

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002807-MR

SUE ELLEN FLEENER

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS WALLER, JUDGE
ACTION NO. 90-CI-00530

JESSIE WAYNE FLEENER

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

*** ** ** ** **

BEFORE: EMBERTON, MILLER AND TACKETT, JUDGES.

TACKETT, JUDGE: Appellant, Sue Ellen Fleener (Sue), appeals from an order of the Bullitt Circuit Court denying her motion to increase child support. For the reasons set forth herein, we affirm in part, reverse in part and remand.

Sue's marriage to appellee, Jesse¹ Wayne Fleener (Jesse) was dissolved by the Bullitt Circuit Court in 1991. The decree ordered Jesse to pay \$96 per week (\$416 per month) in child support for the parties' two children, and further ordered

¹Mr. Fleener's name is alternately spelled "Jesse" and "Jessie" in the record.

Jesse to maintain health insurance for the children. In 1998 Sue filed a motion to increase Jesse's child support obligation. A domestic relations commissioner (the commissioner) recommended that Sue's motion be denied and the Bullitt Circuit Court overruled Sue's exceptions to the commissioner's report. Sue then filed this appeal.

Kentucky Revised Statute (KRS) 403.213(2) provides,

Application of the Kentucky child support guidelines to the circumstances of the parties at the time of the filing of a motion or petition for modification of the child support order which results in equal to or greater than a fifteen percent (15%) change in the amount of support due per month shall be rebuttably presumed to be a material change in circumstances.

The commissioner found that the evidence was insufficient to meet the 15% threshold, and the trial court overruled Sue's exceptions without elaboration.

All parties agree with the commissioner's finding that Sue's gross monthly income is \$1,291; however, the parties disagree as to Jesse's gross monthly income. The commissioner found Jesse's gross monthly income to be \$2,244, but did not specify how he arrived at this figure. Jesse's paycheck for the pay period ending June 13, 1998, (the most recent paycheck he submitted) shows his year-to-date earnings to be \$13,262.91 for twenty-two (22) weeks of work, which calculates to a monthly wage of \$2,612.39.² Jesse's counsel argued, however, that Jesse's earnings were expected to decrease in the future to \$15 per hour.

²\$13,262.91 / 22 weeks = \$602.86 per week X 52 weeks per year = \$31,348.72 per year / 12 months per year = \$2,612.39 per month.

Using a forty-hour work week, earnings of \$15 per hour equates to a gross monthly income of \$2,600.³

The commissioner apparently attempted to average Jesse's 1997 earnings with his 1998 year-to-date earnings to calculate Jesse's monthly income.⁴ Jesse's 1997 W-2 statements indicate a total income of \$25,348.19.⁵ Adding that sum to his \$13,262.91 earnings for the first twenty-two weeks of 1998 leads to a combined 1997-1998 income of \$38,611.10. Dividing that sum by seventy-four (the fifty-two weeks of 1997 plus the first twenty-two weeks of 1998) leads to an average weekly wage for 1997-1998 of \$521.77. This means that Jesse's average monthly wage for 1997-1998 was \$2,261.⁶ Following the mandate of KRS 403.212(g) to deduct the health insurance premium of \$22.54 per week that Jesse paid for the children's benefit, his gross monthly income would be \$2,163.33.⁷ We are unable to determine,

³\$15 per hour X 40 hours per week = \$600 per week X 52 weeks per year = \$31,200 per year / 12 months per year = \$2,600 per month.

⁴When the parties presented their documentation of Jesse's earnings, the Commissioner stated "1997 plus the first one [i.e. wage statement] to this year [1998.] We will just average?" Transcript of Testimony of hearing before the commissioner, page 7.

⁵Jesse submitted three W-2 forms. One form indicated gross income of \$1,532, another indicated a gross income of \$11,824.19, and the third indicated a gross income of \$11,992. \$1,532 + \$11,824.19 + \$11,992 = \$25,348.19 total gross income for 1997.

⁶\$521.77 X 52 weeks per year = \$27,132.04 per annum average / 12 months = \$2,261.

⁷\$22.54 per week X 52 weeks per year = \$1,172.08 per year / 12 months = \$97.67 per month. \$2,261 per month salary - \$97.67 per month health insurance premium = \$2,163.33 adjusted gross income.

therefore, how the commissioner determined Jesse's monthly adjusted gross income to be \$2,244.00.

Regardless, it was improper for the commissioner to consider Jesse's 1997 earnings as it is clear that a court should presume that a party's future income will be "on a par with the worker's most recent experience." Keplinger v. Keplinger, Ky. App., 839 S.W.2d 566, 569 (1992). (emphasis added). Jesse's most recent work experience was evidenced by his paycheck from June 1998 which indicated that his gross income had averaged \$2,612.39 per month. See footnote 2, supra. Deducting \$97.67 per month in health insurance benefits from that sum leaves Jesse's adjusted gross monthly income as \$2,514.72. Adding that figure to Sue's monthly gross income of \$1,291 produces a combined monthly income of \$3,805.72. The child support guidelines found in KRS 403.212(6) provide that the total child support for parents who have two children and a combined monthly adjusted gross income of between \$3,800 and \$3,900 is \$808. Dividing that sum in proportion to Sue and Jesse's respective incomes leaves Jesse owing \$533.28 in monthly child support, an increase of over 28% from the previously ordered amount.⁸ Therefore, Sue's motion to increase child support should have been granted.⁹

⁸\$2,514.72 (Jesse's adjusted gross monthly income) / \$3,805.72 (total combined income) = 0.66 X \$808 (total monthly support under the guidelines) = \$533.28. Thus, Jesse owes \$533.28 per month in child support. \$533.28 - \$416 (child support ordered under dissolution decree) = \$117.28 additional support. \$117.28 / \$416 = 0.282.

⁹ The trial court on remand may choose to accept Jesse's contention that his income will drop to only \$15 per hour. See Keplinger, supra at 569 (holding that a presumption exists that a
(continued...)

Sue also argues that the trial court erred by not prorating Jesse's health insurance premium as the insurance policy covers Jesse's present wife and stepson, as well as Jesse's biological children. Sue is unable to cite any authority in support of her argument. Furthermore, the evidence indicates that Jesse is not forced to pay any additional amounts to cover his current wife and stepson as his premium is the same regardless of the number of people covered by the policy. See e.g. Transcript of Hearing, supra, at page 5 ("it [health insurance premium] is a flat cost whether it is one [covered child] or five"). Thus, we do not believe that Jesse is depriving his biological children of funds and the trial court properly refused to prorate Jesse's health insurance premiums.

The trial court's order denying Sue's motion for an increase in child support is reversed and the matter is remanded for proceedings consistent with this opinion.

ALL CONCUR.

⁹(...continued)
worker's future income will be on a par with his "most recent experience" but that a party may present evidence which would support a contrary finding). Regardless, Sue's motion should have been granted. As noted in footnote 3, supra, usage of Jesse's \$15 per hour figure results in a monthly gross income of \$2,600, which is only \$12.39 per month less than the monthly income reflected on Jesse's latest 1998 paycheck. Thus, the amount of child support owed using the \$2,600 per month income level would easily exceed the 15% threshold found in KRS 403.213.

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