

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2002-CA-000294-MR

DONALD J. HUTTON

APPELLANT

v. APPEAL FROM FRANKLIN FAMILY COURT  
HONORABLE REED RHORER, JUDGE  
ACTION NO. 00-CI-01407

LINDA SUE HUTTON

APPELLEE

OPINION  
VACATING AND REMANDING  
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BEFORE: JOHNSON, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: Donald J. Hutton appeals from an order by the Franklin Family Court which denied his motion to reduce his child support obligation which was set in a divorce decree entered by a Texas court in 1997. He argues that the trial court had jurisdiction to modify the Texas decree, that he has shown a material change in circumstances warranting a modification of child support, and that the trial court failed to make any findings sufficient to justify its denial of his motion or its deviation from the Kentucky child support

guidelines. As we agree with Donald that the trial court's findings are inadequate, we vacate and remand for further proceedings.

On April 10, 1997, the County Court of Coryell County, Texas entered a decree of divorce dissolving the marriage between Donald J. Hutton and Linda Sue Hutton. Under the terms of the Texas decree, Linda received sole custody of the parties' two daughters, Ericka Shannon (d.o.b. November 17, 1984), and Brandywine Alicia (d.o.b. May 1, 1987). In addition, the Texas decree directed Donald to pay child support in the amount of \$1,000.00 per month. The decree further provided that, when Ericka reached the age of 18 or otherwise became emancipated, Donald's support obligation would be reduced to \$468.48 per month. Donald was also made responsible for maintaining health insurance coverage for the children.

Following entry of the decree, Linda and the children moved to Indiana, and they eventually settled in Frankfort, Kentucky. Donald, a member of the United States Army, was stationed in Massachusetts and later in South Carolina. During this time, Donald received \$375.00 per month in additional wages as special-duty pay due to his assignment to recruiting duty. The special-duty pay ended after 1999, and Donald has since retired from the Army. He now receives military retirement pay and works at a civilian job.

In December of 2000, Linda filed a motion with the Franklin Family Court registering the Texas decree and asking the court to make a determination regarding a Christmas-visitation dispute. The visitation dispute was resolved by agreed order. Shortly thereafter, Donald filed a motion to reduce his child support obligation. He argued that child support should be reduced based on the recent reduction in his income, and further asserted that his new child support obligation should be set by application of the Kentucky child support guidelines. Linda opposed the motion, arguing that Donald should remain bound by the agreement which he entered into in Texas.

The trial court found that Kentucky has become the children's home state, and therefore it had jurisdiction to entertain the motion. The court referred the parties to mediation, but they were unable to resolve the dispute. On January 3, 2002, the court held a hearing on Donald's motion. At that hearing, both parties agreed that the child support amount set by the Texas court exceeded the amount which Donald would owe had the Texas child support guidelines been applied. Furthermore, both parties conceded that the \$1,000.00 amount was determined by joint agreement. Donald asserted that he understood that the additional amount would be reduced after his special-duty pay ended. Donald also notes that the additional

child support to which he agreed exceeds the amount which he would have owed under the Texas child support guidelines by approximately the same amount as his special-duty pay. However, the Texas decree does not reflect the existence of an agreement, and, apart from the provision adjusting the amount of child support after Ericka turns 18, the Texas decree does not address the matter of modification of child support.

In an order entered on January 7, 2002, the trial court denied Donald's motion to reduce child support. The court noted that the \$1,000.00 sum had been set by the agreement of the parties, and that the Texas decree allows for a reduction in child support only when the oldest child reaches the age of majority. In addition, the court found that the amount of child support was not expressly conditioned on Donald's additional income. Consequently, the court concluded that Donald had failed to show a "material or extraordinary change of circumstance which would entitle him to a change of his support obligation." Donald now appeals from this order.

As an initial matter, the parties agree that the children have resided in Kentucky for at least six months prior to the commencement of the proceedings in Franklin Family Court. Therefore, Kentucky is now the children's home state, and the trial court had jurisdiction to consider matters involving their

custody and support.<sup>1</sup> Furthermore, because the original child support order was issued by a sister state, the Uniform Interstate Family Support Act (UIFSA), Chapter 407 of the Kentucky Revised Statutes, applies to this situation. Kentucky may modify a child support order of a sister-state's tribunal only after the issuing tribunal's order has been registered in a Kentucky court.<sup>2</sup> Upon registration, a support order issued by another state is enforceable in the same manner and is subject to the same procedures as an order issued by a Kentucky court.<sup>3</sup> Linda registered the Texas decree when she filed her motion regarding the visitation dispute.

The scope of a Kentucky court's authority to modify a child support order issued by another state is governed by either KRS 407.5611 or KRS 407.5613. If all of the parties who are individuals reside in this state, and the child does not reside in the state that issued the support order, modification of the support order proceeds under KRS 407.5613. In this case, Linda and the children reside in Kentucky and none of the parties or the children continue to reside in Texas. But because Donald, as the petitioner for modification, does not

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<sup>1</sup> KRS 403.420.

<sup>2</sup> See KRS 407.5609 and 407.5611.

<sup>3</sup> KRS 407.5603.

reside in Kentucky, modification of the Texas support order is governed by KRS 407.5611 rather than KRS 407.5613.<sup>4</sup>

Pursuant to KRS 407.5611, modification of a registered child support order is subject to the same requirements, procedures and defenses that apply to the modification of an order issued by a tribunal of this state, and the order may be enforced and satisfied in the same manner.<sup>5</sup> However, a Kentucky court may not modify any aspect of a child support order which could not be modified under the law of the issuing state.<sup>6</sup> Finally, upon issuance of an order modifying child support, the Kentucky court becomes the tribunal of continuing, exclusive jurisdiction.<sup>7</sup>

Neither Donald nor Linda has referred this Court to any Texas law which would preclude modification of the Texas child support order. Furthermore, in the absence of a written agreement limiting modification of support,<sup>8</sup> a Texas court may

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<sup>4</sup> KRS 407.5611(1).

<sup>5</sup> KRS 407.5611(2).

<sup>6</sup> KRS 407.5611(3).

<sup>7</sup> KRS 407.5611(4).

<sup>8</sup> Contrary to the understanding of both parties, Texas law, like Kentucky, requires that an initial agreement concerning the amount or modification of child support be in writing. Tex. Fam. Code Ann. § 154.124(a). If the court finds that the agreement is in the children's best interest, it may render an order in accord with the agreement. Tex. Fam. Code Ann. § 154.124(b). Once adopted by the court, terms of the agreement in the order may be enforced by all remedies available for enforcement of a judgment, including contempt, but are not enforceable as contract terms unless provided by the agreement.

modify a child support order upon a showing that the circumstances of the child or of the person affected by the order has materially and substantially changed since the entry of the original order.<sup>9</sup> Because Texas law does not prohibit modification of the original child support order, Kentucky law applies to Donald's motion.

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.<sup>10</sup> However, where application of the Kentucky child support guidelines would result in a 15% change in the amount of support due, there is a rebuttable presumption that a substantial change in circumstances has occurred.<sup>11</sup> The application of the Kentucky child support guidelines in this case would result in Donald's child support obligation being \$655.12 per month - a difference of more than 15% from his current obligation of \$1,000.00. Thus, Donald argues that the presumption applies in this case.

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Tex. Fam. Code Ann. § 154.124(c). However, when there is no separate written agreement and the trial court's order is the only written manifestation of the parties' agreement on support, the trial court's order must provide for enforceability of the agreement as contract terms. Bruni v. Brunni, 924 S.W.2d 366 (Tex. 1996).

<sup>9</sup> Tex. Fam. Code Ann. § 156.401(a) (1997). See also In re D.S., 76 S.W.3d 512, 523 (Tex. App., 2002).

<sup>10</sup> KRS 403.213.

<sup>11</sup> KRS 403.213(2).

In response, Linda asserts that the presumption should not apply because Donald agreed to an amount of child support which was greater than what he would have owed had either the Texas or the Kentucky child support guidelines been applied. She suggests that the 15% change in the amount of support due should be measured by the amount Donald would have owed under the guidelines, rather than the higher amount which he agreed to pay. Although this approach has some superficial appeal, KRS 403.212(2) clearly provides that a 15% discrepancy between the non-custodial parent's *existing* child support obligation and the amount determined under the guidelines at the time of the filing of the motion creates a rebuttable presumption that there is a material change in circumstances.<sup>12</sup> The measure of the discrepancy is not the amount which Donald hypothetically could have been ordered to pay, but rather the amount of child support which he is currently required to pay under the Texas decree.

Donald notes that the trial court's order does not address whether the presumption applies. Furthermore, Donald also states that the trial court failed to set forth any reasons for deviating from the child support guidelines as required by KRS 403.211(3). As a result, he argues that the trial court erred in denying his motion to reduce child support.

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<sup>12</sup> See also Weigand v. Weigand, Ky. App., 862 S.W.2d 336, 337 (1993).

Linda responds that Donald failed to object to the sufficiency of the trial court's findings or to request more specific findings. Ordinarily, CR 52.04 precludes a reversal of a final judgment because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02. But, in Hollon v. Hollon,<sup>13</sup> the Kentucky Supreme Court held that CR 52.04 does not apply if a trial judge's findings fail to satisfy basic statutory requirements, allowing review of certain cases even if no motion for more specific findings is filed by an appellant pursuant to CR 52.02.<sup>14</sup>

In setting or modifying child support, a trial court has the discretion to deviate from the child support guidelines. However, KRS 403.211(2) and (3) clearly require a trial court to make "a written or specific finding on the record" justifying

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<sup>13</sup> Ky., 623 S.W.2d 898 (1981).

<sup>14</sup> Id. at 899. In support of this proposition, Donald also cites an unpublished opinion from this Court. We remind Donald and his counsel that opinions which are designated as not-to-be-published shall not be cited or used as authority in any court in this state. CR 76.28(4)(c). The citing of an unpublished opinion is an improper practice which may result in the striking of the offending brief without leave to refile. Yocom v. Justice, Ky. App., 569 S.W.2d 678, 679 (1977). However, because Hollon is the controlling authority on this matter, and because the unpublished opinion merely cites to and applies Hollon, Donald's violation of the rule against citation to unpublished cases does not warrant sanctions beyond this mention.

any such deviation.<sup>15</sup> The trial court in this case made no findings, written or otherwise, concerning the application of the child support guidelines, or the reasons for its deviation from the guidelines. Since the trial court's order fails to comply with statutorily-mandated requirements, we are compelled to reverse the court's order and remand for additional findings of fact.

Based upon this conclusion, Donald's further argument that he was entitled to a reduction in child support as a matter of law is not yet ripe for review. On remand, the trial court shall find whether there is a 15% discrepancy between the amount of support which Donald is currently paying and the amount which he would owe based upon application of the child support guidelines. If the trial court finds that such a discrepancy exists, then the amount provided by the guidelines shall be presumed to be the appropriate amount of support. While this presumption may be rebutted, the trial court must set forth specific findings specifying its reason for deviating from the guidelines.

Furthermore, the fact that child support was initially set by agreement is not, by itself, grounds for deviating from the child support guidelines. Of course, a trial court has the

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<sup>15</sup> Commonwealth ex rel. Marshall v. Marshall, Ky. App., 15 S.W.3d 396, 402 (2000) (citing Bradley v. Bradley, Ky., 473 S.W.2d 117, 118 (1971)).

discretion to deviate from the guidelines when it finds that the parties have entered into an agreement concerning child support and that agreement is not unconscionable.<sup>16</sup> However, a trial court still retains jurisdiction over child custody, support and visitation, and it is not bound by the parties' agreement in those areas.<sup>17</sup> Moreover, a separation agreement may not preclude or limit modification of child support.<sup>18</sup>

Rather, when an award of child support entered pursuant to the terms of a separation agreement is reopened for modification, the child support must be set anew pursuant to KRS 403.210 *et seq.*<sup>19</sup> Furthermore, the trial court is to consider both the changes in finances of both parents as well as the needs of the child.<sup>20</sup> Thus, the trial court may disregard the prior agreement of the parties upon a showing of a material change in circumstances that is substantial and continuing.<sup>21</sup>

Accordingly, the order denying Donald's motion to reduce child support is vacated, and this matter is remanded to the Franklin Family Court for further proceedings consistent with this opinion.

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<sup>16</sup> KRS 403.180. See also Whicker v. Whicker, Ky. App., 711 S.W.2d 857 (1986).

<sup>17</sup> Tilley v. Tilley, Ky. App., 947 S.W.2d 63, 65 (1997).

<sup>18</sup> KRS 403.180(6).

<sup>19</sup> Giacalone v. Giacalone, Ky. App., 876 S.W.2d 616, 620 (1994).

<sup>20</sup> Id.

<sup>21</sup> Price v. Price, Ky., 912 S.W.2d 44, 46 (1995).

ALL CONCUR.

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