

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001227-ME

JOHNNY LEE PRATER

APPELLANT

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE TAMRA GORMLEY, JUDGE
ACTION NO. 07-CI-00592

ARMMENTRESS JENNIFER PRATER

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, NICKELL AND VANMETER, JUDGES.

NICKELL, JUDGE: Johnny Lee Prater (Johnny) appeals from an order of the Scott Circuit Court requiring him to pay his former wife, Armmmentress Jennifer Prater (Jennifer), \$293.54 each month to support their minor child. Johnny also appeals from a second order overruling his motion to recalculate his child support obligation using a split custody formula. On appeal, he claims the family court erred in two ways. First, he argues the family court based its child support award

on inaccurate figures for the parties' income, health insurance premiums and child care expenses. Second, he argues the family court should have used the formula for a split custody arrangement rather than the statutory guidelines to determine the appropriate child support award. KRS¹ 403.212. Having reviewed the record we agree with Johnny's first assertion and therefore reverse and remand to the Scott Circuit Court for further proceedings consistent with this Opinion.

A son was born to Johnny and Jennifer on December 18, 2003. They subsequently married on April 23, 2005, and Johnny petitioned the Scott Circuit Court to dissolve their marriage in August 2007. Johnny asked that he be named the primary residential custodian of their son, that he and Jennifer share custody jointly, and that child support be awarded to him based upon the individual incomes of the parties. In support of his request to be named primary residential custodian, Johnny submitted an affidavit alleging he had been his son's daytime caregiver since birth.

In the written response Jennifer filed with the court, she claimed she has been her son's primary caregiver since giving birth. According to Jennifer, Johnny works from 5:00 p.m. until 4:30 a.m. Around 2:00 p.m. each day, Johnny takes their son to the home of Jennifer's sister where he remains until Jennifer picks him up by 5:00 p.m. when she leaves work. Jennifer said she cares for the child until she leaves for work at 6:00 a.m. the next morning. Jennifer stated she has bought groceries each week and has paid her sister \$80.00 each week for

¹ Kentucky Revised Statutes.

babysitting services. She estimated the cost for one month of child care was \$346.00. Jennifer also asked that she be named the primary residential custodian, that child support be awarded based on the guidelines, that the additional child care expense be taken into account in any child support award, and that Johnny be awarded reasonable time sharing beginning after their son awakened in the morning until his work shift began at 5:00 p.m. and on alternate weekends.

In October 2007 the parties executed a mediation agreement in which they agreed to share joint custody and maintain their current time sharing arrangement. Neither parent was named primary residential custodian and child support, health insurance premiums and child care expenses were reserved for subsequent resolution by the court. A final decree of dissolution was entered on November 6, 2007.

On January 25, 2008, the court entered an order requiring both parties to submit their last three pay stubs and most recent W-2 form, as well as proof of child care costs and health insurance premiums. Johnny submitted his 2007 W-2 and three pay stubs. The record contains only Jennifer's 2006 W-2.

On February 29, 2008, an order was entered directing Johnny to pay \$293.54 in monthly child support. The award was made retroactive to August 29, 2007, the date of Jennifer's original child support request, and ordered Johnny to pay an extra \$75.00 each month to pay down any arrears. Johnny was also ordered to maintain medical insurance and pay child care expenses for his son. Based on

the record before us, it appears neither parent has been named primary residential custodian.

On March 5, 2008, Johnny filed a written motion to recalculate the child support award. A few days later, Jennifer filed a response in which she stated there was no split time sharing arrangement. The motion to recalculate child support was overruled on March 28, 2008, without Johnny or his attorney being allowed to address the court. That same day, Johnny filed a motion to supplement the record with the remarks he would have made in open court if given the opportunity to speak. This appeal follows.

Johnny advances two arguments on appeal. First, he claims the court's child support calculation was based on inaccurate figures for the parties' income, child care expenses and health and dental insurance premiums. Second, he claims the court abused its discretion in refusing to allow a deviation in the child support guidelines to decrease his monthly obligation.

Jennifer has not filed a brief with this Court. When we do not receive a brief for appellee, CR² 76.12(8)(c) permits us "to reverse the judgment if the appellant's brief reasonably appears to support such a result." *Plattner v. Plattner*, 228 S.W.3d 577, 579 (Ky.App. 2007). We have determined Johnny's brief requires reversal.

² Kentucky Rules of Civil Procedure.

After reviewing the record it appears the trial court miscalculated Jennifer's income,³ as well as the cost of health/dental insurance premiums⁴ and child care.⁵ As a result, we must reverse and remand the matter to the Scott Circuit Court for recalculation of child support.

We reject Johnny's assertion that the trial court erred in computing his income based solely on his wages as reflected on his 2007 W-2.⁶ He claims the three paystubs he submitted were a better measure of his true income because he works in the automotive industry which is experiencing an economic downturn. We note that Jennifer was also working in the automotive industry. While KRS 403.212(2)(f) identifies paystubs as an acceptable form of proving income, it does not require a court to give greater weight to a paystub than a tax return or other form of credible proof. Thus, we cannot say the court abused its discretion in calculating Johnny's gross monthly income based solely on his W-2.

Because we are reversing and remanding for other reasons, we need not rule on Johnny's claim that child support should have been calculated using the

³ Based upon Jennifer's 2006 W-2, the only indication of her wages contained in the record on appeal, her monthly wage would be \$2,088.75, not \$2,014.00 as figured by the family court.

⁴ Based upon data provided by Johnny, he pays \$101.14 monthly for his son's health insurance, and \$15.54 monthly for his dental insurance, for a monthly total of \$116.68, not \$38.84, the figure used by the family court.

⁵ At one point Jennifer estimated the cost of a month of child care was \$346.00. She also stated she paid her sister \$80.00 a week for babysitting services. Johnny offered receipts and other written proof showing some weeks he had paid \$35.00 for child care and other weeks he had paid \$50.00. The family court based its calculation on a monthly child care cost of \$368.37. None of the formulas we have used have yielded this result.

⁶ Johnny's wages, as reflected on his 2007 W-2 were \$40,222.91. To arrive at his monthly gross income, it appears the court divided that amount by twelve which equals \$3,352.00.

split custody arrangement formula found in KRS 403.212(6) instead of the guidelines found in KRS 403.212(7). However, we will comment on it briefly because it will be a viable issue for the trial court to consider on remand.

A “split custody arrangement” is defined as “a situation where each parent is the residential custodian for one (1) or more children for whom the parents share a joint legal responsibility.” KRS 403.212(2)(h). Johnny argues this applies in this case because each parent keeps the child half of the time. From our reading of the record, neither parent has been designated as the primary residential custodian although both have asked to be so named. Johnny claims his son spends fifty percent of the time with him and the remaining fifty percent with Jennifer, but Jennifer disputes the division of time is that neatly defined.

Since the trial court entered its child support order on February 29, 2008, Jennifer has ceased working according to a second mediation agreement entered on June 30, 2008. Without giving any details, the agreement states, “Johnny and Jennifer agree that they will strictly adhere to their previous time sharing agreement; except that since Jennifer is no longer working, she will drop their son off to Johnny at 7:45 a.m. promptly.” Thus, it is unclear whether the child is evenly dividing his time between the separate homes provided by his parents. We also recognize that Jennifer may have resumed working since June of 2008. Therefore, on remand, the trial court is directed to ascertain Jennifer’s current employment status and particulars of the current time sharing arrangement before recalculating the child support award.

For the foregoing reasons, we reverse and remand for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ethyle Noel
Georgetown, Kentucky

BRIEF FOR APPELLEE:

No brief filed.