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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001627-ME

BILLY JOE MALICOTE APPELLANT

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE TAMRA GORMLEY, JUDGE
ACTION NO. 97-CI-00364

KAREN KAY MALICOTE (NOW HUTTON) APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART AND REMANDING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; JONES AND TAYLOR, JUDGES.

JONES, JUDGE: The Appellant, Billy Joe Malicote, appeals the Scott Circuit Court's orders concerning the proper amount of his support arrearage. Appellant's argument consists of two separate elements: 1) he claims he should receive a credit because his support obligation included payments for childcare expenses that were never actually incurred; and 2) he claims his support arrearage should be

recalculated based on a change in his income. For the reasons more fully explained below, we affirm in part, vacate in part, and remand for further proceedings.

I. Background

Before we delve into the specifics of this appeal, we feel compelled to explain that our review has been greatly hampered by the state of the record. The facts of this matter are not overly complicated. The procedural history, however, is another story altogether. Having spent a considerable amount of time tearing apart the record, it appears to us that Appellant's May 2006 motion for support reduction is still pending before the trial court. Resolution of the May 2006 motion is necessary before the trial court can properly calculate Appellant's total child support arrearage. Because the trial court failed to rule on the May 2006 motion, we can neither affirm nor reverse the most recent order establishing Appellant's child support arrearage. Once the trial court rules on the May 2006 motion, it will then be able to calculate the proper arrearage amount. It is our sincerest hope that adjudication of the remanded matters will occur swiftly so that this case can break free of the procedural quagmire that it has been caught up in for so long.

The parties were married on September 25, 1992. Two children were born of this marriage. Both children were minors when the parties filed for dissolution in 1997. The parties entered into an agreed custody and property settlement, which was accepted by the trial court and incorporated into the

dissolution decree entered into the record on June 11, 1998. Under the terms of the agreement, Appellant had a monthly child support obligation of $632.00. This amount included $199.61 for childcare expenses. The agreement provided that Appellee was to "document" her childcare expenses by providing Appellant "copies of her cancelled checks on no less than a quarterly basis."

On May 18, 2001, Appellant filed a *pro se* motion seeking to modify his child support obligation based on a change in employment status. He also indicated in his affidavit that he had not received any cancelled checks from the Appellee for childcare expenses. He averred that Appellee's mother was watching the children free of charge. There is no indication in the record that this motion was ever decided.

The next docket entry, dated August 2, 2005, is another motion to review and modify child support by Appellant, filed with the assistance of counsel. Therein, Appellant again asserted that Appellee had failed to document childcare expenses. Thereafter, the trial court entered a temporary order on October 13, 2005, directing Appellee to provide proof of childcare expenses within twenty days. It is unclear whether Appellee complied with this order. By order entered January 11, 2006, the trial court reduced Appellant's monthly support obligation to $589.00. It further determined that he had a support arrearage of $6,970.00; Appellant was ordered to begin making an additional monthly payment of $100 toward the arrearage. The order does not contain any explicit findings on the childcare issue, but indicates that Appellant stipulated to the arrearage amount.

On May 10, 2006, Appellant filed a *pro se* motion to enforce reasonable visitation, to review and modify child support, and to offset arrearage with past childcare expenses not accounted for by Appellee. A hearing was conducted before the domestic relations commissioner on July 14, 2006. The commissioner's report indicates that the parties were to exchange information to determine the appropriate amount of child support.[1] The next docket entry indicates that the trial court would conduct a hearing on back child support and timesharing in October. For reasons that are not apparent from the record, this hearing was cancelled. No further action on Appellant's motion appears to have taken place following cancellation of the hearing.

In 2009, the Scott County Attorney moved to hold Appellant in contempt for failure to pay child support. The County Attorney stated that as of August 31, 2009, Appellant had a support arrearage of $20,464.21. The contempt motion was set for hearing in April of 2010. The hearing was cancelled when Appellant's new counsel filed a notice of unavailability. For unknown reasons, the hearing was never rescheduled.

This matter lay dormant for the next three years. Then, on October 29, 2013, Appellant renewed his motion for modification of his support obligation and credit for childcare payments.[2] Appellant's motion requested the court to hold

[1] It appears from the record that Appellant may have become unemployed between January of 2006 and May of 2006, thereby explaining why he filed a motion to modify so close in time to the previous order.

[2] We use the word "renew" because Appellant's May 2006 motion had yet to be finally adjudicated when Appellant filed this motion in October 2013.

Appellee in contempt for her failure to produce childcare documentation; offset his child support arrearage in the amount of $32,956.10 for the accrued child care expenses and offset for a student loan which was never applied as stipulated by the parties. After a period of discovery, the trial court conducted a "hearing" in January of 2014 on Appellant's motion. At the hearing, the Scott County Attorney indicated to the trial court that the last proof of childcare that office received was in 2009. At the conclusion of the hearing, the trial court indicated that it would reserve the childcare issue. However, on January 30, 2014, the trial court entered an order providing:

> 1. That due to the day care not being provided since December 31, 2009, the Petitioner's child support is decreased to the sum of $452.76 per month, beginning January 1, 2010, this is using the calculation from the 2006 amount of support, per 2011 the child support is decreased to the sum of $391.02 as oldest emancipated May 31, 2011.
> 2. That Petitioner has an amended arrearage in the amount of $27,285.64 which accrued during the period of June 11, 1998 through December 31, 2013, reflecting the changes in paragraph 1.
> 3. That upon the emancipation of the youngest child, January 31, 2014, the Petitioner shall continue to pay the sum of $391.02 per month on the child support arrearage, until said amount is paid in full. . . .

Appellant moved the trial court to vacate its order. The trial court sustained as to the total arrearage only. The amended order provides that Appellant's arrearage is determined to be $29,199.58 from June 11, 1998, through December 31, 2013, not $27,285.65 as set forth in the written order of January 30, 2014. This appeal followed.

II. Standard of Review

"As are most other areas of domestic relations law, the establishment, modification, and enforcement of child support is generally prescribed by statute and largely left, within the statutory parameters, to the sound discretion of the trial court." *McKinney v. McKinney*, 257 S.W.3d 130, 133 (Ky. App. 2008). The standard of review for a motion to modify child support is abuse of discretion. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001).

III. Analysis

Appellant's first argument is that the trial court's final written order does not reflect what was decided following the hearing. Specifically, Appellant asserts that the trial court's written order adjudicated the childcare issue, but as confirmed by the notations in the docket sheet, at the conclusion of the hearing the trial court stated that it would reserve that issue for future proceedings.

This is not a valid basis for appeal. The final written order issued by the trial court is controlling irrespective of what occurred during the hearing. *See Commonwealth v. Hicks*, 869 S.W.2d 35, 37 (Ky. 1994) (overruled on other grounds by *Keeling v. Commonwealth*, 381 S.W.3d 248 (Ky. 2012)). Hence, when there is a conflict between oral pronouncements and a written order, the written order controls.[3] *Id.*

[3] The trial court's docket entry is signed by the judge. Even if we were to consider this an order, it was not final. Therefore, the trial court had the ability to modify it by subsequent order.

Next, Appellant argues Appellee never presented proper proof of her childcare expenses in the form of cancelled checks. He asserts that her failure should result in a childcare credit to him retroactive to the parties' separation agreement. We disagree. The trial court determined that Appellee presented sufficient proof of childcare expenses through 2009. After that date, the parties agreed that Appellee was no longer paying for childcare.

Pursuant to KRS 403.211(6), amounts allocated for childcare costs are "in addition to the amount ordered under child support guidelines." The allocation of childcare expenses is in the nature of a prepayment or reimbursement of the share of actual costs, and if the expense is not incurred the other party is entitled to be repaid the amount they had provided. *Olson v. Olson*, 108 S.W.3d 650, 652 (Ky. App. 2003).

While Appellee did not produce the exact proof called for in the separation agreement, cancelled checks, the trial court accepted her documentation as sufficient to show that she had paid for childcare through 2009. The provision at issue was clearly placed in the separation agreement for the purpose of requiring some kind of documentation of childcare expenses. Appellee's failure to present the exact documentation specified in the agreement did not require the trial court to nullify the childcare expenses that Appellee documented with proof. *See Craig v. Beach*, 198 S.W.2d 220, 222 (Ky. 1946) ("[T]he law does not require perfection, and a substantial compliance [with certain contract terms] is sufficient."). It was within the trial court's prerogative to determine whether the proof submitted by the

Appellee was sufficient to show that she actually paid for childcare. In light of the evidence produced, the trial court determined that Appellee had provided sufficient documentation of childcare expenses through 2009. Therefore, we agree that the trial court properly refused Appellant a credit prior to 2010. Thereafter, the trial court properly credited Appellant's arrearage as no childcare expenses were incurred after that date.

Appellant also argues that his income for the purpose of calculating his child support was overstated resulting in an overinflated arrearage. As a primary matter, we must point out that it would generally not be acceptable to argue for a recalculation of accrued child support based on a change in income. KRS 403.213(1) provides that child support provisions "may be modified only as to installments accruing *subsequent* to the filing of the motion for modification and only upon a showing of a material change in circumstances that is substantial and continuing." KRS 403.213(1). In the normal course, any change could only be retroactive to the date of the motion. The problem in this case, however, is that Appellant moved for a reduction in child support based on a change of income in May of 2006.

For reasons that are not entirely clear from the record, the court never ruled on Appellant's May 2006 motion. That motion is still pending before the trial court. This presents a myriad of procedural problems. Appellant "agreed" to the arrearage amount set out in the September 2014 order in the sense that Appellant conceded that the child support office's mathematical calculations were

correct based on the $589.00 ordered in January 2006. In so doing, it is clear to us that Appellant still maintained that his child support obligation should not have been based on $589.00 for the entire period because his income changed shortly after the January 2006 order.

The trial court's September 2014 order calculated the arrearage as if Appellant had never filed the May 2006 motion. This was an error. The May 2006 motion must be adjudicated before the total arrearage can be calculated. Therefore, we must vacate the portion of the trial court's order dealing with the child support arrearage amount. On remand, the trial court must first address the still-pending May 2006 motion. Once that motion has been adjudicated, the child support arrearage amount can be calculated with finality. While the result may end up the same, we believe fairness dictates that Appellant finally be provided with an opportunity to have this issue heard and decided.

IV. Conclusion

For the reasons set forth above we affirm the ruling of the Scott Circuit Court with respect to childcare costs and remand in part for a ruling on Appellant's motion for reduction in child support.

ALL CONCUR

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Kevan Morgan Georgetown, Kentucky	Charles M. Perkins Georgetown, Kentucky