STATE OF MICHIGAN

COURT OF APPEALS

KATHLEEN MANN,

Plaintiff-Appellant,

v

BRIAN PISCHKE,

Defendant-Appellee.

UNPUBLISHED
March 6, 2007

No. 265561
Wayne Circuit Court
LC No. 01-112515-DM

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from an order of the trial court applying the shared economic responsibility formula (SERF) and decreasing the amount of child support defendant was required to pay. We reverse and remand for proceedings consistent with this opinion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

A judgment of divorce was entered on January 23, 2002, terminating the parties' marriage. Although plaintiff was awarded sole legal custody of the parties' two minor children, she and defendant shared physical custody of the children; the judgment of divorce provided for 154 days per year of overnight visitation for defendant. Under the terms of the divorce judgment, defendant was to pay support in the amount of $275 per week.

Defendant moved for a reduction in child support in May 2003. On December 11, 2003, the Friend of the Court recommended that his support obligations be reduced using the SERF. At a motion on the hearing on December 18, 2003, the hearing referee declined to follow the recommendation, stating:

> under the child support guidelines I can't use the shared economic [formula] unless it was used at the time of judgment. Or if there is a change in parenting time that takes place that brings it into play [because] the request for a reduction is made concurrently.

Plaintiff then filed a motion for an increase in child support in February 2004. Defendant filed a second motion to decrease child support in August 2004, relying on the Friend of the Court recommendation that the SERF be applied. At a hearing on May 12, 2005, plaintiff's counsel argued that because the judgment of divorce was a consent judgment, defendant's motion was "like wanting two bites at the apple." Defendant had agreed to "a comprehensive

settlement which involved extensive parenting time as well as what the child support obligation should be." Plaintiff's counsel argued that for defendant to argue he should pay less support was "disingenuous and contrary to what the intents of the judgment were." The same referee again rejected defendant's motion to decrease support by applying the SERF, noting

> that it should not apply because it didn't apply in the judgment of divorce, and that's where you need the change of circumstances to apply that, you need the change in parenting time.

The matter proceeded to the trial court, and after a hearing on the cross-motions, the trial judge hand-wrote the following on the order/judgment:

> Ct is satisfied that support should be based upon guidelines recognizing 149 nights = shared economic formula. The *Calley*[1] case indicates that support can be modify [sic] w/o a change in circumstances if proper cause and in Cts discretion. Court will adopt recommendation.

The court relied on *Calley* for a change of circumstances sufficient to apply the SERF and consequently reduce defendant's child support obligation pursuant to the Friend of the Court recommendation.

On appeal, plaintiff argues that the trial court erred in applying the SERF because there was no modification of custody or parenting time. Defendant argues there was a change of circumstances that warranted the modification of support and application of the SERF. Defendant relies on this Court's statement, in the *Calley* case to which the trial court referred, that "any substantial change in the amount of support recommended by a new friend of the court report over the report prepared when a judgment of divorce is entered may constitute a 'change in circumstances' that would justify the modification of a support order." *Calley, supra* at 383. The issue before us is whether the SERF was properly applied here.

This Court reviews a modification in child support for an abuse of discretion. *Paulson v Paulson*, 254 Mich App 568, 571, 657 NW2d 559 (2002). However, as noted, this case involves more than a simple modification in child support. Because the issue in this case is whether the SERF was legally applicable, we must review the question of law de novo. *Burba v Burba (After Remand)*, 461 Mich 637, 647; 610 NW2d 873 (2000).

The judgment of divorce included provisions for child support, child custody and parenting time, and property division and tax deductions for the children. The parenting time called for well over the minimum of 128 overnights required to qualify for the SERF. 2004 Michigan Child Support Formal Manual (MCSF), § 3.05(A); see also *Eddie v Eddie*, 201 Mich App 509, 514; 506 NW2d 591 (1993). However, the judgment does not refer to the SERF and does not address the possibility of modification of the support obligations using the SERF, and

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[1] *Calley v Calley*, 197 Mich App 380, 496 NW2d 305 (1992).

the amount of child support specified in the judgment clearly did not result from application of the SERF.[2]

Plaintiff relies on *Gehrke v Gehrke*, 266 Mich App 391; 702 NW2d 617 (2005), to support her argument that the trial court erred in applying the SERF and reducing defendant's child support obligation. The *Gehrke* Court held that the defendant, who was seeking to apply the SERF, was not entitled to its application "because the child support order he appeals was not issued concurrently with an initial custody or parenting time determination or with a modification of custody or parenting time on the basis of changed circumstances." *Gehrke*, *supra* at 395-396. That decision rested upon the 2001 MCSF § IV(B), p 26, which stated: "[t]he economic sharing formula should only be applied to support orders entered concurrent with an initial custody/parenting time determination or to modifications of custody/parenting time based upon changed circumstances." *Id.* at 396. The rationale for the holding in *Gehrke* was to comply with the plain language of the then-existing MCSF. *Id.* at 397. This Court reasoned that since there was no modification of custody or parenting time, the SERF was not to be applied.

However, the language of the MCSF was amended in 2004. It now reads: "The shared economic responsibility formula should be applied to initial determinations and modifications based upon changed circumstances at the time of modification." 2004 MCSF § 3.05(D), p 30. The plain language indicates that any change in circumstance is sufficient cause to apply the SERF to a modification where it was not applied in the initial determination. Plaintiff's argument that the change in circumstance must be a modification of custody or parenting time therefore must fail.

The question that remains, then, is whether there was indeed a change of circumstances in this case. Although plaintiff stated in her motion that there was a change in circumstances to warrant an increase in support, in his answer to plaintiff's motion, defendant denied there were any changes in circumstances. Neither party supported their allegation in the pleadings. The transcripts of the referee hearings held on December 18, 2003 and May 12, 2005 include no reference to a change of circumstance sufficient to warrant application of the SERF.

As the trial court noted, this Court's decision in *Calley* suggests that the recommendation of the Friend of the Court that support should be substantially modified is itself a change of circumstance: "any substantial change in the amount of support recommended by a new friend of the court report over the report prepared when a judgment of divorce is entered may constitute a 'change in circumstances' that would justify the modification of a support order." *Calley*, *supra* at 383.

However, we find this reasoning circular and inapplicable to the question of application of the SERF to a modification where it was not applied in the initial judgment. Basically, *Calley* says that if a change in support is recommended, that change can be the required change in

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[2] The divorce judgment called for support for the two children in the amount of $1196.26 per month; when the Friend of the Court applied the SERF, the recommended amount of support for the two children was calculated at $725 per month.

circumstances. But a change in circumstances is required to recommend a change in support, so the change in support cannot logically itself be the change in circumstance.

This Court has applied *Calley* for this proposition in only one published opinion, finding that "while it is the case that a change in the amount of support calculated under the support guidelines may be sufficient to justify modification of a support order, *Calley* does not stand for the proposition that a change in support called for under the guidelines is mandatory." *Sharp v Talsma*, 202 Mich App 262, 264; 507 NW2d 840 (1993). In *Sharp*, this Court determined that the trial court must review "all the facts and circumstances claimed to constitute a change of circumstances" and decide whether they warrant a modification. *Id.* at 264-265.

Here, the Friend of the Court recommended a decrease in the amount of support for the two children from $1196.26 per month to $725 per month. The trial court appears to have relied solely on this fact in deciding that, per *Calley,* there was a change of circumstances.

We cannot agree. We revisit the argument advanced by plaintiff's counsel in the May 12, 2005 hearing, that defendant had agreed to "a comprehensive settlement which involved extensive parenting time as well as what the child support obligation should be," and should not after the fact be heard to argue for application of a different formula where there is no apparent change in the circumstances that were relevant when the parties agreed upon the initial judgment. Upon review of all the facts and circumstances provided in the record, we find no change in circumstance sufficient to warrant application of the SERF here.

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Jessica R. Cooper