

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001749-MR

LINDA RENE RITCHIE MCGUIRE

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE LARRY E. THOMPSON, JUDGE
ACTION NO. 80-CI-01009

FRANKLIN DOVER MCGUIRE

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: BARBER, DYCHE, AND McANULTY, JUDGES.

McANULTY, JUDGE: This is an appeal from the Pike Circuit Court's Order modifying Appellee's child support obligation and effectively eliminating court-ordered child support for the parties' adult son, who is seriously disabled. Appellant argues that the trial court failed to apply the statutory guidelines for modifying child support or failed to adequately justify deviating from the guidelines. We agree that the trial court's findings do not establish the requisite foundation for modifying the decree's child support provisions. Accordingly, we vacate the trial court's order and remand for additional proceedings.

Appellant, Linda Rene Ritchie McGuire (Linda), and Appellee, Franklin Dover McGuire (Frank), were divorced in 1980. They have one child together, Paxton Shane McGuire (Paxton). Paxton's date of birth is September 13, 1972. By agreement in 1980, such agreement being incorporated in the divorce decree, the trial court granted sole custody of Paxton to Linda. By further agreement, Frank was to pay \$500 monthly to Linda as child support; however, if Linda remarried, Frank's child support obligation was reduced to \$300 monthly. Frank's obligation was to continue until Paxton attained gainful employment, although Linda and Frank acknowledged that Paxton's attainment of gainful employment may never happen due to his severe disability. Apparently, Linda did remarry at some point as Frank was obligated to pay monthly child support in the amount of \$300; however, at a later point, Frank voluntarily agreed that he would pay Linda \$350 instead of \$300.

Almost twenty years after Linda and Frank's divorce, in the year 2000, the matter of child support returned to the court's docket when Linda sought enforcement of Frank's child support obligation through the Pike County Attorney's Office, Child Support Division. Frank filed a motion for modification of the custody decree to joint custody and for review of child support. In support of his motion, Frank stated that Paxton alternated residences between Frank and Linda and stayed with

each parent for one month at a time. As for his continuing obligation to pay child support, Frank asserted that Paxton had independent income from a trust that was established in Paxton's name with the proceeds of a personal injury lawsuit filed shortly after Paxton's birth. As of February 5, 2001, the principal value of Paxton's trust was approximately \$407,000.00.

Ultimately, after a number of hearings, on June 10, 2002, the trial court issued its findings of fact, conclusions of law and judgment on issues of child support. The following findings and conclusions are pertinent for the purposes of this appeal:

The parties hereto have been divorced for many years. Pursuant to agreement, child support was established in the record in the amount of \$300.00 per month to be paid by the father to the mother. It is beyond dispute that Paxton Shane McGuire is seriously disabled. Although now an adult, the divorced parents are co-guardians for Paxton, and alternate caretaking responsibilities for him. Paxton Shane McGuire has a trust fund which provides financial support for him.

Verbally, the parties agreed some years ago that the child support would be increased from the amount of \$300.00 per month to the amount of \$350.00 per month. The evidence of this voluntary increase is credible and not disputed. Accordingly, the Court finds that the child support was modified and payable in the amount of \$350.00.

After the Pulaski District Court made the parents co-guardians by Order dated April 7, 1997, the father ceased paying support in

the manner previously agreed. The mother subsequently sought payment of the arrearage and an Order requiring the father to continue paying child support. The father introduced evidence that, due to a downturn in his business (he is self-employed), and in light of the shared caretaking arrangement between the parties, he should not have a child support obligation. The father also noted the existence of the trust fund, which presently has a principal of approximately \$407,000.00, and further contributes towards Paxton's food, shelter, and clothing. The father has continued to pay and maintain health insurance for Paxton, at a cost of \$220.00 per month. The Court does not find any evidence of bad faith or voluntary underemployment of the father.

. . .

As to any current or ongoing obligation to pay child support, the Court holds that Mr. McGuire's continued provision of health insurance for Paxton is sufficient support at this time. Pursuant to KRS 403.212(2)(d), and the decision of Redmon v. Redmon, Ky.App., 823 S.W.2d 463 (1992), there is no basis in the record for imputing income to Mr. McGuire, as there is no evidence that he is voluntarily underemployed. There is an implicit requirement of finding of bad faith in the concept of voluntarily [sic] underemployment. McKinney v. McKinney, Ky. App., 813 S.W.2d 829 (1991). There is no evidence herein of such bad faith.

. . .

While the Court does conclude, as a matter of law, that Mr. McGuire has shown a material change of circumstances to relieve him of his child support obligation as of October of 2000, in light of the change of his income and in light of the rotation of caretaking responsibilities, nevertheless, the child support obligation cannot be modified prior to the date of that motion.

Linda filed a motion to alter, amend or vacate the provision of the trial court's judgment concerning voluntary underemployment. In support, Linda pointed out that the current version of KRS 403.212(2)(d) permits a finding of voluntary underemployment absent a finding of any intent to evade or reduce the child support obligation. In response, the trial court heard the issue and acknowledged during the hearing that there was no bad faith requirement to finding voluntary underemployment. In spite of this recognition, however, the trial court denied Linda's motion on the grounds that (1) Frank was not voluntarily underemployed, and (2) Paxton split his time between Frank and Linda equally.

Linda raises three arguments on appeal. First, Linda asserts that Frank should continue to be required to pay support to Linda in an amount of at least \$350.00 per month because he failed to meet his burden of proof in justifying the modification of child support. Second, Linda contends that the trial court misinterpreted and misapplied KRS 403.212(2)(d), the section of the child support guidelines addressing voluntary underemployment. Finally, Linda argues that neither the existence of income from the trust nor the shared custody arrangement justifies complete relief from Frank's child support obligation.

We turn to the statutory guidelines for establishing and modifying child support and set out the following key provisions. First, KRS 403.211 states:

(2) [I]n 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 or dental needs;
- (b) A child's extraordinary educational, job training, or special needs;
- (c) Either parent's own extraordinary needs, such as medical expenses;
- (d) The independent financial resources, if any, of the child or children;

. . .

(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.

(4) "Extraordinary" as used in this section shall be determined by the court in its discretion.

As referenced above in KRS 403.211, KRS 403.212 establishes working definitions and guidelines for determining income from self-employment and for imputing income from voluntary underemployment. Moreover, KRS 403.212 sets out the child support guidelines table. In further guidance, KRS 403.213(1) provides the required showing for a modification of one's child support obligation:

The provisions of any decree respecting child support may be modified only as to installments accruing subsequent to the filing of the motion for modification and only upon a showing of a material change in circumstances that is substantial and continuing.

It is well-accepted that, as to child support, "courts have the flexibility to fashion appropriate orders for situations not addressed by our statutory scheme." Brown v. Brown, Ky. App., 952 S.W.2d 707, 708 (1997). In addition,

As are most other aspects of domestic relations law, the establishment, modification, and enforcement of child support are prescribed in their general contours by statute and are largely left, within the statutory parameters, to the sound discretion of the trial court. KRS 403.211--KRS 403.213; Wilhoit v. Wilhoit, Ky., 521 S.W.2d 512 (1975). This discretion is far from unlimited. Price v. Price, Ky., 912 S.W.2d 44 (1995); Keplinger v. Keplinger, Ky. App., 839 S.W.2d 566 (1992). But generally, 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. Bradley v. Bradley, Ky., 473 S.W.2d 117 (1971).

Van Meter v. Smith, Ky. App., 14 S.W.3d 569, 572 (2000). If a reviewing court is not satisfied that the trial court's findings establish the requisite foundation for modifying the provisions of the divorce decree, the proper remedy is to vacate the court's order and remand for additional proceedings. See id. at 571.

In this case, at first glance, the trial court's findings seem to take into account the parties' changed circumstances. But two particular findings are absent. First, there is no finding under KRS 403.211 that applying the guidelines under KRS 403.212 would be unjust or inappropriate. Second, there is no finding or conclusion under KRS 403.213 that Frank demonstrated a material change in circumstances that was substantial and continuing.

While one may argue that the absence of these findings is a mere technical violation, we believe such findings are necessary to illustrate the trial court adequately considered the implications of totally relieving the parties of court-ordered child support. This is especially true when we consider Paxton's clear extraordinary and special needs, as he is totally

blind and functions mentally on a 3 to 4 year old level.

Moreover, Paxton is only 31 years old and his trust must provide for him for the rest of his life. Of particular concern is the fact that there are no findings as to either Frank or Linda's current incomes or income earned in either party's previous work history.

The obvious change in custody and the substantial amount paid by Frank in maintaining health insurance for Paxton make us unwilling to say the trial court's modification of child support was an abuse of discretion, but at the same time we are unable to affirm the modification in the absence of the mandatory findings. See Van Meter, 14 S.W.3d at 574-75. Consequently, we vacate the trial court's order as it pertains to the modification of child support and remand the matter to the trial court for further proceedings consistent with this opinion.

ALL CONCUR.

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