

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001462-ME

DANITA KAY IRVAN (NOW SMITH)

APPELLANT

v. APPEAL FROM MARSHALL FAMILY COURT
HONORABLE ROB MATTINGLY, JUDGE
ACTION NO. 04-CI-00389

DANNY IRVAN

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: NICKELL AND THOMPSON, JUDGES; GRAVES,¹ SENIOR JUDGE.

THOMPSON, JUDGE: Danita Kay Irvan (now Smith) appeals from an order of the Marshall Family Court that granted Danny Irvan's motion for a reduction in child support and an order that denied her motion to alter, amend, or vacate that order. She alleges that the family court abused its discretion when it reduced child

¹ Senior Judge J. William Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

support without evidence of a material change in the parties' custodial relationship and in violation of the parties' settlement agreement. She further contends that the family court was required to render specific findings of fact regarding its deviation from the Kentucky child support guidelines. We conclude that there was no error and affirm.

When the parties were divorced in 2004, their property settlement agreement was incorporated into a decree of dissolution. Pursuant to the terms of the agreement, the parties agreed to provisions for the custody and support of their two minor children. Specifically, the agreement provided:

Respondent [appellee] shall pay the Petitioner [appellant] \$1,200.00 per month in child support. This support shall begin in October, 2004. Support shall be paid directly to the Petitioner. This amount is in accordance with the Kentucky Child Support Guidelines as if the Petitioner had primary custody. Respondent agrees not to seek a reduction in child support below the Kentucky Child Support Guidelines for a primary custody award for so long as he enjoys joint/split custody and until the emancipation of their oldest child.

In anticipation of the oldest child's emancipation and graduation from high school, the appellant filed a motion to review the child support award and on May 19, 2009, appellee filed a motion to reduce child support. At the hearing, the parties stipulated that they continued to share joint legal and physical custody of the remaining minor child and that the oldest child was emancipated. They further stipulated that the appellant earned \$3,457.03 per month and that the appellee earned \$7,148.37 per month. The only dispute was whether appellant's child

support should be based on the custodial arrangement enjoyed by the parties or, as provided in the settlement agreement, as if appellant retained primary custody of the remaining child. Following a brief hearing where only the parties' stipulations were introduced, the family court reduced the child support to \$225 per month based on the "joint/split" custody agreed to by the parties.

Initially, we reject appellant's contention that the terms of the settlement agreement prohibited modification during any period which appellee continued to enjoy "joint/split" custody of either child. The language of the agreement unambiguously provides that appellee would not seek a modification until he no longer enjoyed "joint/split custody" *and* the oldest child was not emancipated. As evidenced by the appellant's own motion to review the child support award, when the oldest child became emancipated, the appellee was able to seek modification.

Moreover, appellant stated that the child support should be modified when she filed her motion seeking review of the amount. The issue is whether the family court properly considered the "joint/split custody" arrangement agreed to by the parties when setting the amount of child support owed by appellant. Our resolution of this issue is found in our statutes controlling modification of child support awards.

KRS 403.180 permits the parties to a dissolution action to execute a property settlement agreement providing for child custody, child support, and visitation. However, the terms regarding custody, support, and visitation and those

relating to modification are not binding on the family court. KRS 403.180(6).

Modification of child support remains under control of the court subject to the conditions contained in KRS 403.213(1), which states in part:

The provisions of any decree respecting 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.

Subsection 2 of the same statute provides:

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. Application which results in less than a fifteen percent (15%) change in the amount of support due per month shall be rebuttably presumed not to be a material change in circumstances.

Because the oldest child's emancipation warranted modification of the award of child support, the family court was not controlled by the agreement's provision that child support was to be for an amount provided by the guidelines as if appellant was the primary custodian. This Court has previously addressed similar situations and has consistently held that if the conditions for modification exist, the family court is not bound by the parties' agreement when awarding future child support.

Tilley v. Tilley, 947 S.W.2d 63 (Ky.App. 1997).

In *Tilley*, the parties' agreement provided for child support in an amount less than required under the guidelines. The Court held that upon an

appropriate finding that grounds for modification existed, the trial court was not required to consider the parties' settlement agreement when modifying the child support amount and, in doing so, discussed the pertinent statutory and case law.

In *Wiegand v. Wiegand*, Ky.App. 862 S.W.2d 336 (1993), this Court held that under KRS 403.211, KRS 403.213 provides a rebuttable presumption which is applicable to *all* proceedings to modify child support. *Wiegand*, 862 S.W.2d at 337. Furthermore, the Court held that the fact that neither party's income had changed since the original award of child support did not preclude application of KRS 403, stating, "in a situation such as the one here, where there was at least a 15% discrepancy between the guidelines and the non-custodial 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)." The same decision was reached by this Court in *Giacalone v. Giacalone*, Ky.App., 876 S.W.2d 616 (1994), where this Court held that once 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.*" *Giacalone*, 876 S.W.2d at 620. 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. *Id.* 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 Millard in deciding to raise the amount.

Id. at 65 (emphasis original). Based on the authorities cited, the family court did not err when it refused to base appellee's child support obligation as if appellant was the primary residential custodian. Once it was determined that modification was warranted, the family court was within its discretion when it found that the

parties joint custody arrangement justified a deviation from the guidelines.

Downey v. Rogers, 847 S.W.2d 63 (Ky.App. 1993).

Finally, appellant contends that even if the court properly considered the actual custody arrangement of the parties instead of the terms of the settlement agreement, the amount awarded is less than provided in the guidelines under KRS 403.212(6)(b) as it pertains to split custody situations. As a result, she filed a motion requesting specific findings of fact.

The amount awarded by the court was based on the child support worksheet and the stipulations entered into at the hearing. No further evidence was presented by the parties for the court to consider. Because the family court made factual findings based on the limited evidence available, we conclude its order sufficiently satisfied the requirement for specific findings of fact. *See Weigand*, 862 S.W.2d at 337.

Based on the foregoing, the orders of the Marshall Family Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jason F. Darnall
Benton, Kentucky

BRIEF FOR APPELLEE:

Charles W. Brien
Benton, Kentucky