RENDERED: FEBRUARY 11, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000830-ME

MARTIN J. CHALFANT — APPELLANT

v.

APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 02-CI-00449

KAREN CHALFANT (NOW ROSS) — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; DIXON, JUDGE; ISAAC,[1] SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Martin J. Chalfant appeals from a Shelby Circuit Court order entered on April 1, 2010, which denied his motion to recoup overpaid child support.

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

The marriage of Martin and Karen Chalfant (now Ross) was dissolved on December 27, 2005. Karen was awarded $1,289 per month in support for their two children, a son born in 1990 and a daughter born in 1992. The younger child has been diagnosed with mild mental retardation, apraxia, central nervous system dysfunction, hypotonia and scoliosis. Karen filed an appeal from the dissolution judgment. While that appeal was pending, Martin filed a motion to reduce his child support obligation due to a reduction in his income. This motion was filed on March 21, 2007. After holding a hearing on various issues pertaining to custody, the circuit court entered findings of fact, conclusions of law and judgment on February 11, 2008. According to Martin, the judgment stated that he would receive an adjustment in the calculation of his child support payment pursuant to the Kentucky Child Support Guidelines, but reserved the amount of the adjustment for a later ruling. Although the judgment does not contain express words to that effect, it did state that "[t]he child support calculation in the current action will not include Martin's inheritance from his mother's estate[,]" and also ordered an adjustment in the calculation of Martin's child support to reflect his payment of medical insurance for his daughter. A few weeks later, Martin filed a motion requesting the court to set a new child support amount in accordance with its ruling. A hearing was set for May 23, 2008. Meanwhile, on March 21, 2008, this Court rendered its opinion in the underlying appeal. *See Chalfant v. Chalfant*, 2008 WL 744932 (Ky.App. 2008)(2006-CA-000229-MR). Martin filed a motion

for discretionary review. The circuit court postponed the May 23, 2008, hearing until after the motion for discretionary review was ruled upon. The motion for discretionary review was denied on February 17, 2009.

Meanwhile, on January 30, 2009, Martin filed another motion to modify child support citing as grounds that he had lost his job, and that his support obligation for his eldest child would end in June when that child graduated from high school. A hearing on the motion was set for March 18, 2009, and was then rescheduled by agreement of the parties, for April 8, 2009. The hearing was rescheduled yet again, at Karen's request and over Martin's objections, for May 22, 2009. Karen's attorney then filed a motion to withdraw, and the hearing was rescheduled for June 12, 2009.

When the parties appeared in court on that date, the hearing could not be held because Karen had failed to respond to discovery requests and to Martin's motion to compel discovery responses. Martin again asked the court to reduce his child support obligation because the eldest child had graduated from high school the week before. The court issued an order temporarily reducing Martin's child support to $526 per month based on one child. The trial court calculated that amount based on a worksheet submitted by Martin which showed his monthly income to be $6219. The parties were ordered to mediation in August but they were unable to settle the child support modification issue. A hearing on various unresolved issues was held on October 23, 2009, and the circuit court entered an opinion and order finding that Martin had overpaid child support in the amount of

$20,267.22 since March 21, 2007 (the date he filed his initial motion to modify child support).

A hearing on the issue of recoupment of the overpaid child support was held on March 17, 2010. As evidence that the excess funds had not been expended for the reasonable support of their daughter, Martin argued that Karen had deposited the child support checks into a joint business account held by her and her second husband. Karen and her husband testified that it was the only bank account they have and that all the child support checks were used to pay monthly living expenses. The trial court concluded that there were no unexpended child support funds from which recoupment could be made and on April 1, 2010, it entered an opinion and order denying Martin's motion for retroactive recoupment of his overpaid child support. This appeal followed.

Martin argues that under the facts of this case, the trial court erred in applying the test formulated in *Clay v. Clay*, 707 S.W.2d 352 (Ky.App. 1986) for determining when overpaid child support may be recouped. In *Clay*, a panel of this Court held that when a child support award is reversed or vacated on appeal, the payor parent is not entitled to restitution unless there are unexpended child support funds from which the recoupment can be made. After observing that child support is not a contractual obligation but rather derives from the obligation of the parent to the child, not from one parent to another, the *Clay* court explored the public policy ramifications of permitting automatic recoupment of overpaid child support:

> the power of a court to order or permit recoupment should not be denied. But to the extent that such overpayments have been properly expended for the child's support in reliance on the court order, and neither they nor their equivalent are available for repayment, the entitlement to recoupment would, of necessity, entail a reduction in the amount of future support below even that which the appellate court itself, or the trial court in the implementation of the appellate court's mandate, has found necessary. In other words, in such a situation, the onus of the remedy would fall upon the child, not the receiving parent. The existence of a right of recoupment, in that instance, would be entirely inconsistent with the obligation imposed upon the parent by law, because it would require that, during the recoupment period-the interval of time during which the paying parent reduces the periodic payment below the amount last ordered-the child would be receiving less than that found necessary for his or her support; and thus, the recouping parent would not be fulfilling his or her statutory obligation.

Id. at 354 *quoting Rand v. Rand*, 40 Md.App. 550, 392 A.2d 1149, 1151-1153 (1978).

Martin argues that the test in *Clay*, which requires a court to determine whether overpayments have been properly expended on the child's support and are therefore not available for repayment, applies only when a child support award is reversed or modified on appeal, not when, as in this case, the award of child support is modified on a party's motion. He contends that, as an equitable matter, he is entitled to recoupment because Karen had been on notice since February 11, 2008, that a reduction in the amount of child support was a certainty.

> As are most other aspects of domestic relations law, the establishment, modification, and enforcement of child support are prescribed in their general contours by statute and are largely left, within the statutory parameters, to

> the sound discretion of the trial court. This discretion is far from unlimited. But generally, as long as the trial court gives due consideration to the parties' financial circumstances and the child's needs, and either conforms to the statutory prescriptions or adequately justifies deviating therefrom, this Court will not disturb its rulings.

Van Meter v. Smith,14 S.W.3d 569, 572 (Ky.App. 2000)(internal citations omitted).

We agree with Martin that the *Clay* holding applies expressly in cases involving the reversal or vacation of a child support award on appeal. The question is whether the trial court abused its discretion in applying the same reasoning in a scenario involving the modification of child support in response to a motion. Although Martin stresses that Karen was on notice that the child support amount would definitely be modified, the payee in *Clay* was similarly on notice that the amount of child support could be altered as a result of the pending appeal. Furthermore, the public policy concerns which shaped the outcome in *Clay* are equally present in this case, particularly when we consider the disabilities of the younger child.

We find no abuse of discretion in the trial court's ruling in this case, and therefore affirm its order.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kenneth A. Bohnert
Corinne V. Lawrence
Louisville, Kentucky

NO BRIEF FILED FOR APPELLEE