

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2006

JOHN LEHMAN,
Appellant,

v.

DEPARTMENT OF REVENUE o/b/o **JOANNE LEHMAN,**
Appellee.

No. 4D06-1056

[December 13, 2006]

POLEN, J.

Appellant, John Lehman, appeals a non-final denial of his motion to vacate an order of contempt. The order of contempt was ordered as a result of Appellee's, the Department of Revenue ("Department"), calculations showing that Lehman owed child support arrearages in the amount of \$29,003.17 for his three children. Lehman filed a motion to vacate the order of contempt, pursuant to Florida Rule of Civil Procedure 1.540(b)(3), alleging that the Department made misrepresentations to the court by seeking child support for children who were emancipated, either by age or by incarceration. Lehman argued the child support order allocated the award per child, and that he was not required to file a petition for modification in order for an automatic reduction to take place once each child was emancipated. We agree that the parties intended that the child support be allocated per child and reverse and remand.

A trial court's denial of a motion to vacate is reviewed using an abuse of discretion standard. *Top Dollar Pawn Too, Inc. v. King*, 861 So. 2d 1264, 1265 (Fla. 4th DCA 2003). In *State, Dept. of Revenue, Child Support Enforcement v. Segrera*, 661 So. 2d 922 (Fla. 1995), the third district stated:

It is well established that a trial court may, in its discretion, award a lump sum, rather than a separate amount of support for each child, and that the party seeking a reduction in support **has the duty to petition the court to reduce the amount when one child attains majority**...

The payor parent must continue to make child support payments pursuant to the provisions of a valid order until he files a motion for modification and such motion is favorably acted upon.

Id. at 923 (emphasis added). However, in *Yockey v. Yockey*, this court held that child support could be modified retroactively to the filing date of the petition. 784 So. 2d 582 (Fla. 4th DCA 2001). Moreover, when a child support provision allocates the amount of support per child, the trial court can retroactively terminate child support prior to the date such relief is requested. See *State of Fla. Dep't of Revenue ex rel. Wilson v. Wilson*, 782 So.2d 952, 954 (Fla. 2d DCA 2001).

The controlling question in this case is whether the child support award was an aggregate award for all three children or an award allocated per child. In *Florida Department of Revenue v. McClung*, 750 So. 2d 244 Fla. 3d DCA 2000), the third district determined that the language in separate provisions of the parties' agreement should be read together to determine its true intent. *Id.* at 245-46. The language in the parties' agreement was as follows:

The Husband shall pay to the Wife, for the support and maintenance of the minor children of the parties, the sum of \$400 per month.

The support rights of each child shall terminate and the obligation of the husband to pay support for each child shall cease upon occurrence [sic] of any one of the following:

The death of the child.

Attainment of his eighteenth birthday.

The valid marriage of the child.

The lawful entry of the child into the military service of the United States.

Id. at 245. This issue was also dealt with in a fifth district case, *Rodgers v. Reed*, 931 So. 2d 236 (Fla. 5th DCA 2006). In *Rodgers*, the parties' support agreement first obligated the father to pay "\$212.00 per week for the support of the minor child(ren)." *Id.* at 237. This provision was immediately followed by the parties' three children's names and their birthdates. *Id.* The agreement further stated:

Child support payments shall continue until the death of said minor child, the valid marriage of the child, the lawful

entry of the child into the military service of the United States for a continuous period of time of one year or more, or until attainment of said minor child's 18th birthday, unless said child is at the time enrolled in high school on a full time basis, and living at home, in which case support shall continue until the child graduates high school.

Id. The fifth district determined that the reading of these two provisions led to the conclusion that the child support was allocated and therefore, the child support could be retroactively modified to the date of emancipation of each child. *Id.* at 238-39.

We find that the facts of this case are analogous to those in *McClung* and *Rodgers*. The support order in this case read: “[Lehman] is obligated to pay child support for the following minor children. . . .” The children’s names and birthdates were then listed. The agreement stated Lehman was responsible to pay the sum of \$843.00 per month.

Child Support payments shall continue until the minor child(ren) reach(es) the age of 18, die(s), marry(ies) or otherwise emancipate(s). All payments toward satisfaction of the past support shall continue after the child(ren) emancipate(s) until the past support/arrears are satisfied in full and may be enforced by contempt.

As in *Rodgers*, the fact that the children’s name and birthdates were listed in the support order, along with the fact that the conditions for emancipation were laid out, leads to the conclusion that the child support was to be allocated amongst the three children. 931 So. 2d 236. While this language may not be as clear as that found in *McClung*, i.e. “[t]he support rights of **each** child shall terminate and the obligation of the husband to pay support for **each** child shall cease” when each child reached emancipation, we find that the parties’ intent that the child support be allocated per child is still evident. 750 So. 2d at 245 (emphasis added).

Lehman argues that the child support award should have automatically been reduced by one third as each child was emancipated. We find this argument to be unpersuasive, as the language in the child support agreement is not clear as to the exact amount the child support is to be reduced by upon a child’s emancipation. In viewing the child support guidelines, section 61.30, Florida Statutes (2005), we note that as the number of children subject to child support at a set income level

decreases, the amount of child support required does not decrease on a pro rata basis. To accomplish such a result, the agreement or final judgment would have to specify language such as “X dollars per month per child, such amount to be discontinued as each child is emancipated.” Therefore, we reverse the trial court’s denial of Lehman’s motion to vacate the contempt order with instructions to hold an evidentiary hearing to determine the correct amount of arrearages and the appropriate reduction in child support payments.

KLEIN and MAY, JJ., concur.

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Appeal of a non-final order from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Carol-Lisa Phillips, Judge; L.T. Case No. 99-2182 3892.

Ashley A. Sawyer and William M. Shaheen of Libow & Shaheen LLP, Boca Raton, for appellant.

No brief filed for appellee.

Not final until disposition of timely filed motion for rehearing.