

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001778-DR

MICHAEL D. SPALDING, SR.

APPELLANT

ON DISCRETIONARY REVIEW
FROM JEFFERSON CIRCUIT COURT
v. HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 02-XX-000044 AND 02-XX-000045

TIMAL N. HALL

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: DYCHE, JOHNSON AND PAISLEY, JUDGES.

JOHNSON, JUDGE: This Court granted Michael D. Spalding, Sr.'s petition for discretionary review of an opinion and order of the Jefferson Circuit Court entered on July 25, 2002, which affirmed a judgment of the Jefferson Family Court entered on March 1, 2002. The family court's judgment modified its earlier order of child support and ordered Spalding to pay \$55.15 per week in child support commencing on July 24, 2001, plus \$14.85 per week toward arrearages totaling \$18,763.35, for a total weekly payment of \$70.00. Having concluded that the Jefferson Family

Court did not err either in establishing the original child support obligation or in later modifying that obligation, we affirm.

On May 26, 2000, Timal Hall, the appellee herein, filed a complaint with the Jefferson Family Court alleging that Spalding was the father of her two children¹ and seeking an appropriate amount of child support. On February 27, 2001, after Spalding admitted to being the father of both children, the family court entered an order establishing paternity. On May 25, 2001, the family court held a hearing on the issue of child support which was attended by Hall but not by Spalding or his counsel.²

At the hearing held on May 25, 2001, the family court ordered Spalding to pay child support in the amount of \$1,226.59 per month. The child support was calculated based upon a determination of the "needs of the child" pursuant to KRS³ 403.211(5), rather than the statutory child support guidelines

¹ Spalding and Hall were never married and ceased living together sometime around May 2000. Michael was born on March 17, 1993, and Mason was born on November 18, 1994.

² The original hearing to determine child support was scheduled for February 26, 2001, but was continued twice; once to May 11, 2000, and thereafter to May 25, 2001. Spalding claims that he went to court on May 11, 2001, but was told by court personnel that he would receive notice of the new hearing date. Spalding claims that he received no notice of the hearing held on May 25, 2001. The family court accepted Spalding's explanation and declined to hold Spalding in contempt of court for failing to make child support payments pursuant to the order entered on May 25, 2001.

³ Kentucky Revised Statutes.

under KRS 403.212. Spalding was also ordered to pay an additional amount of \$23.41 per month, representing arrearages which had accrued from May 26, 2000, when Hall filed her request for child support until May 25, 2001, the date the child support order was entered.⁴

When Spalding was jailed on July 24, 2001, on unrelated charges, he had not made any child support payments pursuant to the order of May 25, 2001. As a result of Spalding's failure to make any child support payments, on October 29, 2001, the Jefferson County Attorney's Office requested that he be held in contempt of court. On November 16, 2001, Spalding filed a motion for the family court to modify his child support obligation. After several continuances, a hearing was held on March 1, 2002, and the family court considered both the Jefferson County Attorney's contempt motion and Spalding's motion to set aside or modify the child support order entered approximately nine months earlier.

At this hearing, both Hall and Spalding presented evidence regarding the parties' relationship and their economic status during the years 1996 through 2001. Spalding also testified in his own defense on the contempt motion. The family court declined to hold Spalding in contempt of court for failing to make any child support payments, finding that he had not

⁴ The amount of arrearages for that time period totaled \$14,719.08.

received proper notice of the hearing held on May 25, 2001, when the child support order was entered. The family court further ruled that the original amount of child support ordered at \$1,226.59 per month would remain unchanged until Spalding became incarcerated on July 24, 2001. Finally, the family court modified Spalding's monthly child support obligation for the period in which he was in jail and thus less able to earn income. The family court ultimately ordered Spalding to pay \$55.15 per week in child support and \$14.85 per week on the arrearages. The child support arrearages included child support that had accrued from the date of the original child support order of May 25, 2001, which established a \$1,226.59 monthly obligation.⁵

Spalding appealed the order of March 1, 2002, to the Jefferson Circuit Court. On July 25, 2002, the circuit court affirmed the family court's order, concluding that the family court had not abused its discretion either in first establishing Spalding's child support obligation or in subsequently modifying that obligation. Spalding then filed a motion for discretionary review, which this Court granted on October 30, 2002.

⁵ The total arrearage amount of \$18,763.35 breaks down in the following manner. The original child support obligation of \$1,226.59 per month was ordered for the time period from when Hall filed her request for child support on May 26, 2000, until the time Spalding was incarcerated on July 24, 2001. Arrearages from this time period totaled \$17,164.00. The final \$1,599.35 in arrearages reflects the \$70.00 per month obligation which became effective when Spalding was incarcerated on July 24, 2001, until the date the modified child support order was entered on March 1, 2002.

Spalding's first and primary claim of error is that the family court erred in establishing his original child support obligation at \$1,226.59 per month. Specifically, Spalding argues:

On May 25, 2001, the court entered its original child support payment order without regard to the statutory child support guidelines set out in KRS 403.212. . . . Instead, the court merely accepted Ms. Hall's speculative estimate of \$1,250.00 per month [] at face value and without consulting the guidelines at all. The evidence was, therefore, insufficient for the court to enter this payment order. Moreover, no reason for deviating from the guidelines was noted in the record [citation to record omitted].

The resolution of this alleged error rests on the interpretation and construction of two statutory provisions found under KRS 403.211. Since the exact language of these provisions is crucial to our decision, we will set out the relevant provisions in full. KRS 403.211(2) provides:

At the time of initial establishment of a child support order, whether temporary or permanent, or in any proceeding to modify a support order, the child support guidelines in KRS 403.212 shall serve as a rebuttable presumption for the establishment or modification of the amount of child support. Courts may deviate from the guidelines where their application would be unjust or inappropriate. Any deviation shall be accompanied by a written finding or specific finding on the record by the court, specifying the reason for the deviation.

KRS 403.211(5) provides:

When a party has defaulted or the court is otherwise presented with insufficient evidence to determine gross income, the court shall order child support based upon the needs of the child or the previous standard of living of the child, whichever is greater. An order entered by default or due to insufficient evidence to determine gross income may be modified upward and arrearages awarded from the date of the original order if evidence of gross income is presented within two (2) years which would have established a higher amount of child support pursuant to the child support guidelines set forth in KRS 403.212.

Spalding argues that establishing a child support obligation based upon the "needs of the child" standard under KRS 403.211(5) constitutes a "deviation" from the child support guidelines within the meaning of KRS 403.211(2). Hence, he contends that before the family court could have applied the "needs of the child" standard, the court was first required to make specific factual findings on the record explaining why the child support guidelines of KRS 403.212 would not be used to determine his child support obligation. Spalding then asserts that since the family court made no such findings, the order requiring him to pay \$1,226.59 per month in child support was improper. We reject Spalding's interpretation of these provisions.

The child support guidelines under KRS 403.212 use the "combined monthly adjusted parental gross income" as the basis

for determining a parent's child support obligation.⁶ Hence, it follows that before the guideline tables can be applied, a trial court must first determine each parent's "gross income." After the gross income is determined, KRS 403.211(2) permits a trial court to "deviate" from the amount specified in the guideline tables if that amount would be "unjust or inappropriate" under the facts of that particular case. Thus, a "deviation" as the term is used under KRS 403.211(2), refers to those cases where it is possible to determine each parent's gross income, but peculiar circumstances justify a payment obligation different than that amount specified under the statutory guidelines.⁷

On the other hand, KRS 403.211(5) specifically states that the "needs of the child" standard is to be used in those cases where "a party has defaulted or the court is otherwise presented with insufficient evidence to determine gross income" [emphasis added].⁸ Hence, when a court uses the "needs of the child" standard in lieu of the statutory guidelines to set child support, it is not deviating from those guidelines. Rather, the statutory scheme provides for an alternative measure that a trial court can utilize to determine the appropriate child support obligation, if it is not possible to determine each

⁶ KRS 403.212(2)(g).

⁷ See Rainwater v. Williams, Ky.App., 930 S.W.2d 405 (1996).

⁸ KRS 403.211(5).

parent's gross income. Therefore, when there is no "deviation" within the meaning of KRS 403.211(2), a trial court is not obligated to make specific findings explaining why the statutory guidelines will not be used to determine the appropriate child support obligation.

At the hearing held on February 19, 2001, the family court directed both parties⁹ to be prepared to present proof regarding their respective incomes at a subsequent hearing scheduled to determine the appropriate child support obligation. The family court also expressly advised counsel for Spalding that the court would be "inclined" to grant child support based upon the "needs of the child" standard if Spalding were to fail to present proof of his income.

On May 25, 2001, when the family court ordered Spalding to pay \$1,226.59 per month in child support, the order was in fact based upon the "needs of the child" standard. Such action was proper since the record up until that date was devoid of any evidence whatsoever regarding Spalding's income during the relevant time period, but it did include evidence presented by Hall outlining the needs of the two children. Although Spalding was not present when this original child support order was entered, he has not argued that his absence at this hearing prevented him from offering proof of his income. It should also

⁹ Hall was in attendance at this hearing, but Spalding was not. However, counsel for Spalding was present at the hearing on this date.

be noted that in the approximate two-year period from the time Hall first filed her complaint until the date of the final child support order, Spalding's only proffered evidence regarding his income was his brief testimony on March 1, 2002, wherein he stated that he had been unable to find employment since approximately 1999. Thus, it is clear that as of May 25, 2001, the family court had insufficient evidence by which to determine Spalding's gross income. The court therefore properly ordered child support based upon the "needs of the child" standard.

Contrary to Spalding's assertion, the family court's use of the "needs of the child" standard was not a "deviation" from the child support guidelines under KRS 403.212. Thus, the family court was under no obligation to make factual findings explaining why the guidelines would not be followed. Accordingly, Spalding's claim that the family court erred in failing to make such findings is without merit.

Spalding's final claim of error is that the family court abused its discretion in affirming his original payment obligation in part on March 1, 2002:

Although the court had the opportunity to remedy [the original payment order] on March 1, 2002, when it properly listened to testimony from both parties concerning their respective incomes in 2000 and 2001, the court once again merely accepted the \$1,226.59 amount without any factual basis. At that hearing, Timal Hall provided no evidence as to [Spalding's] income for 2000

and 2001 and ultimately admitted that she did not know his income on May 25, 2001. . . . In fact, the only evidence presented concerning [Spalding's] income for those years was [Spalding's] own testimony that he was unemployed.

First, we note that Spalding has apparently conceded that there is little to no evidence in the record regarding his income for the relevant time period. This absence of evidence is precisely why it was proper for the family court to use the alternative "needs of the child" standard in determining Spalding's child support obligation. Second, based upon our review of the record, we cannot say that the family court abused its discretion in affirming the original child support order in part on March 1, 2002.

In Downing v. Downing,¹⁰ this Court discussed the standard of review for appellate courts in child support matters:

Kentucky trial courts have been given broad discretion in considering a parent's assets and setting correspondingly appropriate child support. . . . However, a trial court's discretion is not unlimited. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

In the case at bar, we find no abuse of discretion by the family court.

¹⁰ Ky.App., 45 S.W.3d 449, 454 (2001).

As Spalding himself has noted, the only evidence available to the family court regarding his income for the relevant time period was his bald assertion that he had been unable to find employment since approximately 1999. However, based upon evidence provided by Hall, the family court specifically found that Spalding was a "talented entrepreneur" who had both made a great deal of money in the past and who was also capable of continued financial success. Coupling this fact with the absence of any significant evidence related to Spalding's income, the family court found that the original amount of child support of \$1,226.59 per month was an "appropriate amount." Recognizing however, that Spalding's incarceration hampered his ability to earn income, the family court modified his monthly obligation to reflect this change of circumstances. Based upon these facts, we cannot say that the family court abused its discretion in finding that the \$1,226.59 per month obligation was an "appropriate amount" for the time period prior to Spalding's incarceration.

Based on the foregoing reasons, the opinion and order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Elizabeth B. McMahon
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

Jason E. Taylor
Assistant County Attorney
Louisville, Kentucky