RENDERED: JULY 22, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001269-ME

ROGER BARBER APPELLANT

v.

APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE VERNON MINIARD JR., JUDGE
ACTION NO. 04-CI-00225

CAROL BARBER APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,[1] CHIEF SENIOR JUDGE.

STUMBO, JUDGE: Roger Barber appeals from an Order of the Clinton Circuit Court overruling his Motion to Alter, Amend or Vacate a child support modification order. He contends that the trial court erred in its calculation of child

[1] Chief 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 Kentucky Revised Statutes (KRS) 21.580.

support by improperly failing to acknowledge that an original child support agreement had been altered by a valid, subsequent contract. We find no error, and accordingly affirm.

On November 14, 2004, Carol filed a Petition for Dissolution of Marriage in Clinton Circuit Court. At the time of the filing, Carol and her then-husband Roger had two minor children, namely Levi (now age 15) and Sonya (now age 20). Carol and Roger subsequently entered into a Settlement Agreement, which provided in relevant part that the parties would share joint custody of the children with Carol serving as the primary residential custodian. Additionally, the Agreement gave Roger the right of visitation with Levi – but not Sonya – and provided for Roger's payment of $175 per week in child support until Levi graduated from high school or was otherwise emancipated. The Agreement went on to state that the child support obligation was not modified by the graduation or emancipation of Sonya.

On December 16, 2005, the trial court rendered its Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage, which incorporated and adopted the Separation Agreement in full. Slightly over two years later, Roger moved to amend the Decree such that he would be the primary residential custodian of Levi and would have a reduced child support obligation. Carol responded with a motion to award her "full custody" of Levi with curtailed

visitation by Roger. A hearing on the motions, conducted on April 29, 2008, resulted in the court directing the parties to submit an Agreed Order reflecting the parties' resolution of the issues.

It appears from the record that the parties were unable to produce an Agreed Order. After several months, on February 13, 2009, the court rendered a Custody and Visitation Order reaffirming that the parties had joint custody of Levi (Sonya having been emancipated) and ordering that Roger was obligated to pay child support in an indeterminate amount "commensurate with the Kentucky Child Support Guidelines." The child support award was made retroactive to June 1, 2008.

On July 7, 2009, Carol alleged by way of motion that Roger had stopped paying child support, and she asked the court to direct him to pay support under the terms set out in the Final Decree rendered December 16, 2005. Roger responded that the Clinton County Child Support Office had informed him that he no longer owed child support.

In response to the parties competing child support motions, the court rendered an Order on September 17, 2009, directing Roger to pay child support in the amount of $782.76 per month. In fixing this amount, the court stated that,

> Child support would have been calculated as $157.08, for the Respondent [Roger], from the Petitioner [Carol], and $618.32 for the Petitioner, from the Respondent. As the Parties are sharing custody, the Court has calculated this child support for one child, for each Party paying the other Party. However, the Respondent was Ordered [sic] in the December 16, 2005, [sic] Findings of Fact and

> Decree of Dissolution of Marriage, to continue to pay child support for Sonya Barber. Therefore, calculating that child support, the Respondent should be paying $939.84, and giving him credit of $157.08, therefore, the amount of child support ordered is $782.76.

Roger then moved to alter, amend or vacate the order. In support of the motion, he argued that an Agreed Order was entered on February 13, 2009, which dealt with the same subject matter as the December 16, 2005 Decree which reflected a significantly altered arrangement and hence superseded the existing terms of the 2005 Decree relating to both custody and child support. He went on to contend that the court failed to accurately calculate his income for purposes of establishing support, and improperly required Carol to pay support only for Levi while directing Roger to pay for both Levi and Sonya.

After the filing of Carol's responsive brief, the court rendered an order on May 28, 2010, in which it recalculated Roger's obligation to be $551.59 per month. It based this recalculation on the parties' 2007 income tax returns, and subtracted Carol's obligation of $165.63 per month from Roger's obligation of $717.22 per month to reach the resultant $551.59 per month owed by Roger. It went on to note that while the Separation Agreement was somewhat unusual as it related to child support for Sonya, it was mutually agreed to by the parties and was not then before the court for further adjudication. This appeal followed.

Roger now argues that the trial court erred in its calculation of child support. He contends that he and Carol entered into a "valid subsequent contract" which altered and abandoned the terms of their original custody agreement. This valid subsequent agreement, he contends, was reflected in the court's February 13, 2009 Order providing that child support would be calculated based on the statutory guidelines. At issue is Roger's contention that the latter agreement 1) was entered into nearly three and one-half years after the Separation Agreement; 2) that the facts had substantially changed during that period, with Levi spending about the same amount of time with each parent; and, 3) that the latter agreement did not contain the provision that support would not be modified by the emancipation or graduation of Sonya. In sum, Roger contends that the new agreement – as evidenced by the court orders documenting that agreement – voids the child support language set out in the Separation Agreement and is a wholly new agreement which the trial court improperly failed to acknowledge in fixing Roger's child support obligation at $551.59 per month. Additionally, Roger contends that the court improperly failed to acknowledge that the Separation Agreement's language relating to Sonya (i.e., that her emancipation or graduation would not affect Roger's obligation) was no longer in effect, as it had been superseded by the new agreement.

In response, Carol asserts that the terms of the Separation Agreement, as set out in the Decree of Dissolution, remained in effect until

such time as the parties sought to modify child support. She maintains that child support was to be amended only because Levi was spending more time with Roger than he did at the time of dissolution, and that there never was any valid, subsequent agreement which altered the terms of the Separation Agreement.

We have closely examined the record and the law, and find no error in the Clinton Circuit Court's modification of child support. Roger's claim of error centers on his assertion that a valid, subsequent agreement amended the terms of the Separation Agreement. In support of this claim, he points to language set out in an order rendered on February 13, 2009, in which the court stated that the parties have "reached agreement" as to the joint care, custody and control of Levi. Roger does not, however, direct our attention to any "valid, subsequent agreement" which has been memorialized in the record setting out the terms of the purported agreement, nor any proof that the purported agreement addressed the amount of child support as to Levi or the issue of Sonya's emancipation. Additionally, the trial court went so far as to state in its May 28, 2010 Order that "at no time has either Party agreed to change the Parties' original divorce decree." In the absence of any basis for finding that the parties agreed to make void the terms of the Separation Agreement as it relates to child support, we cannot conclude that the trial court was bound by any such purported agreement. This is especially true since the Separation Agreement was incorporated into

the Decree of Dissolution. Any purported agreement to alter the terms of the Separation Agreement would necessarily be memorialized in writing and incorporated into the record by way of a pleading or court ruling. No such agreement, pleading or ruling appears in the record.

Roger goes on to argue that the trial court did not properly establish the respective incomes of the parties, and that the method utilized by the court to calculate child support was arbitrary and inequitable. We are not persuaded by this argument. The record indicates that at the April 2008 hearing, the court relied on the then-latest 2007 tax returns, and the issue of income was not raised until Roger filed a subsequent motion to alter, amend or vacate. As to the method utilized by the court to calculate child support, we also find no error. In calculating the modification of support resulting from Levi spending more time with Roger, the court relied on the statutory income worksheets, which each party completed and which are set out in the record. This change resulted in a reduction of Roger's child support obligation from $757.75 per month to $551.59 per month. It reflected the court's recognition that Roger's income was approximately three times that of Carol's, and the court went so far as to acknowledge on the record that the statutory method of calculating child support in the instant case was the same as that utilized in the trial judge's own divorce. We have no basis for concluding that the court's modification of child support was not in conformity with KRS Chapter 403 and the supportive case law. *See*

generally, *Giacalone v. Giacalone*, 876 S.W.2d 616 (Ky. App. 1994). Accordingly, we find no error.

Lastly, Roger contends that any interpretation of the Separation Agreement requiring him to pay support to Carol after Sonya's emancipation or graduation is void as against public policy. He directs our attention to *Gordon v. Gordon's Adm'r*, 168 Ky. 409, 182 S.W. 220 (1916), which provides that ". . . courts will not enforce any agreement which, in its objective, operation, or tendency, is calculated to be prejudicial to the public welfare, to sound morality, or to civil honesty." He goes on to maintain that the Separation Agreement violates public policy and is, therefore, not enforceable because it could result in his payment of child support to Carol for the rest of Sonya's life.

We are not persuaded that the provision of the Separation Agreement, which addresses Sonya's emancipation or graduation, could result in Roger paying child support to Carol for the remainder of Sonya's life. The provision at issue states that, "[T]he child support shall not be modified by the emancipation or graduation from High School by the said Sonya Barber." Separation Agreement Paragraph 8, however, states, "[C]hild support shall continue to be paid in the sum of $175 per week until such time as the minor child Levi Barber is emancipated or graduates from High School, which ever [sic] occurs first." The plain meaning of this provision makes it clear that – contrary to Roger's claim - he is not obligated

to pay child support to Carol for the remainder of Sonya's life. Rather, the clear language of the Separation Agreement provides that his obligation terminate with the emancipation or graduation of Levi. We find no error.

For the foregoing reasons, we affirm the September 27, 2009 Order of the Clinton Circuit Court overruling Roger's Motion to Alter, Amend or Vacate its prior child support order.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ralph D. Gibson
Somerset, Kentucky

BRIEF FOR APPELLEE:

Thomas G. Simmons
Monticello, Kentucky