

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2014-CA-002078-ME

RACHEL MARIE THOMAS

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE RALPH E. MCCLANAHAN, JUDGE  
ACTION NO. 09-CI-00646

BRODY JASON THOMAS

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JONES, STUMBO AND VANMETER, JUDGES.

STUMBO, JUDGE: Rachel Marie Thomas appeals from Findings of Fact, Conclusions of Law and Judgment of the Pulaski Circuit Court overruling her Motion for Child Support. As a basis for the Judgment, Judge McClanahan determined that Ms. Thomas had not proven a material change in circumstances

sufficient to modify the divorce Decree. We find no error, and AFFIRM the Judgment on appeal.

The facts are not in dispute. Rachel Marie Thomas and Brody Jason Thomas were divorced by the entry of a Decree of Dissolution entered on August 13, 2009. The Decree incorporated the parties' Property Settlement Agreement, which was executed on May 20, 2009. The Agreement provided in relevant part that the parties would exercise joint custody of their children, that neither would be designated as a residential custodian, and that neither party would pay child support since they intended to share equally in the physical custody of the children. At the time of dissolution, Ms. Thomas was earning about \$1,400 per month in gross income from employment at Buyer's Paradise.

After the dissolution of her marriage to Mr. Thomas, Ms. Thomas married and subsequently divorced Alan Woodson. Woodson's mother is Mary Ann Woodson, who owns a business called Magic Monograms. Ms. Thomas was employed at Magic Monograms during her marriage to Mr. Woodson.

On May 2, 2014, and after divorcing Mr. Woodson, Ms. Thomas filed a Motion for Child Support as against Mr. Thomas. As a basis for the motion, she alleged that her financial situation had changed, that she needed financial support for the children, and that she was receiving unemployment compensation. According to the record, the Motion contained no additional information concerning her changes in circumstances nor the difference in income relative to her Mandatory Case Disclosure executed at the time of dissolution. In response to

the Motion, Mr. Thomas filed a Motion to Dismiss, Supplemental Motion to Dismiss, and Motion for Attorney's Fees.

A hearing on the Motion for Child Support was conducted on October 14, 2014. After taking proof, the Pulaski Circuit Court rendered its Findings of Fact, Conclusions of Law and Judgment on December 3, 2014. It found in relevant part that Ms. Thomas was employed until March, 2014, as a sales manager at Magic Mongrams, and that the reason for her separation from Magic Monograms was unclear as she gave conflicting testimony. Additionally, the court determined that Ms. Thomas claimed to be disabled due to rheumatoid arthritis and fibromyalgia, but did not tender any medical evidence or testimony from a physician or other unbiased third party to support this contention.

The court found that Ms. Thomas's circumstances had not materially changed since 2009. It noted that the parties continue to share joint custody of the children, and that Ms. Thomas occupies a three bedroom, two bathroom house, has no car payment, and has the same earning potential that she had prior to the parties' divorce. Additionally, the court found that she receives monthly maintenance from Mr. Woodson, and was to receive a lump sum payment from him.

Ultimately, the court concluded that KRS 403.213(1) provides that the child support provisions of any decree may be modified only upon a showing of a material change in circumstances which is substantial and continuing. It found that Ms. Thomas had failed to meet her burden of demonstrating a substantial and continuing change sufficient to warrant modification. This appeal followed.

Ms. Thomas now argues that the Pulaski Circuit Court erred in failing to order a modification of child support. She contends that the court confused and misapplied the standard set out in KRS Chapter 403. Specifically, Ms. Thomas maintains that the court improperly placed on her the burden of proving a material change of circumstances, when she should have enjoyed a statutory presumption of her entitlement to child support. Ms. Thomas directs our attention to KRS 403.213, which states:

(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.* (Emphasis added).

Relying on KRS 403.213, Ms. Thomas maintains that because she is requesting a change in child support from \$0 per month to something more than \$0 per month, such a change necessarily constitutes at least a 15% increase which creates a rebuttable presumption of a material change in circumstances. As such, Ms. Thomas contends that the Pulaski Circuit Court improperly placed the burden

on her to prove a material change in circumstances sufficient to support a child support modification, and then erred in holding that she failed to meet that burden. In response, Mr. Thomas argues that there is no child support order to be modified as the parties had waived the receipt of child support in the Separation Agreement, which was incorporated by reference into the Decree. KRS 403.213, he contends, only governs the modification of child support orders and therefore cannot be applied to the facts before us.

From the outset, we must distinguish between a Motion for Child Support (KRS 403.211) and a Motion to Modify Child Support (KRS 403.213). The former requires the application of certain elements in conjunction with the child support table set out in KRS 403.212 in order to determine whether child support is justified and, if so, in what amount. The latter also employs the KRS 403.212 child support table, allows for modification of existing child support only upon a showing of a material change in circumstances, and establishes a presumption of a material change in circumstances if the change would result in at least a 15% increase or decrease in the amount of child support.

Ms. Thomas filed a Motion for Child Support on May 2, 2014, as no child support was previously ordered by agreement of the parties. As the matter proceeded in Pulaski Circuit Court, however, the motion was practiced as a *modification* of child support with the parties and the court relying on KRS 403.213 ("Criteria for modification of orders for child support") and employing modification terminology. Though Ms. Thomas initially tendered a Motion for

Child Support rather than Motion to Modify Child Support, we conclude that the Pulaski Circuit Court properly applied the modification provisions of KRS 403.213. We draw this conclusion because the Legislature included in KRS 403.213 language that "[t]he provisions of any *decree* respecting child support may be modified . . . only upon a showing of a material change in circumstances that is substantial and continuing." KRS 403.213(1) (Emphasis added).

While there was no child support order concurrent with the Decree because the parties had waived child support via their Separation Agreement, there nevertheless was a "decree respecting child support" as the Decree incorporated by reference the child support waiver set out in the Separation Agreement. We believe that the Pulaski Circuit Court properly applied the modification provisions of KRS 403.213 to a motion which, strictly speaking, did not seek to modify anything.

This leaves us with two questions to consider: first, the degree to which the court may amend provisions of the Separation Agreement even after the passage of several years; and second, whether the court properly placed upon Ms. Thomas the burden of demonstrating a material change in circumstances sufficient to justify modifying the Decree. The first question we hold as moot, as the Pulaski Circuit Court did not accept Ms. Thomas's invitation to modify the Separation Agreement as incorporated in the Decree. The dispositive question, then, is whether the court properly placed the burden on Ms. Thomas to demonstrate a

material change in circumstances sufficient to modify the Decree. We must answer this question in the affirmative.

As noted above, KRS 403.213(1) provides that "[t]he provisions of any decree respecting child support may be modified . . . only upon a showing of a material change in circumstances that is substantial and continuing." It is uncontroverted that this provision, taken alone, places upon the movant the burden of demonstrating a material change. The question is whether KRS 403.213(2) establishes a rebuttable presumption of a material change in favor of Ms. Thomas. We conclude that it does not.

By its express terms, the rebuttable presumption set out KRS 403.213(2) applies solely to "a motion or petition for modification of the child support order." Ms. Thomas did not file a motion to modify child support, and there is no "child support order" to modify. Additionally, in order to establish the rebuttable presumption, the court must find at least a 15% change in child support as measured by the child support table set out in KRS 403.212. Since there was no child support order rendered contemporaneously with the Decree, there is no basis for establishing a 15% change. We do not find persuasive Ms. Thomas's contention that *any* requested increase in child support from a zero basis necessarily constitutes at least a 15% change, as neither the statutory language nor case law support such a conclusion.

The standard of review in a child support proceeding is whether the circuit court abused its discretion. *Dickens v. Dickens*, 401 S.W.3d 489, 491 (Ky.

App. 2013), citing *Van Meter v. Smith*, 14 S.W.3d 569, 572 (Ky. App. 2000). The test for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair or unsupported by sound legal principles." *Id.* citing *Downing v. Downing*, 45 S.W.3d 449 (Ky. App. 2001). In the matter at bar, the Pulaski Circuit Court properly applied KRS 403.213(1) in concluding that the burden rested with Ms. Thomas to demonstrate a material change in circumstances that is substantial and continuing. It also correctly determined that Ms. Thomas's request for child support, taken alone, did not trigger the rebuttable presumption of a material change in circumstances as set out in KRS 403.213(2). Finally, the record supported the court's conclusion that Ms. Thomas did not prove a change in circumstances sufficient to modify the Decree.

For the foregoing reasons, we AFFIRM the Findings of Fact, Conclusions of Law and Judgment of the Pulaski Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jennifer Thomas  
Somerset, Kentucky

BRIEF FOR APPELLEE:

Jane Adams Venters  
Somerset, Kentucky