

RENDERED: OCTOBER 21, 2011; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2011-CA-000283-ME

JOHN M. STOVALL

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT  
FAMILY COURT DIVISION  
v. HONORABLE ELEANORE GARBER, JUDGE  
ACTION NO. 05-CI-504468

REBECCA STOVALL  
(NOW DAIGREPONT)

APPELLEE

OPINION  
AFFIRMING

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BEFORE: TAYLOR, CHIEF JUDGE; ACREE AND VANMETER, JUDGES.

TAYLOR, CHIEF JUDGE: John M. Stovall brings this appeal from a December 2, 2010, Order of the Jefferson Circuit Court, Family Court Division, granting Rebecca Stovall's (now Daigrepoint) motion to modify child support. We affirm.

In 2006, the parties' marriage was dissolved by decree of dissolution; the decree incorporated a previously executed property settlement agreement. Thereunder, John agreed to pay \$341 per month in support of the parties' two minor children.

Subsequently, in 2010, Rebecca filed a motion to modify child support. A hearing was held by the circuit court, and on December 2, 2010, the circuit court granted the motion and increased John's monthly child support payment to \$669.37 for the minor children. This appeal follows.

John contends that the circuit court erred by modifying child support. He asserts that no material change in circumstances occurred justifying modification and that application of the child support guidelines was improper as the parties' previously agreed to deviate from same.

Modification of child support is within the sound discretion of the circuit court and will not be disturbed on appeal absent an abuse of that discretion. *Plattner v. Plattner*, 228 S.W.3d 577 (Ky. App. 2007). And, the circuit court retains continuing jurisdiction over child support issues arising subsequent to a decree of dissolution. *Combs v. Daugherty*, 170 S.W.3d 424 (Ky. App. 2005).

KRS 403.213 governs modification of child support and provides:

- (1) The Kentucky child support guidelines may be used by the parent, custodian, or agency substantially contributing to the support of the child as the basis for periodic updates of child support obligations and for modification of child support orders for health care. The provisions of any decree respecting child support may be modified only as to installments accruing

subsequent to the filing of the motion for modification and only upon a showing of a material change in circumstances that is substantial and continuing.

(2) Application of the Kentucky child support guidelines to the circumstances of the parties at the time of the filing of a motion or petition for modification of the child support order which results in equal to or greater than a fifteen percent (15%) change in the amount of support due per month shall be rebuttably presumed to be a material change in circumstances. Application which results in less than a fifteen percent (15%) change in the amount of support due per month shall be rebuttably presumed not to be a material change in circumstances. For the one (1) year period immediately following enactment of this statute, the presumption of material change shall be a twenty-five percent (25%) change in the amount of child support due rather than the fifteen percent (15%) stated above.

John asserts that no material change in circumstances occurred under KRS 403.213(1) and (2) upon which to base the modification of child support. In support thereof, John specifically argued:

[T]he Court also found a change in circumstances due to the fact that both parents had an increase in income from September 2006 to November 2010; **the Court, however, would not allow the Petitioner to give testimony or introduce any evidence to show the parties' income from September 2006.** Had this evidence and/or testimony been allowed, the Trial Court would have recognized that in four (4) years between September 2006 and November 2010, it was the Petitioner/Appellee who received nearly a 24% increase in her monthly income (from \$4,712.35 to \$5,814.00), while the Respondent received only a 14% increase in his monthly income (from \$4,589.61 to \$5,255.00). In reality, the Petitioner/Appellee was Motioning the Court for an increase of the Respondent/Appellant's child support obligation based solely on the fact that she no longer had to pay for childcare and she had received a

24% increase in income since the PSA [Property Settlement Agreement] was entered into in September 2006. (Emphasis added.)

The Trial Court abused its discretion by granting the Petitioner/Appellee's motion and increasing the Respondent/Appellant's monthly child support obligations when there was no material change in circumstances that is substantial and continuing,"[sic] as required by KRS 403.213(1), **without allowing testimony or evidence to show that no such material change existed**, and relying solely on mathematical calculations for its decision. (Emphasis added.)

John is correct that the presumption of a change in circumstances under KRS 403.213(2) is a rebuttable presumption. Thus, John was entitled to introduce relevant evidence that no such change occurred. At the hearing, John sought to introduce evidence documenting that Rebecca's income increased more dramatically than his own since the original agreement upon child support. While such evidence may have been arguably relevant, we do not think its exclusion constituted reversible error. Kentucky Rules of Evidence (KRE) 103(a).

Under the child support guidelines, the family court initially utilizes the gross income of both parties; then the court takes certain deductions therefrom to arrive at each parties' adjusted gross income. The parties' adjusted gross income is added together to determine the total combined parental income; thereafter the total combined parental income is then applied to the table provided in KRS 403.212(7) to arrive at the base monthly support for the child. The total monthly child support obligation is then multiplied by each parent's percentage of the combined monthly

child support obligation to determine the obligor's monthly child support obligation.

The parties' income in 2006 is immaterial to the calculation of child support. Furthermore, the parties' income in 2006 is also immaterial to calculation of whether a 15 percent or greater "change in the amount of support due per month." Rather, the relevant inquiry was identified in *Tilley v. Tilley*, 947 S.W.2d 63 (Ky. App. 1997). In *Tilley*, this Court held that "the amount of support being paid at the time the motion is filed and the amount due pursuant to the guidelines" is the relevant inquiry under KRS 403.213. *Id.* at 65. Thus, we cannot say that reversible error resulted from the court's evidentiary ruling.

Next, John argues that application of the child support guidelines was improper in view of the parties' agreement to deviate from such guidelines as contained in the property settlement agreement. John's argument is curious upon this issue:

In the instant case, the parties negotiated and entered into the Property Settlement Agreement of September 7, 2006[,] with the understanding that the Respondent/Appellant, John Stovall, would pay \$341.00 per month for child support, which was below Kentucky's child support guidelines listed in KRS 403.212. The parties understood that this deviation was largely based on the amount of time that the Respondent/Appellant, John Stovall was to enjoy with his children, and also based upon other agreements throughout the PSA, including the Respondent/Appellant agreeing to give his former wife title to and/or proceeds from property in which she had little or no interest. . . .

The Court's decision to apply the guidelines over top of this agreement was the type of "unjust or inappropriate," action, as contemplated by KRS 403.211(3). Pursuant to KRS 403.211(3)(f), in making their determination as to whether or not applying the guidelines would be unjust, the Trial Court should have considered the parent's agreement to deviate from those guidelines in September 2006, but continuously refused to do so.

Our Court has held that "once an award of child support entered pursuant to the terms of a separation agreement under KRS 403.180 is reopened for modification, 'the child support must be set anew pursuant to KRS 403.210.'" *Tilley v. Tilley*, 947 S.W.2d 63, 65 (Ky. App. 1997)(quoting *Giacalone v. Giacalone*, 876 S.W.2d 616 (Ky. App. 1994)). And, under KRS 403.180(6), the court is not bound by a parties' agreement as to the terms upon which child support may be modified. *Tilley*, 947 S.W.2d at 63. Stated simply, the child support guidelines are applicable to "all proceedings to modify child support." *Id.* at 65 (citing *Wiegand v. Wiegand*, 862 S.W.2d 366 (Ky. App. 1993)). Hence, the circuit court did not err by applying the child support guidelines in this case.

For the foregoing reasons, the Order of the Jefferson Circuit Court, Family Court Division, is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Timothy E. Ash  
Louisville, Kentucky

BRIEF FOR APPELLEE:

J. Russell Lloyd  
Louisville, Kentucky

