

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002676-MR

KEITH MOORE

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE PAUL W. ROSENBLUM, JUDGE
ACTION NO. 91-CI-00236

BOBBIE MOORE

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, COMBS, AND KNOPF, JUDGES.

BARBER, JUDGE: Appellant Keith Moore appeals from a Oldham Circuit Court judgment requiring him to pay child support arrearages and rejecting his claim that the parties had an agreement modifying such support obligations. The trial court found that the modification would not have been approved had a proper motion been brought, because Keith's income had not substantially changed. For this reason, the trial court denied

the modification, and found Keith liable for arrearages. We affirm the trial court's ruling.

The parties divorced in September, 1991. The Property Settlement Agreement incorporated into the decree provided that Keith would pay \$125.00 a week in support for the parties' minor child. Bobbie was directed to provide health insurance for the minor child. In July, 1992, Keith Moore changed employment to a job which he claimed gave him lower pay. Keith asserts that the parties made an oral modification of the child support, reducing it to \$75.00 per week. No written modification was filed, although one was prepared by Keith's lawyer. Bobbie asserts that she refused to sign any modification until she was provided proof of Keith's claimed reduction in income. It is uncontroverted that no such proof was provided.

In 1999, Bobbie lost her employment health insurance for the minor child. Keith provided health insurance for the child, and deducted \$10.00 per week from his child support to pay for the insurance. Bobbie objected to this, and filed an action for flagrant non-support. Keith continued to make the \$75.00 a week payments until February, 2000. In October, 2000, the trial court set a new payment schedule, requiring Keith to make payments of \$84.00 per week. Keith has made these payments as required.

Child support may be modified by oral agreement where the parent can provide proof that there was an oral agreement, and show that the agreement was conscionable at that time. Keith must show with reasonable certainty that there was such an agreement to modify. See Ruby v. Shouse, Ky., 476 S.W.2d 823 (1975). A modification agreement will only be enforceable if the modification might reasonably have been granted had a proper motion to modify been brought. Price v. Price, Ky., 912 S.W.2d 44 (1995).

The trial court did not address the issue of whether Keith proved that an oral agreement had been reached. The court held that the modification would not have been granted had a motion to modify been brought. In the absence of such a showing, the modification agreement could not have been enforceable. The domestic relations commissioner found after review of income tax returns that Keith's income did not substantially change between 1991 and 1992. The commissioner also found that in 1994, the date when Keith attempted to have Bobbie sign the modification, Keith's income had not changed significantly enough to warrant a modification of the child support obligation. Keith does not controvert the financial information relied upon by the commissioner, and the record does not contain documents refuting the commissioner's financial determination.

Based on the income tax records, the commissioner determined that the guidelines suggested a child support obligation equal to or in excess of \$125.00 per week. The trial court ruled that Keith was liable for all child support arrearages since 1991. Keith was given credit for the \$1,710.00 he had paid to provide health insurance for the minor child, and ordered to pay all arrearages minus that sum. Keith was required to pay arrearages of \$50.00 per week from the date he reduced his payment to \$75.00 per month, through October, 2000.

A decision whether to modify a child support obligation is to be made at the trial court's discretion in accordance with law. Snow v. Snow, Ky. App., 24 S.W.3d 668, 672 (2000). A reviewing court should defer to the trial court's discretion in child support matters whenever possible. Downing v. Downing, Ky. App., 45 S.W.3d 449, 454 (2001). Keith did not show an abuse of discretion on the part of the trial court. Therefore, the trial court's decision is affirmed.

COMBS, JUDGE, CONCURS.

KNOFF, JUDGE, CONCURS IN RESULT.

KNOFF, JUDGE, CONCURRING IN RESULT: I concur in the result reached by the majority opinion, but I write separately because I am concerned about the standard which the trial court and the majority apply in reaching their conclusions. In this case, the trial court held that the agreement was unconscionable

because Keith's income had not changed enough to warrant a modification of support. But while this is the appropriate standard to consider a motion to modify child support under KRS 403.213, the trial court and the majority's focus on Keith's income defines the question of unconscionability too narrowly.

As the majority correctly notes, parties to a child-support order may modify its provisions (prospectively) by private agreement, without the intervention of a court, but they do so at some risk. A court will enforce such a private agreement between parents if, but only if, it meets certain requirements. The agreement must exist, of course, and its existence and terms must be proven with reasonable certainty. Furthermore, as explained in Price v. Price, Ky., 912 S.W.2d 44 (1995), a court must find that modification might reasonably have been granted had a proper motion to modify been brought before the court at the time such oral modification was originally agreed to by the parties. Id. at 46.

However, I disagree with the suggestion by the trial court and the majority that an agreement between the parties must be evaluated only under the income and guidelines tests established in KRS 403.213. That statute requires that the parties show "a material change in circumstances that is substantial and continuing." Furthermore, KRS 403.213(2) establishes rebuttable presumptions based upon application of

the guidelines which may be used to show that a material change in circumstances has occurred.

Nevertheless, KRS 403.211(3)(f) permits a trial court to deviate from the child-support guidelines where "[t]he 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." In other words, the parties remain free to enter into agreements which provide for child support in amounts greater or less than the statutory guidelines, subject to approval of the court. The controlling question in such cases is not whether the guidelines would apply, but whether the parties' agreement is equitable under the circumstances and adequately serves the interests of the children. Whicker v. Whicker, Ky. App., 711 S.W.2d 857, 859 (1986).

In this case, the trial court did not expressly address whether Keith had proven the existence of the agreement with reasonable certainty. However, the domestic relations commissioner doubted that Bobbie had agreed to Keith's proposed reduction in child support. Moreover, neither the commissioner nor the trial court noted any circumstances which would have justified such a substantial reduction in child support. Keith failed to document his alleged reduction in income. Furthermore, he does not point to any other change in

circumstances, such as visitation or payment of other expenses, which would have warranted such a significant reduction in his child support. At most, Keith established that he assumed responsibility for the child's health insurance after Bobbie lost her coverage. The trial court gave Keith credit for these payments. Therefore, I agree with the majority that the trial court did not abuse its discretion when it rejected the parties' alleged agreement regarding child support. See also Tilley v. Tilley, Ky. App., 947 S.W.2d 63 (1997).

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