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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000166-ME

BRUCE ALAN CRECELIUS APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TIMOTHY NEIL PHILPOT, JUDGE
ACTION NO. 03-CI-02540

MARY DENISE CRECELIUS APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

DIXON, JUDGE: Appellant, Bruce Crecelius, appeals from an order of the Fayette Family Court denying his motion for a modification of his child support obligation. Finding no error, we affirm.

Bruce and Denise Crecelius were married on May 8, 1992. Two children were born during the marriage, Katie Noel and Cara Nicole. On June 16,

2003, Denise filed a petition in the Fayette Family Court for legal separation. A mediated agreement was thereafter entered on January 20, 2004, granting the parties joint custody of the children, with Denise being the primary residential custodian. The parties further agreed that child support would be set according to the Kentucky Child Support guidelines, with Bruce paying $1,451.60 per month. A worksheet introduced into evidence shows that factored into Bruce's support amount was his percentage of the children's private school tuition payments and after-school care. Interestingly, however, the mediation agreement contained the following provisions:

> 1. We agree that child support will be set consistent with the Guidelines attached to this Agreement and that Father will pay the sum of $1451.60 per month. Beginning March 1, 2004, child support will be paid by wage assignment. Prior to this date, child support will be due on the first of the month.
>
> 2. We agree that Mother will be solely responsible for the payment of tuition to The Lexington Christian Academy and also will be responsible for all child care costs.

The Fayette Family Court issued a decree of dissolution on December 28, 2004, incorporating the mediation agreement, as well as a separate property agreement. A uniform child support order was also entered in the amount of $1,451.60 per month, less $30 for 100 months.[1]

On August 23, 2007, Bruce filed a motion to modify child support on the grounds that he could no longer afford to pay for his children to attend private

[1] The $30 credit was a reimbursement for Bruce's equity interest in the marital residence.

school. Further, although he acknowledged that his monthly child support obligation included his percentage of the children's private school and that the tuition was calculated on the child support worksheet as a childcare expense, he nonetheless argued that "[t]here was never an agreement that [he] would continue to be obligated for private school tuition as part of his child support payment." Denise responded that there had been no material and continuing change in circumstances as required by KRS 403.213 that would justify a modification. Following a hearing, the family court denied the motion for modification. Bruce thereafter filed a motion to alter, amend, or vacate, and for a hearing on whether private school was in the best interest of the children. On December 26, 2007, the family court denied the motion. This appeal followed.

Bruce argues on appeal that private school tuition is an unreasonable and unnecessary child care expense that he should not required to pay under the child support guidelines. Bruce further contends that there is no language in the mediation agreement itself that references the calculation worksheet or imposes a continuing obligation to divide the tuition expenses. To the contrary, the only language pertaining to tuition specifically provides that Denise is solely responsible for such expenses. Bruce also claims that he was entitled to a hearing for the purposes of introducing extrinsic evidence as to the parties' intentions.

In response, Denise points out that Bruce conceded that his child support obligation includes his share of the children's private school tuition calculated in the same manner as a child-care expense. As such, Bruce was aware

of how the support was calculated at the time he signed the mediation agreement and he understood that his portion of the tuition was included in the child support calculation. Further, Denise argues that paragraph 2 of the agreement simply ensures that Bruce will not be "double-billed" for tuition expenses and after-school costs as those costs are already included in his monthy child support payment. Finally, Denise claims that absent explicit language to the contrary, the proper interpretation of the mediation agreement is that future calculations would be conducted in the same manner as the original calcuation. We agree.

KRS 403.211 sets forth the procedure for establishing child support based on the parent's gross income and the child support guidelines. As Bruce correctly asserts, nothing in the statute requires that private school tuition be included in child care costs. Indeed, in *Miller v. Miller,* 459 S.W.2d 81, 83 (Ky. 1970), our Supreme Court concluded that absent proof that public schools were unsuitable or inadequate for the educational purposes of the children, an award of additional support for private school tuition was improper. However,

> when parents wish to provide or agree to provide more support than required by law, the Guidelines should not act as a barrier. Furthermore, when the trial court reviews the parties' agreement that requires child support *in excess of the Guidelines*, it is only required to find that the parents, 'having demonstrated knowledge of the amount of child support established by the [Guidelines], have agreed to child support' in excess of the Guidelines. (Emphasis in original)

Pursley v. Pursley, 144 S.W.3d 820, 826 (Ky. 2004) (*Quoting* KRS 403.211(3)(f)).

Bruce has conceded that at the time of the mediation agreement, he agreed to include the private school tuition as part of his child support obligation. The calculation worksheet that Bruce placed into evidence clearly shows that the tuition expenses were calculated into the monthy support payment. From that fixed amount, Denise is responsible for paying the private school tuition and the child care costs. She will not receive any additional funds from Bruce for the care of the children. Thus, since we find that the parties' intentions were clear and unambiguous from the mediation agreement, we conclude that a hearing to introduce extrinsic evidence was not warranted. See *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99 (Ky. 2003).

Furthermore, "[t]he provisions of any decree respecting child support may be modified only . . . upon a showing of a material change in circumstances that is substantial and continuing." KRS 403.213(1). We are of the opinion that Bruce has failed to prove that there has been a material change in circumstances that is substantial and continuing to warrant a reduction in child support. Although he asserts that he can no longer afford to pay and simply does not want to pay the private school tuition expenses, the record reflects that his income has increased since the mediated agreement. Such does not satisfy the statutory requirements for a modification. Absent a significant and continuing decrease in income, the fact that a party claims he "cannot afford" the payment is insufficent grounds for modification. *Downey v. Rogers*, 847 S.W.2d 63, 65 (Ky. App. 1993). Nor is "a

change of heart," or an unwillingness to comply with the agreement regarding child support a legitimate reason for modification. *Pursley, supra,* at 826.

Finally, Bruce argues that the family court erred in denying his motion for a hearing on whether private school was in the children's best interest. However, the motion did not contain any allegation that continuing in private school was not in their best interest, nor did it address a substantive issue regarding the propriety of private school. Rather, the issue was merely raised as an alternative prayer for relief in his motion to alter, amend or vacate. As such, we cannot conclude that the family court erred in denying a hearing.

For the foregoing reasons, the judgment of the Fayette Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Carl D. Devine
Lexington, Kentucky

BRIEF FOR APPELLEE:

Stephen L. Marshall
Lexington, Kentucky