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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000863-MR

RUBEN E. JONES — APPELLANT

v.

APPEAL FROM MCCREARY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 00-CI-00050

REGINA CAMPBELL — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: HENRY AND SCHRODER, JUDGES; AND EMBERTON,[1] SENIOR JUDGE.

HENRY, JUDGE: Ruben E. Jones appeals from an order of the McCreary Circuit Court rejecting his motion for a reduction of his child support obligation. Upon review, we vacate and remand for further proceedings consistent with this opinion.

Jones and Regina Campbell are the parents of Dowana A. Jones, who was born on April 2, 1995. On February 29, 2000, Jones entered into an agreed order with the McCreary County

[1]Senior Judge Thomas E. Emberton, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Attorney to pay Campbell $175.00 per month for the support of Dowana.

On December 2, 2004, Jones filed a motion seeking to reduce his child support obligation to approximately $88.00 per month on the ground that he had become disabled following an accident on October 7, 2004 in which he had been injured while working on his mobile home. The motion was supported by an affidavit in which Jones alleged that he had sustained a back injury - specifically a ruptured disc and a bulging disc; that he was being treated by a physician; that he was off-work until a follow-up examination scheduled for December 14, 2004, and that he might be required to be off-work past that date. Jones also alleged that he was receiving short-term disability payments totaling $200.00 per week for a maximum of 26 weeks. Before his accident, he had been working as a truck driver for Schneider National Carriers, Inc. A hearing was subsequently scheduled before the Domestic Relations Commissioner ("DRC") of the McCreary Circuit Court, at the time of which both parties were present and represented by counsel.

On March 28, 2005, following the hearing, the DRC entered a report rejecting Jones' motion to modify child support because his "obligation to pay support in the amount of $175.00 per month is not unconscionable." In doing so, the DRC generally referenced testimony from Campbell as to Dowana's

reasonable needs, expenses, and activities. Specifically, the DRC noted Campbell's testimony that Dowana was involved with her school's academic and sports teams and had a number of fees and expenses associated with those activities. The DRC concluded that "$88.00 per month will not sufficiently provide for the reasonable needs of the child who is the subject of this action." He added: "Further, [Jones] failed to show he could not earn a living doing something other than driving a truck, making his change in circumstances material." On March 29, 2005, the trial court entered an order accepting and adopting the DRC report.[2] This appeal followed.

"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." Van Meter v. Smith, 14 S.W.3d 569, 572 (Ky.App. 2000). "This discretion is far from unlimited." Id. "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." Id. Stated another way,

[2] On April 7, 2005, the circuit court entered an amended order making its March 29, 2005 order final and appealable. It addressed no other substantive matters.

we will not disturb the trial court's findings unless the decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Downing v. Downing, 45 S.W.3d 449, 454 (Ky.App. 2001).

KRS[3] 403.213(1) provides, in part, that "[t]he 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." KRS 403.213(2) further provides, in part, that "[a]pplication of the Kentucky child support guidelines to the circumstances of the parties at the time of the filing of a motion or petition for modification of the child support order which results in equal to or greater than a fifteen percent (15%) change in the amount of support due per month shall be rebuttably presumed to be a material change in circumstances." Put another way, KRS 403.213(2) sets forth 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. See Wiegand v. Wiegand, 862 S.W.2d 336, 337 (Ky.App. 1993). Upon reviewing the record, it appears that

[3] Kentucky Revised Statutes.

Jones' income circumstances at the time he filed his motion for modification would create a rebuttable presumption of a material change in circumstances, as applying the child support guidelines in KRS 403.212 now would result in his child support obligation being approximately $88.00 per month - a difference of more than 15% from his current obligation of $175.00.

With this noted, KRS 403.211 "provides that a court may deviate from the [child support guidelines set forth in KRS 403.212] where their application would be unjust or inappropriate and where the court makes a written finding or specific finding on the record specifying the deviation." Smith v. Smith, 845 S.W.2d 25, 26 (Ky.App. 1992). "A decision on whether to deviate from the guidelines is within the trial court's discretion." Rainwater v. Williams, 930 S.W.2d 405, 407 (Ky.App. 1996). However, in order for deviation from the guidelines to be permitted on grounds that applying them would be unjust or inappropriate, the decision must be based upon one of the criteria set forth in KRS 403.211(3). See Wiegand, 862 S.W.2d at 337. KRS 403.211(3) reads as follows:

> (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;
>
> (e) Combined monthly adjusted parental gross income in excess of the Kentucky child support guidelines;
>
> (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. However, no such agreement shall be the basis of any deviation if public assistance is being paid on behalf of a child under the provisions of Part D of Title IV of the Federal Social Security Act; and
>
> (g) Any similar factor of an extraordinary nature specifically identified by the court which would make application of the guidelines inappropriate.

KRS 403.211(4) further provides that exactly what "extraordinary" means "shall be determined by the court in its discretion."

In this case, we are frankly unclear as to what the statutory basis actually was for the trial court's decision not to modify Jones' support obligation. As noted above, it appears from the record that Jones met the rebuttable presumption

requirements of KRS 403.213(2), yet the DRC and the trial court do not address this at all in their orders. They do set forth a finding that Jones "failed to show he could not earn a living doing something other than driving a truck, making his change in circumstances material," but there is no indication in the record that this issue was ever raised or addressed by either the parties or the DRC in the pleadings or at the modification hearing. Instead, the record only indicates that Jones was receiving short-term disability and had been taken off-work by his physician. Accordingly, we question the inclusion of this finding in the DRC's order and the trial court's adoption of it.

The orders of the DRC and the trial court also do not address the applicability of the criteria set forth in KRS 403.211(3) in their decision to deviate from the statutory support guidelines. As noted above, in order for deviation from the guidelines to be permitted on grounds that applying them would be unjust or inappropriate, the decision must be based upon one of the criteria set forth in KRS 403.211(3). See Wiegand, 862 S.W.2d at 337. Moreover, KRS 403.211(2) and (3) clearly require the court to make "a written or specific finding on the record" justifying any such deviation. See Commonwealth ex rel. Marshall v. Marshall, 15 S.W.3d 396, 400-01 (Ky.App. 2000); see also Van Meter, 14 S.W.3d at 574 (holding that courts must "make[] findings clearly justifying the deviation").

Here, the DRC only made general findings that Jones' current support obligation is "not unconscionable" and that $88.00 per month "will not sufficiently provide for the reasonable needs of the child who is the subject of this action." The DRC did note Campbell's testimony that Dowana was involved with her school's academic and sports teams and had a number of fees and expenses associated with those activities; however, he gave no indication as to how this fact related to KRS 403.211(3) or any of the criteria set forth therein.[4] Consequently, we do not believe that the findings of the DRC and the trial court meet the requirements of specificity set forth in the child support modification statutes.

Ordinarily, CR[5] 52.04 precludes vacating a final order because of the failure of the trial court to make essential findings 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 CR 52.02. However, in Hollon v. Hollon, 623 S.W.2d 898 (Ky. 1981), our Supreme Court held that CR 52.04 does not apply if a trial judge's findings fail to satisfy basic

[4] It is plausible that the DRC considered this fact as falling within the "extraordinary educational needs" criterion set forth in KRS 403.211(3)(b), but this is mere speculation on our part and consequently not a basis for affirming the decision. Moreover, we are skeptical that such evidence would even justify a finding of "extraordinary educational needs," as we have held that such needs are "those things not ordinarily necessary to the acquisition of a common school education but which become necessary because of the special needs of a particular student." Smith, 845 S.W.2d at 26.

[5] Kentucky Rules of Civil Procedure.

statutory requirements, thus allowing review of certain cases even if no motion for more specific findings is filed by an appellant pursuant to CR 52.02 and CR 52.04. Id. at 899. We believe that this case fits within the Hollon exception given the cursory findings by the DRC and the trial court and their failure to establish anywhere within the record that it was following the custody modification statutes in rendering its decision. Accordingly, since the trial court failed to comply with statutorily-mandated requirements, we are compelled to vacate and remand for additional findings of fact.

On remand, the trial court shall definitively establish whether there is a 15% discrepancy between the amount of support which Jones 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.

Accordingly, the order denying Jones' motion to reduce child support is vacated, and this matter is remanded to the McCreary Circuit Court for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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