RENDERED: SEPTEMBER 16, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001365-ME

NANCY DELANEY APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE HUGH SMITH HAYNIE, JUDGE
ACTION NO. 03-CI-500477

JOSEPH ERIC CISSELL APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND MAZE, JUDGES.

MAZE, JUDGE: Nancy Delaney (Delaney) appeals from a post-decree order of the Jefferson Family Court which denied her motion to enforce an agreement to modify child support and ordered her to pay a child-support arrearage to Joseph E. Cissell (Cissell). Delaney argues that the parties had agreed to a suspension of child support for certain periods when she had primary residential custody of the

child,[1] and to offset a portion of the child's mobile phone bill against her child support obligation. We conclude that the evidence did not compel a finding that such an agreement existed, and therefore the trial court did not abuse its discretion by declining to modify child support. Hence, we affirm.

Delaney and Cissell were divorced by a decree of the Jefferson Circuit Court on December 23, 2003. The decree incorporated the parties' settlement agreement, under which they were awarded joint custody of their daughter, B.I.C., who was then five-years old. The decree designated Delaney as the primary residential parent, with Cissell having extensive parenting time. Cissell also agreed to pay child support and to pay the cost of the child's parochial school education.

In 2012, Delaney completed her Ph.D. in psychology. She also received a commission in the United States Air Force and was stationed on active duty at Langley Air Force Base in Virginia. Based on the change in circumstances, the parties agreed that B.I.C. would reside with Cissell for the 2012-2013 school year, with Delaney having parenting time during school vacations, summer and

[1] Pursuant to CR 73.08, CR 76.03, CR 76.12, and the policy of this Court, cases concerning child custody, dependency, neglect, abuse, and support, as well as domestic violence, are to be given priority, placing them on an expedited track through our Court. That did not occur in this case. Both human error and obsolete case management software resulted in an administrative delay in assigning this case to a merits panel for decision.

On June 24, 2016, after discovering the administrative error, the Clerk of the Court informed the Chief Judge and Chief Judge-elect who, together, assigned the case to a special merits panel of Court of Appeals Judges who have given it the highest priority to offset any delay to the greatest extent possible. Additionally, the Court has sent a letter of explanation and apology to the parties and placed that letter in the record.
Finally, the Court has undertaken efforts to put into effect procedures to ensure that such an error is not repeated.

Christmas. The agreement also provided that Delaney would pay Cissell child support during this period.

Over the course of the following year, B.I.C. expressed an interest in living with her mother in Virginia. In May of 2013, the parties entered into an Agreed Order under which B.I.C. would relocate to Virginia and live full-time with her mother. The Order further provided that neither party would pay child support to the other during the summer of 2013. However, Cissell would resume paying child support to Delaney beginning in September 2013. Finally, the Agreed Order provided:

> In the event of [Delaney]'s deployment, the parties agree to the following: if the deployment is less than five weeks and is during the school year, [B.I.C.] shall remain in the Virginia home with her step-father. In the event that all or part of the deployment is during a school or summer vacation, that part shall be spent with [Cissell]. In the event that the deployment is over five weeks, [B.I.C.] shall return to [Cissell].

After the parties executed the agreement but prior to the trial court's entry of the Agreed Order, Delaney was unexpectedly deployed for a period of time exceeding five weeks. As a result, B.I.C. remained in Louisville with her father. On August 20, 2013, the parties entered into a new Agreed Order providing that Delaney would pay Cissell child support in the amount of $386 per month. In February 2014, this amount was amended to $517 per month, effective September 1, 2013.

But following entry of that latter order, Delaney began deducting amounts from child support for amounts that she paid toward B.I.C.'s mobile phone bill. In addition, Delaney did not pay child support for the summer months of 2014, arguing that such payments would be suspended under the terms of the May 2013 agreement. Cissell responded that there was no agreement allowing for such deductions or suspension of child support, and moved to recover the arrearage.

On August 14, 2015, the trial court entered a judgment ordering Delaney to pay the arrearage of $4,401.55 to Cissell. The court concluded that the May 2013 Agreed Order only applied to child support for the summer of 2013, and did not address future summers. In addition, the court found that the parties had not agreed to any suspension of child support for November and December 2014, while B.I.C. was residing with Delaney. Finally, the court found that the parties had not agreed to any offset in child support for the child's mobile phone bill. Delaney now appeals from this order.

On appeal, Delaney argues that the trial court erred in finding that Cissell had not agreed to a suspension of child support for November and December of 2014, and for the summer months of 2014 and 2015. Along similar lines, Delaney argues that the trial court erred in finding that the parties had not agreed to an offset in child support for a portion of B.I.C.'s mobile phone bill.

As the trial court recognized, a child support order may be modified only as to installments accruing after the filing of a motion for modification. KRS[2] 403.213(1). However, if the court finds that the parties had an agreement to modify support, the agreement may be enforced as to installments accruing after the agreement. *Price v. Price*, 912 S.W.2d 44, 46 (Ky. 1995). A court will enforce an oral agreement between parties to modify support if: (1) the agreement is proven with reasonable certainty; (2) the court finds that the agreement is fair and equitable under the circumstances; and (3) modification might reasonably have been granted if a proper motion had been made. *Id.,* citing *Whicker v. Whicker*, 711 S.W.2d 857, 859 (Ky. App. 1986).

The trial court's factual findings regarding the existence of an agreement shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses. CR[3] 52.01. A finding of fact is not clearly erroneous if it is supported by substantial evidence, which is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). With regard to the remaining factors, the standard of review for a motion to modify child support is abuse of discretion." *McKinney v. McKinney*, 257 S.W.3d 130, 133 (Ky. App. 2008). The test for abuse of discretion is whether the trial judge's decision was

[2] Kentucky Revised Statutes.

[3] Kentucky Rules of Civil Procedure.

arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001).

In this case, the trial court found insufficient evidence to establish the existence of an agreement to modify child support on any of the points which Delaney asserts. The trial court first pointed out that the May 20, 2013 Agreed Order and the pleadings surrounding the entry of that order only referred to a suspension of child support for the summer of 2013. The parties had anticipated that B.I.C. would re-locate to Virginia, but those plans were put on hold when Delaney was unexpectedly deployed. Consequently, B.I.C. remained in Kentucky and Delaney began paying child support to Cissell under the terms of the August 20, 2013 Agreed Order. Based on this evidence, the trial court concluded that there was no agreement to suspend child support beyond the summer of 2013.

Likewise, the trial court found no evidence of an agreement to suspend child support for the months of November and December 2014. During the fall of 2014, B.I.C. again expressed an interest in moving to Virginia and living with her mother. The child actually moved to Virginia in November and enrolled in school there. However, B.I.C. changed her mind and returned to Kentucky at the end of 2014. Although the parties circulated an Agreed Order to modify primary residence and support, it was never signed. The trial court found that the change in circumstances, standing alone, was insufficient to show that the parties had an agreement to modify support during this period.

And finally, Delaney argues that the trial court erred in finding that the parties had not agreed to offset a portion of B.I.C.'s mobile phone bill against the child support obligation. Delaney notes that she proposed such an offset in February 2014. Cissell did not respond to the offer. But, an April 24, 2014 e-mail Cissell sent to Delaney stated; "I have still not received your *partial* payment." (Emphasis added). She contends that this was an acquiescence to the offset that Delaney had proposed. The trial court, however, concluded that Delaney's unilateral decision to deduct this amount and Cissell's subsequent silence on the matter were insufficient to show an agreement to modify support.

Delaney does not point to any specific evidence challenging these findings, but merely challenges the trial court's interpretation of the evidence. The trial court's findings were not clearly erroneous. Although the parties clearly contemplated a suspension of child support for the summer of 2013, they did not come to any agreement for the following summers. It is likely that the parties would have agreed to modify primary residential custody and support in November 2014. However, the parties ultimately agreed to accommodate B.I.C.'s wishes and to return the child to Kentucky by the end of that year. The parties never reached any concrete agreement regarding child support during the brief period that B.I.C. moved to Virginia. Furthermore, we agree with the trial court that Cissell's failure to respond to Delaney's proposal about the mobile phone bill cannot be deemed to constitute an acceptance of an offer to modify child support. Likewise, Cissell's

indirect acknowledgement of the deduction does not compel a finding that he had agreed to it.

Finally, Delaney argues that it is unfair to require her to pay child support during periods when the child primarily resided with her. However, when Delaney had primary custody, Cissell's child support was not suspended during the extended periods when he had parenting time with B.I.C. Moreover, Delaney's remedy was to file a motion for modification of child support or to enter into an agreement with Cissell when the circumstances warranted. *Price*, 912 S.W.2d at 46. By failing to file a motion to modify or to document an agreement with Cissell, Delaney took the risk that the trial court would not uphold her unilateral understanding that such an agreement existed. Under the circumstances, the trial court did not clearly err or abuse its discretion by denying Delaney's motion to enforce the alleged agreement to modify child support.

Accordingly, the order of the Jefferson Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jonathan S. Ricketts
Louisville, Kentucky

BRIEF FOR APPELLEE:

Penny Honchell
Louisville, Kentucky