RENDERED: MAY 28, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001031-MR

BRADLEY BOTKINS — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE REED RHORER, JUDGE
ACTION NO. 91-CI-01857

TAMMY E. BOTKINS TRACY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, TACKETT, and VANMETER, Judges.

COMBS, JUDGE. The appellant, Bradley Botkins, challenges two orders of the Franklin Circuit Court that modified his child support obligations. In its first order, he argues that the circuit court erred in denying him credit for child support overpayments. As to its second order, he contends that the court lacked jurisdiction. We affirm as to both orders.

Bradley and Tammy E. Botkins Tracy were married in 1990 and divorced in 1992. They have joint custody of their thirteen-year-old daughter, who resides primarily with Tammy.

Bradley pays child support to Tammy through the Franklin County Friend of the Court.

In a 1996 order, the Franklin Circuit Court set the Bradley's child support obligation at $57.35 per week. The 1996 order also continued an arrangement (established in an earlier order) providing that Bradley's child support payments were to be reduced by half during the summer visitation periods when his daughter resides primarily with him.

In June 2002, Bradley ceased making child support payments upon receiving a letter from the Friend of the Court that notified him of Tammy's intention to request an increase in child support. In August 2002, Tammy filed motions for a mutual exchange of income information in order to review Bradley's child support obligations, to modify visitation in light of their daughter's extracurricular activities, and to find Bradley in contempt of court for his failure to pay child support since June 14, 2002.

Bradley responded with a motion for increased time-sharing. He countered the contempt motion by alleging that he had paid excess child support into his account with the Friend of the Court that had reached a total sum of $1200 when he ceased making payments on June 14, 2002.

When the court-ordered mediation failed to resolve the dispute, a trial was held on February 20, 2003. On April 18,

2003, the circuit court entered an order denying Bradley's motion for increased time-sharing while increasing his weekly support payments from $57.35 to $80.94. In its findings of fact, the court stated that Bradley's excess payments of child support amounted to $743.96 and that his arrearages amounted to $458.83. However, it neither granted Tammy's motion to find Bradley in arrears in his support payments nor did it give Bradley credit for his overpayments.

On April 23, 2003, Bradley filed a motion pursuant to CR[1] 59 requesting that the trial court clarify its order. Specifically, he sought a provision consistent with the 1996 order to reduce his child support obligation by half during the annual summer visitation periods. Although the motion did not recite that it was being made pursuant to CR 59.05, Bradley has characterized it on appeal as a motion to alter, amend, or vacate -– as it had been treated by the circuit court.

At a hearing on April 29, 2003, Bradley argued that he was entitled to credit for his child support overpayments. The judge explained that he had decided that the overpayments and the arrearages constituted a "wash." In requesting a clarification of the order as to the effective date of the ordered increase in child support, Tammy argued that it should

[1] Kentucky Rules of Civil Procedure.

be made retroactive to August 7, 2002 -- the date of her filing of a motion for an increase.

On May 16, 2003, the court entered an order directing that Bradley's child support would not be reduced during the summer visitation periods, that the increased child support would be made retroactive to August 7, 2002, and that Bradley was to pay an extra $23.58 per week for the following thirty-seven weeks in satisfaction of the arrearage resulting from the date of the retroactive application of the order.

Bradley's first argues that the trial court erred in failing to grant him credit for the amounts that he overpaid on his child support obligation, reasoning that "when one overpays on an account, one should be entitled to credit." There is no dispute that Bradley made excess child support payments, a fact that was acknowledged by the trial court in its findings of fact. However, public policy considerations dictate that child support obligations are viewed differently from other financial obligations. In Clay v. Clay, Ky. App., 707 S.W.2d 352 (1986), this Court cited extensive portions of an opinion of the Maryland Court of Special Appeals analyzing the effect of any recoupment of child support overpayments. Clay provided in relevant part as follows:

> [t]he obligation of a parent to support his (or her) minor child is required by public policy and is expressly imposed by statute.

> . . . The determination of the amount of support to be paid by a parent, and the fixing of such amount as part of an order of a court having proper jurisdiction, . . . is an implementation of that public policy, and therefore **rests upon a different footing than ordinary judgments representing adjudication of private claims**. . . . The fixing of child support derives from the obligation of the parent to the child, not from one parent to another. . . . [I]n such a situation [reducing current payments to reflect earlier overpayment] **the onus of the remedy would fall upon the child**, not the receiving parent. . . . it would require that, during the recoupment period . . . the child would be receiving less than that found necessary for his or her support; and thus, the recouping parent would not be fulfilling his or her statutory obligation.

Clay, 707 S.W.2d at 353-54 quoting Rand v. Rand, 40 Md.App. 550, 392 A.2d 1149, 1151-53. (Emphasis added.)

Bradley does not allege that Tammy expended the overpayments on anything other than support of their daughter. However, public policy concerns underlie his requested remedy of recoupment:

> [I]n cases in which the custodial parent has expended the overpayment to support the child, the only avenue for reimbursement would permit the noncustodial parent to pay an amount less than that necessary for the child's support. Providing reimbursement by shortchanging the child seems unfair.

L. Graham and J. Keller, 16 Kentucky Practice, Domestic Relations Law § 24.35, p. 257.

At trial, employees of the Franklin County Friend of the Court testified that they were never informed that Bradley requested that the excess payments be credited to his account. They explained that it was their policy that all payments would be sent in full to the intended beneficiary unless they were specifically advised by the payor to credit any excess to his or her account. Unaware of this policy, Bradley had been making the excess payments for more than five years. He had never inquired as to whether they were being credited to his account, nor had he so directed.

Tammy has cited several cases in which payors were not given credit for excess child support expenditures. In Tucker v. Tucker, Ky. 398 S.W.2d 238 (1965), a father gave his child support to his former wife directly in cash; he also paid off a portion of the mortgage on her house. The court refused to grant him credit for these expenditures, reasoning as follows:

> [i]f a party wishes to contribute to the support of his children in some manner other than that in which a court has directed, the court is always open to a timely application for modification. If he does it without such permission it is not incumbent on the court to give him any credit for it.

Tucker, 398 S.W.2d at 239.

In Guthrie v. Guthrie, Ky., 429 S.W.2d 32 (1968), a father voluntarily paid $3,900 in laundry bills for his former wife and children over a ten-year period. The court denied his

claim that he should be given credit for these payments, holding that:

> he made them voluntarily and there was no agreement or understanding that the payments would operate as credit on the child support obligation. Under those circumstances he is not entitled to credit.

Guthrie, 429 S.W.2d at 37 (citations omitted). Bradley has correctly pointed out that these cases involved either non-monetary contributions or payments made through unofficial channels. Nonetheless, the reasoning is relevant in that the court placed the burden of insuring proper crediting upon the party making the excess contributions -- of whatever nature. Therefore, we conclude that the court did not abuse its discretion in refusing to credit Bradley for the child support overpayments.

Bradley next argues that the circuit court lacked jurisdiction to alter or amend its order of April 18, 2003, based on oral motions made by Tammy on April 29, 2003, at the hearing on his CR 59 motion. Bradley argues that under CR 59.05[2], such motions had to be filed within the ten-day period following the Court's initial order of April 18, 2003. He also argues that Tammy's motions failed to comply with CR 7.02(1), requiring that prior notice be given to him.

[2] In his brief, Bradley refers to CR 59.02, presumably a clerical error since CR 59.02 sets the limitations period for filing motions for a new trial. CR 59.05 governs motions to amend, alter, or vacate, which must be filed within ten days after entry of the final judgment.

Upon the timely filing and granting of a motion filed pursuant to CR 59, the entire judgment is suspended. When Bradley filed his motion, he effectively retained the jurisdiction of the circuit court over the judgment. "A motion pursuant to CR 59 converts a final judgment to an interlocutory judgment." See CR 73.02 (1)(e); State Personnel Board v. Heck, Ky. App., 725 S.W.2d 13, 18 (1986).

Noting that the primary purpose of a CR 59.05 motion is to toll the time for filing a notice of appeal, this Court has cautioned that such a motion "does not authorize a general attack upon, or revision of, the judgment at issue." Kentucky Farm Bureau Insurance Co. v. Gearhart, Ky. App., 853 S.W.2d 907, 910 (1993)(citations omitted). However, Tammy's oral motion (that the child support increase be made retroactive to August 7, 2002) was permitted by KRS[3] 403.213(1)). Therefore, it does not constitute "a general attack" upon the judgment at issue as contemplated by Gearheart, supra. Additionally, CR 7.02(1) permits that such oral motions may be made during the course of a hearing in open court: "An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing…." (Emphasis added.)

We also note the federal counterpart of CR 59. Under Federal Rule of Civil Procedure 59(e), the court is given "the

[3] Kentucky Revised Statutes.

power and jurisdiction to amend the judgment for any reason, if it [chooses] to do so, and it [is] not limited to the ground set forth in the motion itself." See Charles v. Daley, 799 F.2d 343, 347 (7th Cir. 1986); E.E.O.C. v. United Ass'n of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the U.S. and Canada, Local No. 120 235 F.3d 244, 250 (6th Cir. 2000).

Bradley argues that the circuit court had already set an effective date for the child support increase in its initial order -- April 17, 2003, the date on the worksheet attached to the judgment. The worksheet shows the calculations utilized by the court in arriving at the revised amount of child support. The worksheet bore a date at the bottom of the page. However, there is no indication that the circuit court intended the increase in Bradley's payments to become effective on that date. Even if the circuit court had intended the increase to become effective on April 17, 2003, the date of its calculations, it nonetheless retained jurisdiction to issue a precise order of retroactivity to August 7, 2002.

Bradley also challenges the jurisdiction of the court to order that he pay full child support during the summer visitation periods, implying that this issue was first raised by Tammy in an oral motion at the CR 59 hearing. However, the record clearly shows that Bradley himself raised this issue in

his CR 59 motion to clarify. Tammy responded to the motion at the hearing, arguing that Bradley no longer paid for child care during the summer visitation. Therefore, she contended that his justification for the reduced summer payments had ceased to exist. In filing the motion, Bradley exposed himself to the legitimate risk that the court might not only deny his motion as stated but that it might also address other ramifications flowing from that motion. We find no error in the court's disposition of this matter in response to Tammy's responses at the hearing.

The orders of the Franklin Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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