

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002888-MR

AUBREY WILLIAMS

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE PATRICIA WALKER FITZGERALD, JUDGE
CIVIL ACTION NO. 81-CI-07700

ANNETTE VIVIAN WILLIAMS

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: DYCHE, HUDDLESTON and JOHNSON, Judges

HUDDLESTON, Judge: Aubrey Williams appeals from Jefferson County Family Court orders awarding Annette Vivian Williams child support arrearages. The parties married in December 1962 and their marriage was dissolved in March 1983. They have three children, all of whom are now emancipated. In the years following the dissolution of the parties' marriage, considerable litigation has occurred over diverse matters.

The present cycle of litigation began on June 27, 1995, when Annette filed a motion seeking a judgment for child support arrearages. With the exception of two 1984 wage assignments, it is

uncontested that in the years following the divorce, Aubrey has not paid his child support obligation pursuant to the traditionally approved methods, i.e., by sending Annette a check or by executing a wage assignment. Aubrey, however, insists that, throughout the years, he has paid various expenses on behalf of Annette and his children, including certain mortgages that he was not legally obligated to pay, and, together, these payments exceed his actual child support obligation.

The matter was referred to a domestic relations commissioner who held hearings on June 28 and June 30, 1995. The video record of these hearings was not included in the record on appeal. On March 15, 1996, the DRC issued his report finding that Aubrey had a net accumulated child support arrearage of \$37,257.00. Both sides filed timely exceptions to the DRC's report. Following a hearing on the exceptions, the circuit court substantially accepted the Commissioner's report and awarded Annette \$34,857.00¹ for child support arrearages. Aubrey filed a "motion for reconsideration," which was denied, but subsequently the court sue sponte entered an order to clarify its earlier order regarding the issue of the 1984 wage assignments. This appeal followed.

Unpaid child support awards become vested when due, and courts are without authority to "forgive" vested rights in accrued unpaid support awards. Dalton v. Dalton, Ky., 367 S.W.2d 840, 842 (1963). See also Stevens v. Stevens, Ky. App., 729 S.W.2d 461 (1987), (court erred in finding a father was not required to pay

¹ The court did not explain why it reduced the Commissioner's recommended award from \$37,257.00 to \$34,857.00.

past-due child support); Heisley v. Heisley, Ky. App., 676 S.W.2d 477 (1984) (unpaid child support becomes vested when due and is a fixed/liquidated debt); Stewart v. Raikes, Ky., 627 S.W.2d 586 (1982) (court has no power to modify decree as to past-due child support).

While the divorce occurred in 1983 and Annette, for some unexplained reason, did not raise the issue of arrearages until 1995, nevertheless, a custodial parent's failure to demand payments does not excuse the non-custodial parent's failure to make child support payments. Gera v. Gera, Ky. App. 796 S.W.2d 13, 14 (1990).

Once the custodial parent introduces into evidence court orders establishing a child support obligation, the validity of which are not at issue, the non-custodial parent has the burden of proving the obligation has been satisfied. Raymer v. Raymer, Ky. App., 752 S.W.2d 313, 314 (1988); Kentucky Rule of Civil Procedure (CR) 8.03.

Aubrey first argues that the trial court abused its discretion when it refused to reopen the proceedings for the purposes of determining whether Annette had received certain earnings pursuant to two wage assignment orders entered in 1984.

CR 59.07 permits a trial court to reopen the proceedings, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and enter a new judgment. The trial court has broad discretion under CR 59.07 which will not be disturbed unless abuse of discretion is shown. Walsh v. Kennedy, Ky., 463 S.W.2d 318, 321 (1971).

It is undisputed that in 1984 two orders were entered assigning certain wages to Annette. On February 1, 1984, the trial court entered an order captioned, "Agreed Order Assigning Wages to [Annette] for Payment of Child Support." The order states, in pertinent part, that:

[T]he court being sufficiently advised, ORDERS That all income, salary and/or wages earned or derived by [Aubrey] from his position as a state legislator in the Kentucky General Assembly shall be assigned directly to the Respondent as and for payment of child support due [Annette].

Similarly, on October 31, 1984, the trial court entered an "Agreed Order Assigning Wages to [Annette] for Payment of Child Support." That order states, in pertinent part, that:

[T]he court being sufficiently advised, ORDERS That all income, salary and/or wages earned or derived by [Aubrey] from his position as Director of the Special Fund for the Department of Labor shall be assigned directly to the Respondent as and for payment of child support due [Annette].

Annette's motion for judgment for child support arrearages was filed on June 27, 1995. Following hearings on June 28 and June 30, 1995, Aubrey filed a motion to hold the arrearage proceedings in abeyance because, among other things, "[l]imiting credit to the mortgages would not take into account the amounts of monies paid by [Aubrey] by wage assignments of his salaries from

the Kentucky General Assembly and the Kentucky Labor Cabinet." The DRC's report, filed March 15, 1996, did not mention the issue of credit for the prior wage assignments. On April 9, 1996, Aubrey filed exceptions, out of time with leave of the trial court, wherein he does not mention credit for the prior wage assignments. However, on January 30, 1997, Aubrey filed a memorandum in support of his exceptions to the DRC's report wherein he argues for a wage assignment credit. Hearings on the parties' exceptions were held, at which time Aubrey indicated that the records relating to the wage assignment were unavailable.

In its July 23, 1997, judgment against Aubrey for child support arrearages, the trial court did not mention the issue of credit for prior wage assignments. In his August 2, 1997, "motion to reconsider," Aubrey again argued that he should be entitled to credit for prior wage assignments. However, again, Aubrey failed to present proof as to the amounts actually received by Annette pursuant to the wage assignments. On October 8, 1997, the trial court entered an order denying Aubrey's motion to reconsider, but that order did not acknowledge Aubrey's claim to credit for past wage assignments. On October 30, 1997, the trial court entered an order stating:

This matter having come before the Court previously, and the Court having entered an Order October 8, 1997 overruling [Aubrey's] Exceptions to the Order entered July 23, 1997, the Court, having reviewed the file, does hereby sua sponte amend its Order of October 8, 1997 to note that although [Aubrey] has repeatedly stated that

his wages were assigned to [Annette] in order to meet his child support obligation and has submitted copies of orders providing for such assignment, and although [Aubrey] was granted the opportunity to supplement the record, no evidence has been proffered supporting [Aubrey's] assertion that such wages were in fact paid to [Aubrey].

The trial court did not abuse its discretion in declining to prolong the proceedings so that Aubrey could again allege, without proof, that Annette actually received the wage assignments. It's clear that Aubrey was afforded a fair opportunity to submit proof on this issue. While we agree that Aubrey should receive credit for any amounts received as a result of these wage assignments, Aubrey, at the hearing on exceptions to the DRC's report, in effect conceded he could not prove his case because the necessary records could not be located. Hence, reversible error was not committed by the court concerning the wage assignment issue.

Aubrey's second argument is that the trial court erred by not allowing him to supplement the record with proof of mortgage payments because the facts of this case warranted treating mortgage payments as child support.

As with the prior issue, this record was held open for a substantial period and Aubrey had a fair opportunity to submit evidence regarding mortgage payments he had, without legal obligation, made on behalf of Annette.

The DRC recommended a credit of \$36,960.00 for payments Aubrey made on mortgages he was not under an obligation to pay. The Commissioner further stated, "[i]n the event [Aubrey] is able to obtain documentation showing with more accuracy the payment that he made on the first mortgage between January 1983 through January 1993, then your Commissioner recommends that he receive additional credit." On the basis that Annette did not object, the trial court accepted the DRC's recommended credit.

In summary, Aubrey received substantial credit for past mortgage payments that he made on behalf of Annette. Annette did not object to those credits, and Aubrey had a fair opportunity following the entry of the DRC's report to present evidence of any additional mortgage payments for which he may be entitled to credit. It was not an abuse of discretion under CR 59.07 for the trial court to decline to reopen the proceedings. See Walsh v. Kennedy, supra.

For the foregoing reasons, the judgment of the Jefferson County Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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