

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001910-ME

THOMAS D. MOORE

APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE TIMOTHY E. FEELEY, JUDGE
ACTION NO. 06-CI-00628

PATRICIA L. MOORE

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: CAPERTON AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

CAPERTON JUDGE: The Appellant, Thomas Moore, pro se, appeals the September 18, 2009, order of the Oldham Circuit Court, denying Moore's motion to alter, amend, or vacate the court's order of June 1, 2009, which reset child support payable between the parties with the downward deviation in favor of the

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Appellee,² Patricia Moore. Having reviewed the record, the arguments, and the applicable law, we hereby vacate the September 18, 2009, order of the Oldham Circuit Court and remand for entry of a new order not inconsistent with this opinion.

Thomas and Patricia were married on October 25, 1990, and had two children, B.F.M (DOB 12/09/1990), and A.N.M. (D.O.B. 04/24/1992). They were divorced in 1997 in Kansas. On August 25, 2006, Thomas filed a petition in the Oldham Circuit Court to recognize the foreign divorce and to modify the residency of the children. Therein, Thomas stated that he was a resident of Oldham County. Until 2006, Patricia resided in Florida, where the Kansas divorce was registered in 2001, but now resides in Pennsylvania. Thomas stated that the parties have shared custody of the children since the time of their divorce, pursuant to their January 8, 1997, separation and property settlement agreement. At that time, the children resided primarily with Patricia.

In his motion to modify residency, Thomas stated that the children wished to live with Thomas and his wife during the school year and with Patricia between school sessions and during certain holidays. In support of that request, Thomas states that Patricia previously agreed to his request, that the children had moved repeatedly and often missed school, and were berated by their grandparents for their wishes to live with their father. Accordingly, Thomas argued that his was

² Appellee failed to file a responsive brief. Kentucky Rules of Civil Procedure (CR) 76.12(8)(c)(i)(ii).

the only stable home and it was in the best interests of the children to reside primarily with him, while Patricia would retain shared custody.

Thereafter, on September 1, 2006, a civil summons was mailed to Patricia at the address in Pennsylvania where she was believed to reside. On October 4, 2006, Patricia filed a response, denying that any change in circumstance had taken place, and stating that the children presently resided with her in Nazareth, Pennsylvania, and that she had never failed to disclose her whereabouts. She further stated that Kentucky was not, and had never been, the home of the children, and asserted that Kentucky was an improper forum in which to bring the action. Accordingly, she requested that the court dismiss Thomas's petition, or in the alternative, to allow Patricia to continue as primary residential custodian.

Subsequently, on October 17, 2006, Patricia filed a motion to dismiss Thomas's petition to recognize the foreign divorce and modify the children's residency. In support thereof, she asserted that the court lacked subject matter jurisdiction to modify the agreement, that Kentucky was not and never has been the home of the children, and that the children's contacts in Kentucky were limited to summer visitation with Thomas. Patricia further stated that the children were not threatened with neglect or abuse, and that there had been no change in circumstances warranting modification of the custody agreement. To the contrary, Patricia asserted that a change in custody would be very disruptive to the children, and that the harm involved in doing so would outweigh any advantages.

The matter was scheduled for a hearing on December 27, 2006. In the interim on November 11, 2006, Thomas filed a notice/motion order indicating that on October 3, 2007, Patricia filed a separate action before the Northampton County, Pennsylvania, Civil Division of Common Pleas, on the same facts and issues as those raised before the Oldham Circuit Court. Therein, Thomas asserted that because Patricia filed a response to his petition in Kentucky, the Oldham Circuit Court had jurisdiction to adjudicate this matter. Thomas attached a copy of the action filed by Patricia in Pennsylvania, as well as a copy of the child custody determination which she registered in Pennsylvania as a foreign judgment on October 20, 2006.

In light of the action filed by Patricia in Pennsylvania, the Oldham Family Court scheduled a conference call with the Pennsylvania Court for December 13, 2006. On that same date following the conference call, the Oldham Family Court issued an order stating that, pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, technical jurisdiction over the children remained with the state of Florida, as Florida had registered the Kansas judgment, and as the children had last lived full-time for a period of six months in Florida. Nevertheless, the court found that because both parents have concluded that Florida no longer had ties with this case, it would be an improper venue for hearing the matter. As a result, it was determined that because the children had resided primarily with their mother since 1997, and as they were registered for school in Pennsylvania, Pennsylvania was the appropriate forum to hear the action.

Thomas then filed a December 22, 2006, motion requesting that the court alter, amend, or vacate its December 13th order declining jurisdiction. That motion came before the court for a hearing on January 19, 2007. During the course of that hearing, the court apparently indicated that the issue of which state had jurisdiction could be reheard if Patricia took no further affirmative steps in Pennsylvania. In a subsequent March 19, 2007, motion, Thomas noted that she had taken none, and that the only action pending in Pennsylvania was a sua sponte order to set a pretrial hearing.

Thereafter, the Oldham Family Court entered an April 6, 2007, order. Therein, the court reiterated its intention that the case first be heard in Pennsylvania. The court nevertheless noted that it had not dismissed its action, and would continue to monitor the situation to ensure that the action in Pennsylvania continued to be pursued, as both courts legally had jurisdiction over the action.

Thomas filed a subsequent July 6, 2007, motion for a home study to be completed at his home in La Grange. In support thereof, Thomas stated that the Oldham Court had previously indicated that a home evaluation would be completed following a home study in Pennsylvania, and upon receipt of all orders of the foreign court. Thomas indicated that the Pennsylvania court had completed its home study, and requested that a home study be conducted at his residence. On July 20, 2007, the Oldham Court ordered a home study to be conducted with the two girls at Thomas's residence.

An adjudication hearing was held on September 28, 2007. During the course of that hearing, the court did not find that the girls were neglected or abused by Patricia, but did nevertheless enter a finding of dependency, allowing the girls to remain in the temporary care and custody of their father, Thomas, while counseling continued. The court also ordered visitation between the girls and their biological mother for the following weekend.

Subsequently, on October 1, 2007, following the temporary removal hearing and the completion of the home study, the court entered an official adjudication hearing order placing the two girls in the custody of Thomas, and setting a disposition hearing for October 19, 2007. Prior to the date of that hearing, the court received and considered a report from Joan Daub, the Family Service Office Supervisor of the Oldham County Office of the Cabinet for Health and Family Services. Therein, Daub stated that she was concerned about the emotional health of the children if they were to remain in the care of their mother, although abuse by Patricia could not be substantiated. Following the hearing, the Court suggested to the parties that they agree between themselves to leave the girls in Thomas's custody through the end of the current school semester, during which time Patricia would have visitation. On the record, the court told the parties that it was dismissing the pending juvenile actions,³ and planned to continue the custody action. It also encouraged the parties to seek clarification with the Pennsylvania

³ These were actions concerning the possibility that the children were being abused by Patricia. When it was determined through home visitations and assessments that such was not the case, the juvenile issues were abandoned, and the custody actions continued.

Court as to how it intended to proceed such that the courts would not make two separate rulings on the custody issues.

Thereafter, on February 11, 2008, Thomas filed a motion indicating that the Pennsylvania Court met on January 30, 2008, and concluded that visitation-support issues belonged in Kentucky.⁴ Thus, Thomas requested that the Kentucky court address the remaining issues of support, visitation, and holiday-sharing. Accordingly, on March 14, 2008, the Oldham Family Court entered an order acknowledging the action taken by the Pennsylvania court, reviewing the visitation schedule set by the Pennsylvania court, and thereby incorporating it as an order of the Oldham Family Court.

Thomas thereafter filed a June 24, 2008, motion requesting that the court address issues of child support. The court scheduled a hearing on that issue for August 26, 2008, but prior to that time, one of the minor children, B.M., left Kentucky for an agreed week-long vacation with Patricia. Patricia thereafter failed to return B.M. at the agreed upon time, and according to Thomas, as of July 29, 2008, her whereabouts, as well as that of the child, were unknown. Accordingly, on August 1, 2008, the court appointed a guardian *ad litem* for B.M, and scheduled a hearing concerning custody of B.M. for August 4, 2008. At approximately the

⁴ To that end, we note that the Court of Common Pleas of Northampton County, Pennsylvania, entered an order in February of 2008 indicating that on January 31, 2008, the parties agreed that they would have joint custody of the girls, with Thomas as primary residential custodian. It was agreed that Patricia would have the children every summer from June 5 through August 5, as well as every other Christmas and Thanksgiving break. It was also indicated that Patricia was entitled to visit the children in the event she could travel to Kentucky, and would give Thomas seven days notice of her intent to do so. It was further agreed that transportation for the custody arrangement would be in accordance with the parties' past practice of meeting in a mutually agreed upon location in West Virginia.

same time, in Pennsylvania, Patricia filed a motion to modify custody, stating that B.M. had only previously expressed wishes to reside with Thomas because her sister had done so. Accordingly, Patricia asserted that B.M. no longer wished to continue living in Kentucky, and wanted to finish high school in Pennsylvania instead. Thomas requested that the Oldham Family Court hold Patricia in contempt for her refusal to return B.M.

Thereafter, the Oldham Family Court entered an August 12, 2008, order in which it denied Thomas's motion for contempt, finding that because the court's prior written custody order allowed for Patricia to have custody through August 5, 2008, no violation had been committed. Further, it declined to order B.M. to return to her father if it was against her wishes to do so. It also decided to terminate any child support payable from one party to the other, effective as of August 1, 2008.

A short time later, on August 27, 2008, the Oldham Family Court entered an additional order, following a hearing which it held on August 26, 2008, to address issues of child support and related matters. Particularly, the court addressed support for the period of time that both children resided with Thomas, from September 2007 through August of 2008. In addressing that issue, the court noted that Thomas had not filed his motion requesting support until February 11, 2008, and that Patricia had testified that, pursuant to the prior agreements of the parties, no child support was payable during the summertime when the child visited the non-custodial parent.

The court computed child support payable under the Kentucky Child Support Guidelines set forth in KRS 403.212. In setting the level of support, the Court computed Thomas's income of \$50,231.00 annually and Patricia's income at \$62,777.00 annually, consisting of her employment and her military retirement. Accordingly, the court ordered child support payable from Patricia to Thomas in the amount of \$821.00 per month for the period from February 11, 2008, through May 31, 2008, for a total amount of \$2,873.50.

The court ordered that any arrears in support be paid in full within sixty days of the August 27, 2008, order. It further noted that as each party now had primary custody of one child, no additional support was due from either. Finally, the court addressed Thomas's request to utilize both children as deductions on his 2008 tax return. The court stated that it had heard testimony from the parties that in prior years each had claimed one child, regardless of with whom the child primarily resided. Accordingly, the court denied Thomas's request, and directed that each party claim a tax exemption for the child currently in their custody.

Subsequently, on January 30, 2009, Thomas filed a motion for modification of support. He indicated that in December of 2008, B.M. turned 18 and graduated from high school, while A.M. was still in his custody. He indicated that a modification was therefore appropriate, and also requested that the court address the issue of what he asserted were arrears owed from 2007. Patricia also faxed to the court various materials she wished it to consider, including a copy of a

paid check for the aforementioned ordered amount of child support, copies of payments made to Thomas for medical expenses for the children, and a letter from B.M. requesting that the court intervene to assist her in obtaining her belongings which remained at Thomas's house.

The court ordered the parties to submit tax returns and relevant financial information and, on June 1, 2009, it issued an order concerning support. Therein, the court acknowledged that Thomas was entitled to seek support from Patricia on behalf of A.M., as A.M. remained a minor and Thomas was her primary residential custodian. The court noted that while Patricia has asserted that she continues to pay full living costs for B.M., such was not considered under the Kentucky statutes, as B.M. was no longer a minor.

While the court recognized that, pursuant to the Kentucky child support guidelines, it would be required to order support payable from Patricia to Thomas in the amount of \$596.00 per month, it stated that it could deviate from those guidelines where strict application would be unjust or inappropriate. Accordingly, the court concluded that because Patricia still supported B.M., and had received little or no visitation with A.M. over the last year, it was unjust to order her to pay full statutory support. Instead, the court ordered that Patricia pay support to Thomas in the amount of \$150.00 per month, to be paid retroactively from January 20, 2009.

Subsequently, on June 10, 2009, Thomas filed a motion requesting that the court alter, amend, or vacate its order of June 1, 2009, and award him the

full support owed under the Kentucky statutes. In support thereof, Thomas asserted that, pursuant to the financial documentation submitted by Patricia, she clearly had sufficient resources to pay the requisite support, and that there was no impediment to her responsibility to do so. Pursuant to *Downing v. Downing*, 45 S.W.3d 449 (Ky.App. 2001), Thomas argued that the court's decision to reduce Patricia's support was not supported by sound legal principles. Shortly thereafter, the court entered a September 18, 2009, order indicating that its previous downward deviation may have been "too drastic," and modified the downward deviation to \$250.00 per month. It is from that order that Thomas now appeals to this Court.

On appeal, Thomas asserts that the trial court incorrectly calculated and set child support. He states that he carries all medical, dental, and optical insurance on A.M., and received no credit for that, nor was he allowed to claim both children as deductions on his tax returns during the time that both children resided with him. While he acknowledges that the court increased child support from \$150.00 per month to \$250.00 per month retroactive to January 2009, he asserts that this was still a drastic downward deviation without justification, and that the amount of child support should be \$596.00 per month. Patricia has filed no response to these arguments.

Having reviewed the evidence below and applicable law, we are compelled to agree with Thomas that the downward deviation made by the court in this matter was unjustified based on the record. In so finding, we recognize that

we may only set aside findings of fact made by the trial court which are clearly erroneous. *See Downing v. Downing*, 45 S.W.3d 449, 453 (Ky.App. 2001). A court's decision is not clearly erroneous if it is supported by substantial evidence, which is evidence that when taken alone or in the light of all the evidence has sufficient probative value to induce conviction in the minds of reasonable men. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003).

Certainly, pursuant to KRS 403.211, courts have the authority to deviate from the guidelines when their application would be unjust or inappropriate. However, in the matter *sub judice*, we simply cannot find that any of the extraordinary circumstances set forth in KRS 403.211(3) exist, nor can we find any other reason why the amount of support calculated under the guidelines would be unjust or inappropriate. Our review of the record reveals that Patricia has an annual gross income of \$63,000. While Patricia asserted below that she has numerous bills which would make the \$596.00 per month support obligation unmanageable, we find no evidence that this is the case in the record beyond her mere assertions. Stated simply, we cannot find that support of a non-minor child and minimal visitation with a minor child justify a deviation in the amount ordered by the court.

Accordingly, we hereby vacate the September 18, 2009, order of the Oldham Circuit Court which orders a downward deviation from the child support guidelines, and remand for entry of an order setting child support pursuant to the child support guidelines set forth in KRS 403.212.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

Thomas D. Moore, *Pro Se*
LaGrange, Kentucky