

RENDERED: August 22, 1997; 2:00 p.m.  
NOT TO BE PUBLISHED

NO. 96-CA-001815-MR

ROBERT GEORGE MULCAHEY

APPELLANT

V. APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE PATRICIA M. SUMME, JUDGE  
CIVIL ACTION NO. 79-CI-000034

LINDA MAYS BUERKLEY

APPELLEE

OPINION

AFFIRMING

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BEFORE: EMBERTON, HUDDLESTON and MILLER, Judges.

HUDDLESTON, JUDGE. This appeal involves a dispute between Robert Mulcahey and his former wife, Linda Buerkley, over Linda's support obligation to their now nineteen-year-old son, Matthew.

On April 30, 1996,<sup>1</sup> Robert filed the following motion:  
Respondent ROBERT GEORGE MULCAHEY, moves to (sic) Court  
as follows:

- 1) To issue an Order setting aside this Court Order of January 17, 1995. Such was entered using in-

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<sup>1</sup> Significantly, this was just over one month before eighteen-year-old Matthew was expected to graduate from high school.

correct figures and informations from the Petitioner . . . .

While the record does not contain an order entered on January 17, 1995, we assume that Robert is referring to the order entered on February 24, 1995, wherein Kenton Circuit Court found Linda to have "an average gross monthly income of \$2,889[.00]" and ordered her to pay "\$86.94 per week plus 3% poundage<sup>2</sup> thereon for a total weekly payment of \$89.55" to Robert as child support for Matthew.

After the February 24, 1995, order was entered, no further action was taken in the case until March 28, 1996, when Linda filed a motion to terminate her child support obligation on the ground that Matthew had turned eighteen and would be graduating from high school on June 10, 1996. Robert responded on April 1, 1996, by filing the following motion:

Respondent ROBERT GEORGE MULCAHEY, moves to (sic) Court as follows:

- 1) To require the Mother-Petitioner to pay an additional fourteen weeks child support effective 17 May 1996.
- 2) To require the Mother-Petitioner to reimburse the Father-Respondent \$1,300.00.
- 3) To require the Mother-Petitioner to furnish the Father-Respondent with last pay check stub for

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<sup>2</sup> "Poundage" is the fee paid by a child support obligor to the county attorney or other agent of the Cabinet for Families and Children, Division for Child Support Enforcement, upon monies ordered to be paid for child support through the agent's office.

1995, and one pay check stub from April 1996

. . . .

Before the court ruled on either of these motions, Robert filed the April 30, 1996, motion previously quoted.

Addressing the pending motions in a June 14, 1996, order, the court stated:

IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

1. Mother's motion to stop child support payment because of over payment is moot as the child graduated June 10, 1996. This motion became mooted by the April 30, 1996 motion filed by [the father] which was heard on May 13, 1996.

2. Father's motion for additional fourteen weeks child support is overruled (sic).

3. Father's motion to reimburse \$1,300.00 for miscellaneous expenses for the daughter is overruled (sic).

4. Mother has made wages higher than testified and agreed to on February 24, 1995. However, a request for modification was not filed until April 30, 1996. Mother shall pay the sum of \$111.95 per week for the parties' minor child through June 10, 1996, the anticipated date of graduation.

5. Mother's child support through June 10, 1996 should total \$7,052.15. The Court calculates she will

be in arrearage \$207.09 based on the increase of child support.

The court generously treated Robert's vague April 30, 1996, motion as a motion to modify child support and, in fact, increased Linda's weekly child support obligation from \$89.55 to \$111.95. Nevertheless, Robert appeals from paragraph four of the court's order. His notice of appeal, in relevant part, states that:

NOTICE is hereby given that ROBERT GEORGE MULCAHEY appeals to the Court of Appeals from the final judgment entered herein on the 14th day of June, 1996, on #4, to issue a[n] Order setting aside the Order of 17th January, 1995, since the Order was issued on testimony from the Appellee which was inaccurate.<sup>[3]</sup>

As best we can determine from Robert's inarticulate brief and pleadings, Robert is claiming that the circuit court erred by making this increase effective only from the date of his motion (April 30, 1996) through the date of Matthew's high school graduation (June 10, 1996) instead of making it retroactive. We disagree. Ky. Rev. Stat. (KRS) 403.213 clearly states that "[t]he provisions of any decree respecting child support may be modified only as to installments accruing subsequent to the filing of the motion for modification and only upon a showing of

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<sup>3</sup> He does not appeal from the court's rulings on the other issues addressed in the June 14, 1996, order.

a material change in circumstances that is substantial and continuing." (Emphasis supplied.) See also Giacalone v. Giacalone, Ky.App., 876 S.W.2d 616, 620 (1994).

Even if the court had interpreted Robert's motion as a request for Ky. R. Civ. Proc. (CR) 60.02 relief as his notice of appeal seems to suggest it might have been, the request came too late. Robert argues that the court's order setting Linda's weekly child support obligation at \$89.55 was based upon inaccurate information. The two provisions of CR 60.02 that Robert could have attempted to invoke -- CR 60.02(b) (newly discovered evidence) or CR 60.02(c) (perjury) -- both require that the motion be made "not more than one year after the judgment, order or proceeding was entered or taken." Since Robert waited until April 1996 to request relief from the February 1995 order, his request comes too late for CR 60.02 relief.<sup>4</sup>

For these reasons, the Kenton Circuit Court order is affirmed.

EMBERTON, JUDGE, CONCURS.

MILLER, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Robert George Mulcahey, pro se FOR APPELLEE:  
Covington, Kentucky

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<sup>4</sup> Again, while Robert has continuously referred to a nonexistent January 17, 1995, order, we assume that he is actually referring to the February 24, 1995, order. Whether the order was entered in January or February of 1995, April 1996 is too late to seek Ky. R. Civ. Proc. (CR) 60.02 relief under subsections (a), (b) or (c).

No appearance.