

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001386-ME

RAYMOND WEAKLY

APPELLANT

v.

APPEAL FROM BULLITT FAMILY COURT
HONORABLE ELISE G. SPAINHOUR, JUDGE
ACTION NO. 09-CI-001383

SHELLY WEAKLY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: COMBS AND LAMBERT, JUDGES; SHAKE,¹ SENIOR JUDGE.

SHAKE, SENIOR JUDGE: Raymond Weakly (Raymond) appeals from a June 22, 2010, Bullitt Family Court order denying his motion to amend, alter, or vacate its decision to modify the parties' child support agreement by awarding child support to his ex-wife, Shelly Weakly (Shelly). Raymond argues that the trial court's

¹ Senior Judge Ann O'Malley Shake 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.

decision lacked the required change of financial circumstances to warrant modification. We agree.

On October 21, 2009, Shelly petitioned the Bullitt Family Court for dissolution of marriage. At that time, the parties had one minor child, Dalton. Shelly had a monthly income of \$2730. Raymond's monthly income was approximately \$2999. Dalton's health insurance was provided without cost by Raymond's employer. There were no child care expenses.

On October 21, 2009, the same day that she filed for divorce, Shelly and Raymond entered into a settlement agreement that was drafted by Shelly's attorney. Raymond was not represented by counsel. The agreement provided Shelly with "exclusive possession and ownership of the parties' marital home" and all "expenses, past, present, and future, associated with the home." The agreement provided that each party shall retain his or her personal automobile and any indebtedness related to the automobile. Each party was assigned his or her personal belongings. In addition, the agreement provided as follows:

6. Neither party shall pay the other child support;
7. This agreement is a deviation from the Kentucky Child Support Guidelines and the parties make this agreement having full knowledge and understanding of said guidelines.

On December 22, 2009, the family court entered the Decree of Dissolution. In its decree, the court adopted the parties' agreement and expressly concluded that the agreement was "not unconscionable."

On February 4, 2010, Shelly filed a “motion for miscellaneous relief,” requesting that the court award child support and apply the Guidelines. The motion stated, “Petitioner’s financial condition has become acute. Respondent has transitioned into his new life comfortably.” Raymond responded to the motion by requesting that the court overrule the motion or re-open the settlement agreement.² At the hearing, proof established indicated that Shelly’s circumstances remained consistent while Raymond’s income had diminished due to lack of work at his place of employment and, as a result of part-time work, he was charged an increased insurance premium. Without making any findings of fact or conclusions of law, on May 27, 2008, the trial court ordered Raymond to pay child support. On June 22, 2010, the court denied Raymond’s motion to amend, alter, or vacate the award. This appeal follows.

Raymond claims that imposition of child support created an unjust result considering the recent execution of the settlement agreement and no circumstances justifying modification of the agreement. Generally, Kentucky law favors monetary awards of child support and presumes that an application of the Guidelines is in the child’s best interest. KRS 403.211(2). In its original child support decision, however, the trial court disregarded the Guidelines in favor of the parties’ settlement agreement. The Court found that the agreement and its deviation from the Guidelines was conscionable.

² The timing of Shelly’s motion to modify child support raises serious concerns about the conscionability of the parties’ property settlement, which was incorporated into the decree of dissolution. On appeal, Raymond did not claim that the settlement should be re-opened due to unconscionability. Therefore, we will not address this issue.

Only six weeks later, when the ink was barely dry on the decree of dissolution, Shelly moved the trial court for an award of child support. The establishment, modification, and enforcement of child support awards are generally within the sound discretion of the court and may be revisited at any time. KRS 403.211- KRS 403.213; *Van Meter v. Smith*, 14 S.W.3d 569, 572 (Ky. App. 2000). Modification, however, is only warranted when the party seeking modification of an allegedly conscionable agreement demonstrates a material change in circumstances that is substantial and continuing. *Goldsmith v. Bennett-Goldsmith*, 227 S.W.3d 459, 461 (Ky. App. 2007).

“Under KRS 403.213(2), a change in circumstances is rebuttably presumed to be substantial if application of the child-support guidelines (KRS 403.212) to the new circumstances would result in a change in the amount of child support of 15% or more.” *Id.*, (quoting *Snow v. Snow*, 24 S.W.3d 668, 672 (Ky. App. 2000)). Given that child support was not previously awarded, the application of the Guidelines clearly increased the child support award by 15%. However, the trial court failed to find that any change of circumstances existed.

In *Dudgeon v. Dudgeon*, 318 S.W.3d 106 (Ky. App. 2010), our Court described the required showing for a motion to modify child support when the Guidelines have been previously found inapplicable. *Id.* at 111-13. The Court provided:

As the child support guidelines in KRS 403.212 are inapplicable, it was error for the family court to deny [the Appellant]’s motions to modify child support based upon

the rebuttable presumption of KRS 403.213(2). . . . [W]e interpret the rebuttable presumptions found in KRS 403.213(2) as inapplicable in the modification of child support cases where application of the child support guidelines have been determined unjust or inappropriate under KRS 403.211(3). In these cases, the proper standard for modification of child support is found in KRS 403.213(1) and simply requires a “showing of a material change in circumstances that is substantial and continuing.

Id.

In *Dudgeon*, the trial court initially abandoned the Guidelines based upon the high incomes of the parties. *Id.* The motive behind the trial court’s initial approval of deviation is irrelevant. If the court previously found that the Guidelines did not apply or approved deviation, the trial court must determine (1) whether deviation from the guidelines is **still** appropriate; and (2) whether there is a “material change in circumstances that is substantial and continual.” *Id.*

Given the trial court’s failure to conduct the appropriate analysis, we vacate the family court’s order of child support and remand the issue to the Bullitt Family Court to make findings concerning whether new circumstances existed that warranted modification.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Linda J. Noll
Louisville, Kentucky

BRIEF FOR APPELLEE:

J. Scott Wantland
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