RENDERED: September 12, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-2236-MR

JOHN W. SANDRIDGE APPELLANT

V.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS STEPHENS, JUDGE
ACTION NO. 95-CI-001070

ANGELA SUE SANDRIDGE APPELLEE

OPINION AFFIRMING

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BEFORE: DYCHE, GUIDUGLI, and MILLER, Judges.

DYCHE, JUDGE. John W. Sandridge, acting pro se, appeals a July 11, 1996, order of the Kenton Circuit Court denying his motion to modify child support brought pursuant to Kentucky Revised Statute (KRS) 403.213. We affirm.

The parties were divorced in October 1993 pursuant to an Indiana state dissolution decree. According to the decree, Angela was awarded custody of the couple's son, Michael, who was born in November 1990, and John was to pay monthly child support of $450. Angela and Michael lived in Kentucky until October 1994, when John was awarded temporary custody of the child by

agreed order. At that time, John had remarried, lived in Maryland, and was in military service with the Air Force.

In April 1995, John filed a petition for modification of child custody and child support in the Maryland Circuit Court. In August 1995, Angela filed a motion in Kenton Circuit Court for determination of jurisdiction and temporary custody. John moved to dismiss Angela's motion arguing Maryland was the more appropriate forum. By agreement with the Maryland court, Judge Douglas Stephens conducted a hearing on jurisdiction and held that Kentucky was the more appropriate forum, but reserved the issues of custody and child support for mediation.

On September 29, 1995, an Agreed Order on custody, visitation and child support was entered. The parties agreed to joint legal custody of their son, with Angela retaining physical possession and John having liberal visitation. The order also provided that John pay child support of $450 per month, except that this amount would be reduced temporarily to $300 from October to December 1995. The order also stated the parties would not seek modification of the child support amount for two years.

On May 23, 1996, Angela moved for modification of the summer visitation provision of the September 1995 Agreed Order, and to hold John in contempt for failure to pay the full monthly child support. On June 21, 1996, John moved to modify the child support obligation based on a substantial and continuing change in his income and the absence of day care expenses for the child.

After conducting a hearing on June 24, 1996, the circuit court issued an order on July 11, 1996, denying John's motion to modify child support, but refusing to hold him in contempt. This appeal followed.

John contends that the circuit court erred by failing to find a substantial change in his income to support a reduction in his child support payments. He also challenges the circuit court's holding that he was obligated to pay the full $450 per month despite the absence of actual child care expenses. John admitted that he unilaterally reduced his child support payments to $300 for the period of January 1996 to June 1996 because Michael was not attending day care. He argues that he attempted to resolve the dispute over the child support informally with Angela, but he was unsuccessful. John argues the child support amount in the September 1995 agreement was based on his estimate that he would be earning at least $30,000 per year, but, in fact, he was only earning half that amount.

It is well settled that the parties to a dissolution of marriage may enter into a separation agreement regarding issues of custody, visitation and support of children. Giacalone v. Giacalone, Ky. App., 876 S.W.2d 616, 618 (1994); KRS 403.180. The terms of the agreement are enforceable as contract terms and by all remedies available for enforcement of a judgment. KRS 403.180(5).

A divorce decree approved by the court generally may preclude or limit modification consistent with the settlement

agreement, except for terms concerning custody, visitation or child support. KRS 403.180. The provisions of a divorce decree dealing with child support may be modified only as to installments accruing subsequent to the filing of a motion for modification and only upon a showing of a material change in circumstances that is substantial and continuing. KRS 403.213(1). A court may recognize the parents' oral agreement to modification of child support, but the agreement must be proven with reasonable certainty and the court must find that the agreement is fair and equitable under the circumstances. Price v. Price, Ky., 912 S.W.2d 44, 46 (1995); Whicker v. Whicker, Ky. App., 711 S.W.2d 857, 859 (1986). Additionally, the proven oral agreement will be enforced only if the modification might reasonably have been granted, had a proper motion to modify been brought. Price, 912 S.W.2d at 46.

John argues the circuit court erred by finding him liable for child support arrearages. He contends that he was obligated to pay only $300 per month, rather than $450 per month because the agreed upon latter amount included $150 for day care expenses that were not actually incurred between January and June 1996. The September 1995 Agreed Order stated in relevant part as follows:

> The child support obligation of the respondent shall remain at $450.00 per month, and includes liability for basic support and day care; however, the respondent's support obligation shall be reduced to $300.00 per month from October 1, 1995 to December 31, 1995, due to the fact that petitioner's day care needs will be less during the period.

> On January 1, 1996, the child support obligation shall return to $450 per month. The parties will maintain this as the base amount for a period of no less than two years, before any modification is sought.

John indicated that Angela complained about his failure to pay the full $450 starting in January. The parties discussed a possible adjustment to the amount but could reach no consensus. John testified that he believed he did not have to pay the full amount when no actual day care expenses were incurred. Angela testified that she agreed to the temporary reduction to $300 per month between October 1, 1995 and December 31, 1995 because John was having financial problems. She indicated that the agreement was intended to require a set amount of $450 per month after January 1, 1996, regardless of whether Michael was placed in an outside day care facility. The trial court held that the agreement was sufficiently definite to require a fixed amount for child support of $450.

After review of the record, we agree with the circuit court that the language of the Agreed Order is unambiguous and imposes a fixed obligation on John to pay $450 per month child support. In fact, the Agreed Order does not designate $150 of the $450 be attributed to day care expenses. The agreement clearly does not authorize John to automatically reduce the child support payments because of a variation in actual day care expenses. Moreover, a parent may not unilaterally modify a child support order. See Price v. Price, supra. Consequently, we hold

that the September 1995 Agreed Order should be construed to require John to pay $450 monthly child support.

John also argues that the circuit court erred by failing to reduce his child support obligation because there was a material change in his circumstances. He maintains that at the time he agreed to pay $450 child support, he expected to earn in excess of $30,000. He states that the circuit court failed properly to appreciate his recent career change from employment with a steady income in the Air Force to a fluctuating income as a self-employed real-estate agent.

In the case sub judice, the parties agreed to fix the child support payments at $450 per month. In addition, John agreed not to seek a modification in the child support amount for a period of two years. Although KRS 403.180(6) generally prescribes restraints on modification of child support in divorce decrees based on settlement agreements, John's waiver of his ability to seek modification is valid under the criteria delineated in Giacalone. John has not challenged the voluntary and knowing nature of the September 1995 Agreed Order. He was represented by counsel at the time. There is no evidence of fraud or overreaching by Angela in reaching this agreement. The trial court held that John was bound by the Agreed Order both as to the amount of the child support and the limitation on his seeking modification of the child support amount. We believe the circuit court did not abuse its discretion in refusing to modify the child support amount.

For the foregoing reasons, the order of the Kenton County Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John W. Sandridge
Millersville, Maryland

BRIEF FOR APPELLEE:

Joel K. Jensen
Covington, Kentucky