

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-000160-MR

MICHAEL NICEWONDER

APPELLANT

V. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 90-CI-1129

DARLENE NICEWONDER DAY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: GUDGEL, Chief Judge; ABRAMSON and COMBS, Judges.

COMBS, JUDGE: The appellant, Michael Nicewonder, appeals from the judgment of the Kenton Circuit Court which held that he owed the appellee, Darlene Nicewonder (now Day), \$1,866.94 in child support arrearage. Having carefully examined the record, we affirm the court's judgment.

The marriage of Michael and Darlene Nicewonder was dissolved by decree of the Kenton Circuit Court on October 26, 1990. Darlene was awarded custody of the parties' two minor children, and Michael was ordered to pay \$110.00 per week in

child support. In June 1995, Michael's weekly child support obligation was increased to \$192.99 due to the extra expenses of after-school and summer day-care for the two children. Approximately a year later in May 1996, Michael filed a motion to reduce his child support obligation and to receive a reimbursement for overpayment. He alleged that his income had decreased and that the day-care costs presented to the court the previous year were invalid. On September 6, 1996, the court conducted a hearing on the matter. At the conclusion of the hearing, the court entered oral findings of fact into the record, which were to be reduced to a written order. The court determined that Michael owed an arrearage of \$1,866.94 in child support. However, the court reduced Michael's child support obligation from \$192.99 per week to \$160.00 per week and held that Michael should be permitted to provide care for the children after school in an effort to minimize the day-care expenses.

On September 16, 1996, Michael filed a motion to amend the court's judgment. He challenged the court's findings as to the child support arrearage, asserting that he owed only \$497.00. He also requested that the court address the issue of whether he was entitled to a reimbursement for overpayment of child support. He argued that his child support obligation had been increased in June 1995 on the basis of fraudulent misrepresentations by Darlene concerning day-care expenses and, therefore, that he was entitled to receive a reimbursement for that improperly increased amount. On December 18, 1996, the court entered an order denying

Michael's motion to amend the judgment, adopting by reference its oral findings (from the hearing of September 6, 1996) regarding the issue of child support arrearage. The court also held that although Darlene may not have utilized the day-care providers upon whose rates the June 1995 increase was based, she had nevertheless incurred equivalent day care expenses from other providers. This appeal followed.

Michael argues on appeal that the court erred in calculating his child support arrearage. He relies on the fact that the records of the Cabinet for Families and Children indicate that he is in arrears only in the amount \$497.00. Michael also argues that he is entitled to receive a reimbursement for the additional child support beginning in June 1995 because he contends that Darlene did not use this increased support to pay for day-care expenses. We disagree with both of these contentions.

Pursuant to CR 52.01, the trial court's findings of fact shall not be set aside unless clearly erroneous. The test on appellate review of a trial court's decision "is not whether we would have decided it differently, but whether the findings of the trial judge were clearly erroneous or that he abused his discretion." Cherry v. Cherry, Ky., 634 S.W.2d 423, 425 (1982). Moreover, "due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses." Ironton Fire Brick Company v. Burchett, Ky., 288 S.W.2d 47 (1956).

The record in the case before us amply supports the court's findings that Michael was in arrears on his child support obligation in the amount of \$1,866.97. At the hearing, Linda Lawler, a child support investigator with the Cabinet for Families and Children, testified that Michael owed a child support arrearage of \$1,866.97. This figure was based upon the total obligation owed by Michael -- reduced by the amount of child support that Darlene had actually received from him. The record shows that Lawler also testified that Michael's child support was only \$497.00, based upon another method of calculation by which a judgment obtained against Michael for \$2,000 was credited to Darlene as payment of support. However, it appears that this judgment was not only for child support arrearage but also for restitution of assistance benefits paid to Darlene and the children during the period that Michael had failed to pay support. Presented with the two different calculations, the court looked to the actual amount of child support that Darlene had received in determining Michael's arrearage -- discounting amounts recouped by the Cabinet as restitution. The court did not act improperly nor were its findings clearly erroneous.

As to the issue of reimbursement of child support, it is well settled in Kentucky that "support payments, once accrued, are fixed and may not be modified by the trial court . . . and any change in the amount of support operates prospectively." Clay v. Clay, Ky. App., 707 S.W.2d 352, 353 (1986).

Furthermore, "restitution or recoupment of excess child support is inappropriate unless there exists an accumulation of benefits not consumed for support." Id. at 354. Here, the court specifically found that Darlene had incurred day-care expenses. Finding no abuse of discretion, we cannot disturb the findings of the circuit court.

For the foregoing reasons, we affirm the decision of the Kenton Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ellen M. Longshore
Alexandria, KY