

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

NO. 2017-CA-001895-ME

ROBERT PHILLIPS

APPELLANT

v. APPEAL FROM WASHINGTON CIRCUIT COURT  
HONORABLE SAMUEL TODD SPALDING, JUDGE  
ACTION NO. 15-CI-00039

ASHLEY COLVIN

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JONES, NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Robert Phillips brings this appeal from an Order entered in the Washington Circuit Court on October 13, 2017, modifying Phillips' child support obligation. We affirm.

Robert Phillips and Ashley Colvin were never married but had a child, N.A.P., on June 22, 2011. Following N.A.P.'s birth, the parties resided together with the child. Then, in 2014, the parties separated, and the child resided with

Colvin. On April 9, 2015, Colvin initiated legal proceeding by filing a Petition for Custody and Child Support in the Washington Circuit Court. Therein, Colvin requested that she be awarded sole custody of N.A.P. and that Phillips be required to pay child support. Phillips filed a response requesting an award of joint custody.

By Agreed Order entered November 12, 2015, the parties were awarded joint custody of N.A.P. with Colvin being designated the primary residential parent. Phillips was granted time-sharing, being essentially every other weekend and certain times during school vacations/holidays. Pursuant to the Agreed Order, Phillips was ordered to pay child support of \$300 per month.

On May 10, 2017, Colvin filed a motion seeking, *inter alia*, an award of sole custody and a modification of child support. Colvin specifically requested that child support be modified pursuant to application of the child support guidelines of Kentucky Revised Statutes (KRS) 403.212. Colvin also sought to have the costs she incurred for N.A.P.'s health insurance be included in the child support calculation and for uncovered health care costs, extracurricular activity expenses, and school expenses to be equally divided between the parties.

A hearing on Colvin's motions was conducted on October 6, 2017. By order entered October 13, 2017, Colvin's motion for sole custody was denied. However, Colvin's motion to modify child support was granted, and Phillips was ordered to pay child support of \$555 per month. On the same date the order was

entered, October 13, 2017, Phillips filed a motion for more specific time-sharing with N.A.P. Then, on November 13, 2017, Phillips filed a notice of appeal from the October 13, 2017, order increasing his child support obligation. After Phillips filed the notice of appeal, the circuit court granted the motion for more specific time-sharing by order entered November 27, 2017. This appeal follows.<sup>1</sup>

Phillips asserts the circuit court erred by granting Colvin's motion to modify child support. Phillips particularly maintains Colvin did not demonstrate a material change in circumstances that was substantial and continuing as required for modification of a child support award under KRS 403.213.

Modification of child support is governed by KRS 403.213. Pursuant to KRS 403.213(1), an order of child support may be modified "upon a showing of a material change in circumstances that is substantial and continuing." And, KRS 403.213(2) "creates a rebuttable presumption that a material change in circumstances exists if the amount of child support owed per month would be altered at least 15 percent as calculated under the child support guidelines in KRS 403.212." *Dudgeon v. Dudgeon*, 318 S.W.3d 106, 109 (Ky. App. 2010).

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<sup>1</sup> Ashley Colvin maintains this appeal is interlocutory and nonappealable. We disagree. The circuit court's order modifying child support was entered on October 13, 2017. On that same date, October 13, 2017, Phillips filed a motion for more specific visitation. Then, on November 13, 2017, Phillips timely filed his notice of appeal from the October 13, 2017, order. In its October 13, 2017, order, the circuit court ruled on all outstanding issues then pending before the court. A circuit court (or family court) retains continuing jurisdiction to hear matters in domestic cases that are ancillary to the proceeding. See *Anderson v. Johnson*, 350 S.W.3d 453 (Ky. 2011).

Therefore, if a parent can demonstrate a 15 percent discrepancy between the amount of child support being paid under the current order of support and the amount of support due upon application of the guidelines, the parent is entitled to a rebuttable presumption that a substantial and continuing material change in circumstances has occurred. *Id.*; *Tilley v. Tilley*, 947 S.W.2d 63, 65 (Ky. App. 1997). The circuit court's decision on modification of child support will not be disturbed on appeal absent an abuse of discretion. *Plattner v. Plattner*, 228 S.W.3d 577 (Ky. App. 2007).

In the case *sub judice*, the parties initially agreed Phillips would pay child support of \$300 per month, and this agreement was incorporated into the Agreed Order of November 12, 2015. Upon Colvin's motion to modify child support, in its October 13, 2017, order, the circuit court found that Phillips' gross monthly income was \$3,707 and Colvin's gross monthly income was \$2,931. The court further found that Colvin paid \$65 per month for the child's health insurance and \$105 per month in child care expenses. Upon application of the child support guidelines of KRS 403.212, the circuit court determined that Phillips' monthly child support obligation would be \$555 per month. Consequently, it is undisputed that there was more than a 15 percent discrepancy between the amount of child support being paid (\$300) and the amount of child support due to Colvin upon application of the guidelines (\$555). Thus, there arose a rebuttable presumption

that a substantial and continuing material change in circumstances had occurred. As this presumption was not rebutted by Phillips, the modification of child support per application of the guidelines was proper. Thus, the circuit court did not abuse its discretion by granting Colvin's motion to modify child support.

Finally, we reject Phillips' contention that the circuit court committed reversible error by not making a specific finding that a substantial and continuing material change in circumstances had occurred per KRS 403.213(1). The law is clear that when the circuit court makes findings of fact that are incomplete, it is incumbent upon a party to file a motion requesting specific findings of fact under Kentucky Rules of Civil Procedure (CR) 52.04. *Anderson v. Johnson*, 350 S.W.3d 453 (Ky. 2011). The failure of a party to do so constitutes a waiver of such error. *Polley v. Allen*, 132 S.W.3d 223, 230 (Ky. App. 2004).

In this case, the circuit court made specific findings of fact relevant to the modification of child support; however, Phillips failed to file a motion for more definite findings per CR 52.04. Hence, this error is not properly preserved for appellate review and was waived. *See Anderson*, 350 S.W.3d 453. And as noted, the statutory presumption set out in KRS 403.213(2) was not rebutted by Phillips. Therefore, it is clear from the evidence that a substantial and continuing material change in circumstances had, in fact, occurred, and despite Phillips' waiver of the

issue, any error by the circuit court in failing to make a specific finding of fact on the issue would be harmless under the facts of this case. CR 61.01.

For the foregoing reasons, the October 13, 2017, Order of the Washington Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Elmer J. George  
Lebanon, Kentucky

BRIEF FOR APPELLEE:

Theodore H. Lavit  
Lebanon, Kentucky