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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001770-ME

REBECCA NORTON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOAN L. BYER, JUDGE
ACTION NO. 07-CI-503346

MATTHEW JASON ANDERSON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND JONES, JUDGES.

DIXON, JUDGE: Rebecca Norton appeals from a judgment of the Jefferson Circuit Court that modified the child support obligation of Matthew Jason Anderson and ordered Rebecca to reimburse Matthew for childcare expenses that were not actually incurred. Finding no error, we affirm.

Matthew and Rebecca divorced in September 2009. Pursuant to a marital settlement agreement, Matthew agreed to pay Rebecca $4000.00 per month

in child support for their four children. The agreement included a provision that reduced child support to $2500.00 per month once the parties sold certain marital real estate. Between 1998 and 2009, Matthew earned a lucrative salary as a professional baseball player. He sustained an injury in 2009, which sidelined his baseball career. In 2011, Matthew was dismissed from his baseball team during spring training; thereafter, he enrolled at the University of Louisville to finish his bachelor's degree.

In October 2012, Matthew filed a motion to reduce his child support obligation and to be reimbursed for child care expenses that were not actually incurred. Rebecca denied that Matthew was entitled to reimbursement, and she vehemently opposed a reduction in child support, contending that Matthew was voluntarily underemployed.

The court held an evidentiary hearing on August 14, 2013.[1] Matthew testified that he had agreed to pay child support above the guidelines because, at the time he signed the agreement, he still anticipated returning to professional baseball. Matthew explained that, in 2011, he realized his baseball career was over; consequently, he moved back to Louisville and decided to complete his bachelor's degree. Matthew testified that he was working part-time at UPS and

[1] The video record before us does not include the video recording of this evidentiary hearing. "It is the responsibility of the appellant to see that the record is prepared and certified by the clerk within the time prescribed by CR 73.08 . . . ." *Ventors v. Watts*, 686 S.W.2d 833, 834 (Ky. App. 1985). The trial court rendered a detailed opinion following the evidentiary hearing; accordingly, we rely on the court's summary of the relevant testimony and evidence to resolve the issues on appeal. "It has long been held that, when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court." *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985).

taking classes at the University of Louisville. Rebecca also testified at the hearing, stating that she earned between $400 and $600 per month cleaning houses.

The circuit court rendered an opinion and order granting Matthew's motion to reduce child support and ordering Rebecca to reimburse Matthew for $28,800 in child care expenses that were not actually incurred. The court found that both Rebecca and Matthew were voluntarily underemployed. The court imputed an annual income to Matthew of $37,440, and it imputed income to Rebecca of $16,640. The court reduced Matthew's child support obligation to $855 per month, explaining the calculation as follows:

> The parties' combined monthly income is $4,507 per month, with [Rebecca] earning thirty-one percent (31%) of this income, and [Matthew] earning sixty-nine percent (69%) of this income. Under the Kentucky Child Support Guidelines, the base support obligation for four children at the parties' combined income level is $1,316 per month, and $1,484 after the healthcare cost is included. Mr. Anderson will be responsible for sixty-nine percent (69%) of that figure, which is $1,023 per month, less the health insurance premium paid by Mr. Anderson, the obligation is $855 per month.

The court denied Rebecca's post-judgment motion to vacate the order, and this appeal followed.

Pursuant to KRS 403.180(1), the parties to a dissolution proceeding are free to enter into a settlement agreement. The court, however, is not bound by the terms of an agreement as to "the custody, support, and visitation of children[.]" KRS 403.180(2). Further, "the establishment, modification, and enforcement of child support is generally prescribed by statute and largely left, within the statutory

parameters, to the sound discretion of the trial court." *McKinney v. McKinney*, 257 S.W.3d 130, 133 (Ky. App. 2008). As a reviewing court, we defer to the trial court's discretion as long as its decision was not "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001).

I. Child Support

At the time he sought modification, Matthew was obligated to pay $2500 per month in child support pursuant to the settlement agreement.[2] Rebecca contends that the court abused its discretion because Matthew failed to satisfy the evidentiary burden set forth in KRS 403.213(1), which requires a "showing of a material change in circumstances that is substantial and continuing." Rebecca asserts that Matthew's financial situation had not changed between the time he signed the settlement agreement and when he sought modification.

The trial court addressed these issues in its order denying post-judgment relief:

> The Court determined that child support is always modifiable under KRS 403.213 if there has been a change in circumstances. The Court modified child support, coming to the conclusion that there had been a change in circumstance when Mr. Anderson came to the realization that he would never again play professional baseball, or earn the income that comes along with that ability. Mr. Anderson changed his career path, went back to school, and is currently working at UPS earning $9.50 per hour. This change in circumstance warranted

[2] It was undisputed that the marital real estate specified in the agreement had been sold; consequently, Matthew's obligation had decreased from $4000 per month to $2500 per month.

> modification, and the Court calculated this child support modification according to the current earning capacity of the parties.

KRS 403.213(1) allows a party to seek modification of child support "only upon a showing of a material change in circumstances that is substantial and continuing." The statute further creates a rebuttable presumption that a material change in circumstances exists if there is a 15% difference in the amount of support a parent pays and the amount actually due pursuant to the guidelines. KRS 403.213(2). The statutory presumption "is applicable to *all* proceedings to modify child support." *Tilley v. Tilley*, 947 S.W.2d 63, 65 (Ky. App. 1997) (*citing Wiegand v. Wiegand*, 862 S.W.2d 336, 337 (Ky. App. 1993)).

We are mindful the trial court was in the best position to assess the credibility of the witnesses and determine the weight of the evidence. *Buddenberg v. Buddenberg*, 304 S.W.3d 717, 720 (Ky. App. 2010). Our review indicates the court found Matthew's testimony to be the most persuasive regarding his career prospects and income. The court concluded that, when Matthew's baseball career ended in 2011, he experienced a material change in circumstances that was substantial and continuing. Furthermore, Matthew was entitled to the rebuttable presumption that a material change in circumstances existed, as there was a 15% difference in the amount of support Matthew was paying and the amount actually due pursuant to the guidelines.

We acknowledge Rebecca's argument that the parties freely negotiated a child support obligation above the guidelines. *See Pursley v. Pursley*, 144 S.W.3d

820, 825-26 (Ky. 2004). However, it is well-settled that a party to a settlement agreement may "seek modification of child support provisions . . . as changes occur - the right to do so is expressly provided by statute." *Id*. at 827. Furthermore, the court is vested with the power to modify child support when the statutory factors are satisfied. KRS 403.213(1). As Matthew satisfied the requirements of the modification statute, the court's order reducing his child support obligation was proper.

II. Child Care Expenses

Rebecca next argues the trial court misinterpreted the language of the settlement agreement when it concluded Matthew was entitled to be reimbursed for child care expenses that were not actually incurred. The agreement states:

> The parties agree that Matthew will pay child support at the rate of $4,000 per month, effective as of the date of this Agreement, until any of the property listed in Sections 2.3 through 2.6 of this Agreement is sold. If any of the property listed in Sections 2.3 through 2.6 is sold, Matthew's child support obligation will be reduced to $2,500.00 per month, *including* any obligation for monthly day care costs which, at the present time, are approximately $800 per month.

Rebecca argues the agreement did not specifically allocate $800 of the child support obligation for child care expenses. According to Rebecca, the parties intended for Matthew's obligation to be a lump sum payment of $2500 for child support regardless of whether child care costs were actually incurred each month.

"Terms of the [separation] agreement set forth in the decree . . . are enforceable as contract terms." KRS 403.180(5). "The construction and interpretation of a contract, including questions regarding ambiguity, are questions of law to be decided by the court." *First Commonwealth Bank of Prestonsburg v. West*, 55 S.W.3d 829, 835 (Ky. App. 2000). "Absent an ambiguity in the contract, the parties' intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence." *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002).

The trial court concluded the terms of the agreement stated that $800 of the child support obligation was included specifically for child care. Based upon our review, we agree with the court's interpretation of the plain and unambiguous language of the settlement agreement. Although Rebecca believes that $800 in child care costs were not included in Matthew's child support payments, "[t]he fact that one party may have intended different results . . . is insufficient to construe a contract at variance with its plain and unambiguous terms." *Id*.

The trial court went on to conclude that Matthew was entitled to reimbursement for child care costs that were not actually incurred, relying on *Olson v. Olson*, 108 S.W.3d 650 (Ky. App. 2003) and *Nosarzewski v. Nosarzewski*, 375 S.W.3d 820 (Ky. App. 2012). The evidence presented established that Rebecca had not incurred any child care costs since August 2010; consequently, the court concluded that Matthew "was contributing $800 per month to child care, and he continued to be obligated to this expense while the expense was not being

incurred for a thirty-six (36) month period, resulting in an overpayment of $28,800." Our review indicates the trial court correctly applied the legal principles enunciated in *Olson* and *Nosarzewski*, and Rebecca has not presented an argument to the contrary in her appeal.

For the reasons stated herein, we affirm the judgment of the Jefferson Circuit Court.

JONES, JUDGE, CONCURS.

CLAYTON, JUDGE, CONCURS WITH RESULT AND FILES SEPARATE OPINION.

CLAYTON, JUDGE, CONCURRING: I concur with the majority in its decision to affirm the trial court; however, I write separately to address the applicability of KRS 403.213(2). The criteria for modification set out in KRS 403.213(2) reads in part:

> 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.

In this case, the parties initially agreed with the court's approval, to an amount of child support which was in excess of the child support guidelines. When child support is not based on the child support guidelines, this Court has previously held that modification is based upon KRS 403.213(1) and not KRS

403.213(2). *Dudgeon v. Dudgeon*, 318 S.W.3d 106 (Ky. App. 2010). Therein, we held:

> Accordingly, we interpret the rebuttable presumptions found in KRS 403.213(2) as inapplicable in modification of child support cases where application of the child support guidelines ha[s] 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. at 112.

Thus, I do not believe that KRS 403.213(2) should be used as a basis for modification in this case, and I would affirm strictly on the determination that Matthew demonstrated a material change in circumstances that was substantial and continuing.

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BRIEF FOR APPELLEE:

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