

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-000417-MR

LYNN S. MCALEER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE RICHARD FITZGERALD, JUDGE  
ACTION NO. 96-FC-004111

THOMAS P. MCALEER, JR.

APPELLEE

OPINION  
AFFIRMING  
\*\* \*\*

BEFORE: BARBER, DYCHE AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. Lynn McAleer (Lynn) appeals pro se from an order of the Jefferson Circuit Court entered February 16, 1999, which denied her motion to modify child support. We affirm.

Lynn and Thomas McAleer (Thomas) were married on November 8, 1992. Two minor children were born as a result of their marriage. Thomas had previously been married to Sherri McAleer (Sherri) and had two minor children from this previous marriage.

Lynn and Thomas separated on December 31, 1995. At that time, Thomas reconciled with Sherri and moved in with her and their two children. Lynn maintained primary custody of the

parties' two minor children and Thomas paid child support in the amount of \$74.00 per week. This amount was later raised to \$85.29 under the terms of an agreed order.

Lynn filed a petition for dissolution of marriage with the trial court on August 1, 1996. On October 16, 1997, the trial court entered an order dissolving Lynn and Thomas' marriage. In regard to the parties' minor children, the trial court ordered joint custody with Lynn as primary custodian from August 15<sup>th</sup> to June 15<sup>th</sup> of each calendar year and Thomas as primary custodian from June 15<sup>th</sup> to August 15<sup>th</sup> of each calendar year. The order further provided that Thomas was to pay child support while the children were with Lynn and Lynn was to pay child support while the children were with Thomas. The decree did not set forth the amount of child support to be paid by the respective parties.

Thomas took custody of the parties' children on June 15, 1998, pursuant to the divorce decree. On that date, Thomas filed a motion with the trial court asking that his obligation to pay child support be either waived or suspended while the children were in his custody during the summer pursuant to the terms of the divorce decree.

In her pro se response to Thomas' motion, Lynn argued that Thomas' child support had not been calculated according to the guidelines set forth in KRS 403.212(2)(c-d). Specifically, Lynn argued:

[T]he very last sentence of section (c) this [sic] statute . . . states that payments of expenses by a business which are significant and reduce personal living expenses, such as,

free housing and car SHALL be counted as income. The Petitioner has always contended this to be the case, throughout, and at every hearing, and trial to date. Also, Mr. McAleer acknowledged at least the use of company vehicles provided by his family business as a result of his employment, and gave a detailed accounting of the makes and models of these vehicles during the most recent child support hearing with the commissioner. IN ACCORDANCE WITH THE STATUTE [sic]...the Petitioner maintains, that this is a minimum income benefit of 400.00 per month (vehicle, ins., and fuel). The Respondent testified that he pays 125.00 per month for a 1991 mobile home equipped with 3 bedrooms and two bathrooms. In the Elizabethtown area, mobile home parks were specifically contacted and this would rent for over 350.00 per month if available. The Petitioner maintains that even on the outside chance that rent is actually paid by Mr, [sic] McAleer, this is therefore an income benefit of 225.00. The total of unreported and UNCONSIDERED income benefits thus far, without additional proof, are 575.00 per month in addition to Mr. McAleer's reported minimum wage earnings.

(emphasis in original). In the alternative, Lynn asked that

Thomas be found to be voluntarily underemployed in his parents' business for purposes of KRS 403.212(2)(d).

The Domestic Relations Commissioner (DRC) entered his report on Thomas' motion on November 3, 1998. The DRC found that Thomas was employed by his parents' business and that his gross monthly income from that employment was \$1,010.71. Sherri, who was also employed in the family business, had a gross monthly income of \$800. The DRC also found that Thomas maintained health insurance for the parties' children (from the first marriage) at a monthly cost of \$51.76, which gave him an adjusted gross income of \$958.95. Thomas had no childcare expenses. The DRC also determined that Thomas had an obligation to pay child support for

his children from his first marriage. The DRC set this obligation at \$257.95 per month. Thus, after deducting Thomas' child support obligation for his prior-born minor children, Thomas' adjusted gross income was set at \$701.

With regard to Lynn, the DRC found her gross monthly income to be \$2,497.96. Her monthly insurance cost for the parties' two children was \$102.58. The DRC found that Lynn had monthly childcare expenses of \$515 for each month in which the children were in her custody. Based on these findings, Lynn's adjusted gross income was set at \$2,395.38.

In determining the amount of child support owed for the parties' children, the DRC established a combined monthly parental income of \$3,096.38 (\$2,395.38 + \$701). Based on this amount, the total child support obligation dictated by the child support guidelines was \$692. Because Lynn earns 77% of the combined parental income, her share of child support was determined to be \$532.84 per month. Thomas was deemed to be responsible for the remaining \$159.16 per month, plus an additional \$118.45 per month representing his share of the childcare costs for the ten months the children are in Lynn's custody, for a total of \$277.61.

Based on the foregoing, the DRC made the following recommendations:

Your Commissioner recommends that each parties' yearly child support obligation to the other party be netted out so that only one party needs to write child support checks.

Your Commissioner finds that Mr. McAleer owes Ms. McAleer child support, including child

care costs, in the amount of \$2,780.50 for the 10 months of the year when the parties' minor children reside with Ms. McAleer (\$159.60 per month plus \$118.45 per month times 10 months per year).

Your Commissioner further finds that Ms. McAleer owes Mr. McAleer \$1,065.68 for the two months of the year when the parties' minor children reside with Mr. McAleer (\$532.84 per month times 2 months per year).

Your Commissioner further finds that Mr. McAleer's net child support obligation to Ms. McAleer is \$1,714.82 per year (\$2,780.50 minus \$1,065.68). This yields a weekly child support obligation amortized over 52 weeks of \$32.98 (\$1,714.82 per year divided by 52 weeks).

Your Commission recommends that Mr. McAleer pay Ms. McAleer child support in the amount of \$32.98 per week for 52 weeks per year, effective June 15, 1998 and continuing until further order of the Court.

The weekly amount was later amended to \$32.89. Lynn's exceptions to the DRC's report appear to have been over-ruled, and on November 16, 1998, the trial court entered an order setting Thomas' monthly child support obligation at \$32.89.

Lynn filed a motion to amend child support with the trial court on November 25, 1998. On January 26, 1999, the DRC filed his report in which he found:

At the hearing before the undersigned . . . it became immediately clear that there had been no change in circumstances since the Order entered on November 19, 1998. Petitioner all but acknowledged that the December 29, 1998 hearing represented her continuing effort to convince somebody - anybody - that the level of child support required of the Respondent was too low, and thus unfair to her. Your Commissioner heard sufficient testimony on December 29, 1998 to be satisfied that the recommendation of the previous Commissioner, and the Order

generated by that recommendation, is well-reasoned and fair.

The trial court denied Lynn's motion by order entered February 16, 1999, and this appeal followed.

Lynn raises the same arguments on appeal that she raised in response to Thomas' motion to amend child support - namely that Thomas was voluntarily underemployed and that the DRC failed to attribute certain items as income to Thomas. She further contends that she offered evidence of these items during the hearings that occurred before the DRC, the videotapes of which are part of the record on appeal. The problem we have in considering these arguments is that Lynn does not provide "specific tape and digital counter numbers on the tape recording to support [her] statement of the case." Ventors v. Watts, Ky. App., 686 S.W.2d 833, 834 (1985). Lynn attempts to excuse this oversight on the front of her brief, where she states:

Furthermore, the Appellant certifies that the original record on appeal was not permitted to be removed from the Office of the Circuit Court Clerk. Therefore, Audio Taped Testimony cited in this Brief was based upon recollection of the hearings only.

It is settled that this Court "will not search a record for testimony where no reference to the transcript is furnished[.]" Ventors, 686 S.W.2d at 834-835. This has been extended to include situations where a party fails to provide digital counter numbers to untranscribed videotapes. Id. Therefore, we will not address these issues.

However, in an attempt to be fair to Lynn, we have reviewed the record to determine if there was a "material change

in circumstances that is substantial and continuing" which would mandate an increase in Thomas' child support obligation pursuant to KRS 403.213(1). Based on our review, we find that no such change has occurred.

Finally, Lynn argues that Thomas was not entitled to a credit for his support of his two prior-born children. We disagree. Pursuant to KRS 403.212(g), Thomas is clearly entitled to a deduction for any support:

a parent is legally responsible for and actually providing. . . for other prior-born children. . . . If the prior-born children reside with that parent, an "imputed child support obligation" shall be allowed in the amount which would result from application of the guidelines for the support of the prior-born children.

Having considered Lynn's arguments on appeal, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT, PRO SE:

No Brief for Appellee

Lynn S. McAleer  
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