

RENDERED: August 13, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000944-MR

MARCELLO MAJORS

APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
ACTION NO. 93-CI-00058

BARBARA MAJORS (WEATHERSPOON)

APPELLEE

OPINION

REVERSING AND REMANDING

** ** * * *

BEFORE: COMBS, HUDDLESTON, and KNOFF, Judges.

HUDDLESTON, Judge: Marcello Majors (hereinafter "Marcello") appeals from an order of the Graves Circuit Court denying his motion to establish child support. After reviewing the record and the arguments of counsel, we reverse and remand.

The parties married in 1974 and separated in 1993. During the marriage, they had five children: Gina, born on May 22, 1975; Amanda, born on June 26, 1977; Marcella, born on March 30, 1979; Matthew born on March 8, 1981; and, Jerrod, born on May 19, 1985. In March 1993, Barbara Majors (now Weatherspoon) (hereinafter "Barbara") filed for dissolution of the marriage and requested that she be awarded custody of the children and that she receive child support. At the time of the dissolution petition, Barbara worked part-time and Marcello was not employed because of a physical disability. In May 1993, the circuit court entered an agreed order

giving Barbara temporary custody of the parties' four minor children and suspending any child support payments on behalf of the children from Marcello so long as Barbara received payments from the Social Security Administration based on Marcello's disability.

In January 1994, the parties executed a proposed Separation Agreement and Property Settlement under which Barbara was to be awarded custody of the four minor children. The Separation Agreement stated that Marcello would not be required to pay child support because the children were already receiving Social Security payments based on his disability status. On January 4, 1994, the trial court issued a Decree of Dissolution of Marriage that incorporated the Separation Agreement. The court effectively adopted the parties' agreement by awarding Barbara custody of the four minor children and holding that the Social Security payments the children received would satisfy Marcello's obligation to pay child support.

In February 1995, Barbara filed a motion to set child support. Marcello responded by asserting that the parties had agreed that neither would pay child support because the children were receiving Social Security Disability Benefits. In March 1995, the trial court issued an order reaffirming its prior order of January 1994 and specifically noting that the parties' Separation Agreement provided that the children's Social Security benefits would satisfy Marcello's child support obligation.

In August 1996, Marcello assumed custody over one of the minor children, Marcella, by agreed order. In July 1997, again by agreed order, the parties modified custody of the remaining two

minor children, Matthew and Jerrod, by transferring sole custody to Marcello with Barbara retaining visitation rights. Neither of the agreed orders modifying custody addressed child support. In February 1998, Marcello filed a motion to establish child support based on the Kentucky Child Support Guidelines. Following a hearing, the trial court denied the motion in April 1998, noting that under the previous court orders modifying child custody no child support was ordered, and that Marcello was receiving the Social Security Disability Benefits for the children following the transfer of custody.

Marcello argues that the trial court erred by failing to determine Barbara's child support obligation according to the Kentucky Child Support statutes. He contends that statutory law provides that the child support guidelines create a rebuttable presumption for assigning the amount of child support. We agree.

KRS 403.211 provides, in pertinent part:

(2) At the time of initial establishment of a child support order, whether temporary or permanent, or in any proceeding to modify a support order, the child support guidelines in KRS 403.212 shall serve as a rebuttable presumption for the establishment or modification of the amount of child support. Courts may deviate from the guidelines where their application would be unjust or inappropriate. Any deviation shall be accompanied by a written finding or specific finding on the record by the court, specifying the reason for the deviation.

Furthermore, KRS 403.213(2) establishes a rebuttable presumption supporting modification of an existing child support order where there is a material change in circumstances, which is defined as a fifteen percent (15%) change in the amount of support due per month in the parties' child support obligations as calculated under the guidelines. Under the guidelines, the minimum amount of child support required to be paid (absent an appropriate deviation) is \$60.00 per month. KRS 403.212(4).

The original divorce decree adopted the parties' Separation Agreement, which indicated that the Social Security Disability Benefits received by the children would satisfy Marcello's child support obligation. There is no indication in the record that the trial court applied the child support guidelines at that time or made findings that a deviation from the guidelines was appropriate. Assuming that the initial divorce decree created a child support obligation for Barbara at zero, the transfer of custody for the two minor children to Marcello and the variance between an initial \$0 amount and the \$60.00 minimum amount under the guidelines constitutes a material change in circumstances under KRS 403.213 justifying modification. Consequently, the trial court erred by failing to consider Marcello's motion to establish or modify child support. See, e.g., Wiegand v. Wiegand, Ky. App., 862 S.W.2d 336 (1993) (child support guidelines applicable to all proceedings to modify child support even if neither party's income had changed since initial agreement on child support); Tilley v. Tilley, Ky. App., 947 S.W.2d 63, 66 (1997) (KRS 403.213 applies to

any action to modify an award of child support and no exception for agreement of parties entered under KRS 403.211(3)).

Barbara contends that the trial court's order denying Marcello's motion to establish child support provided sufficient reasons and justification for its deviation from the child support guidelines. She argues that the court utilized its equitable power in not requiring her to pay child support based on the prior history of the parties. She maintains it is unfair to require her to pay additional child support when Marcello is now receiving the same amount – through the children's Social Security benefits – as she received when she had custody of the children.

KRS 403.211(3) states in relevant part:

A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption and allow for an appropriate adjustment of the guideline award if based upon one (1) or more of the following criteria:

(f) The parents of the child, having demonstrated knowledge of the amount of child support established by the Kentucky child support guidelines, have agreed to child support different from the guideline amount. However, no such agreement shall be the basis of any deviation if public assistance is being paid on behalf of a child under the provisions of Part D of Title IV of the Federal Social Security Act; and

(g) Any similar factor of an extraordinary nature specifically identified by the court which would make application of the guidelines inappropriate.

In its order denying Marcello's motion, the trial court relied on the fact that the two previous agreed orders of August 1996 and July 1997, transferring sole custody of the parties' minor children to Marcello, failed to mention child support and that Marcello was receiving the children's Social Security disability payments which had been previously designated as sufficient to satisfy Marcello's child support obligation. In reviewing a trial court's decision to deviate from the statutory child support guidelines, we apply an abuse of discretion standard of review. See Redmon v. Redmon, Ky. App., 823 S.W.2d 463, 465 (1992); Rainwater v. Williams, Ky. App., 930 S.W.2d 405, 407 (1996).

We believe the trial court's order denying the motion does not provide sufficient specificity or justification for the deviation from the guidelines. While the initial child support order was based on the parties' Separation Agreement, that agreement did not purport to establish a child support obligation for Barbara after a transfer of custody over the children. Furthermore, the two orders transferring custody to Marcello did not address child support at all. The initial Separation Agreement, and corresponding dissolution decree, simply did not cover the situation where Barbara was the noncustodial parent. Creating a so-called implied agreement between the parties relieving Barbara of any child support obligation based on these facts is unreasonable. In short, Barbara has not shown that a

deviation from the guidelines would be justified under KRS 403.211(3)(f).

Barbara also has not demonstrated that requiring her to pay child support¹ would be unjust. See, e.g., Brashears v. Commonwealth, Cabinet for Human Resources, Ky. App., 944 S.W.2d 873 (1997) (holding it was not unjust to require unemployed father receiving Aid to Families with Dependent Children benefits to pay child support according to the guidelines). As the custodial parent, Barbara obviously incurred child care costs. Following transfer of custody to Marcello, Barbara no longer incurred those costs and her current position would place the entire burden of child care costs on Marcello with no contribution from her.

The record in this case also does not reveal any "extraordinary" factors sufficient to make application of the child support guidelines inappropriate. See KRS 403.211(3)(g). Marcello's mere failure specifically to request child support when custody of the children was transferred to him did not constitute a waiver or forfeiture of his ability to seek modification of the original child support order. While the parties may enter into an agreement concerning child support, a parent "may not discharge the duty of supporting a minor child by contract." Giacolone v. Giacolone, Ky. App., 876 S.W.2d 616, 619 (1994). See also KRS 403.180(6). In addition, any agreement between the parties is not binding on the court, which always retains control over child custody, support and visitation. See Tilley v. Tilley, Ky. App.,

¹ At the hearing, Marcello's attorney indicated that Barbara would be required to pay the minimum amount of \$60.00 per month under the guidelines.

947 S.W.2d 63, 65 (1997); KRS 403.180(2) and (6). In conclusion, we believe the trial court erred by not applying the child support statutes, and by failing to make sufficient findings of fact. We also find that the court abused its discretion in deviating from the statutory child support guidelines.

Upon remand, the trial court is directed to apply the statutory child support guidelines in determining the parties' gross income and their respective child support obligations. The Social Security Disability Benefits received by Marcello on behalf of the children should be credited toward his child support obligation. See Miller v. Miller, Ky. App., 929 S.W.2d 202 (1996). If the court decides to deviate from the child support guidelines, it should set forth specific findings of fact consistent with KRS 403.211 supporting its decision.

For the foregoing reasons, the order of the Graves Circuit Court is reversed and this case is remanded for further proceedings consistent with the views expressed in this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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