RENDERED: FEBRUARY 21, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002020-MR

GEORGE R. FAULKNER — APPELLANT

v. — APPEAL FROM BOYD CIRCUIT COURT
HONORABLE MARC I. ROSEN, JUDGE
ACTION NO. 99-CI-00538

KIMBERLY A. FAULKNER — APPELLEE

OPINION

VACATING AND REMANDING

** ** ** ** **

BEFORE: GUDGEL[1], JOHNSON, AND McANULTY, JUDGES.

McANULTY, JUDGE. George R. Faulkner appeals from an order of the Boyd Circuit Court which, in conjunction with a modification of child support, required him to pay the mortgage on the marital residence. We vacate and remand.

George R. Faulkner and Kimberly A. Faulkner were married on March 10, 1979, and have two children, Ricky, born June 29, 1983, and Steven, born July 1, 1987. On June 22, 1999,

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[1] This opinion was prepared and concurred in prior to Judge Gudgel's retirement effective December 1, 2002.

Kimberly filed a petition for dissolution of marriage. In August 1999, the parties entered into a settlement agreement. On September 2, 1999, the final decree was entered, incorporating the settlement agreement.

The agreement provided that the parties would have joint custody of the children, with Kimberly being the primary residential custodian. The agreement further provided that the parties would deviate downward from the child support guidelines; however, the deviation was offset by requiring George to make various payments in lieu of child support. Specifically, the agreement provided, in relevant part, as follows:

> I. CUSTODY, VISITATION AND CHILD SUPPORT
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> 1. The Respondent [George] shall pay to the Petitioner [Kimberly] the sum of $200.00 per month for the support of the parties' minor children, the first payment shall be due August 15, 1999. The parties acknowledge that this child support amount deviates from the Uniform Child Support Guidelines, but the parties agree to the lower child support amount because of the payment obligations the Respondent has agreed to fulfill herein. The parties acknowledge that most of the Respondent's payment obligations will expire in four years. The parties agree that the issue of child support may be revisited at that time.
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> II. NON-MARITAL PROPERTY AND MARITAL PROPERTY

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> 2. The Petitioner shall have title, use and ownership of the marital residence located at 2225 Crest Street, Ashland, Kentucky. The Respondent agrees to pay the mortgage payments on said residence until such time as the parties' youngest child graduates from high school, as further child support. The Respondent agrees to execute a Quitclaim Deed vesting any interest he may have in the marital residence to the Petitioner.
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> . . .
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> 5. The Petitioner shall have title, use and ownership of the 1996 Dodge Caravan and the Respondent agrees to assume the lease thereon until March 2000, at which time the Respondent agrees to refinance the Caravan and be responsible for that loan.
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> 6. The Respondent agrees to be responsible for the Bankruptcy payments.

At the time the settlement agreement was executed, the mortgage payment was $525.00 per month;[2] the vehicle payment was $417.00 per month;[3] and the bankruptcy payment was $225.00 per month, resulting in a total child support and in lieu of child support payments of $1,367.00. It appears that the agreement considered that George's 1998 annual income was $65,672.26 and Kimberly's 1998 annual income was $13,876.67.

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[2] Based upon statements made by Kimberly at a hearing held on August 17, 2001, it appears that the mortgage payment is now $635.00 per month.

[3] At the conclusion of the lease period the caravan was not refinanced, and Kimberly obtained another vehicle. During the August 17, 2001, hearing, Kimberly stated that the vehicle payment was now $168.00 every two weeks, or $336.00 per month.

Following a disagreement regarding George's ongoing responsibility to fund Kimberly's vehicle payment, on June 14, 2000, the parties entered into an agreed order modifying the original settlement agreement. The agreed order provided, in relevant part, as follows:

> 1. The Respondent shall pay to the Petitioner the sum of $1,100.00 per month as child support for the support of the parties' minor children, said child support shall be effective June 1, 2000. A Wage Assignment shall issue for the payment of said amount.
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> . . .
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> 3. The Petitioner shall be responsible for the mortgage payment on the residence located at 2225 Crest Street, Ashland, Kentucky, and shall further be responsible for the payment on her automobile. The Respondent shall continue to be responsible for the monthly bankruptcy payment.

Less than four months later, on October 9, 2000, George filed a motion to reduce child support from the amount established in the agreed order and set his obligation pursuant to the uniform guidelines. Kimberly responded that the June 14, 2000 agreement should be enforced. The matter was referred to the domestic relations commissioner. A hearing on the motion was held on January 16, 2001.

On April 3, 2001, the commissioner issued her report and recommendation on George's motion to reduce child support. The commissioner determined that George's 2000 income was

$51,241.63 and that Kimberly’s 2000 income was $14,332.50. Under the child support guidelines, these earnings produced a child support obligation of $841.93 per month, and the commissioner recommended that George’s obligation be lowered to the guideline amount, retroactive to January 1, 2001. By implication, the commissioner’s recommendation required Kimberly to continue paying the mortgage and vehicle payments pursuant to paragraph three of the June 14, 2000, agreed order. Kimberly filed timely exceptions to the commissioner’s report and recommendation.

On June 29, 2001, the parties’ oldest child, after having graduated from high school, turned eighteen. George accordingly filed a motion that his child support obligation be reduced to reflect payment for the support of one child. See KRS 403.213.

On August 17, 2001, a hearing was held on Kimberly’s exceptions. On August 22, 2001, the trial court entered an order on the exceptions. Pursuant to the order, ongoing base child support was set at $599.30 per month. This was based upon a three-year earnings average for George of $56,061.16, current earnings for Kimberly of $16,639.92 per year, and considered that Ricky had attained the age of majority. In addition, the order required George to make the mortgage payment on the marital residence:

> The Court further finds that it being the original intent of the parties that the Respondent [George] pay the monthly mortgage payment due on the marital residence until the youngest child reaches the age of 18, and the Court having heard arguments as to the intent of the original agreement and the subsequent Agreed Order that was signed by the parties in June 2000, the Court finds that the Respondent shall pay the monthly mortgage payment on the former marital residence beginning with the payment for August 2001. The Court further finds that the Petitioner [Kimberly] shall be responsible for any monthly payments months [sic] due on the automobile.

George contends that the trial court abused its discretion in finding that the original intent of the parties was that he would pay the mortgage payment until the youngest child reached the age of eighteen. George alleges that he should not be required to bear responsibility for the mortgage payment because the original agreement was superseded by their subsequent agreement entered into on June 14, 2000, which required Kimberly to be responsible for the mortgage payment and the payment on her automobile.

KRS 403.180(1) provides that parties may enter into a written separation agreement which contains provisions concerning maintenance, division of property, and the custody, support, and visitation of minor children. KRS 403.180(2), however provides that those terms providing for custody, support, and visitation, are not binding on the court. Thus,

the statute makes it clear that while the parties are free to enter into a separation agreement to promote settlement of the divorce, the court still retains control over child custody, child support, and visitation, and is not bound by the parties' agreement in those arreas. Tilley v. Tilley, Ky. App. 947 S.W.2d 63, 65 (1997). Hence, as concerns issues of child support, neither the parties' August 1999 agreement nor their June 14, 2000 agreement was binding on the trial court. Based upon the distinctive intertwining, consolidation, and linkage of the mortgage payment to child support throughout these proceedings, we construe the mortgage payment, in this unique case, as a child support issue.[4]

A reviewing court should defer to the lower court's discretion in child support matters whenever possible. See Pegler v. Pegler, Ky. App., 895 S.W.2d 580 (1995). As long as the trial court's discretion comports with the guidelines, or any deviation is adequately justified in writing, this Court will not disturb the trial court's ruling in this regard. Commonwealth ex rel. Marshall v. Marshall, Ky. App., 15 S.W.3d 396, 400-01 (2000). However, a trial court's discretion is not unlimited. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Goodyear Tire and Rubber

[4] In their arguments before the commissioner, the trial court, and this Court, the parties have similarly linked the two issues.

Co. v. Thompson, Ky., 11 S.W.3d 575, 581 (2000); Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999); Downing v. Downing, Ky. App., 45 S.W.3d 449, 454 (2001).

First, we agree with the trial court that the parties' intention as reflected in the agreements was that George would fund the payment of the mortgage on the marital residence. Paragraph II.2. of the August 1999 agreement explicitly provided that "[George] agrees to pay the mortgage payments on [the marital] residence until such time as the parties' youngest child graduates from high school, as further child support." We conclude that the June 14, 2000 agreed order did not alter this fundamental understanding.

The June 14, 2000 agreed order increased George's base child support obligation from $200.00 to $1,100.00, an increase of $900.00. However, the obligation to make the mortgage payment and the appellee's vehicle payment was shifted to Kimberly. The original monthly payment on the mortgage and the vehicle were $525.00 and $417.00, respectively, resulting in a shifting of expenses to Kimberly of $942.00. Hence, George's base support was increased by $900.00, and $942.00 in expenses was shifted to Kimberly. The outlay required by George remained substantially the same, and the net result was a mere change in the logistics of funding the payment.

Hence, we agree with the trial court's conclusion that the August 1999 settlement agreement and the June 2000 agreed order reflect that the parties intended that George be responsible for the mortgage payment. However, because, as previously noted, the mortgage payment is effectively a child support issue, and because corresponding original agreements concerning child support have been effectively disregarded, that does not end the matter.

The trial court ultimately set child support at $599.30 pursuant to the guidelines, but required George to pay the mortgage payment, which had by then, for an unexplained reason, increased to $635.00. As a result, while under the June 2000 agreement George was required to pay child support of $1,100.00 for two children, ironically, under the trial court's August 22, 2001 order, he was required to pay child support and in lieu of child support payments of $1,234.30 ($599.30 + $635.00) for one child.[5]

It is not disputed that child support under the guidelines is $599.30. However, based upon the history of the case, the mortgage payment of $635.00 is clearly a payment in lieu of child support, and the provision of the August 22, 2001

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[5] At this point, for simplicity, we are ignoring the $225.00 bankruptcy payment, which George was at all times obligated to pay. Under the original September 1999 agreement, ignoring the bankruptcy payment, George's total obligation was $1,142.00, ($200.00 + $525.00 + $417.00).

order requiring George to again pay the obligation effectively amounts to a deviation from the guidelines. Courts may deviate from the guidelines only upon making a specific finding that application of the guidelines would be unjust or inappropriate. KRS 403.211(2); Downing at 454. Here, the trial court found only that "the original intent of the parties [was] that [George] pay the monthly mortgage payment due on the marital residence until the youngest child reaches 18."

While we agree with the trial court as to the original intent of the parties with respect to the mortgage, as noted above, the trial court is not bound by the agreement of the parties in matters of child support.[6] KRS 403.180(2). Further, while we acknowledge that there is a wide disparity in income earned by the parties, nevertheless, the trial court's August 22, 2001 order did not contain the findings required under KRS 403.211(2). We therefore vacate and remand for additional proceedings to determine whether the deviation from child support established in the trial court's August 22, 2001 order complies with KRS 403.211(2). If so, the trial court should set forth the proper findings in support of the deviation; if not, the trial court should set child support, including funding of the mortgage payment, in compliance with KRS 403.211.

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[6] It is unclear why the trial court considered itself bound by the original intention of the parties with respect to the mortgage payment when, at the same time, other "original intentions" of the parties as reflected in the September 1999 and June 2000 agreements were being disregarded or abandoned.

For the foregoing reasons the judgment of the Boyd Circuit Court is vacated and this matter is remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Rhonda M. Copley
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BRIEF FOR APPELLEE:

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