

Commonwealth Of Kentucky

Court Of Appeals

No. 1997-CA-001315-MR

MELODY CYRUS

APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE KELLEY R. ASBURY, JUDGE
ACTION NO. 88-CI-000052

LEE STEWART

APPELLEE

OPINION

REVERSING AND REMANDING

** ** ** ** **

BEFORE: DYCHE, MILLER, and SCHRODER, Judges.

MILLER, JUDGE. Melody Cyrus brings this appeal from a May 7, 1997 Order of the Boyd Circuit Court. We reverse and remand.

The parties were divorced in 1988 by a Decree of Dissolution of Marriage. Therein, appellant was granted custody of the parties' minor child, and appellee, Lee Stewart, was given reasonable visitation privileges. Appellee was, of course, required to make monthly child-support payments to appellant. Appellee ultimately failed to make timely child-support payments, and in June 1996 had accumulated an arrearage of \$5,225.32. Consequently, appellant filed a motion requesting the circuit court to find appellee in contempt for failure to pay child

support. The matter was referred to a domestic relations commissioner, who proffered a report on April 2, 1997. The report stated in part as follows:

Per the divorce agreement of the parties, the Petitioner was to assume certain marital debts which were left unsatisfied by the Petitioner. The creditors ultimately looked to the Respondent Lee A. Stewart, who was financially unable to satisfy the debts, which resulted in the Respondent filing a Chapter 13 Bankruptcy Proceeding, incurring costs and fees as well as making payments to the creditors via the Bankruptcy system.

To that extent, the Respondent has filed with the court payment records from the United States Bankruptcy Court, reflecting that he made payments to creditors, which were the responsibility of the Petitioner, in the amount of \$7,401.98, and incurred costs in the amount of \$582.44, representing payment of attorney fees in the amount of \$290.00, filing fees in the amount of \$23.50, and trustee costs in the amount of \$268.94. Which would bring the total incurred debt to the sum of \$7,984.42. However, the Respondent was refunded the sum of \$161.01 from the payments made upon the conversion to Chapter 7.

Wherefore, it is the finding and recommendation of this Commissioner that the Respondent be awarded the sum of \$7,823.41 to be used as an offset to any child support arrearage that may now be due the Petitioner.

Appellant filed exceptions to the Commissioner's report, and on May 7, 1997, those exceptions were overruled and the circuit court adopted *in toto* the report and recommendations of the Commissioner. This appeal followed.

Appellant contends that the circuit court committed reversible error by offsetting the child-support arrearage against appellant's debt. We agree. We find Gaines v. Gaines, Ky. App., 566 S.W.2d 814 (1978), instructive to the present case.

Therein, the circuit court set off certain marital debts against child-support payments. The Court of Appeals reversed upon this issue and held, in part, as follows:

Professor Petrilli, in his volume on Kentucky Family Law (§ 27.4 at 492) maintains that the right of support belongs to the child, and we can conceive of no reason why a portion of a debt of one of the parents should be allowed as a set-off against those sustenance payments. Our conclusion finds support in the logic of the California courts in *Williams v. Williams*, 8 Cal.App.3d 636, 87 Cal. Rptr. 754 (1970), when it denied a husband's set-off of his wife's portion of the net deficit resulting from the operation of a community property apartment house against child support payments, for the reason that such support was not an ordinary debt but rather a court-imposed parental duty, and for further reason that the obligation resulting from the deficit was that of the wife and not the child's. This jurisdiction has always placed the immediate welfare of the offspring first regardless of whatever equitable adjustments should be made between the parents. (Emphases added.)

Id. at 818. We view as cogent the reasoning in Gaines and believe that in the case *sub judice* the circuit court committed reversible error by offsetting appellant's debt against the child-support arrearage. Cf. Price v. Price, Ky., 912 S.W.2d 44 (1995).

For the foregoing reasons, the order of the circuit court is reversed, and this cause is remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO APPELLEE BRIEF

Jeffrey D. Tatterson
Russell, KY

