

STATE OF MICHIGAN
COURT OF APPEALS

JAMES DELBERT STODDARD,

Plaintiff-Appellee,

v

KIMBERLY DAWN STODDARD,

Defendant-Appellant.

UNPUBLISHED

November 15, 2002

No. 231635

Allegan Circuit Court

LC No. 97-020512-DM

Before: Murphy, P.J., and Hood and Murray, JJ.

PER CURIAM

In this domestic relations case, defendant appeals by a leave granted from the trial court's order accepting a referee's recommendation that the shared economic responsibility formula (SERF) be applied to determine plaintiff's child support obligations. We reverse and remand.

I.

Plaintiff and defendant were divorced by consent judgment entered on December 16, 1997. Under the terms of the judgment, defendant was awarded physical custody of the two minor children, while plaintiff received parenting time pursuant to a specified schedule. Although the schedule placed the children with plaintiff more than 128 overnights per year, the parties agreed that plaintiff's child support and childcare obligations were to be calculated consistent with the standard child support guidelines. The judgment of divorce also contained a provision allowing plaintiff a fifty percent abatement of support when the children were with him more than six consecutive overnights. Finally, the judgment permitted either party to seek a review of the child support award after January 1998.

In March 1999, defendant filed a motion to modify the amount of child support based on her discovery that plaintiff's income had increased substantially since the case was settled. In response, plaintiff asked the court to reduce the amount of support he paid by applying the SERF because he qualified for it. Thereafter, the trial court granted plaintiff's request and ordered that the judgment of divorce be amended to reflect application of the SERF to reduce plaintiff's child support obligation retroactive to April 20, 2000.

II.

On appeal, defendant argues that the trial court's modification of plaintiff's child support obligation by applying the SERF contravenes the plain language of the child support guidelines because there was no concurrent order entered which modified custody or parenting time based on changed circumstances. We agree. Whether the SERF can be applied to a change in circumstances outside those specified in the manual is a question of law, which we review de novo on appeal. *Burba v Burba (After Remand)*, 461 Mich 637, 647; 610 NW2d 873 (2000).

Under Michigan law, a trial court may modify a child support order "as the circumstances of the parents, and the benefit of the children require." MCL 552.17(1). A child support order must be based on application of the child support formula as developed by the Friend of the Court pursuant to legislative mandate. MCL 552.519; *Ghidotti v Barber*, 459 Mich 189, 200; 586 NW2d 883 (1998). Modification of a child support order is a matter within the trial court's discretion, although the trial court must abide by the statutory framework of MCL 552.17 in exercising this discretion. *Burba, supra*.

The Michigan Child Support Formula Manual (Lexis, 2001) (manual) contains the SERF, which is to be used in situations where the noncustodial parent will spend "substantial amounts of time" with the children. *Eddie v Eddie*, 201 Mich App 509, 513-514; 506 NW2d 591 (1993). The shared economic responsibility provision states, in pertinent part:

When children share substantial amounts of time with each parent, *whether or not there is a joint physical custody order*, child support must be calculated by offsetting the parties' support obligations. Substantial shared time with children translates into economic sharing beginning when the parent with the lesser amount of time with the children has the children in his/her care for a minimum of 128 overnights annually. The formula should only be used if it can be determined from the specific terms of the custody/parenting time order that the children will be with that parent for at least the 128 overnight threshold. *The economic sharing formula should only be applied to support orders entered concurrent with an initial custody/parenting time determination or to modifications of custody/parenting time based upon changed circumstances. It shall not be retroactively applied to existing orders.* [Michigan Child Support Formula Manual (Lexis, 2001), § IV(B) (emphasis added in part).]

Under *Burba, supra*,¹ application of the Michigan Child Support Formula Manual is mandatory. *Id.* at 643-645. Whether establishing a child support amount or modifying it, a court has a statutory duty to follow the criteria as set forth in the manual. *Id.* See also *Ghidotti, supra*.

Here, based on the number of overnight visits plaintiff is entitled to under the judgment of divorce, it is uncontested that plaintiff qualifies to have his child support obligation calculated under the SERF. However, the number of days the children spend with plaintiff is not the only

¹ We recognize that a trial court may deviate from the formula in circumstances that make a determination unjust or inappropriate. *Burba, supra* at 644; *Ghidotti, supra* at 200. However, the trial court did not rely on this exception in rendering its decision, nor did it follow the necessary procedures to invoke the exception. *Burba, supra* at 644.

requirement for application of the SERF. The manual also states that the SERF should only be applied to support orders entered concurrently with an initial custody/parenting time determination or to “modifications of custody/parenting time based upon changed circumstances,” not to just any change in circumstances. The trial court apparently considered a change in the parties’ incomes to be a sufficient change in the circumstances to allow for application of the formula. However, that contradicts the plain language of the manual, which we are required to apply. See *Burba, supra* at 643-651. Plaintiff fails to show that the support order was entered into concurrently with an order modifying custody or parenting time based on changed circumstances.² Any modifications in parenting time alleged by plaintiff are unsupported by the record. Therefore, in the absence of an order modifying the custody or parenting time provisions between the parties, application of the formula amounts to an error.

We recognize that physical custody and parenting time was modified by stipulations of the parties when defendant was physically unable to provide primary care for the children due to a medical condition. During that time when plaintiff had custody of the children, plaintiff’s child support obligations were suspended. However, the original custody and parenting time schedule as determined under the judgment of divorce was reinstated when defendant returned to health. These *prior* modifications do not justify application of the SERF to *subsequent* child support obligations as the manual requires that the order be entered “concurrently.” We also note that plaintiff received full relief from his child support obligations during those times. Moreover, plaintiff did not request application of the SERF at those times nor, as mentioned, was an order entered concurrently with the stipulated orders modifying custody. Accordingly, we reverse and remand this case to the trial court for a determination of the amount of child support owed defendant without application of the SERF.

III.

Defendant also raises a second issue on appeal, contending that the trial court’s application of abatement in addition to the application of the SERF violates the rules set forth in the manual. Defendant is correct, as the manual states, “Note: Parenting time abatement should *never* be used in conjunction with the economic sharing formula, as the economic sharing adjustment inherently reflects substantial economic sharing.” Michigan Child Support Formula Manual (Lexis, 2001), § IV(B) (emphasis in original). However, defendant’s argument merely states that the abatement is improper in light of the court’s application of the SERF. Defendant does not argue the abatement was improperly applied. Because we hold that the SERF should not have been applied, and defendant presents no argument challenging the merits of the trial court’s use of the abatement, we affirm the trial court’s use of the abatement.

² Furthermore, it should be noted that plaintiff “did not receive the benefit of” the SERF following the entry of the divorce judgment (the “initial custody/parenting time determination”) because plaintiff agreed to pay the child support as specified in the consent judgment.

Reversed in part, affirmed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Harold Hood

/s/ Christopher M. Murray