

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001242-MR

CYNTHIA MARIE COOK

APPELLANT

v.

APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JAMES KNIGHT, JUDGE
ACTION NO. 89-CI-00290

JOHN ANDREW COOK

APPELLEE

OPINION AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING
** ** *

BEFORE: DYCHE, KNOX AND HUDDLESTON, JUDGES.

KNOX, JUDGE: Cynthia Marie Cook (appellant) appeals from an order of the Johnson Circuit Court entered on April 22, 1998, which found that she owed child support arrearages to John Andrew Cook (appellee) in the amount of \$65,779.00. After reviewing the record, we affirm in part, reverse in part, and remand.

The following is a summation of the extensive record found in the case sub judice. On July 25, 1989, appellant filed a petition for dissolution of marriage requesting that the circuit court dissolve her twenty year marriage, divide the parties' property, and grant her custody of their two minor children. Appellee answered the petition and filed a motion for

temporary custody, motion for child support, motion for home visitation, motion for temporary debt allocation, and a motion to discontinue appellant's child visitation rights. On February 8, 1990, the Domestic Relations Commissioner (DRC) granted appellee's motion for temporary custody of the children and awarded appellee \$350.00 per month in child support. After discovery was undertaken, the case was submitted to the DRC on appellant's motion.

In the DRC's recommended findings of fact, conclusions of law and decree, appellee was awarded custody of the two children and continued child support at \$350.00 per month. The DRC also found that appellant was in arrears under the temporary child support order in the amount of \$525.00, as of May 7, 1990. Appellant filed exceptions to the DRC's recommendations, specifically objecting to the custody award, amount of child support and arrearages, and disposition of some of the marital property. On November 29, 1990, an addendum supplementing the DRC's recommended findings of fact, conclusions of law and decree was filed. The DRC increased appellant's monthly child support obligation to \$425.00 and made it retroactive to the original order of child support on February 8, 1990. The DRC also found that appellant was in default on her prior child support payments in the sum of \$2,647.50.

On February 27, 1991, the circuit court entered a judgment dissolving the parties marriage and, in pertinent part, adopting the recommendations of the DRC in terms of custody, child support, and the amount of child support arrearages.

Appellant appealed the circuit court's order to this court; however, the appeal was later dismissed on appellant's own motion.¹ On August 12, 1991, appellant filed a motion to suspend child support, compel visitation, establish time to transfer personal belongings, and to forgive arrearages. Appellee responded by filing a motion for contempt for failure to abide by the order of February 27, 1991. On September 11, 1991, the DRC found that appellant owed child support arrearages in the amount of \$6,812.50 and recommended reducing the arrearages to a lump sum judgment with interest accruing at twelve percent (12%). The circuit court adopted the DRC's recommendations on September 20, 1991.

In July 1991, appellee filed a petition to register a foreign judgment in Champaign County, Illinois to enforce the arrearages owed by appellant. On February 19, 1992, the Champaign County Circuit Court ordered appellant to pay \$100.00 per month, beginning March 1992, in satisfaction of the previous Kentucky judgments. A few months later in Kentucky, appellant plead guilty to non-support, a class A misdemeanor, pursuant to a plea agreement entered on October 20, 1992. The circuit court accepted appellant's guilty plea and sentenced her to 12 months probation with an order to pay \$200.00 per month for arrearages and remain current on support payments.

On December 17, 1997, appellant moved the circuit court to recalculate child support on grounds that one of the children

¹ Order dismissing appeal No. 91-CA-679-MR entered October 3, 1991.

had attained the age of eighteen. In response, appellee filed proof of delinquent child support owed by appellant in the form of a computer print-out. After a hearing, the DRC found that appellant was in arrears in the amount of \$65,779.00 and recommended that she satisfy this arrearage by paying \$200.00 per month in addition to an increase in monthly child support to \$490.00. On April 22, 1998, the circuit court set appellant's monthly child support at \$280.00 and ordered her to pay \$300.00 per month on arrearages totaling \$65,779.00. This appeal followed.

On appeal, appellant argues (1) that the circuit court erred in relying on the proof submitted by appellee, (2) the court failed to calculate interest on its judgment as required by Kentucky Revised Statute (KRS) 360.040, (3) the court failed to consider whether the applicability of the maximum interest rate was unjust, and (4) the court erred when it set the arrearage payments at \$300.00 per month.

It is immediately apparent to this Court that the calculation of child support arrearages is in error. The DRC, and subsequently the circuit court, relied on a computer print-out generated by appellee to calculate the total arrearages owed by the appellant. Review of the print-out reveals that the appellee incorrectly calculated the arrearages by adding the payments that were specifically set by the Champaign County Circuit Court and the Johnson Circuit Court to pay for the arrearages of \$6,812.50, which existed as of August 15, 1991, and was reduced to judgment on September 20, 1991. The monthly

payments established to satisfy the prior judgment cannot be added to child support payments that were due after August 15, 1991. In calculating appellant's arrearages from August 15, 1991, to the present, the court should only add the child support not paid during that time. Appellant's non-payment of the amount due for prior arrearages merely serves to prolong the existence of the principal amount of the prior judgment, which also increases with interest annually.

Appellant also argues that the circuit court erred by failing to consider whether the application of the maximum rate of statutory interest was unjust. In light of appellant's history of flagrant non-support, we do not believe the court abused its discretion in awarding interest under KRS 360.040. However, while the circuit court stated in its order that the total arrearage included interest, this Court cannot determine the amount of interest used to calculate the total arrearage. It is true that the trial court does have the discretion to order that interest accrue from the date that each child support payment was due. Young v. Young, Ky., 479 S.W.2d 20 (1972). However, on remand, we remind the trial court that the maximum amount of interest that can be applied is twelve percent (12%), compounded annually. KRS 360.040.

Appellant also contends that the court failed to give appropriate weight to the fact that appellant's parents set up a trust fund for the children and that appellant has had virtually no visitation with them. These contentions are without merit and are simply self-serving. According to terms of the trust, it

does not take effect until after the children reached majority. Any resources available to the children once they reach majority are not relevant to a parent's obligation to support them during their minority. Finally, non-compliance of visitation orders does not relieve the parent of her obligation to pay child support. Stevens v. Stevens, Ky. App., 729 S.W.2d 461 (1987); KRS 403.240.

Next, appellant argues that the circuit court abused its discretion in ordering appellant to pay \$300.00 per month on arrearages without first establishing a factual basis. After reviewing the record, we find that appellant failed to bring the matter to the circuit court's attention through a written request or a motion under CR 52.02. Therefore, the issue is not preserved for appellate review. CR 52.04; Cherry v. Cherry, Ky., 634 S.W.2d 423, 425 (1982).

For the reasons stated above, the order of the Johnson Circuit Court, entered April 22, 1998, is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF AND REPLY BRIEF FOR
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