RENDERED: NOVEMBER 9, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002064-MR

SIDNEY CARRICK FORD — APPELLANT

v.

APPEAL FROM OWEN CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 04-CI-00109

SHEILA CAROL FORD — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: SCHRODER, JUDGE; KNOPF,[1] SENIOR JUDGE; MILLER,[2] SPECIAL JUDGE.

SCHRODER, JUDGE: This is an appeal from an order denying appellant's motion to modify his child support obligation set out in the parties' settlement agreement. Because there was no material change in circumstances which was substantial and continuing, as required by KRS 403.213(1), the trial court

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

properly declined to modify the child support obligation. Hence, we affirm.

The parties, Sheila Ford and Sidney Ford, were divorced by decree of dissolution entered on September 27, 2004. The parties' property settlement agreement, entered into on December 14, 2004, and found by the court to be fair and equitable, was incorporated into a supplemental decree of dissolution entered on December 29, 2004. By the terms of the property settlement agreement, the parties agreed to joint custody of their minor child, Charles Ford, with neither party being designated primary residential custodian. The parties agreed to a parenting schedule whereby each parent had equal physical possession of the child – two nights a week and every other weekend. As for child support, Sidney agreed to pay Sheila $75 per week, which Sheila was to use to pay for "the child's clothing, school lunches and extracurricular activities." Sheila was to pay the for child's health insurance.

At the time of the property settlement agreement (December 14, 2004), Sheila was earning $2,731 a month as a part-time employee of the Owen County Schools and selling jewelry, and Sidney was earning $2,500 a month as a self-employed taxidermist, commercial painter, and farrier. On July 1, 2005, Sheila began a full-time job with the Owen County

Schools earning $2,995 a month, after which she no longer sold jewelry because of her full-time job.

On July 25, 2005, Sidney filed a motion pursuant to KRS 403.213 to modify child support. In his motion, Sidney alleged that Sheila's income had significantly increased since child support was set, and that applying the child support guidelines to the parties' present incomes and considering the equal timesharing arrangement, he would owe no child support to Sheila.

It is undisputed that the only thing that changed since the parties' settlement agreement was that Sheila's income increased $264 a month and the cost of health insurance for the child increased $15 a month. The equal timesharing arrangement was part of the original settlement agreement. In the affidavit in support of the motion for modification of child support, besides stating that Sheila's income had significantly increased, Sidney stated that he "had no knowledge that the child support as calculated in December was not pursuant to the child support guidelines" and that it was his "understanding in December that the amount of child support [he] agreed to pay was the amount that would be ordered by the court, with or without an agreement."

At the hearing on the motion, the court noted that there was no material change in circumstances since the parties'

settlement agreement because the parties' equal timesharing arrangement was in existence at the time of the settlement agreement and Sheila's income had not increased enough to meet the 15% increase in the amount of support due under KRS 403.213(2). Further, the court stated that it was not its practice to deviate from the guidelines and offset child support where the parties' have an equal timesharing arrangement. It was the lower court's position that Sidney was simply seeking relief from what he now viewed was a bad bargain regarding child support in the settlement agreement. In its order of September 8, 2005, denying the motion to modify, the court stated that the facts were all in existence at the time of the separation agreement "and to rehash them seven (7) months post-agreement would encourage parties to engage in endless hearings to consider facts that should have been considered initially." From the subsequent order denying Sidney's motion to alter or amend the above order, Sidney now appeals.

Sidney's first argument is that the trial court abused its discretion and disregarded statutory and case law in refusing to modify the child support obligation. Sidney characterizes the lower court's order as holding that one can never modify a child support obligation that is part of a settlement agreement. We acknowledge that child support obligations in settlement agreements are modifiable. See Tilley

v. Tilley, 947 S.W.2d 63 (Ky.App. 1997). However, from our review of the trial court's order in the present case, the court did not refuse to modify the child support obligation simply because it was part of a settlement agreement, but because there was no material change in circumstances as required by KRS 403.213(1). KRS 403.213(1) allows for modification of child support orders "only upon a showing of a material change in circumstances that is substantial and continuing." In Pursley v. Pursley, 144 S.W.3d 820, 827 (Ky. 2004), the Court recognized that "[i]t is not uncommon for parties to seek modification of child support provisions in separation agreements as changes occur – the right to do so is expressly provided by statute." (Emphasis added.) In the instant case, there was no material change in circumstances; the slight increase in Sheila's income did not result in a 15% change in the amount of child support owed pursuant to KRS 403.213(2). As to Sidney's claim that the parties' waived the prerequisite for modification of the child support in KRS 403.213(2), we believe that even if the parties did so waive the requirement of a 15% change in the amount of support owed, modification would still not be warranted because there was no material change in circumstances that was substantial and continuing. KRS 403.213(1).

Sidney asserts that the trial court erred in refusing to consider the parties' equal timesharing arrangement, which he

claims would result in him owing Sheila no child support. Aside from the fact that the parties' equal timesharing arrangement was not a recent development and thus could not constitute a change in circumstances, we agree with the trial court that it is not required to offset a child support obligation when there is an equal timesharing arrangement as in the present case. While the Court in Downey v. Rogers, 847 S.W.2d 63, 64-65 (Ky.App. 1993), stated that courts could take into account the period of time that the children reside with each parent in setting child support, the Court also stated that child support may be ordered even when the parents have equal possession of the children. (Emphasis added). The Court reasoned that "[m]any, if not most, expenses necessary to provide a home continue throughout the month regardless of where the children reside." Id. at 64. Citing Downey, the Court in Downing v. Downing, 45 S.W.3d 449, 457 (Ky.App. 2001), likewise recognized that the "[t]rial court may also take into account the period of time that the children reside with each parent in setting child support." There has been no statute or case, however, which requires the trial court to consider equal timesharing and offset the child support accordingly. This is not a "split custody arrangement" as defined in KRS 403.212(2)(h) where each party is the residential custodian of one (1) or more children and child support is calculated under KRS 403.212(6).

Sidney's reliance on Schoenbachler v. Minyard, 110 S.W.3d 776 (Ky. 2003), is misplaced. In Schoenbachler, the trial court considered the parties' equal timesharing arrangement in deciding to not require either party to pay child support. Contrary to Sidney's claim, the Supreme Court did not accept or tacitly approve of such a practice in the opinion. In fact, the Court did not address the issue at all, presumably because the issue was not raised on appeal. Rather, the sole issue was whether one parent sufficiently proved non-documented additional income of the other parent for purposes of calculating child support.

"[T]he decision whether to modify an award [of child support] in light of changed circumstances is within the sound discretion of the trial court." Snow v. Snow, 24 S.W.3d 668, 672 (Ky.App. 2000). Under the facts of this case, we cannot say that the trial court abused its discretion in refusing to modify Sidney's child support obligation. We believe this case is analogous to Pursley v. Pursley, 144 S.W.3d 820 (Ky. 2004), wherein the Court determined that the party challenging the validity of the child support provisions in the separation agreement was simply seeking relief from an agreement that he deemed in hindsight to be a bad bargain. As the Pursley Court stated, "[i]n such a case, it is not manifestly unfair or

inequitable to let a party lie in the bed he or she has freely made." Id. at 827.

For the reasons stated above, the order of the Owen Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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