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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001466-ME

RICHARD R. HOOFRING — APPELLANT

v.

APPEAL FROM KENTON FAMILY COURT
HONORABLE LISA OSBORNE BUSHELMAN, JUDGE
ACTION NO. 92-CI-01699

JEANIE LYNN SPRAY GARMON FITE AND
COMMONWEALTH OF KENTUCKY, CABINET
FOR HEALTH AND FAMILY SERVICES — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DIXON, JUDGE; KNOPF,[1] SENIOR JUDGE.

DIXON, JUDGE: Appellant, Richard Hoofring, appeals from an order of the Kenton Family Court modifying a child support agreement. Finding no error, we affirm.

Hoofring and Appellee, Jeanie Fite, are the parents of one minor child, William Donald Hoofring, who was born on July 12, 1991. The parties were never married and, in 1992, Fite moved out of the residence they shared. Hoofring thereafter filed an action in the Kenton Circuit Court for custody of William. On February 24, 1993, the trial court entered a final custody and settlement agreement whereby the parties

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

would share joint legal and physical custody of William. The court ordered Hoofring to pay Fite $30 per week in child support, as well as to maintain medical insurance for William.

On September 19, 1997, the parties entered into a second custody and support agreement that granted Hoofring physical custody of William, and required Fite to pay $25 per week in child support. Apparently, Fite paid child support sporadically, if at all.

In February 2005, the parties again entered into an agreement whereby Fite regained physical custody of William. The agreed order stipulated that because William lived with Hoofring for nearly eight years without full payment of child support by Fite, Hoofring would not be obligated to pay child support to Fite. In exchange, however, Fite was relieved of any liability for her child support arrearage. Finally, the agreement provided that Hoofring was to maintain medical insurance for William until the end of 2005, at which time Fite would become responsible for such coverage.

Sometime in 2006, and apparently in response to Hoofring's insistence that Fite obtain medical insurance for William, Fite went to the Kenton County Attorney's Office to pursue a modification in child support. A motion for modification was filed in October 2006, and following a hearing in December 2006, the trial court[2] orally ruled that the parties' 2005 agreed order did not preclude Fite from seeking child support, but that she would also be required to pay the arrearages that were waived in that agreed order. Findings of Fact and Conclusions of Law were subsequently entered on March 27, 2007,[3] ordering Hoofring to pay $672.14 per month child support and to maintain

[2] At the time of the hearing, the sitting trial judge was ill and the hearing was conducted by Special Judge Kevin Horne.

[3] Prior to Judge Horne entering his Findings of Fact and Conclusions of Law, the Family Court was instituted in Kenton County and the case was reassigned to Judge Lisa Osborne Bushelman. Judge Bushelman entered the Findings of Fact and Conclusions of Law that were prepared by the assistant county attorney based upon Judge Horne's oral ruling.

medical insurance for William. The child support was retroactive from the date of the February 2005 agreed order. Further, Fite was ordered to pay her arrearages in the amount of $5,183.07.

Hoofring thereafter filed a motion to vacate the March 2007 order or, in the alternative, to hold an evidentiary hearing. That motion was granted and a full evidentiary hearing on all issues was held on May 9, 2007. The Family Court entered new Findings of Fact and Conclusions of Law on June 20, 2007, ruling that the 2005 agreed order was subject to modification under KRS 403.213, because a material change in circumstances had occurred. The court noted that the agreed order was entered into under the assumption that the parties would share joint custody of William, but that Hoofring had only seen William once in the previous six months and that Hoofring's lack of involvement had placed a greater burden upon Fite. As such, the family court ordered that Hoofring was obligated to pay $646 per month in child support as dictated by the child support guidelines, as well as to maintain the medical insurance. However, the court ruled that child support was retroactive only to October 9, 2006, the date that Fite filed for a modification of support. The arrearage, however, was substantially reduced for medical expenditures Hoofring had incurred for William. Although the family court did not specifically address Fite's obligation to pay her child support arrearage, it did note that while the 2005 Agreed Order was a "bad bargain," it was "an enforceable order."

On appeal, Hoofring argues that *res judicata* bars relitigation of the child support issues that were previously decided in the 2005 agreed order. Further, he contends that the family court erred in characterizing the agreed order as "enforceable," yet vacating part of the order. Finally, Hoofring argues that, at a minimum, Fite should be obligated to pay the child support arrearage she owes him.

Regarding matters of child support, the family court has broad discretion, and this Court will not reverse a family court's decision absent an abuse of that discretion. *Wilhoit v. Wilhoit*, 521 S.W.2d 512, 513 (Ky. 1975). Pursuant to KRS 403.213(1), a party is entitled to modification of an award of child support upon a showing of "a material change in circumstances that is substantial and continuing." Further, subsection (2) provides,

> Application of the Kentucky child support guidelines to the circumstances of the parties at the time of the filing of a motion or petition for modification of the child support order which results in equal to or greater than a fifteen percent (15%) change in the amount of support due per month shall be rebuttably presumed to be a material change in circumstances.

The family court herein applied the child support guidelines in determining that Hoofring's support obligation should be $646 per month based upon his annual income of $70,000. Clearly, that amount is a 15% increase over the prior amount of child support, namely $0, thus creating a rebuttable presumption that there was a material change in circumstances. KRS 403.213(2).

Hoofring's reliance on *res judicata* is misplaced. KRS 403.180 permits parties to a dissolution action to enter into a written separation agreement addressing the issues of property, child custody, child support and visitation. While the parties may address child support in such an agreement, the terms regarding support are not binding on the trial court. KRS 403.180(2). KRS 403.180(6) prohibits any attempt to limit or preclude modification of agreements concerning child support, custody or visitation. Nevertheless, Hoofring urges this Court to interpret the statute as applying only to separation agreements filed as part of a dissolution of marriage action. He argues that the agreed order at issue herein falls outside the purview and constraints of KRS 403.180, and is thus binding upon the parties. We disagree.

In *Tilley v. Tilley*, 947 S.W.2d 63 (Ky. App. 1997), a panel of this Court concluded that the trial court retained control over child custody, support, and visitation and is not bound by the parties' agreements in such matters. Further, in rejecting the appellant's argument that the support statutes apply only to separation agreements, the Court noted that "KRS 403.213 provides a rebuttable presumption which is applicable to *all* proceedings to modify child support." *Id.* at 65 (Emphasis in original)(*Citing Weigand v. Weigand*, 862 S.W.2d 336, 337 (Ky. App. 1993).

Similarly, as noted by the Supreme Court in *Berry v. CFC ex rel. Howard*, 998 S.W.2d 464, 468 (Ky. 1999),

> KRS 403.180 authorizes the Court to modify provisions of any agreement which pertain to custody, visitation and child support. The parties cannot prevent the court from modifying terms of their agreement. (Citation omitted). The provision of the 1993 order which attempts to protect the father in the event future support should be established is unconscionable and contrary to public policy . . . .

Clearly, to construe the February 2005 agreed order as a waiver of Fite's right to seek child support would be unconscionable and against public policy.

Nevertheless, we agree with the family court that the February 2005 agreed order is enforceable. Appellant seeks to characterize the family court's most recent order as partially vacating the 2005 agreed order. As such, Hoofring argues that the family court erred by selectively enforcing only certain provisions of the agreed order. We are of the opinion, however, that the family court did nothing more than properly exercise its discretion to modify Hoofring's child support obligation. The other provisions of the agreed order, including Hoofring's waiver of any right to payment by Fite for her past arrearage, is valid and enforceable.

The Kenton Family Court's Findings of Fact and Conclusions of Law are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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