

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001405-MR

JAMES ALBERT PEDIGO

APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 97-CI-00843

TAMMY MECHELLE HELSON PEDIGO

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: GUDGEL, Chief Judge; BUCKINGHAM, and JOHNSON, Judges.
BUCKINGHAM, JUDGE. James Albert Pedigo appeals from an order of the Warren Circuit Court adopting the report of the domestic relations commissioner (DRC), which required him to pay \$203.10 per month in child support to Tammy Mechelle Pedigo. Finding no error, we affirm.

James and Tammy were married in 1980 and separated in July 1997. On July 28, 1997, Tammy filed a petition requesting dissolution of the marriage, an award of joint custody with her having physical possession of the parties' two children, and child support payments from James pursuant to the statutory

guidelines (KRS 403.213). Tammy thereafter filed a motion for temporary child custody, child support, and visitation. James filed a response to the divorce petition in which he agreed with joint custody but sought to be granted primary physical possession of the children and requested that Tammy be required to pay child support in accordance with the child support guidelines. The DRC entered an agreed order on Tammy's motion, giving her temporary custody of the children and ordering James to pay \$475 per month as child support under the child support guidelines. A hearing and settlement conference on the divorce petition was scheduled for January 6, 1998.

A major issue of dispute raised at the January hearing concerned custody and visitation. During the hearing, the parties agreed to joint custody of the children with Tammy having physical possession of both children during the week plus one weekend a month, and James having physical possession on all other weekends, with alternating bi-weekly possession during the summer. Based on the more-extensive-than-normal time James would have possession of the children, the DRC suggested that neither party be designated as the primary custodian and that there be a deviation from the child support guidelines, which are based on the assumption that one parent acts as the primary residential custodian. The DRC proposed that James be required to pay child support based on the difference between the two guideline amounts calculated under separate assumptions with each parent being designated the primary residential custodian. Under this

approach, due to a slightly higher gross income, James would have been required to pay approximately \$83 per month.

At the end of the hearing, Tammy expressed reservations about agreeing to this amount of child support. Following further discussions with her attorney, she stated that she agreed to accept this approach of assessing the child support obligation, and she also agreed to waive the ten-day period for filing exceptions to the DRC's recommended order. See CR 53.06(2). The DRC asked the parties' attorneys to submit a proposed report and indicated he would issue a final proposed decree at a later date.

On January 14, 1998, Tammy filed a motion entitled "Motion to Forestall Entry of Any Final Decree Until Further Proceedings," in which she requested a delay in entry of a final decree that would memorialize the terms of the dissolution as discussed at the January 6, 1998, hearing. She specifically challenged the proposed terms for child support and requested an additional hearing on that issue before entry of a final report. James filed a response to the motion arguing that Tammy had entered into a binding agreement on the question of child support and seeking specific performance of the terms as agreed to at the January hearing.

The DRC held a hearing on the motion in February 1998. At the hearing, Tammy's attorney maintained that allowing James to make child support payments below the statutory guidelines amount as discussed at the earlier hearing was unfair and inequitable. James's attorney argued that the separation

agreement was not unconscionable and should be enforced. The DRC denied Tammy's motion but suggested to her counsel that he could file a motion to modify child support at any time.

The DRC issued a report on February 24, 1998, describing and incorporating the terms of settlement as discussed at the January 6 hearing. The report set out a visitation schedule and indicated that the parties had agreed that James would pay \$100 per month child support because each party was to have physical possession of the children an approximately equal amount of time. Tammy filed exceptions to the DRC's report, challenging the child support agreement as unconscionable.

Before the exceptions to the February 24 report were heard by the trial court, Tammy filed a motion entitled "Motion to Increase Child Support" with her accompanying affidavit. After a hearing in April, the DRC issued a report recommending that James pay \$203.10 per month in child support, rather than \$304.65, based on a deviation from the child support guidelines because of the additional amount of time James was to have possession of the children under the schedule accepted by the parties. James filed exceptions to this report arguing that the DRC should have followed the initial agreement of the parties on the amount of child support.

Following a hearing on the exceptions to both the February and April reports of the DRC, the trial court issued an order approving and adopting the DRC's April report. On August 17, 1998, the trial court issued a final decree of dissolution of marriage adopting and incorporating the DRC's

report of February 24, 1998, as modified by the report of April 21, 1998. This appeal followed.

James contends the trial court erred by adopting the DRC's April report. First, he argues that the parties entered into a settlement agreement during the January 6, 1998, hearing that is binding and enforceable against Tammy. He states that the law favors settlement of issues between parties and that Tammy should be required to comply with the proposed agreement on child support. Second, James argues that Tammy failed to demonstrate any change of circumstances subsequent to the January hearing that would justify the higher child support payments.

Unlike provisions for property division and maintenance, any agreement between the parties in a divorce action pertaining to child support is not binding on the court. KRS 403.180 provides in relevant part:

(2) In a proceeding for dissolution of marriage or for legal separation, the terms of the separation agreement, except those providing for the custody, support, and visitation of children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unconscionable.

(6) Except for terms concerning the support, custody, or visitation of children, the decree may expressly preclude or limit modification of terms if the separation agreement so provides. Otherwise, terms of a separation agreement are automatically modified by modification of the decree.

(Emphasis added).

In Tilley v. Tilley, Ky. App., 947 S.W.2d 63, 65 (1997), the court stated, “[t]hus, the statute [KRS 403.180] makes it clear that while the parties are free to enter into a separation agreement to promote settlement of the divorce, the court still retains control over child custody, support, and visitation and is not bound by the parties’ agreement in those areas.” This approach giving the trial court extended discretion in determining child custody and support is premised on the overriding concern for the best interests of the children. See KRS 403.270. Child support is a statutory duty, based on public policy intended to benefit the children rather than the parents. See Clay v. Clay, Ky. App., 707 S.W.2d 352 (1986); KRS 403.211. Child support cannot be waived or diminished solely by a contract between the parents. See Whicker v. Whicker, Ky. App., 711 S.W.2d 857, 859 (1986); Bustin v. Bustin, Ky., 969 S.W.2d 697, 698 (1998).

In the case sub judice, the parties discussed and expressed agreement to the terms of the divorce at the videotaped January 6, 1998, hearing before the DRC. Even assuming this conduct constituted a valid separation agreement under KRS 403.180, see, e.g., Calloway v. Calloway, Ky. App., 707 S.W.2d 789 (1986)¹, any provision dealing with child support was not binding on the trial court or the DRC. Moreover, the trial court was required to apply the child support guidelines and make an independent determination on the amount of child support, rather

¹But see Jackson v. Jackson, Ky. App., 734 S.W.2d 498 (1987) (party who refused to sign tentative separation agreement dictated into record not bound by agreement).

than apply the standard of review of unconscionability applicable to property and maintenance provisions, in reviewing any agreement of the parties on the child support amount. Therefore, the trial court did not err in refusing to enforce the settlement agreement of the parties on the amount of child support that James would pay.

James also argues that the trial court erred in failing to set his child support payments at the agreed amount because there was no change in circumstances following the January hearing to justify the higher support amount. He maintains that the parties' earnings did not change and that Tammy was merely unhappy with the agreement. He states that because Tammy entered into the agreement voluntarily with the assistance of counsel, any presumption of a material change in circumstances under KRS 403.213 supporting a modification of child support was irrefutably rebutted.

James's argument is premised, however, on a misapplication of the child support statutes. KRS 403.213 applies to modification of an existing child support order. As discussed earlier, any separation agreement between the parents involving child support is not binding on the trial court and, therefore, does not act to establish a fixed child support obligation subject to later modification. Only a trial court decree or order setting forth the child support amount creates a valid enforceable obligation. It necessarily follows that until the trial court imposes an initial child support obligation,

there is no child support decree subject to modification under KRS 403.213.

In the present case, the child support obligation requiring James to pay \$100 per month constituted a term of the parties' separation agreement. While the DRC issued a report setting forth this and other terms of the agreement on February 24, 1998, this report merely represented recommendations for the terms of the final divorce decree and was not binding on the trial judge. The trial court has absolute discretion with respect to the use it makes of a DRC's report. See Eiland v. Ferrell, Ky., 937 S.W.2d 713, 716 (1997); CR 53.06. A trial court can adopt, modify, or reject the DRC's report. Basham v. Wilkins, Ky. App., 851 S.W.2d 491, 494 (1993).

Even though the DRC and the parties conducted the April hearing as a modification of the child support situation, no initial permanent child support order had been issued by the trial court and KRS 403.213 simply was not applicable. The trial court correctly treated the DRC's report of April 21, 1998, as a substitution of the DRC's initial recommendations, not as a modification of an existing child support order. Consequently, the trial court was free to establish the child support payments according to the child support guidelines without consideration of or regard to a review of changed circumstances.

For the foregoing reasons, we affirm the order of the Warren Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Matthew J. Baker
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

Kenneth P. O'Brien
Bowling Green, Kentucky