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# Commonwealth of Kentucky

# Court of Appeals

NO. 2009-CA-001830-ME

CABINET FOR HEALTH AND FAMILY SERVICES AND COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KEVIN L. GARVEY, JUDGE
ACTION NO. 97-FC-008942

ORVILLE BOWMAN — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, KELLER, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: The Cabinet for Health and Family Services and Wendy Tipton (formerly Bowman) appeal from the Jefferson Circuit Court's order denying a motion to modify child support. After careful review, we affirm.

Wendy Tipton and Orville Bowman are the parents of A.B., born December 14, 1994. Within the first year of A.B.'s birth, Ms. Tipton filed for divorce in Jefferson County Circuit Court. A decree of dissolution was entered on August 5, 1997. The decree incorporated by reference the parties' property settlement agreement, which granted the parties joint custody of A.B. Mr. Bowman was appointed primary residential custodian, with Ms. Tipton to have A.B. every other weekend and every Tuesday, Wednesday, and Thursday. No child support was ordered for either parent.

Within several months of the entry of the decree, the parties began a decade of custody, visitation, and support litigation. By order entered December 10, 1997, the action was reassigned to family court. While there were some temporary orders which appear to have modified the arrangement, the joint care custody and support orders remained substantially in effect for approximately ten years.

On February 7, 2007, the family court held a hearing in Ms. Tipton's absence that resulted in the suspension of her visitation. On February 19, 2007, Ms. Tipton filed a *pro se* motion to have the February 7, 2007, order set aside. Various hearing dates on Ms. Tipton's motion were assigned and reassigned by the family court. In August 2007, Ms. Tipton filed a motion to suspend Mr. Bowman's visitation, alleging that Mr. Bowman had requested that A.B. remove all of his personal belongings from his home or else they would be thrown away.

On November 20, 2007, the court entered an order suspending Mr. Bowman's visitation and setting child support at $622.74 per month, which included a contribution for health and dental insurance premiums. The child support guideline worksheet in the record indicates that Ms. Tipton, who was not working at the time and who appears to have never worked, was imputed the minimum wage at that time of $5.25 per hour, and Mr. Bowman's gross monthly wages were $3,160.69, yielding an annual salary of $37,928.00. The court also entered a wage withholding order, an order suspending a prior order for mediation, and an order appointing a guardian ad litem for A.B.

Mr. Bowman then filed an objection to the entry of the order setting child support and objected to the guideline calculation, based on his attached calculation indicating a monthly income of $2833.33. On January 8, 2008, the court conducted a hearing. Attorneys were present for both Ms. Tipton and Mr. Bowman, and the guardian ad litem appeared for A.B.

Ms. Tipton testified that since August 2007, A.B. had resided in her primary care. Also at this hearing, the parties tendered an agreed order to the court, which was ultimately entered. The agreed order provided Ms. Tipton with sole custody of A.B. and the right to relocate with the child to Florida. The order further required Mr. Bowman to maintain health and dental insurance for A.B. and provided that Mr. Bowman was not obligated to pay any child support. Mr. Bowman was granted the right to claim A.B. as a dependent on his state and federal taxes in alternate years.

Ms. Tipton did not relocate to Florida, as originally contemplated at the time of the agreed order. Instead, she moved to Tennessee, and A.B. now resides there with Ms. Tipton, her boyfriend, Ms. Tipton's mother, and a younger child. Ms. Tipton is not employed and has a reported zero gross monthly income.

On February 3, 2009, some thirteen months after the entry of the agreed order, the Cabinet for Health and Family Services, by and through the Jefferson County Attorney's Office (Child Support Division), filed a motion to intervene into the parties' divorce action. The State of Tennessee, on behalf of Ms. Tipton, requested IV-D services of the cabinet to modify the current support obligation, with enforcement of the existing order together with an order for income withholding.

The family court sustained the motion to intervene on February 19, 2009. On March 13, 2009, the Cabinet filed a motion seeking an award of child support from Mr. Bowman. This motion was heard on August 13, 2009. At the hearing, Mr. Bowman testified that he was currently earning $20.00 per hour, that he earned around $30,000.00 annually in the ten years A.B. lived with him, and that he had always maintained health and dental insurance on A.B. Mr. Bowman further testified that Ms. Tipton approached him in January 2008 with a proposal that she be given sole custody and be permitted to move outside the Commonwealth of Kentucky in exchange for the agreement that no child support would be paid by Mr. Bowman because she had not paid child support during the ten years A.B. resided primarily with him.

Neither Ms. Tipton nor the Cabinet disputed the fact that Ms. Tipton was not currently employed at the time of the hearing. Ms. Tipton appeared telephonically and testified that she entered into the agreed order on January 4, 2008, believing she was only waiving child support arrears. She testified that the reason she was seeking an award of child support was because Mr. Bowman was not providing health and dental insurance for A.B., a fact which the family court later found to be in error.

By order dated August 19, 2009, the family court denied the motion to modify child support because there had been no material change in circumstances since the January 8, 2008, agreed order. Specifically, the family court found that there was no substantial and continuing change in employment or income by either party, that Mr. Bowman continued to maintain health and dental insurance, and that all parties were represented by counsel who were fully aware of the terms of the agreed order. Finally, the family court found that the agreed order was fair and conscionable to all parties based on the award of sole custody to Ms. Tipton and the ten years Mr. Bowman supported A.B. without receiving any child support from Ms. Tipton.

Ms. Tipton subsequently filed a motion to alter, amend, or vacate, which was denied by the trial court on September 15, 2009. This appeal now follows.

Ms. Tipton argues on appeal that the trial court abused its discretion by improperly binding itself to the prior agreement of the parties regarding child

support and by failing to address the guideline amount of the child support and the needs of the child. For the reasons that follow, we find no abuse of discretion.

The decision whether to modify child support is within the sound discretion of the trial court and shall not be disturbed on appeal unless the trial court abused its discretion. *Snow v. Snow*, 24 S.W.3d 668, 672 (Ky. App. 2000) (internal citation omitted). An abuse of discretion occurs when the "trial judge's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

The Cabinet and Ms. Tipton first argue that there was a material change in circumstances that would thus justify a modification of child support. KRS 403.213(1) provides that a parent may use the Kentucky child support guidelines as a basis for periodic modifications of child support if there is a showing of a material change in circumstances that is substantial and continuing. KRS 403.213(2) states that if the application of the Kentucky child support guidelines results in an equal to or more than fifteen percent (15%) change in the amount of child support due per month, there is a rebuttable presumption that there has been a material change in circumstances that is substantial and continuing.

The Cabinet and Ms. Tipton argue that because child support at the time the motion to modify was filed was zero, there was clearly at least a fifteen percent (15%) change in the amount of child support due. However, the family court specifically found that at the time the agreement was entered into, Ms. Tipton

was not working and thus she was attributed minimum wage. At that time, Mr. Bowman was earning approximately $38,000.00 per year and was maintaining health and dental insurance for A.B. As Ms. Tipton was still not working and Mr. Bowman was earning the same income and providing insurance at the time the motion to modify was filed, the family court found that there had been no material change in circumstances since the parties had entered into the agreed order on January 8, 2008, that warranted modifying child support pursuant to KRS 403.213(1). Thus, any presumption that there was at least a fifteen percent (15%) change from the current child support ($0) and the amount of child support per the guidelines was overcome as a matter of law by the court's determination that no material change in circumstances had occurred.

The family court's findings are supported by the record. The burden was on the Cabinet and Ms. Tipton to prove a material change in circumstances, which they failed to do. While Ms. Tipton alleged that she was forced to seek state assistance for A.B.'s medical needs, the family court found that Mr. Bowman had always provided insurance for A.B. and that Ms. Tipton simply needed an updated insurance card. Thus, the only evidence of any change in circumstances was easily refuted by the record.

Furthermore, it is significant that neither the Cabinet nor Ms. Tipton set forth any arguments or evidence demonstrating that A.B.'s physical needs were not being met. If evidence of physical need had been presented in this case, we would undoubtedly agree with Ms. Tipton and the Cabinet that a material change

of circumstances had occurred in this matter. However, such a circumstance has not been presented here. Accordingly, the family court did not abuse its discretion in denying the motion to modify child support.

In their motion to modify child support and now on appeal, the Cabinet and Tipton really challenge the initial January 2008 order, which set a $0 child support amount. They argue that the court did not consider A.B.'s financial needs and that it is against public policy for parents to agree by contract to not support their children. *See Giacalone v. Giacalone*, 876 S.W.2d 616, 619 (Ky. App. 1994) ("[C]ourts have long held that parents may not discharge the duty of supporting a minor child by contract . . . ."). However, neither the Cabinet nor Ms. Tipton appealed from the initial January 8, 2008, order establishing custody and child support, and instead sought to challenge the child support amount via a motion to modify. Thus, the trial court properly reviewed the matter to determine whether a material change in circumstances existed that was substantial and continuing.

Even if we were to consider the Cabinet and Ms. Tipton's challenge of the initial order via its motion to modify child support, we find no abuse of discretion by the family court.

KRS 403.211(1) provides that an action to establish or enforce child support may be initiated by the parent, custodian, or agency substantially contributing to the support of the child. Further, section (2) provides that the child

support guidelines found in KRS 403.212 shall serve as a rebuttable presumption for the establishment or modification of the amount of child support.

However, KRS 403.211(3) provides that a written or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption and allow for an appropriate adjustment of the guideline award if the finding is based upon certain enumerated criteria. KRS 403.211(3)(f) provides:

> The parents of the child, having demonstrated knowledge of the amount of child support established by the Kentucky child support guidelines, have agreed to child support different from the guideline amount. However, no such agreement shall be the basis of any deviation if public assistance is being paid on behalf of a child under the provisions of Part D of the Title IV of the Federal Social Security Act.

In the instant action, the family court specifically found that the parties entered into an agreement on January 4, 2008, that Mr. Bowman would not pay child support but was required to maintain health and dental insurance for the child. Although Ms. Tipton originally thought that Mr. Bowman was not providing the required insurance and sought state assistance to receive medical treatment for A.B., the family court found that Mr. Bowman had in fact been providing insurance per the terms of the agreement, and thus A.B. was not on state assistance.

Furthermore, the record indicates that at the time they entered into the agreement, Ms. Tipton and Mr. Bowman were aware of the child support guideline

calculations, as both parties were represented by counsel and had filed motions concerning child support in November 2007 addressing the same. Thus, under KRS 403.211(3)(f), the family court was permitted to deviate from the child support guidelines and it was not an abuse of discretion for the family court to deny the motion to modify child support accordingly. The family court made a specific finding that the parties had agreed to child support that deviated from the guidelines and made a finding that A.B. was not on state assistance. Accordingly, we find no abuse of discretion in the court's deviation from the child support guidelines.

The family court was also permitted to deviate from the guidelines under KRS 403.211(3)(g), which provides that a court may deviate for any similar factor of extraordinary nature identified by the court which would make application of the guidelines inappropriate. Although the family court did not specifically reference KRS 403.211(3)(g), it did reason that Ms. Tipton had never paid any child support in the ten years Mr. Bowman had primary custody of the child. Given the unique circumstances of this case and the fact that Mr. Bowman had never enforced Ms. Tipton's obligation to pay child support, the trial court considered application of the guidelines inappropriate in this context. We find no error in a deviation under KRS 403.211(3)(g).

Based on the foregoing, we affirm the Jefferson Circuit Court's order entered August 19, 2009, and the order denying the motion to alter, amend, or vacate entered on September 14, 2009.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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