

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000975-ME

RHONDA A. SANTOS

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JOSEPH W. O'REILLY, JUDGE
ACTION NO. 04-CI-501170

DOUGLAS J. SANTOS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

KELLER, JUDGE: Rhonda A. Santos (Rhonda) appeals from the Jefferson Family Court's April 5, 2006, order denying her post dissolution motion for child support. In that order, the family court stated that Rhonda had failed to meet her burden of proving a change of circumstances. In support of her appeal, Rhonda argues that, since she previously received no child support, application of the child support guidelines would result in an increase of 15% to the amount of child support due, thus creating a rebuttable presumption that there had been a substantial change in circumstances. In response,

Douglas J. Santos (Douglas) argues that, even if Rhonda met her burden of proof, she waived any entitlement to child support in the property settlement agreement the parties reached at the time their marriage was dissolved. For the following reasons, we affirm.

FACTS

We note at the outset that the parties appear to have had some difficulty getting along following the dissolution of their marriage and that they have litigated a number of issues, including visitation and custody. However, we will only recite the facts relevant to whether the family court properly denied Rhonda's motion for child support.

Rhonda and Douglas were married on June 3, 1995. One child, Nicholas, was born of that marriage. Douglas filed a petition for dissolution of marriage on September 17, 2001, and the parties dissolved their marriage on December 3, 2001. The parties entered into a property settlement agreement and agreed that Rhonda would have custody of Nicholas with Douglas receiving reasonable visitation. In the decree of dissolution, the circuit court found that the parties' property settlement agreement was not unconscionable and adopted that agreement as part of the decree. With regard to child support, the property settlement agreement states that:

The parties have agreed that there will [be] no child support paid on behalf of the parties' minor child. During the period of this marriage, the Petitioner has assisted with the financial support of the Respondent's two children from a previous marriage. Therefore, the Respondent is not requesting payment of child support.

On June 2, 2003, the parties entered into an amended property settlement, specifying that Rhonda would have custody of Nicholas during the school year and that Douglas would have custody during all school vacations. We note that, at the time this amendment was entered, Rhonda continued to reside in Kentucky while Douglas was residing in Maine.

On February 20, 2004, Douglas filed a motion seeking custody of Nicholas. On April 29, 2004, Rhonda filed a motion to modify child support, noting that "[a]pplication of the Kentucky Child Support Guidelines to the facts of this case . . . will create a fifteen percent (15%) change of support level thereby requiring modification."

On February 17, 2005, the family court entered an order giving the parties joint custody. Furthermore, the court placed Nicholas's primary residence during the school year with Douglas and with Rhonda for seven weeks during the summer and during Nicholas's spring break. Finally, the court gave the parties alternating visitation schedules during the Christmas and Thanksgiving holidays. Rhonda filed an appeal from the court's February 17, 2005, order, which this Court affirmed.¹

On March 1, 2005, Douglas filed a motion seeking child support from Rhonda. On July 15, 2005, the court entered an order finding that Douglas had an adjusted gross monthly income of \$2,614.40 and that Rhonda had an adjusted gross monthly income of \$5,728.68. The court then ordered Rhonda to pay Douglas \$704.00 per month in child support plus 70% of Nicholas's extraordinary medical expenses.

¹ *Santos v. Santos*, 2005-CA-000394-ME (March 3, 2006).

On April 5, 2006, the family court finally ruled on Rhonda's motion for child support, finding that:

For the time periods covered by the Respondent's motion, the Respondent presented no evidence of a material and continuing change of circumstances other than that she received a raise in salary in January 2004.

KRS 403.213 requires a showing of a material and continuing change in circumstances for modification of a child support order. The burden is on the movant - in this case the Respondent. [The] Court finds that no material and continuing change of circumstances occurred. Movant failed to sustain her burden. Her motion for child support is denied.

It is from this order that Rhonda appeals.

STANDARD OF REVIEW

The family court has broad discretion with regard to matters of child support and a family court's decision will not be reversed unless it has abused that discretion. *Wilhoit v. Wilhoit*, 521 S.W.2d 512, 513 (Ky. 1975). However, the lower court's discretion is not limitless. *See Price v. Price*, 912 S.W.2d 44 (Ky. 1995), and *Keplinger v. Keplinger*, 839 S.W.2d 566 (Ky.App. 1992). It is with this standard in mind that we undertake our analysis of the issues raised by Rhonda on appeal.

ANALYSIS

As noted above, Rhonda argues that, pursuant to the property settlement agreement, she did not receive any child support. Therefore, any application of the child support guidelines would result in a 15% increase in the amount of child support due. KRS 403.213(1) provides that "child support may be modified . . . only upon a showing

of a material change in circumstances that is substantial and continuing." KRS

403.213(2) provides that:

Application of the Kentucky child support guidelines to the circumstances of the parties at the time of the filing of a motion or petition for modification of the child support order which results in equal to or greater than a fifteen percent (15%) change in the amount of support due per month shall be rebuttably presumed to be a material change in circumstances.

Based on the above, one seeking a modification in child support must establish: (1) a material change in circumstances; (2) that the change is substantial; and (3) that the change is continuing. KRS 403.213(2) creates a rebuttable presumption that a material change has occurred but it does not create a rebuttable presumption that said change is substantial or continuing. Based on the record before us, we can identify nothing establishing that, if a change in circumstances occurred, that change in circumstances was substantial or continuing. Therefore, we hold that the family court did not abuse its discretion in denying Rhonda's motion for child support.

We affirm the order of the Jefferson Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Russell Lloyd
Louisville, Kentucky

BRIEF FOR APPELLEE:

Harold L. Storment
Louisville, Kentucky