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Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000575-ME

CHRISTOPHER EARL RAY

APPELLANT

v. APPEAL FROM JESSAMINE FAMILY COURT
HONORABLE MICHAEL DIXON , JUDGE
ACTION NO. 04-CI-00111

DAWN MICHELLE RAY (NOW HAGER)

APPELLEE

OPINION
REVERSING AND REMANDING

** ** *

BEFORE: ACREE, CHIEF JUDGE; KRAMER AND THOMPSON, JUDGES.

THOMPSON, JUDGE: This is an appeal from the denial of a motion to set child support.

Christopher Earl Ray and Dawn Michelle Ray (now Hager) married in 1998 and divorced in 2004. On June 27, 2005, the family court approved the

parties' settlement agreement, which included provisions regarding custody and child support for their daughter, born in 1996. The parties agreed to joint custody of their daughter with primary residence to be with Dawn, Christopher to have visitation and Christopher to pay \$350 per month as child support and, further, the division of their child's extraordinary medical costs in proportion to their relative incomes. In exchange for assuming a larger portion of the marital debt, Christopher's child support obligation was a downward deviation from his presumed obligation under the child support guidelines.

On September 4, 2013, Christopher filed a motion to modify timesharing on the basis that their now seventeen-year-old daughter resided with him since mid-July and wished to continue living primarily with him. Regarding child support, the motion stated:

[Christopher] does not request child support from [Dawn]. [Christopher] accepted a lopsided portion of the parties' debt at the time of dissolution and as a result, pays reduced child support. As the child now lives with [Christopher], said obligation should terminate as of the date of this motion.

Dawn did not oppose the motion and, on September 30, 2013, the family court entered an order granting the motion. Regarding child support, the order stated:

3. Effective September 4, 2013, [Christopher's] child support obligation to [Dawn] is hereby terminated. Any child support amounts garnished from the pay of [Christopher] or paid by [Christopher] after September 4, 2013, shall be returned to [Christopher] by [Dawn] within seven (7) days of the payment of the same. Failure to comply with this Order may be punishable as contempt of Court.

4. At this time, [Christopher] has not asked for child support from [Dawn].

On October 3, 2014, three days after the initial order modifying timesharing was entered, Christopher filed a motion to set child support pursuant to Kentucky Revised Statutes (KRS) 403.211, arguing there was no existing order of support as to Dawn. Dawn opposed the motion arguing there was no material change in circumstances since the entry of the initial modification order, KRS 403.213 governed because Christopher was attempting to modify child support set at zero, and it was not appropriate to consider the changes granted by the order as the basis for modification. Christopher argued he did not waive child support from Dawn and, even if he had waived it, such agreement would be unenforceable. He further argues support was never calculated so he could not agree to a downward deviation, the prior order only terminated his support obligation and did not resolve whether Dawn would owe support, and the modification of timesharing constituted a material change.

On October 9, 2013, Dawn filed a motion to set aside the order modifying timesharing based upon wording altering their settlement agreement in a manner exceeding the specific relief requested in Christopher's motion to modify timesharing and explained that the child support amounts garnished from Christopher after his motion was filed would be allocated to Christopher's outstanding share of their daughter's previously incurred extraordinary medical expenses. On November 8, 2013, the family court entered an order vacating

certain portions of the order modifying timesharing and amending other portions. The order modified paragraph three to account for the medical expenses due, but did not otherwise modify paragraph three or four.

Following a hearing, the family court denied Christopher's motion to set child support, explaining:

There is no proof of either party having a material change in circumstances of a substantial and continuing nature between the September 30, 2013 Order which awarded [Christopher] no support from [Dawn] and the October 3, 2013 motion to set support. Additionally, [Christopher] sought and received [Dawn's] agreement to the motion to modify timesharing based upon the timeshare modification motion, which included a statement that he did not request child support. [Christopher], after having procured [Dawn's] cooperation cannot thereafter seek child support three (3) days after the entry of the Order which granted his request that he not be awarded support.

Christopher timely appealed.

We review child support awards and the denial of child support for abuse of discretion. *Penner v. Penner*, 411 S.W.3d 775, 779 (Ky.App. 2013); *Jones v. Hammond*, 329 S.W.3d 331, 340 (Ky.App. 2010).

Within statutory parameters, the establishment, modification, and enforcement of child support obligations are left to the sound discretion of the trial court. *Van Meter v. Smith*, 14 S.W.3d 569 (Ky.App. 2000). However, this discretion is not unlimited. *Keplinger v. Keplinger*, 839 S.W.2d 566 (Ky.App. 1992). It must be fair, reasonable, and supported by sound legal principles. *Downing v. Downing*, 45 S.W.3d 449 (Ky.App. 2001).

Plattner v. Plattner, 228 S.W.3d 577, 579 (Ky.App. 2007). “Our Legislature has created general guidelines and presumptions, and the trial court may only deviate from these parameters if it gives appropriate written reasons.” *McIntosh v. Landrum*, 377 S.W.3d 574, 577 (Ky.App. 2012) (quoting *Commonwealth ex rel. Marshall v. Marshall*, 15 S.W.3d 396, 401 (Ky.App. 2000)). “[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). See *Penner*, 411 S.W.3d at 783-784; *Brown v. Brown*, 952 S.W.2d 707, 708 (Ky.App. 1997). However, the family court does not have the discretion to deviate from the guidelines because it thinks the General Assembly erred in setting the appropriate levels of support or to ignore the guidelines altogether. *Clary v. Clary*, 54 S.W.3d 568, 570-571 (Ky.App. 2001).

A family court’s discretion does not allow it to completely terminate the nonresidential parent’s child support obligation. *Jones*, 329 S.W.3d at 340-341. Similarly, the family court cannot refuse to set child support because a parent is required to pay at least a minimum amount of support under the guidelines. See *Rainwater v. Williams*, 930 S.W.2d 405, 408 (Ky.App. 1996); KRS 403.212(4).

We must first determine as a matter of law whether Christopher’s motion to set child support is an initial motion or request for a modification.

KRS 403.211 provides as follows:

(1) An action to establish or enforce child support may be initiated by the parent . . . substantially contributing to the support of the child. . . .

(2) At the time of initial establishment of a child support order, whether temporary or permanent, or in any proceeding to modify a support order, the child support guidelines in KRS 403.212 shall serve as a rebuttable presumption for the establishment or modification of the amount of child support. Courts may deviate from the guidelines where their application would be unjust or inappropriate. Any deviation shall be accompanied by a written finding or specific finding on the record by the court, specifying the reason for the deviation.

(3) A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption and allow for an appropriate adjustment of the guideline award if based upon one (1) or more of the following criteria:

(a) A child's extraordinary medical . . . needs;

. . . .

(f) The parents of the child, having demonstrated knowledge of the amount of child support established by the Kentucky child support guidelines, have agreed to child support different from the guideline amount. . . ; and

(g) Any similar factor of an extraordinary nature specifically identified by the court which would make application of the guidelines inappropriate.

KRS 403.213 explains the criteria for modifications of orders for child support:

(1) The Kentucky child support guidelines may be used by the parent . . . substantially contributing to the support of the child as the basis for periodic updates of child

support obligations. . . . The 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.

(2) 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. . . .

Having thoroughly reviewed the record, we conclude as a matter of law that while the portion of the initial modification of timesharing order changing the primary residential parent to Christopher was a modification of timesharing pursuant to KRS 403.320(3) and the portion of the order relieving Christopher of his prior child support obligation was a modification of child support pursuant to KRS 403.213, the motion to establish child support from Dawn could only be considered pursuant to KRS 403.211, regardless of when it was requested. Therefore, it would be appropriate to request the establishment of child support either at the time modification in timesharing was sought, or later through a separate motion, and neither motion would be a motion to modify child support.

In the settlement agreement designating Dawn as the primary residential parent and ordering Christopher to pay child support, only Christopher's child support obligation was established because Dawn was the parent substantially contributing to the support of their daughter by being her primary residential parent. Once Christopher became the primary residential parent, it was appropriate

that the family court terminate his payment of child support to Dawn. *See Goff v. Goff*, 323 S.W.2d 209, 210 (Ky. 1959). After that occurred, there was no longer an order on child support requiring payment by either party. While the family court indicates its initial order modifying timesharing modified the existing child support order by relieving Christopher of his obligation and implicitly setting Dawn's child support at zero, there were no appropriate findings accompanying its decision. Therefore, there was no existing order to modify. Accordingly, once Christopher became the parent substantially contributing to the support of their daughter by being her primary residential parent, he properly sought establishment of child support from Dawn and the family court erred by failing to consider his motion pursuant to KRS 403.211.

We next consider the effect of Christopher's alleged waiver of the right to obtain child support from Dawn in light of KRS 403.211. Parents have a duty to support their children. *Jones*, 329 S.W.3d at 340. This obligation cannot be waived. *Bustin v. Bustin*, 969 S.W.2d 697, 699 (Ky. 1998). "[T]he child support guidelines were designed so that child support would be paid by the noncustodial parent to the custodial parent." *Dudgeon v. Dudgeon*, 318 S.W.3d 106, 111 (Ky.App. 2010) (footnote omitted). Once Christopher became the primary residential parent, he became obligated to provide for their daughter's daily needs and became obligated to maintain an appropriate residence for her, while Dawn was freed from these direct obligations and now had an obligation to support their

daughter through child support payments to Christopher. *See Brown*, 952 S.W.2d at 708.

When a shift occurs in which parent will be the primary residential parent, it is inappropriate to fail to establish child support due from that nonresidential parent. Once Christopher sought to establish child support, KRS 403.211 provided the appropriate standard. The family court was required to utilize the guidelines to calculate the amount of child support Dawn was obligated to pay and determine whether a downward deviation was appropriate. The family court abused its discretion by implicitly ordering zero support from Dawn without engaging in the proper calculations and findings.

Accordingly, we reverse and remand the Jessamine Family Court's order denying Christopher's motion to set child support.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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