

RENDERED: FEBRUARY 27, 2009; 2:00 P.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-001848-MR  
AND  
NO. 2007-CA-001849-MR

KEVIN NEAL ADDISON

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS APPEAL FROM HARDIN FAMILY COURT  
v. HONORABLE PAMELA ADDINGTON, JUDGE  
ACTION NO. 06-CI-01275

LYDIA MARIE ADDISON

APPELLEE/CROSS-APPELLANT

### OPINION AFFIRMING

BEFORE: DIXON AND THOMPSON, JUDGES; LAMBERT,<sup>1</sup> SENIOR  
JUDGE.

THOMPSON, JUDGE: This is an appeal and cross-appeal from an order of the  
Hardin Family Court granting Kevin Neal Addison's motion for an offset against  
his maintenance obligation as a result of mortgage payments made by him, but for

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<sup>1</sup> Senior Judge Joseph E. Lambert, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

which Lydia Marie Addison was obligated, pursuant to a settlement agreement incorporated into the parties' divorce decree. The court further ordered that Kevin's child support obligation be reduced as a result of the maintenance received by Lydia, the custodial parent. Kevin argues that the court erred because it only partially reduced his obligations, improperly denied him credit for tuition payments, and failed to impute income to Lydia. Lydia alleges in her cross-appeal that the court erroneously reduced Kevin's maintenance and child support obligations.

Lydia and Kevin were married in May 1999, and separated in June 2006. After Kevin filed a petition to dissolve the marriage, Kevin and Lydia filed a settlement agreement with the court in July 2006, which divided the marital property, established maintenance for Lydia, and addressed custody, support and visitation of their two children.

In August 2006, Kevin, who was employed by the Army Corps of Engineers, was deployed to Iraq. For the duration of his six-month deployment, Kevin gave Lydia power of attorney, and his paycheck was direct-deposited into their joint checking account. In January 2007, Kevin and Lydia filed an amended settlement agreement which was incorporated into the decree of dissolution entered on March 2, 2007.

Pursuant to the agreement, Kevin agreed to pay Lydia \$1,300 per month maintenance for three years and child support of \$1,300 per month, which he acknowledged exceeded the statutory amount set by the child support

guidelines. *See* KRS 403.212. Kevin also agreed to pay tuition for his children to attend private school. Pursuant to the terms of the agreement, Lydia was required to pay the mortgage on the marital residence until its sale.

In June 2007, the court held an evidentiary hearing to address several motions filed by the parties. Specifically germane to this appeal, Kevin moved for an offset to be applied to his maintenance obligation. He asserted that during his deployment, Lydia wrongfully withdrew \$10,000 from their joint checking account. Kevin also contended that Lydia did not pay the mortgage; consequently, he had paid more than \$15,000 in mortgage payments from the time of their separation until the residence sold in June 2007. Kevin also moved the court to modify his child support obligation because the settlement agreement failed to include Lydia's maintenance as income and, he argued, additional income should be imputed to Lydia. He also sought to include his payments for private school tuition as child support.

The court partially granted Kevin's motion and awarded him an interest free judgment in the amount of \$5,000 payable at a rate of \$200 per month which reduced Kevin's obligation to \$1,100 per month for the remainder of the maintenance term. The court also granted Kevin's motion to modify child support in accordance with the guidelines. The court's order set child support at \$927.25, which was calculated using the reduced maintenance. The court denied Kevin's requests to offset the tuition payments as child support and to impute income to Lydia.

Kevin contends the court should have granted a greater offset to his maintenance obligation. Lydia, in turn, argues that the court abused its discretion by allowing any offset.

Initially, we point out that Kevin did not seek nor did the court grant a modification of the maintenance provision contained in the separation agreement wherein the parties expressly prohibited modification. KRS 403.180(6) provides that if the parties to a settlement agreement choose to make a maintenance obligation non-modifiable, they “settle their affairs with finality beyond the reach of the court's continuing equitable jurisdiction elsewhere provided.” *Brown v. Brown*, 796 S.W.2d 5, 8 (Ky. 1990). Enforcement of settlement agreement, however, remains within the power of the court. KRS 403.180.

Kevin’s motion requested that he be awarded a “credit towards his maintenance obligation” for any mortgage payments toward the marital residence that Lydia failed to make as required by the agreement. Thus, as construed by the court, he sought to enforce the agreement as a contract, a remedy specifically provided for in KRS 403.180. The family court did not modify the maintenance award but “granted an offset” against Kevin’s obligation in the amount of \$5,000 to “be taken at the rate of \$200 per month effective July 1, 2007 and each month thereafter until paid in full or the maintenance obligation ends, whichever occurs first.” It was then a judgment payable by offset to the maintenance.

There is no dispute that pursuant to the separation agreement, Lydia was responsible for paying the mortgage on the marital residence yet, Kevin paid

the \$1, 537.20 monthly mortgage payments from September 2006 until the sale of the residence in June 2007. Moreover, from September 2006 to April 2007, Lydia withdrew approximately \$10,000 in excess of Kevin's maintenance and child support obligations from a joint account maintained after the parties separated. Thus, Kevin contends \$5,000 is inadequate reimbursement. Lydia counters that the settlement agreement did not specify a date when she was to begin paying the mortgage and, therefore, contends that Kevin was not entitled to any reimbursement for his payments.

Except for the goodwill that existed between the parties immediately following their divorce, there is no explanation for their continued use of a joint account or Kevin's assumption of the mortgage payments in contradiction of the settlement agreement. It is apparent, however, that Kevin did not seek to enforce the settlement agreement until April 11, 2007. Until he sought to enforce the terms of the agreement, the trial court was within its discretion to determine that his mortgage payments and authorization given to Lydia to freely access his income was voluntary and not subject to reimbursement.

As to Lydia's contention, although no date is specified when the mortgage payments were to be made by Lydia, any reasonable construction of the agreement is that Lydia's obligation commenced at the time Kevin's obligations for maintenance and child support commenced. Certainly, at the time Kevin made his motion for an offset on the maintenance payments, Lydia was obligated to pay the mortgage payments. Thus, we conclude the award of \$5,000 as reimbursement

for the mortgage payments was not clearly erroneous. *Bailey v. Bailey*, 231 S.W.3d 793, 796 (Ky.App. 2007).

Pursuant to the settlement agreement drafted by Kevin's attorney, Kevin agreed to pay \$1,300 per month in child support, an amount of support in excess of the statutory guidelines. The child support worksheet attached to the agreement failed to allocate maintenance payments to Lydia as her income. Consequently, the amount of support pursuant to the guidelines was calculated as \$1,157, the base amount of support for Kevin's income. Had child support been calculated with Lydia's maintenance included as her income, Kevin's payment would have been \$921.44.

KRS 403.213(1) allows a party to seek modification of child support "only upon a showing of a material change in circumstances that is substantial and continuing." The statute further creates a rebuttable presumption that a material change in circumstances exists if there is a fifteen percent difference in the amount of support paid and the amount actually due pursuant to the guidelines. KRS 403.213(2). It is well settled that the statutory presumption "is applicable to *all* proceedings to modify child support." *Tilley v. Tilley*, 947 S.W.2d 63, 65 (Ky.App. 1997) (*citing Wiegand v. Wiegand*, 862 S.W.2d 336, 337 (Ky.App. 1993)).

Under the facts presented, Kevin is entitled to the rebuttable presumption that a material change in circumstances exists, as he currently pays \$1,300 per month, even though the guideline amount is \$921.44. We acknowledge

Lydia's argument that the parties freely negotiated a child support obligation above the guidelines, and it is unfortunate that Kevin has apparently had a change of heart about his bargain. *See Pursley v. Pursley*, 144 S.W.3d 820, 825-26 (Ky. 2004).

However, it is clear that the court is not bound by the parties' agreement as to child support. KRS 403.180(2); *Tilley*, 947 S.W.2d at 65. Furthermore, the court is vested with the power to modify child support when the statutory factors are satisfied. KRS 403.213(1). Although Lydia argues otherwise, we find no abuse of the family court's discretion when it reduced Kevin's child support consistent with the child support guidelines. *Snow v. Snow*, 24 S.W.3d 668, 672 (Ky.App. 2000).

We disagree with Kevin's contention that the court erred when it failed to impute income to Lydia because she was voluntarily unemployed. Although KRS 403.212(2)(d) requires that the court impute potential income to a voluntarily unemployed parent, the statute further provides that a "determination of potential income shall not be made for a parent who is . . . caring for a very young child, age three (3) or younger, for whom the parents owe a joint legal responsibility." Because Lydia was the full time caregiver for the parties' two-year-old daughter, the court properly declined to impute income to Lydia.

Finally, Kevin contends the court erred by refusing to decrease his child support obligation in consideration of his payments for private school tuition. We note that Kevin does not argue he is entitled to modification based on changed circumstances pursuant to KRS 403.213(1); rather, Kevin's argument is that he finds it unfair that he must pay both tuition and child support.

Pursuant to paragraph thirteen of the settlement agreement, Kevin agreed to pay for his daughters' private school tuition. Although Kevin apparently regrets agreeing to pay for his children's private school tuition, he did not challenge the settlement agreement as unconscionable; and we are not persuaded that his dissatisfaction with his bargain entitles him to a modification of child support. Kevin agreed to provide for his children's education. "[I]t is not manifestly unfair or inequitable to let a party lie in the bed he . . . has freely made." *Pursley*, 144 S.W.3d at 827. We conclude the court properly found Kevin was not entitled to a reduction in child support because of his tuition payments.

For the reasons stated herein, the judgment of the Hardin Circuit Court is affirmed.

LAMBERT, SENIOR JUDGE, CONCURS.

DIXON, JUDGE, DISSENTS IN PART AND FILES SEPARATE  
OPINION.

DIXON, JUDGE, DISSENTING IN PART: Respectfully, I must disagree with the majority's decision in this case affirming. Quite unlike many areas of the law in Kentucky, the legislature and courts of the Commonwealth have clearly enunciated the precept that parties to a divorce may contract to specifically prohibit modification of maintenance provisions thereby rendering these provisions non-modifiable by any court. KRS 403.180(6); *Brown v. Brown*, 796 S.W.2d 5, 8 (Ky. 1990); *Wheeler v. Wheeler*, 154 S.W.3d 291, 295 (Ky.App. 2004).

Nevertheless, the majority effectively modifies the non-modifiable maintenance provision between the parties here by calling the modification an “offset.” The majority contends that the family court’s modification of the non-modifiable provision reducing maintenance by \$200 per month until Lydia pays Kevin \$5,000, a “judgment payable by offset to the maintenance.” Such a holding is merely a matter of semantics. In reality, the majority affirms the family court’s attempt to carve an exception to an ironclad rule. Based upon the majority’s decision, it is now unclear under what circumstances a non-modifiable maintenance agreement under KRS 403.180(6) may ever be truly non-modifiable. Surely almost every party seeking modification may make some claim which a court could now term a “judgment payable by offset.”

While equitable arguments for modification of other provisions of the parties’ settlement agreement may exist, that issue was not presented to the family court, and therefore is not before this Court. Contrary to the majority’s assertion, Kevin specifically requested the family court change, i.e. modify, *only* the provisions of the settlement agreement relating to maintenance and child support. There were numerous other provisions of the settlement agreement which were subject to modification. However, Kevin did not seek modification of any of those terms. In short, Kevin asked the family court for the only relief that he could not receive under the terms of the settlement agreement — an agreement which his own attorney prepared. Lydia was unrepresented by counsel.

Therefore, because the parties here specifically contracted to make the maintenance provision non-modifiable pursuant to KRS 403.180(6), I believe it is error to affirm the family court's modification, even by "offset." Consequently, I would reverse and remand on this issue. In all other respects I am in agreement with the majority opinion.

BRIEFS FOR APPELLANT:

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