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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002398-MR
AND
CROSS-APPEAL NO. 2003-CA-002445-MR

MICHAEL S. FINCK — APPELLANT/CROSS-APPELLEE

v.

APPEALS FROM JEFFERSON FAMILY COURT
HONORABLE KEVIN L. GARVEY, JUDGE
ACTION NO. 96-FC-003618

WILMA M. FINCK — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART
REVERSING AND REMANDING IN PART

** ** ** ** **

BEFORE: BUCKINGHAM, KNOPF, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Michael S. Finck brings this appeal from an order of the Jefferson Family Court, entered August 18, 2003, setting child support, allocating income tax dependency exemptions, child care expenses and attorney fees. Wilma M. Finck cross-appeals from the same order. We affirm in part, reverse and remand in part.

Michael and Wilma were married December 22, 1984. The marriage was dissolved by decree of dissolution effective February 7, 1997. Pursuant to the parties' property settlement agreement, Michael and Wilma agreed to share joint custody of their two children, Andrew and Zachary. The issue of primary residence and visitation was reserved for later adjudication. By order entered August 20, 1997, the parties were to alternate weekly placement of the children. No child support was ordered. This arrangement continued until April 2002, when Andrew began living full-time with Wilma.

On April 7, 2003, Wilma filed a motion seeking child support, reimbursement for one-half of the children's health insurance premiums, the income tax dependency exemption for both children, payment of tuition and other expenses related to Andrew's parochial education, and for an award of attorney's fees and costs. A hearing was conducted, and on August 18, 2003, a final order was entered. Pursuant to the order, Michael was ordered to (i) pay child support of $628.00 per month for Andrew, retroactive to July 1, 2002; (ii) reimburse Wilma for one-half of the children's insurance premiums retroactive to August 31, 2000; (iii) reimburse Wilma $850.00 for expenses associated with Andrew's education; and (iv) pay $3,829.45 in

attorney's fees and costs to Wilma.[1] The family court denied Wilma's motion that Michael pay the parochial school tuition for Andrew's junior and senior year. Wilma was awarded the tax exemption for both children in the odd-numbered years; in even-numbered years Wilma was to claim Andrew and Michael was to claim Zachary.

Both parties filed motions pursuant to Ky. R. Civ. P. (CR) 59.05 to alter, amend, or vacate the family court's order. By order entered October 15, 2003, the family court vacated the portion of the order requiring Michael to reimburse Wilma $850.00 for expenses related to Andrew's education incurred after his sophomore year. The court amended the award of attorney's fees and costs to Wilma from $3,829.45 to $2,829.45. The court also amended its order to reflect that Wilma would receive the income tax dependency exemption for both children so long as the exemptions continued to "produce a financial benefit" to her; otherwise, Michael would be entitled to the exemptions. All other issues raised by the parties' motions were denied. These appeals follow.

[1] In the order entered August 18, 2003, Michael was also ordered to pay Andrew's tuition bill for his sophomore year at Trinity High School. In the order entered October 15, 2003, the circuit court acknowledged that Michael had paid this bill and would have no future obligation to pay Andrew's private tuition expenses.

Michael and Wilma raise numerous issues in this appeal and cross-appeal. For the sake of clarity, we will address the issues presented on appeal and cross-appeal collectively.[2]

Michael and Wilma both contend the family court erroneously ordered child support retroactive to July 1, 2002. Michael argues child support should be retroactive to April 7, 2003, the date Wilma filed the motion to modify support. Wilma contends child support should be retroactive to either the date of an earlier motion to modify child support, August 31, 2000, or the date Andrew began to live with her full-time, April 2002.[3]

Kentucky Revised Statutes (KRS) 403.213(1) states that "child support may be modified only as to installments accruing subsequent to the filing of the motion for modification and only upon a showing of a material change in circumstances that is substantial and continuing." It has been repeatedly held that an order modifying child support shall only be retroactive to the date the motion to modify was filed. Giacalone v. Giacalone, 876 S.W.2d 616 (Ky.App. 1994). The only motion properly before the family court was Wilma's April 7, 2003,

[2] In his reply brief, Michael states that he "hereby renews the earlier Motion filed in this Appeal on December 29, 2003, to dismiss Appellee's/Cross-Appellant's Cross Appeal in this matter, as permitted by this Court's Order entered February 18, 2004, and hereby adopts said Motion hereinto by reference." We have reviewed Michael's argument set forth in the original motion and deny the same.

[3] Wilma had previously filed a motion seeking child support on August 31, 2000; however, the motion was apparently never heard and no other action was taken until April 7, 2003, when Wilma filed a new motion that resulted in the appeals.

motion. The August 2000 motion to modify support was essentially abandoned by Wilma. Furthermore, it is undisputed that the material change in circumstance relied upon by the family court, namely Andrew living full-time with Wilma, did not exist in August, 2000. As such, we are of the opinion that it was error for the family court to order child support retroactive to July, 2002. Rather, we hold that child support should be retroactive to April 7, 2003, the date Wilma filed the motion to modify child support.

Both parties also contend the family court erred in determining the amount of child support. The amount of income allocated to each party is undisputed. Michael contends, however, that application of the child support guidelines contained in KRS 403.212(7) would result in child support of $538.20 per month. Michael asserts that the court erroneously included Zachary's child care expenses of $202.00 per month in the calculation of support. Michael does not dispute that child care expenses existed at the time of the hearing, but rather asserts that "no such expense is presently incurred."[4] Michael essentially argues that circumstances have changed since the hearing.

[4] Wilma asserts that the expense for child care ended on August 18, 2003; she contends, however, that the expense was being incurred at the time of the hearing on July 29, 2003.

When a material change in circumstances regarding an award of child support occurs after the date of the hearing, we believe the proper course of action consistent with KRS 403.213 is to file a motion to modify support. As such, we are of the opinion that the proper remedy for Michael in this case was to file a new motion to modify support. Since no motion was brought by Michael before the trial court for consideration, we will not address the matter for the first time on this appeal.

Wilma further asserts the family court erred in determining the amount of child support. Wilma argues that pursuant to KRS 403.212(6), child support should have also been awarded to her for the parties' other child, Zachary, who continues to divide his time between both parents.

Zachary presently resides equally with his parents, pursuant to the court's original order that called for equal parenting time and for which no child support was to be paid by either party. Wilma did not raise the issue of support for Zachary in her motion to modify or in her motion pursuant to CR 59.05 to alter, amend or vacate the August 18, 2003, order. Wilma also failed to raise the issue in her prehearing statement to this Court. Wilma's prehearing statement identified the issues on appeal as follows: "The effective date of the Respondent's [Michael's] child support and whether or not the Respondent should reimburse the Petitioner [Wilma] the sum of

$4,418.73 for Andrew's tuition for his junior year at Trinity High School as Respondent agreed."

It is well-established that an issue "not raised or adjudicated in the court below cannot be considered when raised for the first time in this court." Combs v. Knott County Fiscal Court, 283 Ky. 456, 141 S.W.2d 859, 860 (1940)(citation omitted). Furthermore, CR 76.03(8) clearly provides that a party is limited on appeal to issues identified in the prehearing statement. Since the issue regarding child support for Zachary was not adjudicated below nor addressed in Wilma's prehearing statement, we will not address the merits of that issue on this appeal.

Michael next argues the family court erred by awarding both income tax dependency exemptions to Wilma. Michael asserts the exemptions were allocated in the parties' property settlement agreement and the terms of the agreement "may not be modified, except by agreement of the parties in writing, and except for child support."

KRS 403.180(6) provides that "[e]xcept 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." By including this language in a property settlement agreement, "the parties may settle their affairs with a finality beyond the reach of the

court's continuing equitable jurisdiction elsewhere provided" unless a party can demonstrate that the terms of the agreement are unconscionable. Brown v. Brown, 796 S.W.2d 5, 8 (Ky. 1990).

As Michael and Wilma specifically included a non-modification provision in their property settlement agreement, which was incorporated into the final decree by agreement, the family court exceeded its continuing equitable jurisdiction when it reallocated the tax dependency exemptions. There being no written agreement between the parties to modify the earlier agreement for tax dependency exemptions and there being no evidence in the record to establish that the original agreement was unconscionable, the family court's order modifying the dependency exemption allocation was in error.

Michael next argues the court abused its discretion by awarding Wilma $2,829.45 in attorney's fees and costs. Michael asserts:

> [T]he trial court did not find that [Wilma] had any need per KRS 403.220, for an award of attorney fees, nor did the trial court give sufficient weight to the testimony regarding [Wilma's] considerable assets . . . . [or] the fact that much of the attorney fees incurred in this action were incurred regarding the issue of private school tuition on which [Wilma] did not prevail at the hearing.

It is well-established an award of attorney's fees is entirely within the family court's discretion. Poe v. Poe, 711

S.W.2d 849 (Ky.App. 1986). When awarding attorney's fees, the only requirement is that the family court consider the financial resources of the parties. Id. Given the vast disparity in the parties' income, we are of the opinion that the family court did not abuse its discretion in awarding attorney's fees and costs to Wilma.

Michael next maintains the family court erred by ordering him to reimburse Wilma one-half of the child care expenses previously incurred on behalf of Zachary. Michael asserts that Wilma did not raise this issue in the family court, and thus, the issue is not properly before this Court.

The family court stated the following regarding the child care expenses:

> Upon presentation to the Court of evidence that [Wilma] has paid a third party child care cost, this Court will enter an Order containing a specific money amount which [Michael] shall reimburse [Wilma].

Having reviewed the record, we are of the opinion that the family court has not yet ordered Michael to pay specific child care costs. This Court will not give advisory opinions on issues that have not ripened into an actual controversy. Therefore, we decline to address this argument at this time.

The final issue addressed on appeal is Wilma's argument that the family court erred by not ordering Michael to pay tuition for Andrew's junior year at Trinity High School.

Wilma argues that Michael made the decision to send Andrew to a parochial high school without her acquiescence. It is undisputed that Michael paid for Andrew's freshman and sophomore year. Wilma contends that Michael should not be permitted to cease paying the tuition after he made the unilateral decision to send Andrew there.

It is well-established that absent proof that public schools are inadequate for educational purposes, a parent generally does not have an obligation to pay tuition for a child's private-school education. Miller v. Miller, 459 S.W.2d 81 (Ky. 1970). KRS 403.211(3)(b) provides that a child's extraordinary educational needs may provide a basis for deviating from the child support guidelines. However, as there was no evidence that a public school would be inadequate for Andrew, it was not an abuse of discretion for the family court to deny a request for payment of tuition to a parochial school. See Id. While Wilma may feel that Michael has a moral obligation to pay Andrew's tuition, we cannot conclude that he has a legal obligation to do so. See Id.

In sum, we conclude that child support for Andrew shall be retroactive to April 7, 2003, the date Wilma filed the motion to modify support and the tax dependency exemption allocation shall be as provided in the parties' property

settlement agreement. The family court's order is affirmed in all other respects.

For the foregoing reasons, the order of the Jefferson Family Court, is affirmed in part, reversed and remanded in part for proceedings not inconsistent with this opinion.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEE:
Steven B. Taylor Louisville, Kentucky	Harold L. Storment Louisville, Kentucky