

RENDERED: DECEMBER 24, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-002035-ME

TAMATHA LEE HALL

APPELLANT

APPEAL FROM GREENUP CIRCUIT COURT
FAMILY COURT DIVISION II
v. HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 06-CI-00441

LUTHER DANIEL HALL

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CAPERTON, LAMBERT, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Tamatha Lee Hall brings this appeal from a September 27, 2013, Order of the Greenup Circuit Court, Family Court Division II, granting a motion to reduce child support filed by Luther Daniel Hall. We reverse and remand.

On February 12, 1998, the parties were divorced by decree of dissolution of marriage entered in the Muhlenberg Circuit Court (Action No. 97-CI-00384). The decree incorporated a property settlement agreement that provided Tamatha would have sole custody of the parties' only minor child born on September 15, 1997. The parties further agreed that Luther would pay child support of \$1,200 per month based upon the child support guidelines.¹ After the decree of dissolution was entered, the parties had a second child on January 4, 1999.

Relevant to this appeal, the parties then entered into an "Agreed Order" on July 24, 2006, regarding custody and support of their two minor children in the Greenup Circuit Court, Family Court Division, II. The Agreed Order provided that Luther would pay child support of \$2,250 per month for the support of both minor children. The Agreed Order recognized that child support was not calculated according to the child support guidelines.

On August 8, 2013, Luther filed a motion for modification of his child support obligation. Therein, Luther averred that his current monthly income was \$19,317. Despite an increase in his monthly income, Luther sought to decrease his child support obligation. Following a hearing, the family court entered an order reducing Luther's child support on September 27, 2013, which provided:

[Luther's] income for the tax year 2012 was \$231,882.00.
[Tamatha] draws Social Security Disability of \$744.24
[per month]. [Luther] pays insurance for the children in

¹ Tamatha Lee Hall was not employed outside the home, and Luther Daniel Hall was earning \$14,500 per month as a physician.

the amount of \$253.00 per month. There is no daycare, no maintenance and no prior-born children. **Based upon the Uniform Child Support Guidelines, the child support worksheet shows that [Luther] should be required to pay the sum of \$1,766.00 per month.** (Emphasis added.)

[Tamatha] argues that [Luther] should not be allowed a reduction in child support. First, she argues that any change would not be a 15% change and therefore would not meet the presumption as provided for in the statute. Further, she states that her expenses are such that they exceed her income and therefore a reduction should not be allowed. [Tamatha] also argues that the amount of child support that is currently paid in the amount of \$2,250.00 per month was per agreement between the parties and was already less than what he should have been required to pay and therefore he should not be allowed a reduction.

[Tamatha] states that [Luther's] income is such that it is off the charts using the child support worksheet and therefore it is discretionary with the Court as to what the amount of child support should be.

The Court finds that [Luther] is entitled to a reduction of child support and therefore ordered that he be required to pay the sum of \$1,766.00 per month.

This appeal follows.

Tamatha argues that the family court erred by granting Luther's motion to reduce the amount of his child support obligation from \$2,250 to \$1,766 per month. Tamatha particularly maintains that child support was set at \$2,250 per month pursuant to the parties Agreed Order of July 24, 2006. Tamatha believes the Agreed Order should be "upheld" and that the family court erred by modifying child support. Tamatha also argues that the amount of the modified child support

was improper because the family court utilized the child support guidelines when the parties' income exceeded the uppermost income level of the guidelines.

In this Commonwealth, it is well-established that parties may enter into a separation agreement regarding child support in a dissolution of marriage proceeding. *Giacalone v. Giacalone*, 876 S.W.2d 616 (Ky. App. 1994). However, the court retains ongoing jurisdiction over child support and may modify child support that was previously set by agreement of the parties. *Tilley v. Tilley*, 947 S.W.2d 63 (Ky. App. 1997). Where a party seeks modification of an agreed order of child support, the party must demonstrate “a material change in circumstances that is substantial and continuing” per Kentucky Revised Statutes (KRS) 403.213(1).² *Tilley*, 947 S.W.2d at 65. If a material change in circumstances that is substantial and continuing occurs, the family court then must consider child support “anew”:

[O]nce 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 *et seq.*” Furthermore, in reaching its decision, the trial court is to consider both the changes in finances of both parents as well as the needs of the child. Thus, it was proper for the trial court to disregard the prior agreement of the parties as to the amount of child support payable by [ex-husband] in deciding to raise the amount.

² In this case, the child support guidelines of Kentucky Revised Statutes (KRS) 403.212 are inapplicable because the parties combined monthly adjusted parental gross income exceeds the uppermost level of the guidelines. KRS 403.211(3)(e); *see Dudgeon v. Dudgeon*, 318 S.W.3d 106 (Ky. App. 2010). Therefore, when ruling upon Luther's motion to modify child support, the 15 percent presumptions of KRS 403.213(2) are inapplicable. *See Dudgeon*, 318 S.W.3d 106. The family court merely determines if a “material change in circumstances that is substantial and continuing” has occurred. KRS 403.213(1).

Id. at 65 (citations omitted).

When initially considering child support, the family court is guided by KRS 403.211(2), which states:

At the time of initial establishment of a child support order, whether temporary or permanent, or in any proceeding to modify a support order, the child support guidelines in [KRS 403.212](#) shall serve as a rebuttable presumption for the establishment or modification of the amount of child support. Courts may deviate from the guidelines where their application would be unjust or inappropriate. Any deviation shall be accompanied by a written finding or specific finding on the record by the court, specifying the reason for the deviation.

The applicability of the child support guidelines to high income parents was recently addressed by this Court in *Dudgeon v. Dudgeon*, 318 S.W.3d 106 (Ky. App. 2010). In *Dudgeon*, 318 S.W.3d 106, this Court specifically held:

[KRS 403.211](#)(3) provides that the child support guidelines in [KRS 403.212](#) shall not be utilized where it would be unjust or inappropriate and sets forth criteria for the court to consider:

.....

(e) Combined monthly adjusted parental gross income in excess of the Kentucky child support guidelines;

.....

[KRS 403.211](#)(3) (footnote omitted). Thus, under [KRS 403.211](#)(3)(e), application of the child support guidelines is inappropriate because Michael and Laurie's combined monthly adjusted parental gross income exceeds the upper level of the guidelines.

Id. at 110-111. Therefore, the child support guidelines shall not be utilized to calculate child support where the parties combined monthly income is in excess of the uppermost income level of the guidelines; rather, KRS 403.212(5) mandates that the family court utilize its discretion when setting child support.

In its order setting child support, the family court did not find that a material change in circumstances that is substantial and continuing occurred justifying modification of child support. Rather, the family court recognized that Luther's monthly income was \$19,324 and that Tamatha's monthly income was \$744.24.³ The family court then set the monthly child support at \$1,766 per month "based upon the Uniform Child Support Guidelines." We think the family court erred by failing to determine whether a material change in circumstances that is substantial and continuing occurred justifying modification of child support and by utilizing the child support guidelines in setting the child support amount. We address each *seriatim*.

It was clear error for the family court to modify child support without initially determining that a material change in circumstances that is substantial and continuing occurred as required by KRS 403.213(1). *See Tilley*, 947 S.W.2d 63. The family court may not modify child support previously set forth in an agreed order without making such a determination. Thus, we reverse the family court for its failure to comply with KRS 403.213(1).

³ When the Agreed Order was entered in 2006, Tamatha's monthly income was stated as \$0, and Luther's at \$14,500.

It was also clear error for the family court to utilize the child support guidelines to set the amount of child support. It is undisputed that the parties combined monthly income was \$20,068 and that this amount exceeded the uppermost income level of the guidelines, which is \$15,000. It appears that the family court simply utilized the uppermost income level (\$15,000) of the child support guidelines and set child support at \$1,766.⁴ As set forth in *Dudgeon*, 318 S.W.3d 106, the family court may not utilize the guidelines to set child support where the parties' monthly income exceeds the uppermost income level of the guidelines. Rather, the family court must utilize its discretion in setting child support when the parties' monthly income surpasses the guidelines. KRS 403.212(5); 16 Louise E. Graham & James E. Keller, *Kentucky Practice – Domestic Relations Law* § 24:31 (2013).

Tamatha also argues that the family court erred by denying her motion for attorney's fees pursuant to KRS 403.220. As we have reversed the family court's child support award and remanded, we also believe that the family court should reconsider Tamatha's motion for attorney's fees. We remind the family court that it must consider the financial resources of the parties when awarding attorney's fees. KRS 403.220.

In sum, we conclude the family court erred by modifying child support without initially determining whether a material change in circumstances that is substantial and continuing occurred and further erred by utilizing the guidelines to

⁴ Under the child support guidelines for a combined monthly income level of \$15,000, the uppermost combined child support for two children is \$1,844.

set child support. Thus, we reverse the family court's modification of child support. Upon remand, the family court shall initially determine whether a material change in circumstances that is substantial and continuing occurred justifying modification of child support. If the family court finds that such circumstances occurred and that modification is warranted, the family court then shall exercise its discretion and set an appropriate amount of child support based upon the particular changed circumstances of this case. The family court shall also reconsider Tamatha's motion for attorney's fees on remand.

We view all remaining contentions of error as moot or without merit.

For the foregoing reasons, the Order of the Greenup Circuit Court, Family Court Division II, is reversed and this case is remanded for proceedings consistent with this Opinion.

LAMBERT, JUDGE, CONCURS.

CAPERTON, JUDGE, CONCURS, AND FILES SEPARATE
OPINION.

CAPERTON, JUDGE, CONCURRING. I agree with the majority but write separately only to emphasize the deference that should be given when the parties have an agreement in circumstances involving incomes which exceed the Uniform Child Support Guidelines.

Pursuant to the facts presented below, Luther and Tamatha entered into an agreed order in 2006 which provided that Luther would pay \$2,250.00 monthly in child support. That amount was based on the income of the parties at

that time and necessarily reflects their attitudes toward and desires to provide for their children while being cognizant that the amount exceeded the obligations under the Uniform Child Support Guidelines.

As Luther's income grew he returned to the court and sought a reduction of child support in 2013. It is curious to me that the amount agreed to by the parties in 2006 could be found to be subject to a reduction in 2013 when their incomes had increased. Certainly the spirit of the agreement of the parties in 2006 should be carried forward in these circumstances and be given some weight by our courts when considering the amount of child support in 2013 in light of the love and care for their children.

BRIEFS AND ORAL ARGUMENT
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BRIEF AND ORAL ARGUMENT
FOR APPELLEE:

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