

RENDERED: AUGUST 24, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001627-ME

CHRISTOPHER EDWARD RYMAN

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE CHRISTOPHER J. MEHLING, JUDGE
ACTION NO. 16-CI-00208

SUSAN ESTES RYMAN

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, JOHNSON AND SMALLWOOD, JUDGES.

SMALLWOOD, JUDGE: Christopher Ryman appeals from an order denying his motion to modify child support. We find that the trial court did not err and affirm.

The parties to this appeal were divorced on April 22, 2016. The parties had negotiated a property settlement and custody agreement which was incorporated into the divorce decree. The agreement stated that Mr. Ryman would

pay Susan Ryman \$955 per month in child support for two children. The agreement had a provision that stated: “The parties have agreed that child support will be reviewed upon wife working full time (at least 30 hours) and waive the 15% threshold requirement.”¹

Attached to the agreement was a child support worksheet that indicated Mr. Ryman’s earning capacity was \$8,250 per month and Ms. Ryman’s earning capacity was \$2,123 per month.² Mr. Ryman also agreed to pay maintenance to Ms. Ryman which amount was not included in the child support worksheet.

On May 30, 2017, Mr. Ryman filed a motion to modify child support. He alleged that the parties had made a mistake in the calculation of child support. The trial court would not allow Mr. Ryman to proceed under this theory because the parties had agreed to the amount. The trial court did allow Mr. Ryman to initiate discovery in order to determine if child support could be reviewed pursuant to the terms of the agreement.

The trial court ultimately held a hearing on August 29, 2017, during which both parties testified. After finding Ms. Ryman was working more than 30

¹ Prior to the divorce, Mr. Ryman was the primary earner for the family and Ms. Ryman stayed home with the children. This provision indicated the parties realized Ms. Ryman would need some time to reenter the workforce.

² Ms. Ryman’s income was not her actual income, but an amount imputed to her.

hours per week, the trial court proceeded to take evidence regarding whether there had been a change in circumstances justifying a modification of child support.

Ms. Ryman testified that the parties agreed to deviate from the child support guidelines and agreed not to include the maintenance amount in the calculation because her income was so much less than Mr. Ryman's. Mr. Ryman testified that he could not remember much about the child support negotiation and that he mainly relied on his attorney.

The court found that the amount of child support agreed to deviated from the child support guidelines, but did so pursuant to the parties' design. The court also found that the additions and subtractions for the payment of maintenance were intentionally omitted from the original child support calculation. In addition, the court found that Mr. Ryman's 2017 income will be \$109,312, or \$9,109 per month, and that Ms. Ryman's 2017 income will be \$20,300, or \$1,692 per month. The trial court concluded that while Ms. Ryman's employment triggered the modification clause of the agreement, there had not been a change in circumstances sufficient to justify the modification. This appeal followed.

Child support may be modified if there has been a material change in circumstances that is substantial and continuing. Kentucky Revised Statute (KRS) 403.213(1). "As are most other aspects of domestic relations law, the establishment, modification, and enforcement of child support are prescribed in

their general contours by statute and are largely left, within the statutory parameters, to the sound discretion of the trial court. This discretion is far from unlimited.” *Van Meter v. Smith*, 14 S.W.3d 569, 572 (Ky. App. 2000) (citations omitted). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001) (citation omitted). Finally, findings of fact will not be disturbed unless they are clearly erroneous. Kentucky Rule of Civil Procedure (CR) 52.01.

Mr. Ryman argues on appeal that the trial court erred in not modifying child support and that the court erred by not imputing a larger income to Ms. Ryman. We find no error.

The trial court thoroughly evaluated the child support issue. The court examined the parties’ current income and estimated the current child support payments. The trial court did this twice, once including the maintenance payments in the calculation and once omitting the maintenance payments. The court found that without factoring in the maintenance, as in the parties’ original agreement, Mr. Ryman would owe about \$1,055 per month. Upon consideration of the maintenance payments, Mr. Ryman would owe \$796.38 per month.

The trial court found that because the parties deviated from the child support guidelines in setting the original child support amount, and that the current

\$955 amount was between the two estimated amounts announced by the court, the equitable decision would be to keep the child support as is. We find this was reasonable. Additionally, we note that Ms. Ryman's current income is over \$400 less than the amount imputed to her in 2016. This is further reason not to modify the child support.

As to imputing more income to Ms. Ryman, we also find no error. "Child support determinations are based on the combined gross income of both parents. In calculating child support obligations, income may only be imputed to parents when the parent is voluntarily unemployed or underemployed, and such a calculation is to be based upon the parent's potential income." *Lambert v.*

Lambert, 475 S.W.3d 646, 653 (Ky. App. 2015) (citations omitted).

If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income. . . . Potential income shall be determined based upon employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community.

KRS 403.212(2)(d).

Mr. Ryman argues that the court should have imputed a higher monthly income to Ms. Ryman because she should be able to work longer hours and earn more. This Court could find nothing in the record that indicates Mr. Ryman requested that the trial court find Ms. Ryman was voluntarily

underemployed or that the court impute a higher income to Ms. Ryman. Mr. Ryman also failed to introduce evidence of the prevailing job opportunities and earning levels in the community, as required by KRS 403.212(2)(d). The only evidence regarding Ms. Ryman's employment came from her testimony. She testified that she had trouble finding a job because of her age and her lack of recent experience. We find that the trial court did not err in its calculation of Ms. Ryman's income.

Based on the foregoing, we find no error and affirm.

ACREE, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS AND FILES SEPARATE
OPINION.

JOHNSON, JUDGE, CONCURRING: I concur with the majority opinion that the child support amount to be paid monthly should remain unchanged. However, upon reviewing the party's briefs and applicable statutes, I disagree with the majority's reasoning as it relates to the calculation of the amount of child support.

Under Kentucky law, to modify a child support payment there has to be a "material change in circumstances that is substantial and continuing." Kentucky Revised Statutes ("KRS") 403.213. To create a rebuttable presumption that there has been a material change in circumstance, there has to be a 15% change in the amount of child support to be paid when applying the child support guidelines. KRS 403.213(2). However, KRS 403.211(3) has an enumerated list of

factors that allows a trial court to deviate from the child support guidelines at its discretion when the guidelines would be unjust or inappropriate.

This Court has previously held that 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. *Dudgeon v. Dudgeon*, 318 S.W.3d 106 (Ky. App. 2010). The *Dudgeon* court used the extraordinary circumstances provision of KRS 403.211(3) to come to determine that "the rebuttable presumptions found in KRS 403.213(2) [is] inapplicable in modification of child support cases where application of the child support guidelines have been determined unjust or inappropriate[.]" *Dudgeon*, 318 S.W.3d at 112. The trial court must make specific findings related to one of the KRS 403.211(3) exceptions when deviating from the guidelines due to injustice or inappropriateness. *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001).

Here the trial court decided to deviate from the child support guidelines due to the parties reaching an agreement on how to calculate child support. That agreement states explicitly that the child support calculation will be revisited once Mrs. Ryman obtains employment in excess of 30 hours a week, and that Mr. Ryman will pay a \$900 maintenance to Mrs. Ryman. However, the record shows that the parties agreed that the \$900 maintenance payment will not be used in calculating child support payments. An agreement by the parties to calculate

child support in a different manner than the standard guidelines is one of the exceptions enumerated under KRS 403.211(3) in subsection (f), and this allows the trial court to determine in its own discretion whether there has been a material change in circumstances in accordance with KRS 403.213(1). *Dudgeon*, 318 S.W.3d at 112.

We review the trial court in this instance by testing whether the trial judge was clearly erroneous or whether it abused its discretion. A “court abuses its discretion when it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard.” *Overstreet v. Overstreet*, 144 S.W.3d 834, 838 (Ky. App. 2003). It is clear from the record and the majority opinion that the trial court made specific findings of fact as required by *Downing* in determining that the standard guidelines were inappropriate. *Downing*, 45 S.W.3d at 454. Thus, the trial court did not err when deciding to keep the child support payment at its current level.

Further, the current payment is \$955 a month in child support. When you recalculate the support payment without the maintenance included, as the parties agreed, the payment would be \$1,055. The change in payment amount does not clear the 15% threshold in KRS 403.213(2) to create a rebuttable presumption of a material change of circumstance. If the standard set in KRS 403.213(2) is used, the trial court committed no error as the 15% threshold has not been met.

The majority errs in its opinion by stating that the trial court's decision was reasonable based on principles in equity. We should affirm the lower court's decision by stating that it was within the trial court's discretion to act as it did because it followed the law.

BRIEFS FOR APPELLANT:

Christopher Ryman, *pro se*
Hebron, Kentucky

BRIEF FOR APPELLEE:

Tasha K. Schaffner
Crestview Hills, Kentucky