

RENDERED: NOVEMBER 22, 2017; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2017-CA-000618-ME

RYAN SHELLABARGER

APPELLANT

v. APPEAL FROM CARTER CIRCUIT COURT  
HONORABLE JEFFREY L. PRESTON, JUDGE  
ACTION NO. 11-CI-00132

LORI SHELLABARGER

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: COMBS, J. LAMBERT, AND NICKELL, JUDGES.

COMBS, JUDGE: Ryan Shellabarger appeals from an order of the Carter Family Court. He contends that the family court erred in its calculation of the parties' child support obligations and in its allocation of the federal dependent-child tax exemptions for their minor children. We agree with both contentions.

Ryan and Lori Shellabarger were divorced in June 2012. Pursuant to the court's decree, the parties were awarded joint custody of their four minor children. Lori was designated as the primary residential custodian of the children, and she and the children continued to reside in the marital home. Ryan paid the monthly mortgage payment. One-half of the mortgage payment, \$262.50 per month, was designated as maintenance to Lori. Ryan was also ordered to pay \$916.00 per month for the support of his children.

In February 2016, Ryan filed a motion for modification of the timesharing schedule and requested that he be designated the primary residential custodian of the children. Following a hearing during which each of the children was interviewed, Ryan was awarded primary residential custody of the children – only three of whom remained minors. The order was entered on June 10, 2016.

In December 2016, Ryan filed a motion requesting the court to order Lori to pay support for the children. He also sought an order directing that he was entitled to claim each of the children as a federal dependent-child tax exemption on his federal tax returns. A hearing was conducted on January 31, 2017.

The proof indicated that Ryan earns approximately \$46,000.00 annually as a minister; his current wife provides for the children's health insurance through her employer. Lori has a degree in education and is employed part time as a substitute teacher with the Carter County Board of Education where she earns

\$500 per month. Lori also works approximately twelve (12) hours (on average) each week as Children's Director at Oak Grove Church of Christ where she earns \$550 per month. She also earns money each month as a personal tutor. Lori testified that she had previously earned additional money as a dog-sitter but that she was not likely to continue to do so because her son was allergic to dogs. During her testimony before the court, Lori explained that she could not afford to pay child support given her current earnings. However, she admitted that she had not looked -- and did not intend to look -- for full-time employment outside the Carter County Board of Education. There was no testimony to indicate that Lori was not capable of working full time.

In its order entered on February 13, 2017, the family court set Lori's child support obligation at \$260.19 per month based upon her income of \$1,050 per month. This calculation did not take into account any amounts earned for tutoring or dog-sitting. Nor did it take into account the maintenance payments that she received each month from Ryan. The court ordered that Ryan would be allowed to claim each of the three children as federal dependent-child tax exemptions for 2016. Thereafter, the parties were to "alternate the children on a two to one basis until the oldest child can no longer be claimed."

Ryan filed a timely motion to alter, amend, or vacate, or in the alternative, for additional findings of fact. In his motion, Ryan contended that the

family court had erred by failing to permit him to claim each of the three children as a federal dependent-child tax exemption for as long as they were in his primary custody and control since neither Lori nor the children would receive a financial benefit if she were awarded the exemption. In the alternative, Ryan requested the court to make specific findings concerning its reasoning for awarding Lori an exemption for any of the children. Additionally, Ryan contended that the family court had erred by failing to calculate Lori's monthly income accurately and by failing to impute further income to her as a consequence of her voluntary underemployment. Ryan's motion was denied by the court's order entered on March 13, 2017. This appeal followed.

On appeal, Ryan first argues that the family court abused its discretion by concluding that Lori was entitled to claim any of the three children as a federal dependent-child tax exemption since there was no sound financial reason to do so. We agree.

In *Adams-Smyrichinsky v. Smyrichinsky*, 467 S.W.3d 767 (Ky. 2015), the Supreme Court of Kentucky observed that the decision to assign a federal tax exemption to a party who is not entitled to it under the provisions of the Internal Revenue Code cannot be undertaken lightly. The court concluded that where a family court awards a tax exemption as part of a support order to a party who does not qualify for it under provisions of the federal tax code, the family court must

explain precisely how the award of the exemption benefits the child. *Id.* at 784. It specifically noted that the family court faces a “heavy burden” in justifying such a decision. *Id.* at 783.

Under the terms of the family court’s order of June 10, 2016, Lori clearly does not qualify as a “custodial parent” as that term is defined by the Code of Federal Regulations. *See* 26 C.F.R. § 1.152-4 (“The custodial parent is the parent with whom the child resides for the greater number of nights during the calendar year, and the noncustodial parent is the parent who is not the custodial parent.”) Consequently, she is plainly not entitled to claim any of the three children as a federal dependent-child tax exemption under federal law. *See* 26 U.S.C. § 152(e) (assigning exemption to “custodial” parent). The Carter Family Court did not articulate any reason to justify its decision to award a dependent-child tax exemption to Lori, and it denied Ryan’s motion for specific findings to support the decision. Pursuant to *Smyrichinsky, supra*, the family court abused its discretion, and we are compelled to vacate that portion of its order.

Ryan also contends that the family court abused its discretion when it established Lori’s child support obligation. He argues that the family court erred by omitting some 30% of Lori’s actual gross income as itemized in her testimony and by failing to take into account her potential income since she is not physically or mentally incapacitated in any manner -- yet is not employed to full capacity. He

argues that the family court erred further by failing to deduct from the parties' combined monthly gross income the amount of maintenance that he pays to Lori each month. Ryan contends that the family court's written findings do not indicate that it intended to deviate from the statutory guidelines; consequently, its failure to calculate each party's child support obligation accurately under the guidelines constitutes reversible error. We agree.

Kentucky's statutory child support guidelines create a rebuttable presumption that the guideline amount is the appropriate amount of support in calculating child support. *Clary v. Clary*, 54 S.W.3d 568 (Ky. App. 2001). With respect to the family court's use of the statutory guidelines, KRS<sup>1</sup> 403.212 provides, in relevant part, that "income" means the "actual gross income of the parent if employed to full capacity or potential income if unemployed or underemployed." "Gross income" includes income from *any source* but specifically includes any maintenance received. *Id.* "Potential income" is determined based upon "employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community." *Id.* A court may find a parent to be voluntarily unemployed or underemployed without finding that the parent intended to avoid or reduce her child support obligation. *Id.*

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<sup>1</sup> Kentucky Revised Statutes.

Additionally, a family court must subtract from the parties' combined monthly income the amount of maintenance either parent is paying. KRS 403.212(2)(g)(1).

The provisions of KRS 403.212 dictate the family court's methodology for calculating each party's income, and the discretion that a family court may exercise while making these required statutory calculations is limited. *See Bell v. Bell*, 423 S.W.3d 219 (Ky. 2014). In the case before us, the family court did not find on the record that the application of the guidelines would be unjust or inappropriate based upon some factor of an extraordinary nature. Thus, the court erred in purporting to follow the guidelines while in fact deviating from them without explanation as required pursuant to *Smyrichinsky, supra*. The guidelines required the court to consider two issues which it omitted: Lori's maintenance award as part of her gross income and her alleged voluntary unemployment or underemployment. Consequently, we must vacate this portion of the order and remand the matter for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

MaLenda S. Haynes  
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BRIEF FOR APPELLEE:

R. Jason Greer  
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