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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-001638-MR

GARY DUNCAN — APPELLANT

v.

APPEAL FROM FLOYD FAMILY COURT
HONORABLE JULIE PAXTON, JUDGE
ACTION NO. 86-CI-00486

HOLLY HALL; KENTUCKY CABINET FOR HEALTH AND FAMILY SERVICES — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: WINE, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.[1]

BUCKINGHAM, SENIOR JUDGE: Gary Duncan appeals from an order of the Floyd Circuit Court determining that he owes a child support arrearage of $20,741.94 to his ex-wife, Holly Hall. For the reasons stated below, we affirm.

[1] Senior Judges Michael L. Henry and David C. Buckingham, sitting as Special Judges by Assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The parties were married on September 22, 1979. They have two children, twins, Sylvia and Gary, born on May 24, 1985. On July 14, 1986, Holly filed a petition for dissolution of marriage. The final decree was entered on April 7, 1987. Holly was granted custody of the children. Pursuant to the parties' settlement agreement, Gary was ordered to pay child support of $300.00 per month. Gary's child support obligation was later reduced to $200.00 per month.

In 1997 Gary received correspondence from attorney Eric C. Conn on behalf of Holly requesting that Gary voluntarily terminate his parental rights to the children. The correspondence indicated that Holly was engaged to be married and that her fiancé would legally adopt the children upon termination of Gary's parental rights. Gary agreed to execute the documents terminating his parental rights and orally conveyed this information to Holly. Holly, in turn, contacted Conn, and a meeting was arranged at Conn's office. Gary appeared at Conn's office and executed the documents. Gary asserts that Conn informed him that he would take the necessary steps to complete the termination.

Ultimately, however, the termination was never completed. Holly testified that she told Gary this no later than six months after she decided not to go through with the termination. According to Gary, Holly never informed him that the termination did not go through, he thought that it had, and he accordingly quit paying child support. Gary alleges that he did not know about the termination not going through until the present action was filed.

In January 2003 Holly filed a motion in Floyd Family Court, through the Cabinet for Families and Children,[2] asserting past due child support and requesting an arrearage judgment. On July 16, 2004, the family court entered an order granting a judgment against Gary in the amount of $20,741.94 for past-due child support. This appeal by Gary followed.

This case was tried by the family court sitting without a jury. It is before this court upon the family court's findings of fact and conclusions of law and upon the record made in the family court. Accordingly, appellate review of the family court's findings of fact is governed by the rule that such findings shall not be set aside unless clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01; *Largent v. Largent*, 643 S.W.2d 261 (Ky. 1982). A factual finding is not clearly erroneous if it is supported by substantial evidence. "Substantial evidence" is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky. App. 2002). The trial court's application of law is, of course, reviewed de novo. *Monin v. Monin*, 156 S.W.3d 309 (Ky.App. 2004).

As a general principle, unpaid child support payments for the maintenance of children become vested when due, and courts are without authority to "forgive" vested rights in accrued unpaid child support. *Dalton v. Dalton*, 367 S.W.2d 840, 842 (Ky. 1963). *See also Heisley v. Heisley*, 676 S.W.2d 477 (Ky. 1984) (unpaid child support becomes vested when due and is a fixed/liquidated debt); and *Stewart v. Raikes*, 627

[2] Now the Cabinet for Family and Health Services.

S.W.2d 586, 587 (Ky. 1982) (a court has no power to modify a decree as to past-due child support).

In *Whicker v. Whicker*, 711 S.W.2d 857 (Ky.App. 1986), this court clarified that agreements modifying child support obligations made between the parties without prior notification or approval of the court are enforceable provided "(1) such agreements may be proved with reasonable certainty, and (2) the court finds that the agreement is fair and equitable under the circumstances." *Id.* at 859. *See also Arnold v. Arnold*, Ky., 825 S.W.2d 621, 622 (1992). The *Whicker* court further stated therein that in order to enforce such modified agreements, "a court must find that modification might reasonably have been granted, had a proper motion to modify been brought before the court pursuant to KRS 403.250 at the time such oral modification was originally agreed to by the parties." *Id.*

In its July 16, 2004, order the family court found that "the Respondent [Gary] had no reason to believe that the termination of his parental rights was effectuated and that the actions of the parties reflect such." Implicit in this finding is a finding that Gary had failed to prove with reasonable certainty that the parties had an agreement, either explicit or implicit, to modify child support.[3] These findings are supported by substantial evidence in the record, and, consequently, we are bound thereby. CR 52.01.

Specifically, Holly testified that no later than six months after the initial discussions regarding the termination and Gary's execution of the termination papers, she

[3] Gary's only basis for claiming that there was an agreement is his understanding that his parental rights had been terminated.

told him that the termination had not gone through. Moreover, both Gary's and Holly's testimony established that the names of the children were not changed - as would have been expected with an adoption – and that Gary continued to maintain a relationship with the children. The foregoing is sufficient evidence to support the family court's findings.

In support of his position that he was relieved of his obligation to pay child support following his execution of termination of parental rights documents in 1997, Gary relies upon *Mauk v. Mauk*, 873 S.W.2d 213 (Ky.App. 1994). In *Mauk* the father of three minor children executed adoption papers to permit the husband of his ex-wife to adopt the children. Thereafter, the names of the children were changed, and the father ceased to have contact with the children. Believing that the adoption had gone through, the father ceased paying his child support obligation and having a relationship with the children. However, the adoption had not gone through; there was only a legal name change. Fifteen years after the adoption papers were executed, the mother sought past-due child support. *Mauk* held, in substance, that because the father had a good faith basis for believing both that his parental rights had been terminated and that he and the mother had a corresponding implicit agreement to modify his child support obligation, there had been a proper modification of child support under the *Whicker* standard.

The present case is distinguishable from *Mauk* in that in this case Gary was informed that the termination proceedings had not gone through, the names of the children had not been changed, and Gary continued to have visitation with the children. Hence, *Mauk* is not applicable to the present situation.

In short, there is substantial evidence in the record to support the family court's finding that Gary did not have a reasonable basis for believing that his parental rights had been terminated. It follows from that finding that Gary had no reason to believe that there had been an agreement between the parties to modify his child support obligation. It further follows that the *Whicker* standard has not been met in this case.

For the foregoing reasons, the judgment of the Floyd Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Johnny Ray Harris
Prestonsburg, Kentucky

BRIEF FOR APPELLEE HOLLY HALL:

Jo Ann Harvey
Prestonsburg, Kentucky

NO BRIEF FOR KENTUCKY CABINET FOR HEALTH AND FAMILY SERVICES