

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000994-MR

STEVEN EDWARD SHEARER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 01-CI-02593

GRETCHEN MARIE SHEARER

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, DYCHE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Steven Edward Shearer appeals from the March 18, 2003, order of the Fayette Circuit Court. We affirm.

Steven Edward Shearer and Gretchen Marie Shearer were married in 1995 and divorced by decree of dissolution entered in the Fayette Circuit Court on August 5, 2002. Two minor children were born of the marriage. The decree incorporated a mediation agreement whereby the parties agreed Steven would pay child support of \$1,000.00 per month.

In late 2002, Steven began receiving Social Security Disability ("SSD") benefits as the result of a brain tumor. Steven received \$1,581.00 per month in SSD benefits and also received \$100.00 per month under his former employer's disability policy. The children also began receiving SSD benefits as a result of Steven's disability in late 2002.

In January 2003, Steven filed a motion seeking a reduction in child support. Steven requested that his child support obligation be decreased to the amount the children were receiving in SSD benefits, or \$796.00 per month. The circuit court granted Steven's request and stated Gretchen would "receive this amount from the Social Security benefits the children receive due to [Steven's] disability." The order also directed Steven to pay health insurance premiums for the children. This payment constituted the only direct contribution by Steven toward the support for his children. The order was retroactive to January 13, 2003, the date of the filing of Steven's motion.

Steven subsequently filed motion for reconsideration, wherein he argued Gretchen should be responsible for the health insurance premiums, he should receive the 2002 tax exemption and he was entitled to reimbursement for overpayment of child support. The circuit court granted Steven's request for the 2002 tax exemption and denied his request for reimbursement of

child support. The issue of health insurance was held in abeyance.

Steven subsequently filed another motion for reconsideration on the issues of child support reimbursement and payment of health insurance premiums. On April 15, 2003, the circuit court entered an order denying Steven's motion. This appeal follows.

Steven contends he is entitled to reimbursement for excess child support paid. Specifically, Steven contends he should be reimbursed the amount of SSD benefits paid to the children during October, November, and December of 2002. Steven asserts that during this three-month period the children received SSD benefits and also received child support he paid in the amount of \$1,000.00 per month. Steven claims that during this three-month period, Gretchen received a total of \$5,346.00 in child support, of which, he paid \$3,000.00. The other \$2,346.00 was received in SSD benefits and, thus, was excess child support.

The dispute between the parties is whether Steven is entitled to reimbursement for the three-month period in late 2002, when he alleges Gretchen received SSD benefits and also accepted the full payment of \$1,000.00 per month in child support. Steven claims he was not aware the children had started to receive the SSD benefits and, thus, paid the full

amount of his child support obligation in October, November, and December. He acknowledges the child support order was only retroactive to January 13, 2003, and, thus, admits his child support obligation was still \$1,000.00 per month.

Steven relies on Van Meter v. Smith, Ky. App., 14 S.W.3d 569 (2000) when arguing he is entitled to reimbursement for the excess child support paid in late 2002. In Van Meter, the father applied for, and eventually received, SSD benefits. During the interim period, the father received benefits under his employer's coordinated benefits plan. The father utilized the funds received under the coordinated benefits plan to pay his child support. When the SSD benefits were finally approved, the children received a lump-sum accrued benefits payment of \$21,000.00. Pursuant to the coordinated benefits plan, the father was then required to repay the plan an amount equal to the back-payment of SSD benefits both he and the children had received.

This Court's decision in Van Meter is clearly distinguishable from the case *sub judice*. In Van Meter, the decision was premised upon the father being required to repay his employer under the terms of his coordinated benefits plan. As such, the father did not reap a windfall. See 16 Louise E. Graham and Hon. James E. Keller, Kentucky Practice, Domestic Relations Law, § 24.35.1 (2d ed. 1997). In this case, Steven

does not assert he is required to repay benefits the children received. He simply argues that Gretchen should not be permitted to keep an amount in excess of his child support obligation.

We view Clay v. Clay, Ky. App., 707 S.W.2d 352 (1986) as dispositive. Therein, this Court was squarely faced with the issue of whether to allow recoupment of an overpayment of child support. The Court noted that once support is paid, it is not generally recoverable. The Court specifically held that "restitution or recoupment of excess child support is inappropriate unless there exists an accumulation of benefits not consumed for support." Id. at 354. The Court pointed out that the circuit court should make a specific finding of fact upon whether such accumulation of benefits exists.

In this case, the circuit court failed to make such a finding of fact; however, Stephen failed to request such finding as required by Ky. R. Civ. P. (CR) 52.04, which states:

A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by motion pursuant to Rule 52.02.

As Stephen failed to request such a specific finding under CR 52.04, we believe he waived the issue and it may not be

considered on appeal. See Cherry v. Cherry, Ky., 634 S.W.2d 423 (1982); Whicker v. Whicker, Ky. App., 711 S.W.2d 857 (1986). Nonetheless, we observe the record is void of any evidence indicting that such an accumulation of benefits existed. From an equitable point of view, we would add that ultimately the children would be the ones to suffer if Gretchen were ordered to repay the child support.

For the foregoing reasons, the decision of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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