RENDERED: March 5, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003340-MR

LINDA PAWLEY — APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE SAM MONARCH, JUDGE
ACTION NO. 82-CI-00206

RAYMOND E. PAWLEY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, GARDNER, AND MILLER, JUDGES.

MILLER, JUDGE: Linda Pawley brings this appeal from a December 3, 1997, order of the Grayson Circuit Court in a post-dissolution proceeding. We affirm.

The parties were divorced by a February 28, 1983, Decree of Dissolution. Incorporated within the decree was the parties' separation agreement, which provided that appellee would pay $150.00 per week in child support for the parties' five minor children: William, Mary Ann, Thomas, Pamela, and Robert. It stated in relevant part as follows:

CHILD SUPPORT

3. Petitioner agrees to provide the benefits and to pay the sums to Respondent for child support as follows:

A. The sum of $150.00 per week; this sum is based on a regular forty-hour work week by Petitioner at his job at The Gates Rubber Company, or equivalent employment, and his income from the Kentucky Air National Guard.

B. In addition to the sum outlined in 3(a) hereinabove, the sum of $3.50 for each hour of overtime worked for and paid by The Gates Rubber Company, or equivalent employment. Petitioner shall provide a copy of his weekly check stub from The Gates Rubber Company, or equivalent employment, to Respondent to verify his earnings for purposes of this agreement.

C. Petitioner shall provide medical insurance coverage for the minor children of the parties under his medical insurance at The Gates Rubber Company, or equivalent employment.

D. Petitioner shall pay the cost of reasonable and necessary extraordinary medical care for the minor children of the parties not covered by medical insurance.

E. Petitioner shall claim all five (5) minor children of the parties as exemptions for federal and state income tax purposes.

F. The sum payable by Petitioner to Respondent under this agreement for child support shall continue for a period of two years (unless Petitioner loses his employment at The Gates Rubber Company or equivalent employment by virtue of layoff or other reasons beyond his control), even though the oldest of

> the parties' children is now 17 years of age. If one or more of the children of the parties resides with a person other than Respondent during this period, Respondent shall be responsible to that person(s) for the support of such child or children from the sums paid to Respondent by Petitioner on that child's behalf. At the end of two (2) years from the date of this agreement, the amount of child support is to be renegotiated between the parties, and, if they are unable to agree, the matter is to be submitted to the court for determination.

When William reached his eighteenth birthday on August 6, 1983, appellee unilaterally reduced his child-support payment by one-fifth, or $30.00, to $120.00 per week. When Mary Ann reached her eighteenth birthday on September 24, 1986, appellee again reduced his child-support obligation by $30.00 to $90.00 per week. Thereafter, each time a minor child reached his/her eighteenth birthday, appellee unilaterally reduced his child-support obligation per capita.

On July 12, 1994, appellant moved the court to hold appellee in contempt for failing to pay certain delinquent child-support payments. Appellant contended that appellee unilaterally and improperly reduced his child-support payment of $150.00 per week each time a child reached majority. The matter was referred to a domestic relations commissioner (commissioner). The commissioner found in part as follows:

> The commissioner finds that the Petitioner [appellee] had a right to assume that his child support obligation was a per capita obligation and that he could reduce his obligation on a per capita basis, until the adoption of [Ky. Rev. Stat.] KRS 403.210

> et seq. [Citations deleted.] From and after the adoption of the statute, child support is presumed to not be payable on a per capita basis. . . .
>
> That being the case, the commissioner finds that the child support obligation of the petitioner could not be unilaterally modified by him after the adoption of the statute and his unilateral reduction in child support by reason of Pamela attaining her majority on September 17, 1992, was unwarranted.

Exceptions were filed to the commissioner's report. On February 20, 1996, the Grayson Circuit Court adopted the commissioner's report but remanded the matter to the commissioner for a determination of child-support arrearage. Subsequently, on December 3, 1997, the circuit court entered an order explicitly making the February 20, 1996, order final and appealable. This appeal followed.[1]

Appellant contends that the circuit court erred by determining that appellee could unilaterally reduce child-support payments until the adoption of KRS 403.210 et seq. We disagree.

We liken this case to that of Sullivan v. Sullivan, Ky. App., 576 S.W.2d 262 (1979). Therein, the parties' marriage was dissolved by dissolution, and the husband agreed to pay $60.00 per week for child support of their five infant children. The husband, however, decreased the child-support payment by one-fifth when the first of his five children reached the age of majority. He again reduced his child-support payments by one-

[1]Appellee asserts that the instant appeal should be dismissed as untimely pursuant to Ky. R. Civ. Proc. 73.02. We reject same and believe appellant's Notice of Appeal was timely filed.

fifth when the second child reached majority. In September 1974, the wife sought an increase in child support for the remaining three children. Child support was increased by order of the court. Thereafter, the wife brought an action for arrearage dating back to the time that the husband first reduced his child-support payments. The court concluded that based upon the foregoing history, the trial court did not abuse its discretion in determining that it was the parties' intent to make the child-support payments a "per child per week payment." Id. at 263. The court held that the trial court did not abuse its discretion when it "interpreted what the parties apparently intended in their original agreement based on the actions of both parties." Id.

In the case *sub judice*, appellee consistently reduced his child-support obligation upon a child reaching majority, as in Sullivan. Moreover, appellant took the child-support payments and never complained to the court even though the parties were before the court in the spring of 1992 upon a motion to modify child-support. Upon the whole, we do not believe the circuit court erred by concluding that the parties intended to make the child-support payments on a "per child, per week" basis. We believe this consistent with the parties' actions and the evidence amassed in this case. As such, we perceive no error.

For the foregoing, the order of the circuit court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

K. Harold Goff II
Leitchfield, KY

BRIEF FOR APPELLEE:

Charles C. Mattingly III
Hardinsburg, KY