RENDERED: AUGUST 30, 2019; 10:00 A.M.
TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2018-CA-000429-ME

SCOTT A. NELSON — APPELLANT

v.

APPEAL FROM KENTON FAMILY COURT
HONORABLE DAWN M. GENTRY, JUDGE
ACTION NO. 06-CI-00693

JENNIFER M. ECKLAR — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, KRAMER, AND TAYLOR, JUDGES.

DIXON, JUDGE: Scott A. Nelson appeals from an order entered by the Kenton Family Court on April 6, 2017, modifying his child support obligation. After careful review of the record, the briefs, and the law, we affirm.

The parties were never married and are parents to one minor child, born in 2005. On March 10, 2006, Nelson petitioned for joint custody of the child. Temporary orders for custody and child support were subsequently entered by the

family court. At the time of those orders, Nelson earned $2,583.00, and Ecklar earned $2,916.00 in gross monthly income. Nelson was ordered to pay $371.00 per month in child support.

The parties later entered into a parenting agreement, which was incorporated into the *nunc pro tunc* agreed judgment of custody on October 21, 2008. This agreement stated, in part, "no child support shall be exchanged between the parents" and "[e]xpenses for fees for school, sports, social activities, day care, medical or dental co-pays and medical/dental insurance premiums shall be divided evenly." Furthermore, the parties agreed that Ecklar would provide health insurance for the child with the caveat that "[i]n the event one parent's employment provides medical or dental insurance for the benefit of [child], which is least expensive and provides similar or better benefits for [child] than the other parent's insurance, then in that case, that parent will provide medical or dental insurance." The parties agreed to share joint custody and equal timesharing with the child.

In 2012, by agreed order, the parties modified their agreement regarding the child's expenses. Pursuant to section three of the agreed order, Nelson was responsible for "all reasonable expenses associated with the following needs of the minor child: shoes, coats, school clothing and formal outfits; all school lunches, school fees, school supplies, field trips and other school related

expenses; birthday parties and social events attended by the minor child; and haircuts." "School clothing" was defined as "$200 worth of clothes for school every 6 months." The parties further agreed that Nelson would be responsible for 65% of uncovered health related expenses, health insurance premiums, and child care costs, and that Ecklar would be responsible for the remaining 35% of those expenses.

On April 19, 2016, Ecklar filed a motion for the child to attend school in her district, for Nelson to pay child support, and to hold Nelson in contempt for failing to comply with the parties' prior agreement regarding the child's expenses. Ecklar later withdrew her motion regarding the child's school, and the family court ordered the parties to mediation. The parties were unable to reach an agreement regarding child support. Ecklar refiled her motion for child support on March 6, 2017, citing Nelson's failure to comply with the prior agreement of the parties and an increase in his income as grounds for modification of child support.

At the hearing, Ecklar testified to an annual income of $35,526.98. She also testified to receiving occasional bonuses based upon her work performance, which were reflected on her 2016 W-2, bringing her gross annual income to $38,734.60. Her monthly income was $3,227.88. Nelson agreed that his annual income in 2015 was $103,078.00, or $8,589.83 per month. Nelson further testified to paying yearly expenses for the child totaling $3,835.00, or

$319.58 per month, pursuant to the 2012 agreed order. Nelson also testified to funding a college savings account and furnishing an allowance to the child of $10.00 per week.

Regarding the child's health insurance, Ecklar testified that the child had been covered by her plan through her employer since his birth. The cost of health insurance is $117.76 per month. Nelson did not testify to having a health insurance plan through his employer to which he could add the child but stated that the child could be covered by his fiancée's plan at no additional cost. Nelson further testified to providing dental and vision insurance for the child but did not provide documentation of those expenses.

In its April 6, 2017, order, the family court found Ecklar's income to be $3,227.88 per month and Nelson's monthly income to be $8,589.83. Based upon these amounts, the court determined that Nelson contributes 73% of the combined income of the parties and Ecklar 27%. The court calculated the base amount of child support, pursuant to the child support guidelines in KRS[1] 403.212, to be $1,084.00, making Nelson responsible for $791.32 per month and Ecklar responsible for $292.68 per month. The court found that Ecklar incurred the cost of the child's health insurance in the amount of $117.76 per month and ordered Nelson responsible for 73% of that expense, or $85.86 per month. The court

[1] Kentucky Revised Statutes.

acknowledged Nelson's provision of dental and vision insurance for the child, but with no documentation of those expenses, no credit was granted. Based upon the parties' shared parenting schedule, the family court deemed it inequitable to apply the child support guidelines and credited Nelson $292.68 against his total obligation. Therefore, Nelson's monthly obligation amounted to $584.60. Based upon this amount, the family court found the following:

> There has been a change in circumstances since the August 14, 2012 Agreed Order which would warrant a change in child support. [Nelson] is earning more income which would result in a greater than 15% change to his child support obligation. Petitioner was paying approximately $319.58 per month toward the child's expenses in lieu of child support.

Upon Nelson's motion to alter, amend, or vacate the family court's order, the court entered supplemental findings of fact. In its supplemental findings, the family court found that there was a material change of circumstance that was substantial and continuing, which rendered the parties' prior agreement unconscionable. The court further determined that there had been a substantial change in both parties' incomes since child support was ordered in 2006. The court also found that Nelson's monthly income was improperly calculated in the April 6, 2017, order and should have been $8,583.33. However, this did not affect the court's calculation of Nelson's monthly obligation; therefore, the court did not alter its order for him to pay $584.60 per month in child support. Upon yet another motion

by Nelson to alter, amend, or vacate the order, the court found that Nelson's obligations under section three of the parties' 2012 agreed order no longer applied. This appeal followed.

On appeal, Nelson raises three arguments. First, he alleges that the family court erred in finding a material change in circumstances that was continuous and substantial requiring modification of the parties' previous agreement regarding the child's expenses. Second, he argues that the family court incorrectly allocated the base amount of child support between the parties. Third, he contends that the family court erred in failing to follow the parties' agreement regarding provision of health insurance for the child.

"[T]his state's domestic relations law is founded upon general statutory guidelines and presumptions within which the [family] court has considerable discretion." *Van Meter v. Smith*, 14 S.W.3d 569, 574 (Ky. App. 2000). "We review the establishment, modification, and enforcement of child support obligations for abuse of discretion." *Wilson v. Inglis*, 554 S.W.3d 377, 381 (Ky. App. 2018) (citing *Plattner v. Plattner*, 228 S.W.3d 577, 579 (Ky. App. 2007)). "Decisions regarding child support obligations must be fair, reasonable, and supported by sound legal principles." *Seeger v. Lanham*, 542 S.W.3d 286, 298 (Ky. 2018) (citation and internal quotation marks omitted). With regard to child support, "[a]s long as the family court's discretion comports with the guidelines, or

any deviation is adequately justified in writing, this Court will not disturb the [family] court's ruling[.]" *Ciampa v. Ciampa*, 415 S.W.3d 97, 99 (Ky. App. 2013) (citation omitted).

First, the trial court did not err in finding a material change in circumstances that was substantial and continuing requiring modification of the parties' agreement. "[W]hile 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." *Tilley v. Tilley*, 947 S.W.2d 63, 65 (Ky. App. 1997). Although *Tilley* pertained to a dissolution where the parties reached an agreement in a child custody action, the family court retains the same control over custody, support, and visitation.

In *Tilley*, the parties entered into an agreement in which the husband agreed to pay $250.00 per month in child support, and the wife acknowledged that this amount was less than what the husband would be obligated to pay if the child support guidelines were applied. *Id*. at 64. The wife later filed a motion to modify the husband's child support obligation, and the family court found an increase of the husband's obligation was required because of the "discrepancy between the amount of child support agreed to by the parties and the amount set forth under the guidelines." *Id*. On appeal, this court held "where there was at least a 15%

discrepancy between the guidelines and the non-custodial 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)." *Id*. at 65 (citation omitted). Our court determined that the family court properly disregarded the parties' prior agreement regarding the husband's child support obligation. *Id.*

Furthermore, this Court declines to follow the husband's reasoning that modification of child support pursuant to KRS 403.212 does not apply where parties agree to an amount lower than what would be required under the guidelines. *Id*. at 66. "If the legislature intended an exception for an agreement entered into by the parties pursuant to KRS 403.211(3), it could have added one to the statute[,]" but because no exceptions were added, "it is presumed that none were intended." *Id*. (citation omitted). "Support is subject to reconsideration by the [family] court whenever this subject is properly presented." *Farmer v. Farmer*, 506 S.W.2d 109, 111 (Ky. 1974) (citations omitted). Moreover, the parties' parenting agreement specifically acknowledged "that the [family court] retain[ed] continuing jurisdiction on ***all*** issues relating to [child]."[2] (Emphasis added).

Here, pursuant to a temporary order, Nelson paid $371.00 per month in child support. The parties then entered into an agreement in 2008 that no child

[2] Parenting agreement, pg. 9.

support would be paid by either party but that the child's expenses would be divided evenly. The parties then modified their agreement so that Nelson was solely responsible for a number of the child's expenses. Nelson testified that these expenses amounted to $319.58 per month. After granting Nelson a credit, based upon the parties' equal timesharing arrangement and assigning his 73% of the cost of the child's health insurance, the family court, upon Ecklar's motion, determined his monthly obligation to be $584.60. As determined by the family court, this increase exceeds the 15% change required to create a rebuttable presumption of a material change in circumstances pursuant to KRS 403.213(2).

Because Ecklar successfully proved a 15% change in the amount of child support owed, Nelson was then required to rebut the presumption that this change constituted a material change in circumstances. Nelson was unable to do so and argued only that it was impossible to determine a 15% change in the child support obligation where the parties initially agreed to some amount or arrangement outside the guidelines. We are unpersuaded by this argument because it directly contradicts this court's reasoning in *Tilley* and would undermine the control family courts retain over child support, even when parties enter into agreements. *Tilley*, 947 S.W.2d at 65. Therefore, we affirm the family court's finding that a material change in circumstances required a modification of Nelson's child support obligation.

Next, Nelson argues that the family court erred in its allocation of the base amount of child support. Under the guidelines, the family court determined the base amount of child support owed by the parties was $1,084.00. Based upon Nelson's contribution of 73% of the parties' total income, the court assigned him 73% of the total obligation, or $791.32. The court found Ecklar responsible for the remaining 27% of the obligation, or $292.68. Nelson now argues that he should have been assigned only 50% of the total obligation, or $542.00, because the parties share equal timesharing with the child. He reasons that it is unfair for Ecklar to receive a higher percentage of child support when they divide timesharing equally. He further argues that he should be assigned $542.00 and granted a credit for the amount the family court determined Ecklar was responsible, or $292.68, bringing his proposed obligation to $249.32.

Nelson's proposal for allocation of the base amount of child support has no support in fact or law. This Court has previously held:

> To calculate child support under the guidelines of KRS 403.212, the combined monthly adjusted parental gross income is located on the child support guideline table and then the corresponding base monthly child support obligation is, likewise, identified. This base monthly child support obligation is then allocated to each parent in proportion to that parent's respective percentage of the aforementioned combined monthly adjusted parental gross income.

*Dudgeon v. Dudgeon*, 318 S.W.3d 106, 110 (Ky. App. 2010) (footnote omitted). Although this court's decision in *Dudgeon* specifically addresses how family courts should allocate child support when the parties have equal or near-equal incomes and timesharing arrangements, it need not be applied here because Nelson and Ecklar do not have equal or near-equal incomes. Instead, Nelson earns more than two-thirds of the parties' combined monthly income. Therefore, the family court appropriately allocated the parties' combined monthly adjusted parental gross income.

Additionally, the family court addressed the parties' equal timesharing arrangement by granting Nelson a credit in the amount of $292.68 toward his monthly obligation. KRS 403.211 provides flexibility for family courts to consider timesharing arrangements and deviate from the guidelines where they are "convinced their application would be unjust." *Downey v. Rogers*, 847 S.W.2d 63, 65 (Ky. App. 1993). In this matter, the family court determined "it would be inequitable to apply the statutory child support guidelines" because of the parties' equal timesharing schedule and granted Nelson a credit toward his obligation. This is not an abuse of the family court's discretion.

Finally, Nelson argues that the family court erred in not following the parties' agreement regarding the child's health insurance. Terms of a settlement agreement are enforceable as contract terms. *Cagata v. Cagata*, 475 S.W.3d 49, 56

(Ky. App. 2015). "The construction and interpretation of a contract is a matter of law and is reviewed under the *de novo* standard. Absent an ambiguity in the contract, the parties' intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence." *Id.* (citations and internal quotation marks omitted).

Here, the parties agreed that Ecklar would provide health insurance through her employer, but that if a parent's employer offered a less expensive health insurance plan with similar or better benefits for the child, that parent would be responsible for maintaining health insurance for the child. At the time of the hearing, Ecklar was able to continue to provide health insurance for the child through her employer while Nelson was not able to provide insurance through his employer. While Nelson's fiancée may have the ability to add the child to her health insurance plan, such an occurrence is not contemplated by the agreement of the parties. Therefore, the family court properly abided by the agreement of the parties when it ordered Ecklar to continue to provide the child's health insurance and assigned Nelson a portion of the premiums.

For the foregoing reasons, we affirm the order of the Kenton Family Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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