RENDERED: FEBRUARY 9, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002549-ME

CYNTHIA A. GOODSON — APPELLANT

v.

APPEAL FROM NICHOLAS CIRCUIT COURT
HONORABLE DAVID E. MELCHER, JUDGE
CIVIL ACTION NO. 05-CI-00056

DONALD W. GOODSON — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; WINE, JUDGE; PAISLEY,[1] SENIOR JUDGE.

PAISLEY, SENIOR JUDGE: Cynthia A. Goodson appeals from a judgment entered on November 10, 2005 by the Nicholas Family Court in which the family court denied Cynthia's motion to modify her ex-husband's child support obligation. On appeal, Cynthia argues that her motion was not to modify her ex-husband's support obligation but was to initially establish such an obligation. She also argues that if her motion was for modification, then she was entitled to a rebuttable presumption that a material change in

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

circumstances justifying an increase had occurred. Finding that the family court abused its discretion, we vacate and remand.

On June 17, 1996, Cynthia married Donald W. Goodson. While their marriage produced no offspring, Cynthia had a daughter, Elizabeth, born on May 9, 1990, from a previous relationship. Donald adopted Elizabeth on October 7, 1999. On May 24, 2002, Cynthia filed a *pro se* petition for dissolution of the parties' marriage with the Kenton Family Court since she was residing in Kenton County at the time. On that same day, she and Donald entered into a settlement agreement in which she received sole custody of Elizabeth and Donald would not be granted any visitation nor would he be required to pay child support. The Kenton Family Court incorporated the settlement agreement into the decree of dissolution of marriage which it entered on July 2, 2002.

Subsequently, Cynthia, along with Elizabeth, moved to Nicholas County, and, on August 26, 2005, Cynthia moved the Nicholas Family Court to initially establish child support payments for Donald or, in the alternative, modify his current obligation, which was zero. In a judgment entered on November 10, 2005, the family court found that Cynthia had failed to allege any substantial change in circumstances and failed to allege that the settlement agreement was unconscionable; thus, it denied Cynthia's motion.

On appeal, Cynthia argues that her motion was not to modify Donald's support obligation but was, in fact, a motion to initially establish support pursuant to Kentucky Revised Statutes (KRS) 403.211 since Donald's child support obligation had not been previously established. In the alternative, Cynthia argues that this case should

be remanded to the family court since she was not given an opportunity to show that a substantial change in circumstances had occurred.

Also, in the alternative, relying on KRS 403.213, Cynthia argues that if her motion was for modification, then the point was not whether the separation agreement was unconscionable but whether there had been a substantial change in circumstances that would justify modification of Donald's current child support obligation, which was zero. Relying on *Tilley v. Tilley*, 947 S.W.2d 63 (Ky. App. 1997), Cynthia argues that in dissolution proceedings where the parties have entered into a settlement agreement, the trial court retains jurisdiction over the issue of child support, and, if the moving party is able to show a 15% discrepancy between the agreed-upon amount of support and the amount that would be required under the guidelines, then the moving party is entitled to a rebuttable presumption that a material change justifying modification has occurred.

Regarding matters of child support, the family court has broad discretion, and, ordinarily, we will not reverse a family court's decision regarding support unless it abused that discretion. *Wilhoit v. Wilhoit*, 521 S.W.2d 512, 513 (Ky. 1975). However, while the lower court has extensive discretion, this discretion has limits. *See Price v. Price*, 912 S.W.2d 44 (Ky. 1995) and *Keplinger v. Keplinger*, 839 S.W.2d 566 (Ky. App. 1992).

In 1972, the General Assembly passed KRS 403.180 which allows the parties to a dissolution action to enter into a written separation agreement addressing the issues of property, child custody, child support and visitation. While the parties may address child support in such an agreement, the terms regarding support are not binding

on the trial court. KRS 403.180(2). According to KRS 403.213(1), the provisions of any dissolution decree addressing child support may be modified, but only if a motion for modification is filed and the moving party demonstrates "a material change in circumstances that is substantial and continuing." Furthermore, if the trial court applies the guidelines set forth in KRS Chapter 403 to the parties' circumstances at the time the moving party files his or her motion and if the result under the guidelines is equal to or greater than a 15% change in the amount of support due per month, then the moving party is entitled to a rebuttable presumption that a material change in circumstances has occurred. KRS 403.213(2).

In *Wiegand v. Wiegand*, 862 S.W.2d 336 (Ky. App. 1993), this Court addressed the issue of whether a trial court could modify an ex-husband's child support obligation where he and ex-wife had set his obligation by agreement. In *Wiegand*, ex-wife and ex-husband agreed in 1983 that ex-husband would pay child support in the amount of $125.00 per month. In 1992, ex-wife moved the trial court for an increase in ex-husband's support obligation because, under the guidelines set forth in KRS Chapter 403, his obligation would have been $334.00 per month. *Id*. The trial court denied the motion stating that the evidence rebutted the presumption that a material change in circumstances had occurred. *Id*. The Court of Appeals reversed the denial and held that:

> KRS 403.213 does not require there to be a change in either party's income before a trial court may modify an existing child support award. Instead, in a situation such as the one here, where there was at least a 15% discrepancy between the guidelines and the noncustodial parent's existing child support obligation, the existence of this fact standing alone creates a

> rebuttable presumption that there is a material change in circumstances pursuant to KRS 403.213(2).

Id. at 337.

In *Tilley v. Tilley*, 947 S.W.2d 63 (Ky. App. 1997), this Court addressed a similar situation as found in *Wiegand*. In *Tilley*, ex-wife and ex-husband entered into a settlement agreement in 1991 that had been prepared by ex-wife's attorney. *Id*. at 64. In the agreement, the parties had agreed that ex-husband would pay child support in the amount of $250.00 per month, which was less than what ex-husband would have paid under the guidelines. Furthermore, the agreement stated that ex-wife understood that ex-husband's support obligation was less than the base amount mandated by the guidelines. *Id*. In 1995, ex-wife moved the trial court for an increase in ex-husband's child support obligation. Holding that it was not required to consider the parties' settlement agreement, the trial court granted ex-wife's motion. Following the holding in *Wiegand*, this Court affirmed the trial court's decision and additionally held:

> [O]nce an award of child support entered pursuant to the terms of a separation agreement under KRS 403.180 is reopened for modification, "the child support must be set anew pursuant to KRS 403.210 *et seq.*" Furthermore, in reaching its decision, the trial court is to consider both the changes in finances of both parents as well as the needs of the child. Thus, it was proper for the trial court to disregard the prior agreement of the parties as to the amount of child support payable by [ex-husband] in deciding to raise the amount. (citations omitted.)

Id. at 65. We can find no meaningful distinction between the facts in the present case and the facts in *Wiegand* and *Tilley*; thus, the holdings in those cases control. Therefore, the family court was not bound by Cynthia's and Donald's previous settlement agreement,

and the record demonstrates that a 15% discrepancy existed between Donald's support obligation, which was zero at the time Cynthia filed her motion, and any obligation he would have been required to pay under the guidelines found in KRS Chapter 403. Furthermore, pursuant to KRS 403.213(2) and the holdings in *Wiegand* and *Tilley*, Cynthia was indeed entitled to a rebuttable presumption that a material change in circumstances had occurred. Furthermore, Donald never presented evidence that rebutted this presumption. As a result, the family court abused its discretion when it failed to give the benefit of this rebuttable presumption to Cynthia.

We are mindful of the potential for unfairness if a party in a dissolution action uses an agreement to receive child support below the guideline amount to extract concessions on other issues and then subsequently seeks an increase in support when there is no actual material change in the financial circumstances of the parties. In this case, Donald claims that he assumed all the marital and personal debt of Cynthia. In addition, Donald agreed to forfeit any visitation with his child. The record does not provided us with the basis for such an arrangement. Obviously, in matters of custody, visitation, and child support the court is not bound by the parties' agreement because the welfare of the child is involved. These are factors the family court should consider on remand.

The judgment denying Cynthia's motion to modify is vacated and this case is remanded to the Nicholas Family Court to hold an evidentiary hearing in order to reconsider Cynthia's motion in light of KRS Chapter 403 and the holdings in *Wiegand* and *Tilley* and to give both parties an opportunity to present evidence.

COMBS, CHIEF JUDGE, CONCURS.

WINE, JUDGE, CONCURS WITH RESULT AND FILES SEPARATE OPINION.

WINE, JUDGE, CONCURRING: I concur in the result. In May 2002 after a six-year marriage, the parties decided to divorce. The separation agreement, drafted by the appellant, states in clear and unequivocal terms that she shall have sole custody of the child the appellee had only recently adopted and that the appellee shall not enjoy visitation with the child nor shall he be required to pay child support. The final decree, which incorporated the agreement, was entered on July 2, 2002. At that time, the child was 12 years of age.

Three years later in the spring of 2005, the appellant filed a complaint for support first in the Court of Common Pleas in Athens County, Ohio, then before the Kenton Circuit Court. Subsequently, the matter was transferred to the Nicholas Family Court. For three years, the appellee had no contact with either his adopted daughter or his ex-wife. The child would be more than 16½ years of age.

While it is difficult to comprehend why a parent would forfeit his or her right to visit with a minor child, for any amount of money or reason, here the appellee elected to do so. On remand, the lower court may revisit all issues including custody and visitation pursuant to KRS 403.180(2). However, it is unlikely the appellee and child will reestablish a relationship at this late date.

Contrary to the appellant's contentions, child support was established in 2002 when the court ordered no support should be paid. This is an attempt to modify that

order, therefore, KRS 403.213 is applicable. If there is a fifteen (15) percent change in the amount due per month, child support must be set anew pursuant to KRS 403.210. *Tilley v. Tilley*, 947 S.W.2d 63 (Ky. App. 1997).

If as alleged in his written arguments the appellee is unemployed, the court will decide his potential income pursuant to KRS 403.212(d) and subject to the totality of the circumstances. *Polley v. Allen,* 132 S.W.3d 223 (Ky. App. 2004).

BRIEF FOR APPELLANTS:	BRIEF FOR APPELLEES:
Dawn Curran Letcher Carlisle, Kentucky	Eric Tedder Carlisle, Kentucky