RENDERED: NOVEMBER 13, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000163-ME

JAMES MATTHEW COLLINS — APPELLANT

v.

APPEAL FROM CARROLL CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 11-CI-00232

TAMMY MARIE BARRY-COLLINS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DIXON, AND D. LAMBERT, JUDGES.

COMBS, JUDGE: James Collins appeals an order of the Carroll Circuit Court setting child support. We have reviewed the record and the law, and we affirm.

James and Tammy Barry-Collins married on February 3, 2007, and he adopted then her two children. On December 27, 2011, Tammy filed a petition for

dissolution. A property settlement agreement accompanied the petition. It included a provision setting child support to be paid by James. According to the agreement, he was to pay Tammy six hundred dollars every other week.

The trial court entered the decree on March 5, 2012, and incorporated their agreement into the decree – including the portion as to the child support arrangement. However, on June 25, 2012, James and Tammy filed an addendum to the agreement which temporarily increased James's obligation to seven hundred fifty dollars every other week. They agreed that those payments were for marital debt in lieu of child support, and the debt obligation was to end on March 15, 2013. In the addendum, Tammy waived future child support because of the pending adoption of the children by their biological father.

As anticipated, the children's biological father filed a petition for adoption on June 7, 2013. James's consent to the adoption and the termination of his parental rights was entered on June 12, 2013. However, for unknown reasons, the adoption was never finalized. Subsequently, on January 9, 2014, Tammy filed a motion seeking to have James's child support reinstated. After a hearing, the domestic relations commissioner filed its order recommending denial of the motion on September 15, 2014. The trial court, however, disagreed with the commissioner's proposal and entered an order December 30, 2014, setting child support at six hundred dollars every other week according to the terms of the original property settlement agreement. This appeal followed.

James's sole argument is that the agreed order of June 25, 2012, which waived his child support obligation, should be enforced. We disagree.

Matters concerning child support must be administered according to statute and by discretion of the trial court. *Nosarzewski v. Nosarzewski*, 375 S.W.3d 820, 822 (Ky. App. 2012). Child support obligations may be modified only pursuant to the sound discretion of the court. *Snow v. Snow*, 24 S.W.3d 668, 672 (Ky. App. 2000). We may disturb the findings of the trial court only if it has abused its discretion by making decisions that were "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Clary v. Clary*, 54 S.W.3d 568, 571 (Ky. App. 2001).

In finding that the waiver of child support was unenforceable, the trial court relied in part on Kentucky Revised Statute[s] (KRS) 403.180, which provides guidance regarding the applicability of property settlement agreements. Pertinent to this case, the statute provides as follows:

> (2) In a proceeding for dissolution of marriage . . . the terms of the separation agreement, except those providing for the custody, support, and visitation of children, are binding upon the court. . . .
>
> (6) Except for terms concerning the support, custody, or visitation of children, the decree may expressly preclude or limit modification of terms if the separation agreement so provides.

Case law reiterates that "the statute makes it clear that while the parties are free to enter into a separation agreement to promote settlement of the divorce, the court still retains control over child custody, support, and visitation and is not bound by

the parties' agreement in those areas." *Tilley v. Tilley*, 947 S.W.2d 63, 65 (Ky. App. 1997). Our courts have established that "a parent's obligation to support his/her minor child cannot be waived." *Bustin v. Bustin*, 969 S.W.2d 697, 699 (Ky. 1998) (*citing Whicker v. Whicker*, 711 S.W.2d 857 (Ky. App. 1986)).

James argues that the agreement which terminated his obligation to pay child support should be enforced. Although he cites several cases, they were decided prior to the enactment of KRS 403.180 in 1972. Thus, they do not apply to this case. However, he also submits the later case of *Mauk v. Mauk*, 873 S.W.2d 213 (Ky. App. 1994), for our consideration. The facts of *Mauk* are similar to those in the case before us.

Mauk paid child support for approximately six years after dissolution of his marriage. His former wife then asked Mauk to execute a waiver of parental rights and consent to the adoption of the children by her new husband. He complied and ceased making child support payments. The adoption was never finalized, but the children used the last name of their stepfather. Mauk knew of the name change, but he was never advised that the adoption had not actually taken place. His former wife did not seek child support.

Fifteen years after Mauk executed the consent/waiver, and after the children had reached majority, his former wife initiated an action seeking arrearages of unpaid child support. This Court held that at the time of execution, the agreement was reasonable and equitable because the parties were taking steps to effectuate an adoption of the children. The court declined to set aside the agreement because

Mauk never received notice that the adoption had not occurred, and his former wife had never attempted to modify the agreement. This Court affirmed the trial court's decision to uphold the original agreement relieving him of any child support obligation.

However, this case is distinguished from *Mauk* in numerous ways. Tammy seeks *prospective* child support -- not arrearages. The children in *Mauk* had been emancipated while James and Tammy's children are minors. As this appeal demonstrates, Tammy is timely seeking to modify the agreement. James is fully aware that the adoption was not completed.

We are mindful that public policy demands the payment of child support because it is a parent's obligation to his child -- not to the other parent. *Clay v. Clay*, 707 S.W.2d 352, 353-54 (Ky. App. 1986) (*quoting Rand v. Rand*, 392 A.2d 1149, 1151-53 (Md. App. 1978)). Any agreement which protects a parent from that obligation is unconscionable as being repugnant to public policy. *Berry v. Cabinet for Families & Children ex rel. Howard*, 998 S.W.2d 464, 468 (Ky. 1999). While James voluntarily executed consent to termination of his parental rights, actual termination could not take legal effect until adjudicated by the court. *See Hicks v. Enlow*, 764 S.W.2d 68, 71 (Ky. 1989).

Therefore, we affirm the judgment of the Carroll Circuit Court.

DIXON, JUDGE, CONCURS.

D. LAMBERT, JUDGE, DISSENTS.

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