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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-001093-ME

JAMES WILLIAM PIKE — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE DENISE DEBERRY BROWN, JUDGE
ACTION NO. 18-CI-500948

LORI MICHELLE PIKE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; K. THOMPSON AND L. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: James William Pike appeals from an order by the Jefferson Family Court denying his motion to modify child support on the basis that there were no material changed circumstances that were substantive and continuing since the parties entered into a marital settlement agreement that was

incorporated into the decree of dissolution. Pursuant to that agreement, the parties deviated from the child support guidelines by waiving all child support.

James and Lori Michelle Pike were married in 2000 and had three children. Lori filed a petition for dissolution on April 6, 2018, and a contentious process ensued.

The family court ordered a temporary parenting schedule giving James and Lori equal parenting time on a rotating schedule.

In May 2018, James filed a motion for temporary child support on the basis that Lori's income was higher than his income. The matter was referred to mediation, but no agreement was reached.

In January 2019, James filed a motion for sole custody of the two younger children. The oldest child had reached her majority. He alleged that Lori had a problem with alcohol and had driven while intoxicated with the children in the car.

James also renewed his motion for temporary child support. James argued he was paying all the children's expenses except for their private school tuition, but Lori had stopped paying their son's tuition. James provided his pay

stubs, estimated that his yearly salary would total about $55,000.00 for 2018, and expressed his belief that Lori was making at least as much money as he was.[1]

In a hearing on these issues, the family court opined that James had not provided a basis for immediate temporary sole custody but stated it would consider James's motions for sole custody and for child support at the trial.

Meanwhile, discovery occurred. James and Lori complained that the other's responses were incomplete and non-responsive and filed motions to compel.

Rather than proceeding to trial, on March 7, 2019, the parties entered into an agreed memorandum of understanding which was signed by counsel for the parties and was read into the record. The memorandum stated that James and Lori would share joint custody, continue with equal timesharing, neither party would pay child support, Lori would pay the remainder of tuition for the school year, and James would pay school fees and for extracurricular activities. The family court pointed out that the parties would need to come to an agreement as to what would happen regarding tuition following the current school year and stated the parties would have to enter into a formal settlement agreement.

[1] In Lori's final disclosure she stated that her monthly income was $3,916.00, which would mean that she made about $47,000.00 a year.

In May 2019, James and Lori filed competing motions. James filed a motion requesting that Lori be ordered to pay their son's tuition as she had agreed in the memorandum of understanding because their son could not take his finals until his tuition was paid. Lori filed a motion requesting that the family court enter the written memorandum of understanding into the record.

At the hearing, the family court instructed the parties not to return to court until they had an agreement filed. In the written order, entered on May 14, 2019, the family court ordered the parties to transcribe their agreement and tender it to the court and ordered Lori to pay their son's tuition for that school year.

On May 23, 2019, the parties entered into a marital settlement agreement which they both initialed on every page and signed, along with their counsel, and submitted it to the family court. The parties agreed to joint custody and to continue in their rotating equal time schedule with their daughter. Their son would live primarily with James and have therapy with the goal that he would eventually share the same parenting schedule as their daughter. Until his therapist recommended an expansion in parenting time with Lori, their son would spend every other weekend with Lori.

Under the heading "child support" the agreement stated in full:

> Neither party shall pay child support to the other. The parties acknowledge that this is a deviation from the Kentucky Child Support Guidelines. For the remainder of the 2018-2019 school year, Lori shall pay 100% of the

> children's private school tuition and James shall pay 100% of the children's school fees and extracurricular activities, which include, but is not limited to: school lunch fees, afterschool care, travel baseball, cell phones, tutoring, cheerleading, technology and PE [fees] and school trips.

On June 2, 2019, Lori moved for entry of a decree, stating there were no further pending issues. James did not respond to her motion or appear at the scheduled motion hour on June 10, 2019.

Instead, on June 11, 2019, James filed a motion to establish child support. James stated that the settlement agreement provided that if Lori will not pay the children's private school tuition, he shall be permitted to seek child support. James also stated that he is unable to meet the children's monthly expenses without assistance. James submitted a copy of his renewed motion for temporary child support and supporting documentation, noting that his income had not changed.

Lori filed a response contesting James's interpretation of the settlement agreement and asserting that he failed to follow the proper procedure pursuant to Kentucky Family Court Rules of Procedure and Practice (FCRPP) 9(4) in bringing his motion for modification.

On June 13, 2019, the decree of dissolution was entered, incorporating the marital settlement agreement by reference.

On June 17, 2019, the family court held a hearing on the motion to establish child support. After James argued that he needed child support because he was supporting his son fulltime and would now need to pay his son's tuition as well, the family court stated that James knew all of that at the time he entered into the settlement agreement and should have explored those issues prior to entering into the settlement agreement.

On July 1, 2019, an order was entered denying James's motion for child support. The family court set out a very detailed timeline in the case. The family court found that the parties entered into a marital settlement agreement, signed by both parties and counsel, providing that neither would pay child support and omitting any mention of future private school tuition. The family court noted that Lori's motion to enter the divorce decree was scheduled for motion hour, no objection was made to the entry of the decree at that time, and the decree incorporated the settlement agreement. The family court found that James failed to allege any change of circumstance sufficient to modify child support after less than a month. The family court specified that the order was final and appealable with no just cause for delay in its entry or execution. This appeal followed.

James argues he was never provided with Lori's income during discovery. He argues there is a change of circumstances because Lori is no longer paying tuition and they no longer have equal parenting time now that he has their

son all the time. James also argues he was entitled to a hearing for the family court to determine his and Lori's incomes and he was denied due process.

"As are most other areas of domestic relations law, the establishment, modification, and enforcement of child support is generally prescribed by statute and largely left, within the statutory parameters, to the sound discretion of the trial court." *McKinney v. McKinney*, 257 S.W.3d 130, 133 (Ky.App. 2008). We review the family court's decision on such a motion for abuse of discretion. *Wilson v. Inglis*, 554 S.W.3d 377, 381 (Ky.App. 2018). "[G]enerally, as long as the trial court gives due consideration to the parties' financial circumstances and the child's needs, and either conforms to the statutory prescriptions or adequately justifies deviating therefrom, this Court will not disturb its rulings." *Van Meter v. Smith*, 14 S.W.3d 569, 572 (Ky.App. 2000).

During the parties' dissolution, James had a right to establish child support as codified at Kentucky Revised Statutes (KRS) 403.211(1). By entering into the settlement agreement with the assistance of counsel, which was then incorporated into the decree, James established Lori's child support obligation at zero. *Martin v. Cabinet for Health and Family Services*, 583 S.W.3d 12, 18 (Ky.App. 2019).

When Lori filed her motion for entry of a decree, James could have opposed it, explaining that the agreement did not resolve all of the issues and that

either a hearing had to be held on the remaining issues, or the parties needed to continue to negotiate to resolve outstanding issues. In this way, the issue of the children's education going forward could have been resolved.[2] Instead, James chose to ignore Lori's motion and filed his motion for child support, knowing that the decree could be entered at any time.

Once the decree was entered, James had the option of appealing from the decree or bringing a collateral action pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 to set aside the decree. He did neither. Therefore, we do not consider whether the initial decision on child support was a proper deviation from the guidelines and do not consider James's complaints about Lori's failure to produce proof of her income during discovery.

Instead, we consider James's motion for child support as authorized pursuant to KRS 403.213 as a motion to modify child support. *Martin*, 583

[2] Normally parties cannot be ordered to pay for parochial or private school. *Miller v. Miller*, 459 S.W.2d 81, 83-84 (Ky. 1970). However, if parties have a longstanding history of sending their children to such schools, there may be an implied agreement found which can justify a deviation from the guidelines under KRS 403.211(3)(f) or (g). *See Monin v. Monin*, No. 2018-CA-000476-ME, 2018 WL 6444008, at *4 (Ky.App. Dec. 7, 2018) (unpublished) and the cases cited therein. However, the parties would still need to have the means to pay for this education. Lori stated that her parents were paying for their son's private school tuition, they were no longer willing to pay this tuition, and she and James could not afford to pay for son to continue to attend St. Xavier.

S.W.3d at 18-19. Therefore, we review whether the family court was justified in denying James's motion to modify child support without a hearing.

KRS 403.213(1) provides in relevant part 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." Under KRS 403.213, it is the burden of the party filing a motion for modification of child support to make such a showing and if such a showing is not made, it is appropriate for the family court to deny the motion for modification of child support. *Goldsmith v. Bennett-Goldsmith*, 227 S.W.3d 459, 461 (Ky.App. 2007). When a deviation is made from the child support guidelines on the basis that they were unjust or inappropriate pursuant to KRS 403.211(3), the rebuttable presumptions contained in KRS 403.213(2) are inapplicable on a motion to modify child support. *Dudgeon v. Dudgeon*, 318 S.W.3d 106, 112 (Ky.App. 2010).

In interpreting KRS 403.250(1), which governs modification of maintenance, the Court held that trial courts may "summarily dispose of motions for modification" where the moving party failed to show "a substantial and continuing change in condition[.]" *Ogle v. Ogle*, 681 S.W.2d 921, 923-24 (Ky.App. 1984). Similar reasoning has been applied in determining that motions for modification of child support do not require a hearing where they either fail to allege any basis upon which the family court could find a material change in

circumstances that is substantial and continuing, *Herrell v. Commonwealth ex rel. Gray*, No. 2008-CA-001052-ME, 2009 WL 961134, at *2 (Ky.App. Apr. 10, 2009) (unpublished), or "the record contains sufficient, uncontested evidence to enable the trial court to make an informed decision on the motion[,]" *Wilson v. Wilson*, No. 2013-CA-001473-MR, 2015 WL 3826245, at *3 (Ky.App. Jun. 19, 2015) (unpublished).

The method by which the moving party moves for modification of child support is set out in FCRPP 9(4)(a) which states that such a motion "shall be accompanied by [five enumerated items including] . . . [a] completed child support guidelines worksheet with movant's portion completed[,] . . . [c]opies of the movant's last three pay stubs [and] . . .[t]he most recently filed federal and state income tax returns." The respondent is then to file the same information before the hearing. FCRPP 9(4)(b). Through the disclosure of current financial information by both parties, a child support worksheet can then be completed.[3]

James failed to comply with the requirements of FCRPP 9(4)(a). James failed to provide any updated financial information in his motion for child support. This would have been an appropriate reason for the family court to deny

[3] In motions for modification which seek to rely on the presumptions of KRS 403.213(2), the absence of such records by both parties would make it impossible to determine whether, compared with a prior child support worksheet, there is an appropriate change in income to merit a presumptive change of circumstances to justify changing the child support award.

James's motion and is also an appropriate ground for us to affirm. *See Martin*, 583 S.W.3d at 20. However, because the family court reviewed James's motion on the merits, we do, also.

The family court found that James failed to establish any change in circumstances since the settlement agreement was signed and the decree incorporating it was entered. We agree.

Because the parties agreed to a deviation in their settlement agreement which awarded zero child support and was made part of the decree, a change can only be made from that award if there is a substantial and continuing change from when the decree was entered. James knew he would be primarily caring for their son until and unless the counseling resulted in him returning to an equal timesharing schedule.

Although James argues that under the terms of the settlement agreement he was entitled to seek child support if Lori stopped paying for the children's private school tuition, the settlement agreement contained no such language. Instead the waiver of child support was not conditioned on anything and Lori only committed to paying their son's tuition for the 2018-2019 school year. James also knew that the settlement agreement did not contain any commitment as to whether after that school year the children would attend private school or if they did, who would pay for it.

There can be no change in circumstances when all the relevant circumstances that James now complains about were known at the time the settlement agreement was signed. James cannot use the modification process because he now is unhappy with the settlement agreement. Because the evidence was clear that there was no material change, the family court acted properly in denying James's motion without an evidentiary hearing.

If, ultimately, the parties' son does not return to equal timesharing with Lori, this might be a continuing and substantial change which could justify a change in child support. However, it was premature for James to assume that this would occur without waiting to see if the counseling would allow their son to be willing to have equal timesharing with Lori.

Accordingly, we affirm the order by the Jefferson Family Court which denied James's motion to modify child support.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Allison S. Russell Louisville, Kentucky	Jason Anthony Bowman Louisville, Kentucky