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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002385-MR
NO. 2003-CA-002466-MR
NO. 2004-CA-001400-MR
NO. 2004-CA-001502-MR

WILLIAM P. DOUGHTY — APPELLANT AND CROSS-APPELLEE

v.

RACHEL LYNN DOUGHTY — APPELLEE AND CROSS-APPELLANT

APPEALS AND CROSS-APPEALS FROM MERCER CIRCUIT COURT
HONORABLE DOUGLAS BRUCE PETRIE, JUDGE
ACTION NO. 99-CI-00015

OPINION
AFFIRMING IN PART, VACATING IN PART, REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: HENRY, TACKETT, AND VANMETER, JUDGES.

HENRY, JUDGE: William P. Doughty and Rachel Lynn Doughty appeal and cross-appeal, respectively, from Orders issued by the Mercer Circuit Court pertaining to child support and custodial designation. On review, we affirm in part, vacate in part, reverse in part and remand.

The parties are the natural parents of two sons: Tanner Preston Doughty, age 11, and Brandon Reed Doughty, age 8.

On January 22, 1999, the parties entered into a Separation Agreement and Property Rights Settlement agreeing to share joint custody of the children and also setting forth a specific time sharing arrangement in which the children would spend time with each parent on a daily basis during the week while alternating weekends with a particular parent. The Agreement also indicated that the children would spend every night in the family home under the care of their father, Mr. Doughty. It further stated that the parties agreed to work together to alternate holidays and school breaks with the children, and to generally maintain a flexible schedule arrangement to meet the needs of each party and the children. The Agreement did not specifically designate a primary residential custodian, but it did stipulate as follows: "Although the children will remain in the family residence with their father on a daily basis, the parties agree that no child support will be paid by the wife because the father has sufficient financial resources to provide for the care of the minor children and because the mother will be providing food and other basic needs while the children are with her." The Agreement also provided that the parties agreed to share equally in the expense of providing day care for the children, and that both parties would continue to provide health insurance for the children, with any expenses not covered by insurance to be shared equally. It also noted that Mr. Doughty

would claim one child as a dependent for tax purposes, while Ms. Doughty would claim the other child.

On January 25, 1999, Mr. Doughty filed a Petition for Legal Separation, in which it was requested that the aforementioned Agreement be approved and adopted as set forth. On April 23, 1999, a Decree of Legal Separation was entered that incorporated all of the terms and provisions of the Separation Agreement and Property Rights Settlement. This decree was ultimately converted to a Decree of Dissolution of Marriage on June 15, 2000. The parties continued to operate under the child sharing agreement to which they had previously agreed until May 12, 2000, when an Agreed Order was entered maintaining the joint custody arrangement but modifying the time-sharing agreement so that the children would begin spending Tuesday night with their mother, and Thursday night with her until 7:00 p.m. The Agreed Order also set forth that Mr. Doughty would be responsible for 65% of all child care, medical, dental, school, and other miscellaneous expenses, while Ms. Doughty would be responsible for 35% of those expenses.

On September 10, 2002, Ms. Doughty filed a motion to modify the time-sharing arrangement set forth in the May 12, 2000 Agreed Order—citing a change in circumstances—and to have Mr. Doughty pay child support. The trial court overruled the motion for a time-sharing modification in a May 28, 2003 Opinion

and Order, but it scheduled a hearing to evaluate the limited issue of whether child support should be payable to either party and, if so, what the amount of support should be. Following this hearing, the trial court entered an Order on September 4, 2003 finding that a "split custody arrangement" existed under the provisions of KRS[1] 403.212(2)(h) because each parent provided residential care for the children and because they shared joint legal responsibility. The trial court also ordered Mr. Doughty to pay his ex-wife the sum of $806.00 per month in child support, effective September 1, 2002.

Mr. Doughty subsequently filed a Motion to Alter, Amend, or Vacate the September 4, 2003 Order, specifically arguing that the trial court was clearly erroneous in defining the shared custody arrangement between the parties as a "split custody arrangement" pursuant to KRS 403.212(2)(h) because that provision does not apply to the type of "shared custody" or "joint custody arrangement" that existed in the case at hand. He also filed alternative motions asking the trial court to designate him as "primary physical custodian" of the children, asking the trial court to allow him to supplement the record with additional evidence showing that the children spent 60.15% of their time with him and 39.85% with their mother, and asking the trial court to allow him to pay any owed child support into

[1] Kentucky Revised Statutes.

the office of the Mercer County Circuit Court Clerk pending final resolution of the matter.

Following an October 14, 2003 hearing, the trial court entered an Order on October 21, 2003 granting Mr. Doughty's Motion to Alter, Amend, or Vacate and finding that the child custody arrangement was a "shared custody arrangement" and not a "split custody arrangement." The trial court also modified its previous child support determination and ordered Mr. Doughty to pay his ex-wife $493.00 per month in child support, using the "Colorado method of Child Support calculation in shared custody cases, which has been adopted by local rule in the Jefferson County Family Courts." In employing this methodology, the trial court noted: "This method is only to be employed where the Court first finds that there has been an actual shifting of expenses between the parties during the time the child(ren) is in their care. Based upon the proof in the record, the Court so finds in this case."

A hearing was held on all remaining issues on November 25, 2003. At that time, the trial court allowed Mr. Doughty to supplement the record as previously requested and allowed him to establish a blocked $20,000.00 escrow account for the payment of child support during the appeal of this matter. However, it overruled his motion to be named as "primary physical custodian" of the children. The trial court also overruled or deferred for

future consideration motions filed by Ms. Doughty requesting that Mr. Doughty be held in contempt of court for failing to pay child support, requesting attorney's fees, requesting that Mr. Doughty be required to pay an accrued arrearage in a lump sum, and requesting a wage assignment order. An Order to this effect was entered on June 15, 2004. These appeals and cross-appeals followed.

On appeal, Mr. Doughty raises the following arguments: (1) Did the trial court err in failing to name him as the "primary physical custodian" or "residential custodian" of the Doughty children; (2) Did the trial court erroneously disregard Kentucky statutes and case law and apply the law of a foreign jurisdiction in ordering him to pay child support; and (3) Did the circuit court err in ordering him to pay child support to his ex-wife. On cross-appeal, Ms. Doughty raises the following additional issues: (1) Did the trial court err in failing to find a "split custody arrangement" in this case; (2) Did the trial court err in failing to establish child support as being effective as of September 1, 2002; and (3) Did the trial court err in ordering the creation of a blocked account for child support monies while this matter is pending on appeal.

Mr. Doughty's first argument is that the trial court erred in failing to grant his motion to name him as the actual "primary physical custodian" or "residential custodian" of the

Doughty children. We again note that the original Separation Agreement and Property Rights Settlement entered into between the parties and ultimately incorporated into the Decree of Legal Separation and Decree of Dissolution of Marriage by the circuit court failed to designate a "primary residential custodian."

In reviewing decisions related to child custody, we reverse only when the circuit court's findings of fact are clearly erroneous, or when its decision reflects a clear abuse of the discretion granted such courts in custody matters. See Reichle v. Reichle, 719 S.W.2d 442, 444 (Ky. 1986). Although findings of fact are generally required in domestic matters, such findings are not required when a trial court denies a motion for modification because the reason for such denial must necessarily be that the movant failed to meet his or her burden of showing the required change of conditions for modification. See Klopp v. Klopp, 763 S.W.2d 663, 665 (Ky.App. 1988) (Citations omitted); Burnett v. Burnett, 516 S.W.2d 330, 332 (Ky. 1974); see also Powell v. Powell, 423 S.W.2d 896, 897-98 (Ky. 1968). Accordingly, a circuit court's ultimate decision regarding custody will not be disturbed, absent an abuse of discretion. Cherry v. Cherry, 634 S.W.2d 423, 425 (Ky. 1982); Sherfey v. Sherfey, 74 S.W.3d 777, 782 (Ky.App. 2000). Abuse of discretion implies that the circuit court's decision is unreasonable or unfair. Kuprion v. Fitzgerald, 888 S.W.2d 679,

684 (Ky. 1994). In reviewing the decision of the circuit court, therefore, the test is not whether the appellate court would have decided it differently, but whether the findings of the circuit judge were clearly erroneous or that he abused his discretion. Cherry, 634 S.W.2d at 425; Sherfey, 74 S.W.3d at 782-83.

Our Supreme Court has recently clarified that any effort to modify a joint custody decree must meet the requirements of KRS 403.340 and 403.350. Fenwick v. Fenwick, 114 S.W.3d 767, 783-84 (Ky. 2003) (Citations omitted). We believe that an attempt to procure a designation as "primary residential custodian" in a joint custody situation when no such designation was set forth in the original divorce/custody decree falls within the purview of this rule. Cf. Crossfield v. Crossfield, 155 S.W.3d 743, 746 (Ky.App. 2005) (holding that a change in the "primary residential custodian" from one parent to the other in a joint custody arrangement is subject to the statutes relating to modification of custody).

Under KRS 403.340(3), a prior custody decree cannot be modified unless the court finds "that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interests of the child." In determining if a change has occurred necessitating modification for the best interests of the child, the court is

to consider the following: (1) Whether the custodian agrees to the modification; (2) Whether the child has been integrated into the family of the petitioner with consent of the custodian; (3) The factors set forth in KRS 403.270(2)[2] to determine the best interests of the child; (4) Whether the child's present environment endangers seriously his physical, mental, moral, or emotional health; (5) Whether the harm likely to be caused by a change of environment is outweighed by its advantages to him; and (6) Whether the custodian has placed the child with a de facto custodian. The party seeking modification of custody under KRS 403.340 must bear the burden of proof. Wilcher v. Wilcher, 566 S.W.2d 173, 175 (Ky.App. 1978).

[2] KRS 403.270:
...

(2) The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:
(a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
(b) The wishes of the child as to his custodian;
(c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
(d) The child's adjustment to his home, school, and community;
(e) The mental and physical health of all individuals involved;
(f) Information, records, and evidence of domestic violence as defined in KRS 403.720;
(g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;
(h) The intent of the parent or parents in placing the child with a de facto custodian; and
(i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

The circuit court concluded that Mr. Doughty failed to satisfy any of the requirements for modification in his motion to be named as "primary residential custodian." Upon review of the record, we conclude that the circuit court did not abuse its discretion in failing to award Mr. Doughty this designation given that we could not find substantial evidence in the record to support applicability of the standards of modification set forth in KRS 403.340(3). Mr. Doughty's arguments in support of his motion center mainly on the position that he is currently in physical custody of the children for what the trial court reasonably determined was a bare majority of the time, and that he currently incurs 100% of the children's medical, dental, and school expenses. However, these facts alone simply do not satisfy the necessary standards and burden of proof for custody modification under our statutory and case law. Consequently, we cannot say that the trial court abused its discretion in this respect.

Mr. Doughty also argues that "the parties clearly anticipated that [he] would be the primary custodian of the children as is evidenced by the fact the children were to spend every week night with him and by the language which states that [he] was waiving his right to receive child support from [Ms. Doughty]. However, if this were the case, such a designation could have been set forth more definitively within the original

Separation Agreement and Property Rights Settlement signed by the parties. Accordingly, we find that the trial court did not abuse its discretion in failing to grant Mr. Doughty's motion for modification to name him as the "primary residential custodian" of the Doughty children.

We next address Mr. Doughty's contentions relating to the circuit court's ordering him to pay child support in this case. "As are most other aspects of domestic relations law, the establishment, modification, and enforcement of child support are prescribed in their general contours by statute and are largely left, within the statutory parameters, to the sound discretion of the trial court. Van Meter v. Smith, 14 S.W.3d 569, 572 (Ky.App. 2000), citing KRS 403.211—KRS 403.213; Wilhoit v. Wilhoit, 521 S.W.2d 512 (Ky. 1975). "This discretion is far from unlimited." Id., citing Price v. Price, 912 S.W.2d 44 (Ky. 1995); Keplinger v. Keplinger, 839 S.W.2d 566 (Ky.App. 1992). "But generally, as long as the trial court gives due consideration to the parties' financial circumstances and the child's needs, and either conforms to the statutory prescriptions or adequately justifies deviating therefrom, this Court will not disturb its rulings." Id., citing Bradley v. Bradley, 473 S.W.2d 117 (Ky. 1971). Stated another way, we will not disturb the trial court's findings unless the decision was arbitrary, unreasonable, unfair, or unsupported by sound legal

principles. Downing v. Downing, 45 S.W.3d 449, 454 (Ky.App. 2001).

In setting or modifying child support, a circuit court has the discretion to deviate from the child support guidelines. However, KRS 403.211(2) and (3) clearly require the court to make "a written or specific finding on the record" justifying any such deviation. See Commonwealth ex rel. Marshall v. Marshall, 15 S.W.3d 396, 401 (Ky.App. 2000), citing Bradley v. Bradley, 473 S.W.2d 117, 118 (Ky. 1971); Van Meter, 14 S.W.3d at 574, citing KRS 403.211(2); Rainwater v. Williams, 930 S.W.2d 405 (Ky.App. 1996). The circuit court in this case made no findings, written or otherwise, concerning the application of the statutory child support guidelines, or the reasons for its deviation from said guidelines in awarding child support to Ms. Doughty. Consequently, since the court's child support order fails to comply with statutorily-mandated requirements, we are compelled to vacate and to remand for additional findings of fact as to why deviation was appropriate. See Van Meter, 14 S.W.3d at 574-75, citing Rasnick v. Rasnick, 982 S.W.2d 218 (Ky.App. 1998); Board v. Board, 690 S.W.2d 380 (Ky. 1985); Fruchtnicht v. Fruchtnicht, 122 Ohio App.3d 492, 702 N.E.2d 145 (1997).

In reaching this conclusion, however, we are in no way commenting on the actual propriety of deviating from the child

support guidelines in awarding child support in this case,[3] and we again recognize that trial courts are afforded considerable discretion in fashioning an appropriate child support order when they conclude, and give reasons why, deviation from the guidelines is appropriate. See KRS 403.211(2); Rainwater, 930 S.W.2d 405 at 407, citing Redmon v. Redmon, 823 S.W.2d 463 (Ky.App. 1992); Keplinger v. Keplinger, 839 S.W.2d 566 (Ky.App. 1992). We also note for the benefit of the trial court and the parties that this court has previously declined to find that the circuit court abused its discretion in awarding child support where the parties have joint custody and share equal or almost equal physical possession of their child, which appears to be the case here. See Downey v. Rogers, 847 S.W.2d 63, 64-65 (Ky.App. 1993).

We next turn to the issues raised by Ms. Doughty on cross-appeal. Before doing so, however, we note that Mr. Doughty failed to file a cross-appellee response brief addressing any of the issues raised by Ms. Doughty in her cross-appellant brief. CR 76.12(8)(c) allows us to either (1) accept Ms. Doughty's statement of facts and issues as correct; (2) reverse the judgment if Ms. Doughty's brief reasonably appears to sustain such action; or (3) regard Mr. Doughty's failure to

[3] Indeed, "it is clear that the trial court could take into consideration the period of time the children reside with each parent in fixing support, and could deviate from the guidelines ... if convinced their application would be unjust." Downey v. Rogers, 847 S.W.2d 63, 65 (Ky.App. 1993).

respond as a confession of error and reverse the judgment without considering the merits of the case. These provisions are by no means mandatory, and it is instead left to our discretion as to whether any of these penalty options should be applied here. See Kupper v. Kentucky Board of Pharmacy, 666 S.W.2d 729, 730 (Ky. 1983). Given that the issues raised by Ms. Doughty are those of a purely legal nature that can be addressed by referring to the precedent to which she cited in her cross-appeal brief, we are not inclined to impose the aforementioned penalties in this case.

The first issue raised by Ms. Doughty is whether the trial court erred in failing to find that a "split custody arrangement" existed in this case pursuant to KRS 402.212(2)(h). In examining this statute, the trial court concluded that it was inapplicable in this case because it only addresses a "shared custody" situation, as opposed to "split custody." "Since the interpretation of a statute is a legal question, the trial court's interpretation is subject to de novo review by an appellate court." Clary v. Clary, 54 S.W.3d 568, 571 (Ky.App. 2001). Upon examining KRS 403.212(2)(h) and .212(6), we agree with the trial court that they are inapplicable here, and that the Doughtys have a "shared custody arrangement."

KRS 402.212(2)(h) defines "split custody arrangement" as "a situation where each parent is the residential custodian

for one (1) or more children for whom the parents share a joint legal responsibility." We believe that this definition does not apply to a situation where the parents "share" custody of all children and all children spend relatively equal time with each parent. Instead, we believe it is only intended to apply in those cases in which the parents have joint legal custody of more than one child, but some children reside primarily in each parental household. See Louise E. Graham and Hon. James E. Keller, 16 Ky. Prac. Domestic Relations L. § 24.29.1 ("Child Support-Split Custody") (2005). Our conclusion is bolstered by the language set forth in KRS 403.212(6)(a), which provides: "The child support obligation in a split custody arrangement shall be calculated in the following manner ... (a) Two (2) separate child support obligation worksheets shall be prepared, one (1) for each household, using the number of children born of the relationship in each separate household, rather than the total number of children born of the relationship." We believe that this language anticipates a situation in which some children spend most of their time in one household, while the others spend most of their time in the other household. Accordingly, we find that the trial court did not err in concluding that a "shared custody arrangement," rather than a "split custody arrangement," exists here.

Ms. Doughty's next contention is that the trial court erred in failing to establish that child support was owed to her as of September 1, 2002. The trial court originally did find that payments to Ms. Doughty were to commence as of this date, but after the hearing on Mr. Doughty's Motion to Alter, Amend, or Vacate, the court amended its original ruling to conclude that child support was owed as of April 7, 2003. Ms. Doughty appeals from this amended decision, arguing that the trial court's first ruling was correct.

Ms. Doughty correctly argues that, when a motion for modification seeking child support is filed, any subsequently awarded child support payments may be made retroactive to the date on which the motion for child support was filed. See KRS 403.213(1); Pretot v. Pretot, 905 S.W.2d 868, 871 (Ky.App. 1995), citing Giacalone v. Giacalone, 876 S.W.2d 616, 620 (Ky.App. 1994). She specifically argues here that, as she filed a motion for child support on September 10, 2002, payments should be calculated as of that date. The problem with this contention, as noted by the trial court, is that the record reflects that Ms. Doughty withdrew this motion sometime after filing it and then renewed it on April 7, 2003. Given this fact, we conclude that the trial court did not abuse its discretion in ruling that any child support payments would be

effective as of April 7, 2003. See Giacalone, 876 S.W.2d at 620, citing Ullman v. Ullman, 302 S.W.2d 849, 851 (Ky. 1957).

Ms. Doughty's final contention is that the trial court erroneously allowed Mr. Doughty to supersede the court's child support order by permitting him to deposit $20,000.00 into a blocked bank account while this matter is on appeal. Ms. Doughty argues that Mr. Doughty should have been obligated to make child support payments while the appeal is pending.

In Franklin v. Franklin, 299 Ky. 426, 185 S.W.2d 696 (1945), the predecessor to the Kentucky Supreme Court concluded that "judgments respecting the custody and maintenance of infants may not be superseded." Franklin, 299 Ky. at 428, 185 S.W.2d at 697, citing Casebolt v. Casebolt, 170 Ky. 88, 185 S.W. 510 (1916). This decision has led to the general understanding that a child support award normally may not be superseded. See Clay v. Clay, 707 S.W.2d 352, 353 (Ky.App. 1986); Louise E. Graham and Hon. James E. Keller, 16 Ky. Prac. Domestic Relations L. § 13.10 ("Appeals-Stay") (1997).

However, in Getty v. Getty, 793 S.W.2d 136 (Ky.App. 1990), a panel of this court deviated from this understanding and concluded that a judgment for a liquidated sum of child support may be superseded or bonded on appeal where the judgment consists of arrearages resulting from the retroactive effect of a circuit court's ruling based upon that court's increase of

child support. Id. at 137. In reaching this decision, the court noted that the appellant had complied with past pay orders and was paying the increased support amount during the pendency of the appeal, and that there was a large accumulated lump sum subject to the retroactive order. Id. at 138.

The Getty court criticized the holding in Franklin v. Franklin, supra, that judgments respecting the custody and maintenance of infants may not be superseded, finding that Franklin erroneously expanded the scope of Casebolt v. Casebolt, supra, which dealt only with a child custody situation and concluded that "there can be no liability upon a bond superseding a judgment awarding the custody of a child to one parent." Id., citing Casebolt, 185 S.W. at 511. The Getty court noted that the decision in Clay v. Clay "held that a reversal of an increase in child support gives the payor no right of recoupment" which in effect "makes the appellant's right to an appeal under Section 115 of the Kentucky Constitution an academic exercise only." Id. at 137. The court went on to note that "Franklin and Casebolt predated the adoption of Section 115 of the Kentucky Constitution which grants one appeal as a matter of constitutional right." Id. at 138.

With this said, whatever opinion the Getty panel might have held regarding the interaction between the Clay and

Franklin decisions and Section 115 of the Kentucky Constitution, Franklin remains a viable precedent of the highest court of our state, and we are bound to follow it. SCR[4] 1.030(8)(a). At the same time, we cannot ignore the fact that Getty has remained undisturbed for fifteen years, and its application seems particularly practical in a situation where, as here, the full amount of the child support arrearage has been paid into escrow. Accordingly, we affirm the order of the trial court insofar as it approved the payment of the arrearage portion of the child-support award into a blocked escrow account during the pendency of the appeal, but we reverse the order to the extent that it permitted the payment of current and accruing support into such an account. Getty v. Getty, 793 S.W.2d at 137, 138.

To summarize our holding: On the direct appeals, we affirm the decision of the trial court denying "primary physical custodian" or "residential custodian" status to the appellant, and we vacate the court's child support order and remand for findings of fact as set out above. On the cross-appeals, we affirm the trial court's ruling that this case involves a "shared custody arrangement" rather than a "split custody arrangement"; we affirm the ruling that support payments became effective April 7, 2003; and we affirm the order of the trial court permitting the payment of past-due child support into a

[4] Kentucky Rules of the Supreme Court.

blocked escrow account during the pendency of the appeal; but we reverse that order to the extent that it would permit the payment of any current or accruing support into such an account. We remand the case for further proceedings and for entry of orders consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Edward D. Hays Danville, Kentucky	Michael L. Judy Frankfort, Kentucky