

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-003061-MR

SHARON MCCORD

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE MARY L. COREY, JUDGE
ACTION NO. 94-FD-001964

JAMES CORNELIUS

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BARBER, COMBS AND McANULTY, JUDGES.

McANULTY, JUDGE: This is an appeal from an order of the Jefferson Family Court which increased appellant's child support obligations, modifying them retroactively to the date of the filing of the original motion for modification. The appellant is challenging the Jefferson Family Court's order that the child support payments are retroactive to July 15, 1997. We affirm.

Appellant Sharon McCord and appellee James Cornelius were divorced in 1995, at which time the appellee was awarded sole custody of their three daughters. Subsequently, on July 15, 1997, Appellee filed a motion to modify child support. On January 30, 1998, the trial court ordered that the parties come

to an agreement on a modified child support amount, or it would remand the matter to the Commissioner to recalculate an amount based upon both parties' earnings. The parties never reached an agreement, nor did the appellee ever present his 1997 tax return to the appellant as ordered by the court. Subsequently, on July 8, 1998, during a hearing on other issues, the Judge asked whether the child support recalculation was ever agreed upon. Appellee's counsel responded that his client had not "pushed" for the modification and said he would get the tax forms to him. The court instructed the parties to add the motion for modification to the issues for the Commissioner's determination.

The Commissioner filed a report on September 1, 1998, and recalculated the amount of child support. On November 5, 1998, the trial court entered an order granting the motion to recalculate child support, and ordering modification in the amount recommended by the trial commissioner, effective July 15, 1997. This appeal followed.

The appellant contends that the Court erred in modifying the child support in favor of the appellee retroactively to the date of the original motion for modification. However, KRS 403.213(1) clearly provides that, "the 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 a material change in circumstances that is substantial and continuing." See Pretot v. Pretot, Ky. App., 905 S.W.2d 868 (1995); Giacalone v. Giacalone, Ky. App., 876 S.W.2d 616 (1994).

The law of the Commonwealth clearly states that retroactive child support payments are due subsequent from the time of the original motion for modification. Id. Thus, the trial court correctly determined that the appellant must pay retroactive child support payments as of July 15, 1997.

In addition to the provisions of KRS 403.212(1), the Court's order of January 20, 1998, put the appellant on notice that the child support modification would be retroactive to the filing date. The trial court's order stated that it was a final and appealable order. From this point forward, the then unpaid periodical payments for child support became vested. See Heisley v. Heisley, Ky. App., 676 S.W.2d 477 (1984). In Heisley, the Court stated: "Any payments which may have become due previous to such modification constitute a fixed and liquidated debt in favor of the judgment creditor against the judgment debtor." Id. at 477, citing Stewart v. Raikes, Ky., 627 S.W.2d 586, 587 (1982).

The appellant argues that the appellee is not entitled to a modification of child support based upon the appellee's failure to act. Foremost, the appellant's argument is based upon the appellee's failure to turn over his 1997 tax return, which appellant alleges was intentional, and which the appellant contends prohibited any possible calculation of a modification of child support. The appellant argues that the appellee thereby waived the retroactive child support beginning July 15, 1997. Waiver is intentional relinquishment of a known right, or such conduct as warrants inference of such surrender, and it is not essential to its application that prejudice result to the party

in whose favor waiver operates. United States Fidelity and Guar. Co. v. Miller, 237 Ky. 43, 34 S.W.2d 938, 940 (1931). The appellee did not intentionally relinquish the right to child support or display any conduct where any such relinquishment could be inferred. Furthermore, the appellee did finally produce his 1997 tax return to the Commissioner at the hearing for recalculation of modified child support, yet the return was not actually even used in the calculations.

Secondly, the appellant argues that the appellee is estopped from collecting any retroactive child support based upon his failure to act. Estoppel is based upon the principle that one who failed to act when he should have acted should not reap a profit to the detriment of his adversary. Sizemore v. Bennett, Ky., 408 S.W.2d 449, 451 (1966). Estoppel does not apply in this situation. The appellant has not shown that the appellee's withholding of the income tax form was detrimental. The trial court ordered that if the parties did not reach an agreement, it would recalculate the amount, which the court did. Appellant was at all times obligated to pay the child support. Thus, the appellee's inaction did not subject the appellant to any greater obligation than she was already under. Moreover, the appellee is not reaping a profit in this situation, but is only receiving the child support owed. The appellee is raising three teenage daughters on a meager amount of child support. The appellee is entitled to an increase in child support from the appellant. KRS 403.213(1) clearly governs this situation with regards to retroactive child support payments.

The statute is not sympathetic to lengthy disputes between ex-spouses nor is it bothered with defenses of waiver or estoppel. KRS 403.213(1) clearly provides that any increase shall apply only to installments accruing subsequent to the filing of the motion for modification. Giocalone, 876 S.W.2d at 620. The appellant's contention that the retroactive child support payments owed to the appellee should be barred because of waiver and estoppel fail based upon KRS 403.213(1) and the case law of the Commonwealth.

Based on the foregoing reasons, the judgment of the Jefferson Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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