

RENDERED: AUGUST 24, 2001; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-001496-MR

MARY FRANCES TAYLOR HARVEY

APPELLANT

v. APPEAL FROM BARREN CIRCUIT COURT  
HONORABLE BENJAMIN L. DICKINSON, JUDGE  
ACTION NO. 92-CI-00324

JOSEPH SMITH

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: GUIDUGLI, HUDDLESTON AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Mary Harvey has appealed as a matter of right from an order of the Barren Circuit Court entered on May 25, 1999. The trial court ordered that Harvey pay appellee Joseph Smith, her former husband and her child's father, \$8,188.11 in child support and \$796.05 in medical bills, for the time period during which Smith had custody of the couple's then minor child. Having concluded that the trial court did not err in ordering Harvey to pay Smith the child support and medical expenses retroactively, we affirm.

This case has a somewhat complex procedural history. On April 21, 1978, Harvey and Smith were married in Hart County. The couple's only child, Christy Nicole Smith, was born on November 25, 1978. Approximately eight years later, on July 15, 1986, the couple obtained a divorce in Hart Circuit Court. As part of their divorce agreement, Harvey, the mother, was awarded custody of Christy, and Smith, the father, was ordered to pay child support while retaining visitation rights. Mother and daughter later moved to Barren County, and the father moved to Warren County.

Subsequently, in December of 1994, Christy became pregnant. Mother and daughter had a "falling out" because of the pregnancy. As a result, in early 1995, Christy began living with her father in Warren County. On February 28, 1995, the father filed a petition to modify custody in Warren Circuit Court. A hearing on this motion was held before the Domestic Relations Commissioner on March 13, 1995. The mother had not been served and was not present at the hearing. Nonetheless, on March 22, 1995, the trial court awarded the father permanent custody of Christy.

On April 19, 1995, the father filed a motion for modification of child support in Warren Circuit Court, seeking financial support from the mother for the expenses of caring for Christy. On May 8, 1995, a hearing was held before the Commissioner on the father's motion to modify child support. In his report filed on May 18, 1995, the Commissioner recommended

that a finding be entered that Christy had been integrated into the father's household, and that the mother be ordered to pay child support of \$389.91 per month through a wage assignment. On May 18, 1995, the same day the Commissioner's report was filed and before the ten-day period for objections had expired,<sup>1</sup> the Warren Circuit Court entered a wage assignment order against the mother for payment of child support.

On May 24, 1995, the mother filed an entry of appearance and a motion dismiss/motion to transfer proceedings to Barren Circuit Court. On May 25, 1995, she filed objections to the Commissioner's findings. On May 31, 1995, the Warren Circuit Court, with the agreement of the parties, ordered the mother's wage assignment set aside because she had not been served before the March 13, 1995 hearing. Once the mother was served and entered her appearance, she argued throughout the proceedings in Warren Circuit Court that it was not the proper venue for the father's claims.

On November 25, 1996, Christy turned eighteen and began living with her mother again. On January 28, 1997, the father filed a motion in the Warren Circuit Court to reduce the child support to a judgment. Approximately one year later, on January 26, 1998, the trial court ordered the case remanded to the Commissioner to make findings regarding (1) whether the mother had received notice of the May 8, 1995 hearing; (2) the amount of money, if any, the mother should pay the father for the time that

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<sup>1</sup>Kentucky Rules of Civil Procedure 53.06(2).

Christy had lived with him; and (3) whether Warren County was the proper venue. The Warren Circuit Court took no further action following this remand to the Commissioner.

On September 8, 1998, the father filed a motion for a judgment on past due child support in the Barren Circuit Court. On March 8, 1999, the Commissioner for the Barren Circuit Court recommended that the mother pay the father past due child support and medical expenses for the period of time Christy had lived with him. The trial court entered a judgment in favor of the father on May 25, 1999, making the child support obligation retroactive to February 28, 1995, the date the father filed his motion to modify custody in Warren Circuit Court. This appeal followed.

The crux of the mother's argument on appeal is that the Barren Circuit Court erred by awarding retroactive child support following the proceedings in the Warren Circuit Court. Specifically, she argues:

[The father's motions] in the Barren Circuit Court requested [] that he be allowed to collect child support from a Warren Circuit Court [order] which had been vacated by the January 26, 1998 [order remanding to the Domestic Relations Commissioner] of the Warren Circuit Court . . . .

The Barren Circuit Court's May 25, 1999 [findings of fact, conclusions of law, and order] effectively sets [the mother's] child support obligation retroactively and without the entry of any [order] in any court changing custody from Mary Frances Harvey to Timothy Joseph Smith.

While it is true that the father's claims were not finally adjudicated by the Warren Circuit Court due to improper venue, this appeal only concerns an order of the Barren Circuit Court. The father's action for child support in the Warren Circuit Court was discontinued and then recommenced in the Barren Circuit Court. Under the circumstances of the challenge to venue in the Warren Circuit Court, we do not believe it was error for the Barren Circuit Court to set the child support obligation retroactive, beginning with the date the father filed his motion for modification in the Warren Circuit Court.

In Pretot v. Pretot,<sup>2</sup> this Court stated:

[U]pon the enactment of KRS<sup>3</sup> 403.213(1) on July 13, 1990, the Legislature mandated that "[t]he provisions of any decree respecting child support may be modified only as to the installments accruing subsequent to the filing of the motion for modification. See Giacalone v. Giacalone, Ky.App., 876 S.W.2d 616, 620 (1994) [emphases original].

Therefore, in setting the child support obligation and making it retroactive, the Barren Circuit Court simply recognized that February 28, 1995, was the date the father had filed his motion to modify custody in the Warren Circuit Court.

In Adkins v. Adkins,<sup>4</sup> this Court noted that trial courts have broad discretion when modifying support payment agreements:

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<sup>2</sup>Ky.App., 905 S.W.2d 868, 871 (1995).

<sup>3</sup>Kentucky Revised Statutes.

<sup>4</sup>Ky.App., 574 S.W.2d 898, 899-900 (1978).

KRS 403.250 states that there must be "a showing of changed circumstances" in order to modify a decree respecting support. No certain procedure for making this showing is set forth. Show has been defined as "(t)o demonstrate, to make apparent or clear, either to the eyes or to the understanding or to both, by display, by evidence, by illustration, or by other means." [citation omitted].

. . .

It was said in Wilhoit v. Wilhoit, Ky., 521 S.W.2d 512, 513 (1975) that "(t)he trial court is vested with broad discretion in matters of this kind, and this court will not interfere unless that discretion is abused." This court is of the opinion that the modification of the original divorce judgment, so as to allow the father to have custody of the children for three months out of each year, is a changed condition so substantial and continuing as to make the terms of the original separation agreement unconscionable. We, therefore, cannot say that the trial court abused its discretion in so finding. A twenty-five percent change in time of custody of children is most substantial. This substantial change in time of custody renders the support payment unconscionable.

In the case sub judice, the Barren Circuit Court found, inter alia:

That in December of 1994 the parties' daughter, Christy Nicole Smith, began residing with her father, [ ] and continuously resided with him until her majority on November 25th, 1996 with the consent of [the mother]. The court finds that during such period [the father] was the custodian in fact and that as the child had been integrated into the home of [the father], [the father] was for all purposes herein the custodian of the child during that period.

While there was no express modification of the mother's and father's separation agreement, there was nonetheless a substantial change of circumstances warranting a modification in the support agreement. It would have been unconscionable to expect the father to continue paying child support according to the divorce agreement, while at the same time being Christy's primary care-giver. Accordingly, based upon these facts and the applicable law, we cannot say that the trial court abused its discretion in granting the father past due child support.

The mother's reliance on Sidebottom v. Mitchell<sup>5</sup> is misplaced. In Sidebottom, the former Court of Appeals stated:

[W]hen a couple with minor children are separated, either without a divorce or under a divorce judgment which has made no provision concerning child support, if the wife desires to compel the husband to carry his primary burden (as between them) of supporting the children, she must obtain a court order (ordinarily in the divorce court) directing what payments he shall make, and if she does not obtain such an order she cannot recover from him for expenditures made by her for the support of the children, except expenditures for such period of time during which an order could not have been obtained because the husband was beyond reach of process [emphasis added].

In the instant case, the mother's and father's divorce agreement expressly provided that the father would be obligated to pay child support to the mother. Therefore, Sidebottom, which dealt with cases where the parties had not reached a support agreement, is clearly distinguishable.

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<sup>5</sup>Ky., 421 S.W.2d 830, 831 (1967).

In summary, the Barren Circuit Court did not abuse its discretion in granting the father past due child support beginning on February 28, 1995. Trial courts are authorized to award child support retroactively beginning with the date the motion for modification is filed. Trial courts are also entitled to broad discretion in modifying the support payments as they deem necessary. In the case sub judice, we cannot say that the Barren Circuit Court abused its discretion.

For the foregoing reasons, the order of the Barren Circuit Court is affirmed.

HUDDLESTON, JUDGE, CONCURS.

GUIDUGLI, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

William Thomas Klapheke, II  
Glasgow, KY

BRIEF FOR APPELLEE:

Frank Hampton Moore, Jr.  
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