

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002281-MR

JAMES WILSON

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE STEVEN R. JAEGER, JUDGE
ACTION NO. 98-CI-02060

ANITA WILSON

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: BUCKINGHAM, McANULTY, SCHRODER, JUDGES.

BUCKINGHAM, JUDGE: This is an appeal by James Wilson from an order of Kenton Circuit Court denying his motion to modify child support. James argues that his child support obligation should be terminated or reduced because the parties' minor child is confined to a medical care facility as a result of a disability and because the custodial parent, Anita Wilson, does not incur the expenses child support is traditionally meant to cover. Having considered James's arguments and finding no error in the court's decision, we affirm.

The parties were married on August 17, 1987, and had one child during the marriage, Amanda Nicole, born August 14,

1988. On October 14, 1998, James filed a petition to dissolve the marriage. Following a final hearing, on August 24, 1999, the final decree of dissolution was entered. The decree awarded Anita sole custody of Amanda and required James to pay child support of \$494.21 per month.

Amanda has cerebral palsy and requires special facilities and extraordinary care. In December 2000, she underwent surgery in conjunction with her medical condition. She remained hospitalized through the summer of 2001, at which time she was transferred to a nursing home. On August 17, 2001, James filed a motion to terminate or modify child support on the basis that Anita will ~~A~~not incur any future costs for the care and support of her minor daughter at all.@ Following a hearing, the circuit court entered an order on September 20, 2001, denying James's motion. This appeal followed.

James contends that the circuit court erred by denying his motion to modify child support. He alleges that Amanda's condition has not and will not improve so as to enable her to return to Anita's residence; that by all accounts Amanda is an invalid and in need of 24-hour professional care; that all of Amanda's care and needs are paid for by his medical insurance; and that the only costs Anita will incur will be for any clothing expenses for Amanda, but that Anita has provided no proof of any such expense.

KRS¹ 403.213(1) permits modification of child support ~~A~~upon a showing of a material change in circumstances that is

¹Kentucky Revised Statutes.

substantial and continuing.@ In a proceeding to modify child support, the child support guidelines serve as a rebuttable presumption that the guideline amount is the proper level of support. KRS 403.211(2). KRS 403.211(2) provides that a court may deviate from the guidelines where application of the guidelines would be unjust or inappropriate in a particular case. Deviation from the guidelines is also allowed on a motion for modification. Rainwater v. Williams, Ky. App., 930 S.W.2d 405, 407 (1996) (citing Redmon v. Redmon, Ky. App., 823 S.W.2d 463 (1992)). KRS 403.211(3) identifies the extraordinary needs of the child as a basis to deviate from the guidelines. A decision on whether to deviate from the guidelines is within the trial court's discretion. Id.

Testimony at the September 17, 2001, hearing disclosed that Amanda underwent surgery in connection with her disability in December 2000. At the time of the hearing, she was hospitalized in Rockcastle County undergoing rehabilitation from the surgery. Mentally, she was in a vegetative state but was improving. She was off the ventilator and was on a waiting list to enter a nursing/convalescent home in Louisville, Kentucky.

James's testimony disclosed that he had little personal knowledge of Amanda's situation. His claim that Amanda would be permanently confined to a hospital facility and that Anita would incur no expenses for Amanda's care was based upon hearsay and speculation. James presented no other witness testimony, medical testimony, medical records, or other evidence in support of his broad claims that Amanda would be permanently confined to a

medical facility and that Anita would incur no, or minimal, expenses to support Amanda.

Anita testified that she visited Amanda every two weeks. During these trips, Anita stayed in a motel in Rockcastle County from Friday evening until Sunday. Anita also testified that she was undergoing training to care for Amanda, that Amanda would soon begin visits to the home, and that the ultimate plan was for Amanda to be returned to the residence.

James currently pays child support in accordance with the child support guidelines, the presumptively correct payment level. The burden was upon him to rebut the presumption imposed by the guidelines and, further, to show that the guideline level would be unjust or inappropriate. In its order denying James's motion to modify, the circuit court stated, A[h]ospitalization or placement of a minor child in a nursing facility is not a basis to terminate or modify support. This disabled child has needs in excess of those expenses merely covered by insurance.@ We agree.

The proof presented by James failed to overcome the statutory presumption. The trial court's findings that Anita would incur expenses over and above the expenses covered by insurance was not clearly erroneous. Largent v. Largent, Ky., 643 S.W.2d 261, 263 (1982) The evidence presented by James did not demonstrate that Amanda would be permanently confined to a convalescent facility; however, even if such confinement were required, Anita would incur ongoing expenses associated with the care of Amanda such as clothing and personal care items and, in

addition, Anita would incur extraordinary travel and lodging costs in order to visit Amanda.

The record discloses that Anita's income is \$10,368.00 per year whereas James's income is \$35,000.00 per year. Under the circumstances of this case, Anita's travel and lodging expenses to visit Amanda would be a proper expenditure of child support proceeds, as such expenditures would provide Amanda with the opportunity to receive visitation with her mother, an opportunity which might otherwise be financially prohibitive.

The decision to deviate from the guidelines was within the trial court's discretion. Rainwater, supra. The trial court did not abuse its discretion by denying James's motion to modify his child support obligation.

For the foregoing reasons, the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Fortner
Covington, Kentucky

BRIEF FOR APPELLEE:

Nick Benson
Benson and Schultz, P.S.C.
Walton, Kentucky