

RENDERED: October 10, 2003; 2:00 p.m.
TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002114-MR

R.D.P.¹

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN III, JUDGE
ACTION NO. 87-CI-01487

S.M.B.

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: R.D.P., the father of two minor children from his marriage to S.M.B., has appealed from an order of the Daviess Circuit Court entered on July 12, 2001, which requires him to pay an increased amount of child support to S.M.B. Having concluded that the trial court did not abuse its discretion by increasing the father's monthly child support

¹ The parties will be referred to by initials to protect the interests of the minor child who was committed to the Department of Juvenile Justice.

obligation based on a calculation for two children even though one child had been committed to a state agency, we affirm.

R.D.P. and S.M.B. were married on June 6, 1985, in Daviess County, Kentucky. Two children were born of this marriage, H.P. and A.P. The marriage was dissolved by a decree of dissolution entered on June 6, 1988. The mother was awarded custody of the couple's two children and the father's original child support obligation was set at \$50.00 per week.

Approximately four years later, on July 23, 1992, the trial court ordered the father's child support obligation increased to \$98.00 per week.²

Citing a "substantial and continuing change in the financial condition" of both parties, the mother moved the trial court to increase the father's child support obligation on January 31, 2001.³ During the time this motion was pending, the couple's oldest child, H.P., was in a rehabilitation program with the Department of Juvenile Justice (DJJ) and she was not living with her mother. Also during this time period, the mother was pregnant with a child from a subsequent marriage.

On March 21, 2001, following a hearing on the matter, the Commissioner recommended that the father's child support

² The record indicates that the father was not working when the \$98.00 per week child support obligation was established.

³ The record shows that at the time the mother filed her motion, the father had a gross income of \$3,429.00 per month.

obligation be increased to \$171.00 per week, which was to be effective from the date of the filing of the motion until six weeks following the mother giving birth. After this six-week period, the Commissioner recommended that the mother have income imputed to her based on the minimum wage and that the father's child support obligation be reduced to \$153.68 per week. This recommendation was based upon the child support guidelines for two children pursuant to KRS⁴ 403.212. On July 12, 2001, the trial court entered an order increasing the father's weekly child support obligation consistent with the Commissioner's recommendation. The father was ordered to pay \$171.00 per week for the time period beginning on January 29, 2001,⁵ through June 15, 2001.⁶ Beginning on June 16, 2001, the father's child support obligation was reduced to \$153.68 per week.

On July 16, 2001, the father filed a motion to alter, amend, or vacate the trial court's order entered on July 12, 2001. The father argued that his child support obligation should not be based on a calculation for two children since H.P. was in a rehabilitation program with the DJJ and she was not living with her mother. On August 22, 2001, the trial court

⁴ Kentucky Revised Statutes.

⁵ The trial court stated that January 29, 2001, was the date of the filing of the motion, but January 29 was the date the motion was signed by counsel. The motion was filed on January 31, 2001.

⁶ The child was born on May 6, 2001.

entered an order denying the father's motion to alter, amend, or vacate. This appeal followed.

The father's primary claim of error in this appeal is that since H.P. was in a rehabilitation program with the DJJ and since she was not living with her mother when his child support obligation was increased, the trial court erred by ordering him to pay child support based on a calculation for two children. We disagree.

In matters relating to child support, the trial court is vested with broad discretion and a reviewing court will provide relief only where there has been an abuse of that discretion.⁷ Further, the primary purpose behind statutory child support guidelines is to ensure that the needs of the children are taken care of commensurate with the parents' ability to pay support.⁸

In the case at bar, we cannot conclude that the trial court abused its discretion in establishing the father's child support obligation based upon a calculation for two children. The fact that H.P. was not living with her mother at the time the father's child support obligation was increased is largely

⁷ Wilhoit v. Wilhoit, Ky., 521 S.W.2d 512, 513 (1975).

⁸ Gossett v. Gossett, Ky.App., 32 S.W.3d 109, 112 (2000). See also Stevens v. Stevens, Ky.App., 729 S.W.2d 461, 463 (1987)(stating that the public policy behind KRS 403.240, which mandates that a child support obligation is not terminated because of contemptuous conduct on the part of the custodial parent, "is to insure that the child in question is adequately supported").

irrelevant with respect to the father's duty to provide for H.P.'s support.⁹ In Commonwealth v. O'Harrah,¹⁰ the former Court of Appeals stated:

The law of nature as well as the law of man imposes upon the father, who has brought life into the world, the imperative duty to maintain and support his child.

Hence, the father has a continuing legal duty to provide support for H.P.

Although there is no case directly on point in Kentucky, several other jurisdictions have addressed the issue of whether a child's incarceration relieves the child's parents of the obligation to provide support. These courts have held that a parent's duty to provide child support is not absolved merely because a minor child is in the custody of an agency of the state.¹¹ For example, in Garver v. Garver,¹² the Supreme Court of Wyoming stated that a child's "incarceration does not act to relieve the parents of their duty of support, a duty that arises from both statute and common law." We agree with these

⁹ The record is unclear concerning the specific circumstances surrounding H.P.'s placement with the DJJ. Accordingly, it is impossible for this Court to determine whether the mother as custodian of H.P. would be responsible for paying a reasonable sum for H.P.'s support to the DJJ. See KRS 610.170.

¹⁰ Ky., 262 S.W.2d 385, 388 (1953).

¹¹ See Alice M. Wright, J.D., Annotation, What Voluntary Acts of Child, Other than Marriage or Entry Into Military Service, Terminate Parent's Obligation to Support, 55 A.L.R.5th 557 § 14 (1998)(discussing cases in which courts have held that a child's incarceration with a government agency did not relieve the parents of their obligation to provide continuing support).

¹² 981 P.2d 471, 473 (Wyo. 1999).

courts and hold that H.P.'s placement with the DJJ does not relieve her father of his duty to provide for her support. Accordingly, we further hold that the trial court did not abuse its discretion by establishing the father's child support obligation based upon a calculation for his two children.

Finally, the father argues that the mother lacked standing to bring her motion to increase child support and that the circuit court lacked jurisdiction because of this alleged standing deficiency. This argument is unpersuasive. Pursuant to the parties' divorce decree, the mother was awarded custody of both H.P. and A.P. Furthermore, the circuit court's most recent orders in this matter in 1992 had awarded the mother an increase in child support from the father. KRS 403.211(1) provides in part that "[a]n action to establish or enforce child support may be initiated by the parent, custodian, or agency substantially contributing to the support of the child." KRS 403.213(1) additionally provides in part that "[t]he Kentucky child support guidelines may be used by the parent, custodian, or agency substantially contributing to the support of the child as the basis for periodic updates of child support obligations" As noted by this Court in Leathers v. Ratliff,¹³ pursuant to KRS 403.180 "[t]he provisions of the decree respecting child support are subject to the continuing

¹³ Ky.App., 925 S.W.2d 197, 200 (1996).

jurisdiction of the court." Thus, the issue that the father refers to as a question of the mother's standing is in fact a question of whether the mother met the statutory requirement of "substantially contributing to the support of the child." This type of defense goes to the question of whether the mother is entitled to an increase in child support not to whether she has standing to seek the increase. Since the father did not raise this defense before the trial court, the issue is not preserved for our review. Additionally, as we noted previously, whether the mother as custodian of H.P. would be responsible for paying a reasonable sum for H.P.'s support to the DJJ is not before this Court.

Based on the foregoing reasons, the order of the Daviess Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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