

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-001813-MR

CHARLOTTE WARNER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE REBECCA M. OVERSTREET, JUDGE  
CIVIL ACTION NO. 99-CI-03522

COMMONWEALTH OF KENTUCKY  
EX REL. JOE MASTIN

APPELLEE

### OPINION

### AFFIRMING

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BEFORE: DYCHE, EMBERTON and HUDDLESTON, Judges.

HUDDLESTON, Judge: Charlotte Warner appeals a circuit court order directing her to pay \$180.00 per month in child support based upon the imputation of minimum wage income. Warner argues on appeal that the imputation of the minimum wage as an earning potential for her was error because of her physical and mental limitations.

Joe Mastin, guardian for Warner's child, filed a complaint to establish a child support amount to be paid by Warner. Warner presented evidence in the form of a letter from Timothy Ferguson, M.D., which stated that Warner had a low-grade physical disability due to a renal transplant and hypertension. Dr.

Ferguson further noted, however, that Warner was capable of being gainfully employed.

Further evidence presented showed that Warner has an IQ of 70 and has been diagnosed with low borderline or high mentally deficient intellectual functioning. Evidence also showed that Warner receives \$512.00 per month in Supplemental Security Income.<sup>1</sup>

Based upon this evidence, the circuit court determined that Warner was capable of earning at least a minimum wage. According to the child support guidelines,<sup>2</sup> based on an earning of \$893.00 per month (a sum arrived at by adding Warner's \$512.00 per month in SSI benefits to \$381.00 imputed minimum wage earnings), Warner was to pay \$180.00 per month in child support to Mastin. On June 13, 2000, the court ordered Warner to pay child support consistent with the guidelines. Following a denial of her motion to reconsider,<sup>3</sup> Warnen appealed to this Court.

Kentucky Revised Statute (KRS) 403.212(d) sets forth the relevant standard for imputing income to a parent who is unemployed. The statute provides that:

If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a

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<sup>1</sup> "The Supplemental Security Income program provides benefits to those who are blind, disabled, or 65 or older, and who are otherwise eligible based upon a lack of income and resources." Commonwealth ex rel. Morris v. Morris, Ky., 984 S.W.2d 840, 841 (1998), citing 42 United States Code (U.S.C.) § 1381.

<sup>2</sup> See Ky. Rev. Stat. (KRS) 413.212(7).

<sup>3</sup> Warner's motion to reconsider was filed on June 12, 2000, one day before the court entered its written order. Apparently Warner's June 12, 2000, motion to reconsider was in response to the court's June 2, 2000, ruling in court.

determination of potential income, except that a determination of potential income shall not be made for a parent who is physically or mentally incapacitated . . . . Potential income shall be determined based upon the employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community.

Warner argues that, because she is both physically and mentally incapacitated, the circuit court erred in imputing a minimum wage income to her and requiring that she pay \$180.00 monthly in child support.

The circuit court's order of June 13, 2000, directs Warner to pay \$180.00 per month in child support. Although the court's written order does not contain findings of fact to justify this amount, a review of the video tape of the hearing of June 2, 2000, reveals that the court apparently relied on the report from Dr. Ferguson which stated that Warner was capable of being gainfully employed. Based on that report, the court found that Warner was capable of working and imputed a minimum wage income.

"Findings of fact are not to be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."<sup>4</sup> Dr. Ferguson's statement, found in the record, that Warner is capable of being gainfully employed is sufficient evidence to support the

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<sup>4</sup> Ky. R. Civ. P. (CR) 52.01; see State St. Bank & Trust Co. v. Heck's, Inc., Ky., 963 S.W.2d 626 (1998).

circuit court's order. Although there is evidence to support Warner's position that she cannot obtain or hold a job, this evidence is not conclusive.

Warner also argues that the imputation of the minimum wage is in the nature of a garnishment of exempt SSI benefits and is a violation of federal law. That issue was addressed in Commonwealth ex rel. Morris v. Morris,<sup>5</sup> where the Supreme Court held that the inclusion of SSI benefits "in the income commutation for calculation of child support payments" is not "in conflict with 42 U.S.C. § 407(a), an anti-attachment statute relating to SSI benefits."<sup>6</sup>

In conclusion, we note that the circuit court left open the possibility that the amount of support may be reduced pending the result of an evaluation by Vocational Rehabilitation. Further, the court ordered that the case be referred to a compliance officer to assist Warner in obtaining employment.

The order is affirmed.

DYCHE, Judge, CONCURS.

EMBERTON, Judge, DISSENTS.

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<sup>5</sup> Supra, n. 1.

<sup>6</sup> Morris, 984 S.W.2d at 840, 842.

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