

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000770-ME

NICHOLAS STOLTE

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
FAMILY COURT DIVISION
v. HONORABLE TARA HAGERTY, JUDGE
ACTION NO. 15-CI-502202

KENDRA WINSTON (FORMERLY STOLTE)

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * **

BEFORE: ACREE, DIXON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Nicholas Stolte brings this appeal from a February 6, 2017, opinion and order of the Jefferson Circuit Court, Family Court Division, ordering him to pay child support of \$2,337 per month. We reverse and remand.

Nicholas and Kendra Winston (formerly Stolte) were married on May 18, 2007, and have three children. Kendra filed a petition for a decree of dissolution of marriage on July 15, 2015. Following mediation, the parties

executed a settlement agreement on August 24, 2015, and shortly thereafter executed an addendum to the settlement agreement (collectively referred to as Settlement Agreement). The Settlement Agreement provided that Nicholas and Kendra would be awarded joint custody of their three children and would share “50/50 time with the children.” Neither party was designated the primary residential parent. Per the Settlement Agreement, Nicholas was to pay various expenses and extracurricular activities on behalf of the children including health insurance, school expenses for the 2015/2016 school year, and school expenses for the 2016/2017 school year. The Settlement Agreement also provided that beginning with the 2017/2018 school year, the children’s school expenses would be negotiated annually based upon the income levels of the parties. Relevant to child support, the Settlement Agreement provided that Kendra and Nicholas agree “to \$0 child support payments between either parties [and to] review of visitation arrangement and child expense obligation . . . **1 year** from the date of signing this agreement.” Settlement Agreement at 1-2 (emphasis added). The Settlement Agreement was incorporated into the parties’ decree of dissolution of marriage (Decree) entered on December 29, 2015.

In August 2016, Kendra filed a Motion for an Award of Child Support and Maintenance. Following a hearing and by order entered February 6, 2017,

Kendra was awarded child support of \$2,337 per month.¹ The child support award included a credit for health insurance premiums Nicholas paid on behalf of the children in the amount of \$222 per month. The family court found Nicholas's yearly income to be \$100,000 and found Kendra's to be \$20,000. Extraordinary medical expenses were ordered to be paid in proportion to the parties' incomes – 83 percent by Nicholas and 17 percent by Kendra. The family court further ordered that if the children were to attend private school for the 2017/2018 school year, the parties would need to reach an agreement on how tuition would be paid. The parties were ordered to divide the cost of work-related child care in proportion to their income. Nicholas filed a motion pursuant to Kentucky Rules of Civil Procedure (CR) 52.01 and CR 59.05, which was denied. This appeal follows.

Nicholas initially contends the family court erred by modifying the Decree to award child support to Kendra. Specifically, Nicholas asserts that Kendra's motion should have been treated as a motion to modify child support rather than a motion to establish child support. In support thereof, Nicholas argues the Decree, which incorporated the Settlement Agreement, addressed child support by providing that no support would be paid by either party; thus, the modification

¹ The family court also concluded that Nicholas Stolte owed child support retroactive to the date the motion for child support was filed by Kendra Winston (formerly Stolte). This retroactive application resulted in a child support arrearage of \$13,302.

of child support standard set forth in Kentucky Revised Statutes (KRS) 403.213 was controlling.

At the outset, we note that parties to a dissolution of marriage proceeding may enter into a separation agreement addressing issues of child support. And, although a separation agreement may limit modification of certain terms, it may not preclude modification of an award of child support. KRS 403.180(6); *Giacalone v. Giacalone*, 876 S.W.2d 616, 619 (Ky. App. 1994); *Tilley v. Tilley*, 947 S.W.2d 63, 65 (Ky. App. 1997) (holding that KRS 403.180 “makes it clear that while the parties are free to enter into a separation agreement to promote settlement of the divorce, the court still retains control over child custody, support, and visitation and is not bound by the parties’ agreement in those areas.”)

There is a clear distinction between a motion to establish child support pursuant to KRS 403.211 and a motion to modify an award of child support pursuant to KRS 403.213. A motion to establish child support requires application of KRS 403.211 to determine whether an award of child support is proper. If an award of support is proper, the child support guidelines of KRS 403.212 are utilized to calculate the amount of the award. A motion to modify child support, on the other hand, is addressed in KRS 403.213(1), which specifically 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.” (Emphasis added.) A presumption of a material change in circumstances arises where the modification would result in a 15 percent or more change in the amount of the child support. KRS 403.213(2).

In the case *sub judice*, child support was addressed in the parties’ Settlement Agreement that was incorporated into the Decree. The Decree specifically provided that “\$0 child support” would be paid by either party. As there was a “decree respecting child support,” we believe the family court erred by applying the provisions of KRS 403.211 to establish child support. Rather, the family court should have utilized the standard for modification of child support pursuant to KRS 403.213. Therefore, we reverse the family court’s award of child support and remand for the family court to reconsider the child support issue pursuant to the modification standard set forth in KRS 403.213.

We deem any remaining issues as moot.

For the foregoing reasons, the opinion and order of the Jefferson Circuit Court, Family Court Division, is reversed and remanded for proceedings consistent with this opinion.

ACREE, JUDGE, CONCURS.

DIXON, JUDGE, DISSENTS AND WRITES SEPARATE

OPINION.

DIXON, JUDGE, DISSENTING: I must respectfully dissent with the majority's reasoning in this case. The majority has determined that the family court herein erroneously established child support under KRS 403.211, rather than modified child support pursuant to KRS 403.213. However, I can discern nothing within the family court's order warranting such a conclusion. While Kendra sought relief under both statutes, the court's order omits reference to either statute. Nevertheless, a review of the order indicates the court was fully aware it was modifying a previous support agreement. The court then went on to note that both parties income had increased since that time. While the court may not have specifically determined the extent of the material change in each parties' income, such was unnecessary pursuant to the holding of *Weigand v. Wiegand*, 862 S.W.2d 336 (Ky. App. 1993):

Further, KRS 403.213 does not require there to be a change in either party's income before a trial court may modify an existing child support award. Instead, in a situation such as the one here, *where there was at least a 15% discrepancy between the guidelines and the noncustodial parent's existing child support obligation, the existence of this fact standing alone creates a rebuttable presumption that there is a material change in circumstances pursuant to KRS 403.213(2)*. Any refusal to order an increase in support in a situation such as the one here, therefore, is required to be accompanied by findings which specify the reasons for a deviation from the guidelines pursuant to KRS 403.211(3), just as would

be required in cases involving initial awards of child support.

Id. at 337 (emphasis added). There can be no dispute that much more than a 15% discrepancy existed between a \$0 support agreement and application of the guidelines. Consequently, modification was appropriate and the family court so ordered.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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