

RENDERED: OCTOBER 28, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002006-ME
AND
NO. 2011-CA-000415-ME

JOHN THOMAS SIMMONS

APPELLANT

v. APPEAL FROM CARTER CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 08-CI-00415

JACQUELYN NICOLE SIMMONS (now BROWN)

APPELLEE

OPINION REVERSING AND REMANDING

** ** * ** * ** *

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

DIXON, JUDGE: In these related appeals, John Thomas Simmons (Father) appeals two orders rendered by the Carter Circuit Court, wherein the court denied Father's motion to reduce child support owed to Jacquelyn Nicole Simmons Brown (Mother), held Father in contempt of court for failing to pay child support and

medical bills, and ordered Father to pay a portion of Mother's attorney fees. We reverse both orders of the Carter Circuit Court and remand for further proceedings.

Mother and Father married in August 1997, and divorced in February 2009, pursuant to a decree of dissolution rendered by the Carter Circuit Court. Two children were born during the marriage. According to the decree, the parties stipulated Father would pay child support of \$1368.00 per month, and they would share joint custody of the children. At the time of the final hearing, Father was employed as a pipefitter at Trico Development. His support obligation was calculated based on annual income of \$65,000, and the court specifically found that Father received a weekly per diem between \$235.00 and \$250.00. Mother was employed by the Elliott County Board of Education as a teacher, and she earned approximately \$30,000.00 annually. In its findings of fact, the court stated Mother requested maintenance of \$500.00 per month. The court denied Mother's request for maintenance; instead, the court awarded Mother a vehicle acquired during the marriage and ordered Father to pay the monthly payment (\$605.00) for the remaining four years of the loan "in lieu of an award of maintenance."

Additionally, the court ordered Father to pay medical bills for the children.

In October 2010, Father filed a motion to reduce his child support obligation because his income decreased. Father tendered a pay stub showing his weekly per diem had been eliminated, and he tendered a child support worksheet purporting to show at least a 15% change in the amount of support owed pursuant to the child support guidelines. The court held a hearing and heard testimony from

the parties. Father testified that Trico Development had lost its primary contract for pipefitting work, and the company had reduced its workforce as a result.

Father explained that, although he was still employed by Trico, the company had eliminated his per diem. Father testified that the future of the company looked grim due to the decrease in available work. Father submitted several paycheck stubs into evidence. In contrast, Mother argued that Father's child support obligation was non-modifiable because the parties had stipulated in the decree that Father would pay \$1368.00 per month.

On October 13, 2010, the court rendered an order denying Father's motion to reduce child support. The court asserted that the parties had negotiated child support at the time of their divorce, and Father had agreed to pay \$1368.00. The court emphasized that, during the divorce proceedings, Mother "did not seek maintenance" and waived any claim to "other properties" in exchange for the stipulated amount of child support. The court found Father's income had not changed, aside from losing the per diem. The court concluded Father failed to establish a material change of circumstances warranting modification of support. The court also ordered Father to pay \$500.00 of Mother's attorney's fees due to the disparity in income. Father now appeals the October 13, 2010, order ("the October order") in case number 2010-CA-002006.

On January 19, 2011, during the pendency of Father's appeal of the October order, Mother filed a motion to hold Father in contempt of court for failing to pay child support and medical expenses as ordered by the decree. Mother

alleged Father made only a partial payment (\$350.00) of his January child support obligation and failed to pay \$654.00 in medical expenses. Father filed a reply and cross-motion to reduce child support, asserting he was laid-off from his job and was receiving unemployment benefits. Father requested calculation of child support based on his unemployment income. At a hearing on the motions, Father testified he had been laid off in November, and he had not been able to find work as a pipefitter. Father stated he received unemployment benefits of \$746.00 every two weeks, and he submitted his check stubs as evidence. Father conceded that he made a partial child support payment for January. Father explained he paid Mother \$350.00 in child support after paying past-due automobile payments (per the decree), which had fallen behind because he paid Mother the full amount of child support for December. Father stated he had paid two medical bills on behalf of the children. Father's testimony indicated that Trico Development had been owned by his current wife's family and his wife owned a welding contracting business. Father testified his wife's business did not have any employees, and he stated there was no work as a pipefitter. In contrast, Mother testified that she believed Father was working for himself while drawing unemployment because he was "on the road" when he spoke to Mother on the telephone.

On February 7, 2011, the court rendered an order denying Father a reduction in child support, finding Father in contempt and awarding Mother attorney's fees. Specifically, the court noted that it was "unbelievable" that Father's new wife owned a welding business, yet he was unemployed;

consequently, the court concluded Father was hiding income. Further, the court, referencing its October order, emphasized Mother had given up a claim for maintenance and property in exchange for the negotiated amount of child support. The court found Father in contempt for failing to pay child support and medical expenses, and sentenced him to 180 days in jail. The court probated the jail sentence provided that Father purged himself of contempt by paying the full amount of medical expenses and child support due by the end of February 2011. Finally, the court ordered Father to pay \$350.00 for Mother's attorney fees "for the bringing of this motion[.]" Father now appeals the February 7, 2011, order ("the February order) in case number 2011-CA-000415. Because these appeals involve related issues, we will resolve both appeals in this opinion.

In *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001), this Court explained, "A reviewing court should defer to the lower court's discretion in child support matters whenever possible." "As long as the trial court's discretion comports with the guidelines, or any deviation is adequately justified in writing, this Court will not disturb the trial court's ruling in this regard." *Id.* "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.*

Modification of existing child support orders is governed by statute. KRS 403.213(1) provides that modification of child support is allowed "only upon a showing of a material change in circumstances that is substantial and continuing." The statute provides a rebuttable presumption that changed circumstances exist if

there is a 15% discrepancy in the existing obligation and the applicable guideline amount. KRS 403.213(2). In *Wiegand v. Wiegand*, 862 S.W.2d 336 (Ky. App. 1993), this Court explained that, pursuant to the statutory scheme, “a circuit court clearly must consider and apply the guidelines in each and every proceeding which seeks modification of a support order.” *Id.* at 337. Thereafter, if the court concludes deviating from the guidelines is warranted, the court must make a specific finding to support its reasoning. *Id.*; KRS 403.211(2)-(3).

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Father asserts the October order constituted an abuse of discretion because the court denied his motion to reduce child support without applying the child support guidelines pursuant to KRS 403.312. In contrast, Mother contends Father’s child support obligation had been established by agreement, and further, Father failed to establish a material change in circumstances because his income had not changed.

A review of the hearing and the written order reflect that the trial court declined to consider or apply the relevant statutory provisions regarding Father’s motion for modification of child support due to the loss of Father’s per diem allowance. The October order provides in part:

The Court finds that even though [Father] has lost his per diem, the Court was not a party to the negotiations at the time [of] the divorce and does not know if the per diem was used to compute child support. However, the Court knows that the amount of child support was an agreed upon amount between the parties and [Mother] did not

seek maintenance and she testified she did not seek other properties in exchange for that agreed upon amount. . . .

. . . the Court declines to change the amount of child support since the Court finds it was a negotiated amount between the parties at the time of the divorce decree and that [Mother] gave up certain claims that she could have asserted in exchange for that amount of child support.

Contrary to Mother's contention (and the trial court's acceptance of that contention) that an "agreed upon amount" of child support cannot subsequently be amended, the law is well-settled that, even where child support is set by agreement, a party is not precluded from thereafter seeking modification.

Tilley v. Tilley, 947 S.W.2d 63, 66 (Ky. App. 1997).

In *Tilley*, a panel of this Court addressed a factual situation very similar to those presented here. There, Mother had entered into a settlement agreement which substantially deviated Father's child support obligation downward. Thereafter, and without any change in income, Mother sought modification pursuant to KRS 403.213. The court observed,

KRS 403.180(2) provides that with the exception of those terms providing for custody, support, and visitation, the terms of the separation agreement are binding on the court. . . . Thus, the statute makes it clear that while the parties are free to enter into a separation agreement to promote settlement of the divorce, the court still retains control over child custody, support, and visitation and is not bound by the parties' agreement in those areas.

Id. at 65. As a result, in concluding that Mother could seek modification of child support despite her prior agreement, the Court reasoned pursuant to KRS 403.213(2), "a party who is able to show a 15% discrepancy between the amount

of support being paid *at the time the motion is filed* and the amount due pursuant to the guidelines is entitled to a rebuttable presumption that a material change in circumstances has occurred.” *Id.* (Emphasis added). Therefore, clearly Father here, is not prohibited by the parties initial agreement to subsequently seek modification. Accordingly, the trial court erred by determining that the parties’ prior agreement negated subsequent modification of his child support obligation.

Mother next argues Father has failed to show a material change in circumstance justifying modification under KRS 403.213(2). She claims that Father produced no evidence that the original agreement regarding child support included the per diem payments. Therefore, she argues Father cannot demonstrate the requisite change in his financial circumstances necessary for modification. The trial court evidently agreed with Mother’s position. In addition to the portion of the court’s order we have previously referenced, the trial court observed,

[Father] still earns the same amount of money currently that he earned previously with the exception of the per diem costs, which by its very nature should be reimbursement for expenses that [Father] incurred. [Mother’s] income has not changed.

Based upon the foregoing, the Court hereby overrules [Father’s] motion to reduce child support since there has not been a material change in circumstances.

It appears the trial court concluded that because whatever calculations were used to set the original support order were not supplied to it, the Court could not establish whether the rebuttable 15% change pursuant to KRS 403.213(2) had occurred. Moreover, the Court seems to have deemed Father’s per diem costs as

irrelevant to his actual income. The Court appears to have dismissed the per diem costs, determining that Father “still earns the same amount of money currently that he earned previously with the exception of the per diem costs,” which it curiously identified as, “by their very nature reimbursement for expenses that [Father] incurred.”

As previously noted, modification of existing child support obligations is governed by KRS 403.213. Modification may be appropriate if application of the Kentucky child support guidelines at the time of filing results in at least a 15% change in the amount of support due per month. Both parties agree that the original child support agreement resulted in an upward deviation from child support guidelines. In fact, based upon the income amounts claimed by Father, his agreed support payments appear to constitute slightly more than 100% of the child support obligation for two children under the guideline table in KRS 403.212(7). Furthermore, it is clear that Mother is, in fact, employed and has significant income. Therefore, unquestionably, Father’s agreed support payments exceed that provided by statute.

Nevertheless, the trial court concluded Father had not proven a material change of circumstances. In so doing, the Court applied the statutory prerequisite of change, not the guideline obligation under KRS 403.212, but rather required a material change of 15% from Father’s original agreed obligation. This conclusion was also in error.

Our court addressed this issue in *Wiegand, supra*. There, Father's support obligation for child support amounted to \$170 per month. Mother moved for an increase in support to the amount set by the child support guidelines in KRS 403.212(7) which totaled \$340 per month. There had been no change of income by either party. In concluding that modification was appropriate, the Court reasoned:

KRS 403.213 does not require there to be a change in either party's income before a trial court may modify an existing child support award. Instead, in a situation . . . where there [is] at least a 15% discrepancy between the guidelines and the noncustodial parent's existing child support obligation, *the existence of this fact standing alone creates a rebuttable presumption that there is a material change in circumstances pursuant to KRS 403.213(2).*"

Id. at 337. (Emphasis added). *See also, Tilley*, 947 S.W.2d at 65. Therefore, as Father is currently paying 100% of the parties combined child support obligation under KRS 403.212(7), he has unquestionably proven a material change in circumstances. Accordingly because the court failed to "consider and apply the guidelines[,]” it abused its discretion by denying Father's motion. *Wiegand*, 862 S.W.2d at 337. We reverse the court's October order and remand for further proceedings.

Father also contends the award of attorney's fees to Mother was an abuse of discretion. According to the October order, the court ordered Father to pay \$500.00 in attorney's fees due to the disparity in each party's income. KRS 403.220 provides that a court may order payment of attorney's fees "after

considering the financial resources of both parties[.]” In light of our conclusion that the court erred in its analysis of modification and Father’s financial circumstances, we reverse the award of attorney’s fees and direct the trial court to reconsider the issue on remand. *See Marcum v. Marcum*, 779 S.W.2d 209, 211 (Ky. 1989).

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In his appeal of the February order, Father raises similar arguments. He contends the court abused its discretion by failing to apply the child support guidelines based on his unemployment. Father also opines the court’s finding of contempt and award of attorney’s fees were an abuse of discretion. We agree.

Mother argues the court simply doubted the credibility of Father’s testimony and acted within its discretion to deny the motion for modification. While a trial court enjoys great discretion as the fact-finder, the court clearly failed to apply the child support guidelines to the evidence of Father’s reduced income to determine if he was entitled to the rebuttable presumption of changed circumstances. KRS 403.213(2). The February order plainly indicates the court did not believe Father’s testimony regarding his unemployment; however, the court was obligated to consider and apply the guidelines to Father’s motion. *Wiegand*, 862 S.W.2d at 337. If Father is entitled to a statutory presumption of changed circumstances, the court may conclude the presumption has been rebutted, but it must set forth specific findings to explain its deviation from the guidelines. KRS 403.211(2)-(3). The court abused its discretion by denying the motion to modify child support

without considering the guidelines; accordingly, we reverse the February order and remand for additional proceedings.

As to the finding of contempt, the trial court is vested with discretion in utilizing its contempt power to enforce a court order. *Howard v. Howard*, 336 S.W.3d 433, 447 (Ky. 2011). However, “[t]he power of contempt cannot be used to compel the doing of an impossible act.” *Lewis v. Lewis*, 875 S.W.2d 862, 864 (Ky. 1993). In a civil contempt proceeding, the court must make a factual finding regarding the debtor’s actual ability to pay the obligation. *Id.*

Here, there is no indication the court considered whether Father was financially capable of purging himself of contempt in less than one month (or risk 180 days’ incarceration),¹ despite Father’s argument that he was behind on his court-ordered obligations only because his unemployment benefits were significantly less than his former income. In light of the court’s failure to consider Father’s ability to pay, coupled with the court’s errors regarding modification (which may or may not have impacted the amount of support actually due), the finding of contempt was an abuse of discretion. We reverse the contempt order and remand for further proceedings consistent with this opinion.

Finally, Father asserts the court abused its discretion by awarding attorney’s fees of \$350. Given our conclusion that the court erred in its analysis of modification and Father’s financial circumstances, we reverse the award of

¹ It appears Father owed \$1664.00 (\$654.00 in medical bills and \$1010.00 for January child support) to purge himself of contempt.

attorney's fees and direct the trial court to reconsider the issue on remand. *See Marcum v. Marcum*, 779 S.W.2d 209, 211 (Ky. 1989).

For the reasons stated herein, we reverse both the October 13, 2010, order and the February 7, 2011, order rendered by the Carter Circuit Court and remand for further proceedings consistent with this opinion.

ALL CONCUR.

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