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 educational, 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 [FN1]; and

(g) Any similar factor of an **extraordinary** nature specifically identified by the court which would make application of the guidelines **inappropriate**.

(4) "Extraordinary" as used in this section shall be determined by the court in its **discretion**.

KRS 403.290(2)-(4)(emphasis added). Pursuant to KRS 403.290, deviation from the child support guidelines is a matter of discretion of the Trial Court where the Court must find that application of said guidelines would be unjust or inappropriate. Clearly, the Trial Court did not find that application of the Kentucky child support guidelines to be either unjust or inappropriate in the instant case, and the Court of Appeals affirmed the Trial Court's ruling.

According to the Kentucky Court of Appeals in Downey v. Downey, Ky.App., 847 S.W.2d 63 (1993), "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 for reasons advanced by the appellant, if convinced their application would be unjust." Downey v. Downey, 847 S.W.2d at 65. As noted supra, deviation from the Kentucky Child Support Guidelines is clearly a matter of discretion for the trial court. In the instant case, the Trial Court was not convinced that application of the Kentucky Child Support guidelines would be unjust.

However, it is important to note a striking distinction between the Downey case, Id,, and the instant case. In Downey, the parties exercised an equal amount of parenting time, but the Court of Appeals in Downey still affirmed the trial court's decision not to deviate from the Kentucky Child Support Guidelines despite an equal amount of parenting time. In the instant case, the Appellant asserts that he has the parties' minor children forty-five percent (45%) of the time. (Trial Tape 05-21-2010 at 09:51). This amount is close to equal, but it is not equal. In fact, the Appellant acknowledges his parenting time is not equal and testified, "I would like just equal custody, equal time with my children." (Trial Tape 05-21-2010 at 09:51 and at 10:20). Even if it were an equal amount of time, the Downey case supra demonstrates that an equal amount of parenting time is not sufficient alone to find an abuse of discretion where the trial court does not find application of the Kentucky Child Support Guidelines to be unjust or inappropriate.

Moreover, although the Appellant asserts that he has parenting time with the parties' minor children for forty-five percent (45%) of the time, a closer examination of the Appellant's actual parenting time reveals otherwise. The Appellant specifically testified

regarding the parties' parenting time, "At this time, she [Dorinda] has them [the children] starting with Monday, she has them all of Monday, I have them Tuesdays to 7:00 p.m., I have them all of Wednesday, she has them all of Thursday, and then we rotate Friday, Saturday, and Sundays." (Trial Tape 05-21-2010 at 09:50). Under cross examination and when asked by this Counsel "Just to clarify your current schedule, you have the children every other weekend, a few hours on Tuesday evening, and an overnight on Wednesday night, correct?" the Appellant testified, "Yes, that's correct." (Trial Tape 05-21-2010 at 10:15 to 10:16). The Trial Court found in its Findings of Fact, Conclusions of Law, Judgment and Order entered on June 10, 2010 that with regard to parenting time it was "in the best interest of the [parties'] minor children "for the present arrangement to remain as stated in the Temporary Pendente Lite Agreed Order entered into this Court on June 17, 2009." (Appendix 3 at p.2). The Temporary Pendente Lite Agreed Order prescribes the Appellant's parenting time as "every Tuesday until 7:00 p.m. and Wednesday overnight and every other weekend." (Appendix 1 at p.1).

Although it is not specifically described, every other weekend is a forty-eight-hour period. The Local Rules of Practice for the 10th Judicial Circuit provide for parenting time on every other weekend, which is from Friday at 6:00 p.m. until Sunday at 6:00 p.m. (Attached heretofore as Appendix 5). The Appellant admits at trial that his parenting time is not equal and testified, "It's close to the local rules." (Trial Tape 05-21-2010 at 10:35). Also, the amount of time spent with the parties' minor children on Tuesdays until 7:00 p.m. is less than twenty-four hours. While the children are in school, the Appellant might spend three (3) hours with said children if they are dismissed from school and arrive in the Appellant's possession by 4:00 p.m. If we examine the Appellant's parenting time by looking at a two-

week period as an example, it reveals that the Appellant does not in fact have parenting time in the amount of forty-five percent (45%) of the time. There are three hundred thirty-six (336) total hours in a two-week period of time. In that same two-week period of time, the Appellant will have the parties' minor children for forty-eight (48) hours during one weekend, plus six (6) hours for his two Tuesdays, and, for argument's sake, plus forty-eight (48) hours for his two Wednesdays overnight, bringing the Appellant's total time with the parties' minor children during a two-week period of time to one hundred two (102) hours. Thus, Appellant really only has parenting time with the parties' minor children for thirty percent (30%) of the time instead of forty-five percent (45%) as asserted (102/336 = 30.357143%). Clearly, thirty percent (30%) of the total time cannot be considered close to equal parenting time. This Counsel is surprised the Appellant has the audacity to assert that he has parenting time with the parties' minor children for 45% of the time when the math does not add up, nor does the Appellant even attempt to demonstrate how he arrived at such a calculation.

While the Court of Appeals reached a different result in Plattner v. Plattner, Ky.App., 228 S.W.3d 577 (2007) than it did in the Downey case, supra, it provided an interesting distinction. The Court of Appeals reversed the trial court's decision not to deviate from the Kentucky child support guidelines and clarified the distinction from the Downey case supra in noting, "our conclusion [in Downey] was based, in part, upon the fact that the children's father had **agreed** to pay a portion of his child support obligation to the children's mother." Plattner v. Plattner, 228 S.W.3d. at 580 (emphasis added).

Likwise, the instant case can be distinguished from the Plattner case, supra, on the same basis as the Downey case, supra, in that Mr. McFelia agreed to pay child support to

Dorinda as evidenced by the The Temporary *Pendente Lite* Agreed Order entered June 17, 2009. (Appendix 1). Apparently, application of the Kentucky child support guidelines was not inappropriate or unjust from Mr. McFelia's own point of view when he executed the Temporary *Pendente Lite* Agreed Order establishing his child support obligation.

Furthermore, nothing changed as it related to the parenting time exercised by the parties from the time they executed the Temporary *Pendente Lite* Agreed Order, which was entered one June 17, 2009 until the final hearing in this matter on May 21, 2010.

As he did before in his brief at the Court of Appeals, the Appellant now cites Brown v. Brown, Ky.App., 952 S.W.2d 707 (1997) in support of its assertion that the Trial Court erred and abused its discretion by not finding application of the Kentucky Child Support Guidelines to be unjust or inappropriate. However, in Brown v. Brown, supra, the mother, Hays, who had the children forty percent (40%) of the time appealed the trial court's order requiring her to pay a sum of monthly child support and refused to order the father, Brown, to pay her child support. Brown v. Brown, 952 S.W.2d at 707. The Court of Appeals held, "we find no abuse of discretion by the court in deviating from the guidelines to give Hays a credit of 40% against her support obligation." Id. at 708. Although the Court of Appeals in Brown v. Brown, supra, acknowledged a deviation from the Kentucky Child Support Guidelines due to the mother having the children forty percent (40%) of the time, it is important to note that the underlying ruling was that the trial court did not abuse its discretion in granting such deviation.

Additionally, the Appellant complains that the Court of Appeals, in the case *sub judice*, did not mention in its Opinion the case of Dudgeon v. Dudgeon, Ky.App., 318 S.W.3d 106 (2010). Although the Appellant now cites Dudgeon v. Dudgeon, 318 S.W.3d

106 (2010) in support of his position, a true analysis of the Dudgeon case actually exploits the shortcomings of Appellant's arguments.

As stated thoroughly supra, deviation from the Kentucky child support guidelines is a matter of discretion within the trial court if said court finds application of said guidelines to be unjust or inappropriate, and the Trial Court in the instant case did not find that application of said guidelines to be unjust or inappropriate. In Dudgeon, supra, the Kentucky Court of Appeals reviewed a child support modification motion and explained the issue then presented and its subsequent holding as follows:

> The facts of this case invite our Court to address an increasingly relevant and onerous dilemma—the proper standard for modification of child support where each parent enjoys nearly equal physical time with the children, each parent earns nearly equal income, and each parent pays nearly equal amounts of other expenses related to the children. We hold that these three specific circumstances are of an "extraordinary nature" rendering the child support guidelines inapplicable under Kentucky Revised Statutes (KRS) 403.211(3)(g) and, thereby, mandating application of the standard for modification of child support found in KRS 403.213(1).

Dudgeon v. Dudgeon, 318 S.W.3d at 107 (emphasis added). In summary, the circumstance clearly warranting deviation of the child support guidelines is (1) "where each parent enjoys nearly equal physical time with the children," (2) "each parent earns nearly equal income," and (3) "each parent pays nearly equal amounts of other expenses related to the children." Id. at 107.

It is worth noting that the combined monthly adjusted parental gross income for the parties in Dudgeon v. Dudgeon exceeded the uppermost level of the child support guidelines, a fact by itself which rendered application of the Kentucky child support guidelines problematic, and ultimately "inappropriate" according to the Court of Appeals. Id. at 110.

Regardless, the instant case is clearly distinguishable as the Appellant fails the Dudgeon factors.

First, the parties do not enjoy nearly equal physical time with the children. This is a false premise put forth by the Appellant, Mr. McFelia. As discussed thoroughly supra, Mr. McFelia only enjoys 30% of the physical time with the children.

Secondly, the parties do not enjoy nearly equal income. According to the child support worksheet attached to the Uniform Child Support Order entered June 17, 2009, Dorinda earned $1,559 in gross monthly income and Mr. McFelia earned $2,730 in gross monthly income for a total of $4,289.00 in combined monthly adjusted parental gross income. At trial, Mr. McFelia provided no proof of income but testified that he had received a raise and earned more income than when child support was originally set by the Temporary *Pendente Lite* Agreed Order entered one June 17, 2009. (Trial Tape 05-21-2010 at 10:12). According to the child support worksheet, Dorinda's income represents 36% and Mr. McFelia's income represents 64% of said total—clearly not "nearly equal income."

Thirdly, the parties do not pay nearly equal amounts of other expenses related to the children. Interestingly, the Appellant does not allege anywhere in his brief that the parties pay nearly equal amounts of other expenses related to the children. The Appellant never offered any evidence or testimony that he provided any other child related expenses. Rather, Dorinda testified that Mr. McFelia refused to buy their daughter a curling iron and hair dryer to keep at his residence and told Dorinda, "I give you child support; that's what that's for." (Trial Tape 05-21-2010 at 11:29). Moreover, Dorinda testified that it is she who purchased a cellular telephone for their daughter and provides her with continuous cellular telephone service. (Trial Tape 05-21-2010 at 11:31).

A measurable comparison of the above three "extraordinary" factors in the Dudgeon case to the McFelia case at bar yields the following contrast:

NEARLY EQUAL?	**Dudgeon** case		**McFelia** case at bar	
	Laurie	Michael	Dorinda	Mr. McFelia
Physical Time with the Children	53.6%[1]	46.4%[2]	70%	30%
Income	45.6%[3]	54.4%[4]	36%	64%
Payment of Other Child Related Expenses (Ratio)	50%[5]	50%[6]	100%	0[7]

The analysis above shows that the Appellant does not satisfy any but rather fails on all three "extraordinary" factors put forth in the Dudgeon case. Mr. McFelia does not enjoy nearly equal physical time with the children, he does not enjoy nearly equal income, and he does not pay nearly equal amounts of other expenses related to the children. Accordingly, the Dudgeon factors are not truly applicable, or helpful to Mr. McFelia, in the instant case.

Also, interestingly the Appellant in Dudgeon v. Dudgeon asked the trial court to "codify" his actual parenting time-sharing schedule with the parties' children. In the instant case, Mr. McFelia never made such a request. He further fails to cite the record or otherwise demonstrate evidence that he has nearly equal physical time with the children. Instead, the Appellant simply asserts in his brief that he has the children 45% of the time. The material facts of this case are clearly disputed.

Perhaps it is because the Appellant knows he does not satisfy the Dudgeon factors supra that he also cites an unpublished opinion from the Kentucky Court of Appeals, Light v.

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[1] Dudgeon v. Dudgeon, Ky.App., 318 S.W.3d 106, 108 (2010).
[2] Id. at 108.
[3] Id. but note that this is for Laurie's income in 2008. The Opinion reported Laurie's increase in income for 2009 but did not report Michael's income for 2009.
[4] Id. See footnote 3 supra.
[5] "The evidence also established that each party, likewise almost equally shared other expenses associated with the children." Dudgeon v. Dudgeon at 108.
[6] Id. See footnote 5 supra.
[7] Dorinda testified that the Appellant refuses to provide certain child related expenses for items in his own home and told her, "I give you child support; that's what that's for." (Trial Tape 05-21-2010 at 11:29).

Goodman, 2010-CA-002190-ME (Ky.App. August 17, 2012) (2012 WL 3538297). The facts of Light v. Goodman reveal a situation where the parties "cared for the children an equal amount of time and each bears the totality of the children's costs occurring during their timesharing period," but the parties did not earn exactly the same income. Light v. Goodman, 2012 WL 3538297 at 1,2. Although not equal, parties did earn similar incomes in Light v. Goodman, as the Appellant, Marsha, earned $1,260 per month and the Appellee, Frankie, earned $1,930 per month. The Court of Appeals in Light v. Goodman held, "Nothing in *Dudgeon*, however, creates a litmus test or requires the existence of equal parental incomes to justify deviation. Instead, consideration of a deviation looks to the unique circumstances of each case." Id. at 2. Although the factors provided in the Dudgeon case were not strictly adhered to by the trial court in Light v. Goodman, the Court of Appeals upheld the trial court's deviation from the Kentucky child support guidelines because it did not abuse its discretion. Id. at 3.

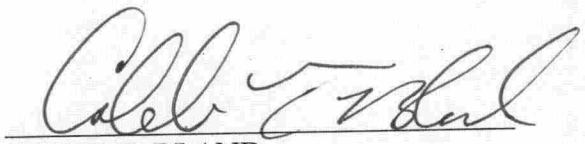
Although Appellant states in his brief that Light v. Goodman is "on all fours with the present matter," a careful examination of each case's facts reveal otherwise. As in Dudgeon v. Dudgeon, the parties in Light v. Goodman enjoyed nearly equal physical time with the children and paid nearly equal amounts of other expenses related to the children. However, unlike the parties in Dudgeon v. Dudgeon, the parties in Light v. Goodman had similar but not exactly equal incomes. As stated supra, despite being the only recognized difference between the facts of Dudgeon v. Dudgeon and Light v. Goodman, income is not the only inequality between the parties *sub judice.* In contrast with the facts of Light v. Goodman, Mr. McFelia does not enjoy either nearly equal physical time with the children or pay nearly equal amounts of other expenses related to the children. Clearly, the instant case does not

"rest on all fours" with Light v. Goodman. Instead, it is important to note that the Court of Appeals in Light v. Goodman, as it did in the instant case, correctly recognized and held, "The determination of extraordinary circumstances is within the trial court's discretion." Light v. Goodman, 2012 WL 3538297 at 3. The Appellant, Mr. McFelia, never demonstrated extraordinary circumstances warranting a deviation from the Kentucky child support guidelines.

CONCLUSION

Based upon the foregoing argument of facts and law, Appellee, Dorinda McFelia, respectfully requests that this Court affirm the Trial Court's Findings of Fact, Conclusions of Law, Judgment and Order on June 10, 2010 and the Court of Appeals Opinion affirming same and rendered September 9, 2011.

Respectfully submitted:



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