

RENDERED: JUNE 18, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000763-MR

WAYNE DAVIS MICHAEL¹

APPELLANT

v. APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 96-CI-00225

LINDA EILEEN MICHAEL

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND KNOPF, JUDGES; AND EMBERTON, SENIOR JUDGE.²

GUIDUGLI, JUDGE. In this action concerning the propriety of an order awarding back-due child support, Wayne Davis Michael (hereinafter "Wayne") has appealed from the Grant Circuit

Court's March 27, 2003, order overruling his objections to the

¹ Although the notice of appeal lists the parties' last name as "Michaels", we note that throughout the record the last name is "Michael". Therefore, we shall use the correct surname of "Michael" in this opinion.

² Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Domestic Relations Commissioner's report entered January 3, 2003. We affirm.

Wayne and Linda Eileen Michael (hereinafter "Linda") were married in Scott County, Kentucky, on March 10, 1979. One child, Daniel Wayne Michael, was born of the marriage on June 23, 1991. Wayne and Linda separated in February 1996, and she filed a Petition for Dissolution of Marriage on September 3, 1996. The case languished for some time, with the circuit court going so far as to dismiss the case for lack of prosecution, which order was later set aside. On January 20 and 27, 2000, Wayne filed motions to reduce his child support obligation, citing to a drastic reduction in his income. Although the record does not contain any type of order regarding child support prior to that date, the record reflects that Wayne was prosecuted on at least one occasion in the Grant District Court for non-support.³ On October 11, 2000, the district court entered an Agreed Order and Judgment finding Wayne guilty of non-support and conditionally discharging his one-year jail sentence for two years on the condition that he pay \$85.22 per week in child support, representing \$65.22 per week in child support and \$20 per week toward arrearages in support and medical payments. The support payments were to be payable to the Division of Child Support.

³ Commonwealth of Kentucky, Cabinet for Families and Children OBO Linda Michael v. Wayne Michael, Grant District Court case No. 96-M-00661.

On May 25, 2001, the circuit court entered a decree of dissolution, reserving the issues as to the separation of property and child support. The same day, the Domestic Relations Commissioner entered a report containing his recommendations as to the reserved issues, which report was adopted by the circuit court on June 19, 2001. Wayne and Linda were granted joint custody of their minor child, with Linda being assigned as the residential guardian and Wayne being given visitation rights. Wayne's motion to reduce his child support obligation was denied. On November 2, 2001, the circuit court entered a subsequent order regarding the marital real estate. Pursuant to that order, each was entitled to 50% of the marital real estate. Wayne was given sixty days to pay Linda her share, or the property was to be listed for sale. On Linda's motion concerning Wayne's non-compliance, the circuit court ordered the property to be sold. When Wayne failed to do so, the circuit court ordered the property to be sold by the Master Commissioner. However, the property again failed to sell, and the circuit court ordered the Master Commissioner to transfer the property to Linda so that she could attempt to sell it. The property apparently was sold, and Linda's attorney retained a portion of Wayne's proceeds.

On November 12, 2002, Linda filed a motion for contempt and for a judgment representing the arrearage of child

support. She indicated in the motion that Wayne had not paid any of the ordered child support since August 17, 2001, creating an arrearage of \$4174.08 from that date until November 8, 2002. The Domestic Relations Commissioner entered the following recommended order on January 3, 2003, after a December 11, 2002, hearing:⁴

1. The Respondent, WAYNE DAVIS MICHAEL, is hereby found to be in contempt; the Motion of the Petitioner is hereby SUSTAINED and [Respondent] is responsible for costs of this action.
2. The Respondent shall be required to pay \$500 to Petitioner representing attorney's fees Petitioner has incurred relative to the issue of child support.
3. The sum of \$5,093, part of proceeds of sale of the parties' real property held by Petitioner's attorney, shall be applied to the existing child support arrearage of \$4,174.08 as of November 7, 2002 and any amount accrued since that date; and to satisfy a lien held by Grant County Child Support Office in the amount of \$1,446.79.
4. That Respondent shall pay current support in the amount of \$65.22 per week and an additional \$10.00 per week toward any arrearage for a total weekly obligation of \$75.22.
5. Said support shall be payable to the Division of Child Support, P.O. Box 14059, Lexington, Kentucky 40512 with IV-D No. 1656004 clearly written on each payment.

⁴ The certified record does not contain any recording or transcript of the December 11, 2002, hearing before the Domestic Relations Commissioner.

6. That Respondent may purge himself of contempt by performance of all acts recommended herein on or before January 29, 2003. Otherwise, he shall appear before the Grant Circuit Court on that date to show cause why he should not serve ten days in the Grant County jail for contempt.

On January 15, 2003, Wayne filed objections to the Domestic Relations Commissioner's report and notice of hearing. He cited to the testimony of Karen Coulson of the Grant County Child Support Collection office, who, he alleged, testified that Linda had voluntarily relinquished her right to receive child support. Wayne also relied upon a notarized, handwritten note from Linda dated August 14, 2001, in which she stated:

Wayne Michael is going to pay the child support he owes me today. I do not want the State to collect my child support anymore for me. I do not want him to go to jail[.] I could not get in touch with Child Support office to let them know that I do not want the State to collect child support for me.

Lastly, he relied upon Section 26.000 of the Kentucky Prosecutors' Child Support Enforcement Handbook, which allows for arrearages to be reduced or set aside when there is "a verbal and/or written agreement between the parties that the absent parent does not owe support." Linda filed a response to Wayne's objections, in which she indicated that Karen Coulson actually testified that Linda asked the child support office to stop its efforts to collect child support on her behalf. At no

time did Linda ever file a motion to suspend Wayne's child support obligation and there was no agreement between them to this effect. Linda never relinquished her right to receive child support or relieved Wayne of his obligation to pay child support. On March 27, 2003, the circuit court entered an order overruling Wayne's objections, and confirming and adopting the Domestic Relations Commissioner's January 3, 2003, report. This appeal followed.

On appeal, Wayne limits his argument to the assertion that the circuit court erred in awarding the money at issue to Linda as she had voluntarily declined to have Division of Child Support collect the child support owed to her, thereby freeing Wayne from having to pay any child support. He does not appear to argue that he should not be required to pay any current child support. On the other hand, Linda argues that Wayne's child support obligation continued to accrue, as there was nothing in the record to establish that she ever relinquished her right to receive child support.

Our standard of review in this appeal is whether the circuit court abused its discretion by awarding the sum of \$5093, retained from Wayne's portion of the real property sale, to Linda to apply to his past due child support. The record on appeal clearly supports the circuit court's decision, even without a transcript or recording of the testimony at the

December 11, 2002, hearing. In her August 14, 2001, note, Linda did not relinquish her right to receive child support; she merely stated that she did not want the Division of Child Support to collect payments on her behalf. This does not mean that Wayne would not have to continue to pay the court-ordered child support. He still retained his obligation, but no longer had to make his payments through the Division of Child Support. Furthermore, the record does not reflect that any party moved the circuit court to relieve Wayne of his obligation to pay child support, nor is there an agreed order to this effect. The circuit court did not abuse its discretion by holding Wayne in contempt, ordering the amount representing a portion of his proceeds from the sale applied to his past-due child support, and ordering him to continue to pay child support.

For the foregoing reasons, the Grant Circuit Court's March 27, 2003, order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael D. Triplett
Williamstown, KY

BRIEF FOR APPELLEE:

William R. Adkins
Williamstown, KY