

RENDERED: APRIL 26, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001512-MR

COMMONWEALTH OF KENTUCKY,
CABINET FOR FAMILIES AND CHILDREN

APPELLANT

v. APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE ROBERT I. GALLENSTEIN, JUDGE
ACTION NO. 99-CI-00062

EUGENE DENTON AND DEE DEE DENTON

APPELLEES

ORDER DENYING MOTION TO DISMISS

AND

OPINION

VACATING AND REMANDING

** ** * * * * *

BEFORE: JOHNSON, MILLER AND SCHRODER, JUDGES.

JOHNSON, JUDGE: The Commonwealth of Kentucky has appealed from an order of the Fleming Circuit Court entered on May 3, 1999, which denied its motion for a modification of child support and payment of medical expenses. Having concluded that the trial court erred when it denied the motion as untimely, we vacate and remand.

On February 16, 2000, the Fleming Circuit Court entered a final decree, which dissolved the marriage of Eugene Denton and

Dee Dee Denton. The trial court ordered Eugene to pay Dee Dee \$30.00 per month in child support for their son Robert. The child support was calculated by computing each parent's child support obligation pursuant to the child support guidelines at KRS 403.212, then giving Eugene credit for the Social Security disability benefits being paid on behalf of Robert as a result of Dee Dee's disability. Under the guidelines, Eugene's child support obligation for Robert computed to \$383.00 per month. However, the trial court allowed Eugene to offset against his child support obligation the \$353.00 in Social Security disability benefits being paid on behalf of Robert, leaving a monthly payment by Eugene of only \$30.00. Further, the trial court ordered Eugene to provide Robert with medical insurance and for both parties to divide equally Robert's out-of-pocket medical expenses.

On March 3, 2000, just 16 days after entry of the trial court's decree of dissolution, the Commonwealth, Cabinet for Families and Children, filed a motion to intervene and to modify the child support order of February 16, 2000. The trial court granted the Commonwealth's motion to intervene, but denied its motion for modification of child support and payment of medical expenses. The trial court stated that the Commonwealth's motion to modify child support was "nothing more than [an] attempt to amend, alter, or vacate under CR¹ 59.05 and therefore was not timely filed[.]" The trial court further denied the

¹Kentucky Rules of Civil Procedure.

Commonwealth's motion to have out-of-pocket medical expenses allocated to Eugene, stating that the parties' separation agreement dictated that the out-of-pocket expenses be divided equally. This appeal followed.

As a preliminary matter, we must address Eugene's motion to dismiss the appeal. Eugene alleges four grounds in support of dismissal: (1) the order appealed from is an order overruling a motion and thus not a final, appealable judgment; (2) the notice of appeal failed to properly designate the final judgment appealed from which was the decree entered on February 16, 2000; (3) appellant failed to conform with CR 75.01 concerning the designation of untranscribed material; and (4) appellant improperly named Dee Dee as an appellee instead of an appellant. We reject all four of these arguments and deny the motion to dismiss this appeal. As discussed in detail infra, the Commonwealth is entitled to appeal the denial of its motion to modify the decree and on remand the trial court shall consider the motion to modify pursuant to the case law and statutes discussed infra. The notice of appeal did properly designate the order entered on May 3, 1999, as the judgment appealed from. Furthermore, any deficiency in the designation of the record under CR 75.01 and the designation of Dee Dee as an appellee does not substantially affect the appeal as it is not grounds for dismissal.²

²Ready v. Jamison, Ky., 705 S.W.3d 479 (1986).

The courts of this Commonwealth have long held that trial courts have continuing jurisdiction over motions to modify child support.³ Furthermore, the statute governing motions for modification of child support, KRS⁴ 403.213, contains no limitation upon the time during which a motion for modification can be made.⁵ The trial court is required to determine whether there has been a sufficiently substantial change of circumstances to justify the modification.⁶

In Ogle, this Court considered the propriety of a modification motion that had been filed during the pendency of an appeal from the original child support decree. In rejecting the appellee's argument that the motion was merely an additional attack on the original order, this Court noted that motions for modification of maintenance and child support are not time-sensitive and that the proper question in considering the motion was whether it met the requirement of a substantial and continuing change.

In the memorandum in support of its motion, the Commonwealth made clear that it sought a modification of the child support order, not a reconsideration of the original order. While

³Penrod v. Penrod, Ky., 489 S.W.2d 524, 527 (1972); Ogle v. Ogle, Ky.App., 681 S.W.2d 921, 923 (1984).

⁴Kentucky Revised Statutes.

⁵See Ogle, supra at 923 (holding that motions for modification of spousal maintenance and child support are not time-sensitive).

⁶Id.

we understand the trial court's concern that the timing of the motion and the arguments contained in the supporting memorandum had the appearance of a CR 59.05 motion, we nonetheless hold that the trial court erred when it based its decision on these grounds. Accordingly, we vacate the order entered on February 16, 2000, and remand this matter so the trial court can determine whether the Commonwealth's motion satisfies the requirements of KRS 403.213. We note that to merit relief under KRS 403.213 the Commonwealth must show "a material change in circumstances that is substantial and continuing."⁷ At the conclusion of its analysis, should it appear that the motion for modification is merely an additional attack on child support as originally granted, the trial court may, of course, once again deny the Commonwealth's motion.⁸

Similarly, we believe the trial court erred when it decided that the parties' agreement controlled as to the sharing of out-of-pocket medical expenses. While parties to a marriage dissolution are free to enter into an agreement in an effort to speedily resolve the action, the trial court retains control over the areas of child custody, support and visitation, and is not bound by the parties' agreement in those areas.⁹ Once again, we vacate the February 16, 2000, order of the Fleming Circuit Court and remand this matter so that the trial court can make a determination as to whether a substantial and continuing change

⁷KRS 403.213(1).

⁸Ogle, supra at 924.

⁹Tilley v. Tilley, Ky.App., 947 S.W.2d 63, 65 (1997).

warrants a modification of the current decree in regard to the division of out-of-pocket medical expenses.

For the foregoing reasons, the motion to dismiss the appeal is DENIED. Furthermore, the order entered by the Fleming Circuit Court on February 16, 2000, is vacated and this matter is remanded for proceedings not inconsistent with this Opinion.

ALL CONCUR.

Entered: April 26, 2002

/s/ Rick A. Johnson
JUDGE, COURT OF APPEALS

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