

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000067-ME

AUGUST N. RACH

APPELLANT

v. APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JANIE MCKENZIE-WELLS, JUDGE
ACTION NO. 06-CI-00311

JAMIE L. RACH (NOW CARCAMO)

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: CLAYTON AND COMBS, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: August Rach appeals from the December 29, 2009, order of the Lawrence Family Court for increase of support. That order required Mr. Rach to pay \$850.00 per month in child support to Jamie L. Rach, now Jamie Carcamo. We reverse and remand.

¹ Senior Judge Joseph E. Lambert 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 parties were married on March 7, 2003, and two children were born of the marriage. On August 19, 2006, Mr. Rach filed a petition for dissolution of marriage. Concurrent with the filing of the petition, a separation agreement was also filed. Among other issues, the agreement addressed custody of the minor children, timesharing, and child support. The parties agreed that they would share joint custody of the two children with shared parenting time and that neither party would pay child support to the other. It was also agreed that Mr. Rach would provide health care coverage for the children and also be allowed to claim the children on his income tax returns. On November 20, 2006, the trial court rendered its findings of fact, conclusions of law, and decree of dissolution. The trial court failed to incorporate the settlement agreement into its final judgment.

On November 26, 2007, Ms. Carmaco filed several motions seeking to revoke any right of Mr. Rach's to claim the children on his income taxes, to appoint her as primary custodian, to set a child support obligation for Mr. Rach, and to establish a set timesharing schedule. On May 6, 2008, the parties entered into an agreed order which incorporated the original agreement into the decree and made several amendments to the decree. Those amendments were: appointing Ms. Carmaco as the residential parent; ordering Mr. Rach to pay \$435 per month in child support; and allowing Mr. Rach to claim only one of the children on his tax return for a period of five years, after which time the issue would be revisited.

On November 24, 2009, Ms. Carmaco, through the Lawrence County Attorney's Office, filed a motion to modify the existing child support order. The motion included a child support worksheet. On December 29, 2009, the trial court entered an order increasing Mr. Rach's child support obligation to \$850.00 per month. That amount was determined by application of the child support guidelines. It is from that order that Mr. Rach now appeals.

Mr. Rach's only argument on appeal is that there has been no change in circumstances sufficient to justify a modification of child support. He maintains that his income is the same now as it was when the parties entered into the May 6, 2008, agreed order setting support at \$435 month. In response, Ms. Carmaco maintains that the child support guidelines were followed by the trial court, that there was no abuse of discretion, and thus the order should remain. For the following reasons, we conclude that the trial court erred.

Kentucky trial courts are given broad discretion in determining child support. *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky.App. 2001). "However, a trial court's discretion is not unlimited. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.*

The Kentucky child support guidelines are set forth in KRS 403.212 and "serve as a rebuttable presumption for the establishment or modification of the amount of child support." KRS 403.211(2). "Courts may deviate from the guidelines where their application would be unjust or inappropriate. Any deviation

shall be accompanied by a written finding or specific finding on the record by the court, specifying the reason for the deviation.” *Id.* Mr. Rach argues that a deviation from the guidelines is justified by the timesharing schedule of the parties in which Mr. Rach would keep the children more frequently than envisioned by the local timesharing guidelines.

We first note that child support and timesharing are two distinct, unrelated issues. Although a trial court may consider the period of time that the children reside with each parent when setting child support, child support may be ordered even when the parents have equal possession of the children. *Downey v. Rogers*, 847 S.W.2d 63, 64-65 (Ky.App.1993). It is common, and permissible, for parties to agree to lesser amounts of child support due to timesharing and other reasons. However, *any* deviation from the guidelines of KRS 403.212 requires specific findings showing justification for the deviation. Because no such findings existed at the time the parties agreed to the \$435.00 obligation, there is no way to know why the agreement was reached. The appropriate time to correct the deficiency would have been through a post-judgment motion or timely-filed appeal. However, no relief was sought and the \$435.00 obligation became final and remains the prevailing order of the court.

A child support obligation may be modified “only upon a showing of a material change in circumstances that is substantial and continuing.” KRS 403.213(1). There is a rebuttable presumption of a material change in circumstances when the application of the guidelines to the parties’ circumstances

at the time a motion for modification is made results in a change in the amount of support due that is equal to or greater than a fifteen percent (15%). KRS 403.213(2). “Hence, a circuit court clearly must consider and apply the guidelines in each and every proceeding which seeks modification of a support order.” *Wiegand v. Wiegand*, 862 S.W.2d 336, 337 (Ky.App. 1993).

It was the duty of Ms. Carmaco to show that circumstances had substantially changed since the earlier order. A motion for modification is not an open-ended opportunity to relitigate the original order. This is especially true in situations where the child support order resulted from an agreement between the parties and not from direct order of the trial court. To allow otherwise would permit parties to negotiate for certain rights at the time of dissolution or subsequently in exchange for a smaller child support obligation and then have their financial obligation increased without the benefit of further bargaining. We do not believe this is the scheme envisioned by the legislature pursuant to the language of KRS 403.213(1). Accordingly, the trial court abused its discretion when it raised Mr. Rach’s child support obligation without a proper finding of changed circumstances.

For the forgoing reasons, the December 29, 2009, order of the Lawrence Family Court is reversed and this cause remanded with instructions to the trial court to examine the issue of changed circumstances, make proper findings of fact and conclusion of law, and render a judgment accordingly.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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