

Commonwealth Of Kentucky

Court of Appeals

NO. 2007-CA-000630-MR

HOMER R. MIDDLETON

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 03-CI-01252

LINDA LOU MIDDLETON

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: ACREE AND STUMBO, JUDGES; GRAVES,¹ SENIOR JUDGE.

STUMBO, JUDGE: This is an appeal from three orders of the Boyd Circuit Court, the first two setting forth Homer R. Middleton's (Appellant) obligation for child support and the third ordering him to pay \$3,399 in child support arrearage. He argues that he is not obligated to pay child support and that the trial court abused its discretion in ordering him to pay the support arrearage. He claims that the child, Tiffany, resided with him the majority of the time and he should not have to pay child support to his former wife, Linda Lou Middleton (Appellee). He further claims that he brought the fact of Tiffany residing with him to the court's attention in a motion to alter, amend, and vacate, but the court

¹ Senior Judge John W. Graves, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

did not rule on it, thereby depriving him of a final order from which he could have sought modification. We find that the first two orders Appellant is appealing are not properly before this court as they fall outside the 30 day period to file an appeal as stated in Kentucky Civil Rule 73.02. The only order properly before us is the third one in which Appellant is ordered to pay the child support arrearage. The circuit court may not alter child support payments retroactively. Therefore, the court did not abuse its discretion in failing to reduce the arrearage. We, therefore, affirm the trial court.

The marriage of Appellant and Appellee was dissolved via a decree of dissolution of marriage on February 10, 2004. Shortly after, the parties came to an agreement as to the custody of their child Tiffany. Tiffany was allowed to live with whichever parent she chose to and visit the other when she chose to. Due to this arrangement, neither parent was to pay child support. This arrangement was accepted by the Domestic Relations Commissioner on July 8, 2004, and adopted by the circuit court on July 23, 2004.

This arrangement continued until Appellee filed a motion to modify physical custody of the child on January 25, 2006. Appellee claimed that the pressure to choose which parent the child wished to reside with was too much for her. Appellee requested the court to grant her physical custody and allow Appellant visitation time.

On March 16, 2006, the court held a hearing to determine the custody issue. Prior to the hearing, the court interviewed the daughter. On June 16, 2006, the court entered an order granting Appellee's custody modification. In the order, the court stated that it was Tiffany's desire to live with her mother. The court gave physical custody of Tiffany to her mother and granted her father visitation at all times that the parties could agree to, but not less than the Boyd County Visitation Guideline. It also

ordered Appellant to pay child support in the amount of \$309.40 per month. This obligation was made retroactive to January 26, 2006, the day after Appellee filed her motion to modify custody.

On June 30, 2006, Appellant filed a motion to alter, amend, or vacate the June 16, 2006, order. In his motion, Appellant argued that the order was to be entered pursuant to an agreement of the parties and that the order did not reflect said agreement. He argued that the agreement was for joint custody, with Appellee as the primary physical custodian, and that Appellant would have visitation time no less than that listed in the visitation guidelines. Additionally, Appellant claimed that Tiffany had been residing with him for the past two months and that there was no discussion between the parties as to the child support being retroactive.

On September 11, 2006, the trial court entered an order giving the parents joint custody, with Appellee having primary physical custody. It also amended the child support order directing that payments were retroactive to March 16, 2006. Our review of the record indicates that the change was based on Appellant's contention that Tiffany had been residing with him for the two months leading up to the original child custody modification.

On January 23, 2007, Appellee filed a motion for a rule seeking enforcement of the child support order asserting that no payments had been made. The amount owed, beginning with the first payment on March 16, 2006, was \$3,399.

On February 23, 2007, the trial court entered an order setting forth the child support arrearage. The order stated that Appellant was in arrears in the amount of \$3,399, but that the child was primarily residing with Appellant and had been so for some time. The court terminated Appellant's future child support payments obligation, but stated that Kentucky law requires child support orders to remain in effect until a

modification is sought. Since Appellant did not seek a modification when Tiffany began to reside with him, the trial court held it could not reduce or eliminate the arrearage amount. Appellant then appealed the child support obligation issue on March 22, 2007.

Appellant appeals all three orders requiring him to pay child support. However, since the first two were entered in 2006, they are both outside the purview of this court because they were not appealed within 30 days. CR 73.02. The only order properly appealed is the one entered February 23, 2007.

As noted by the trial court, Kentucky law is clear that child support payments which become due cannot be altered. See *Price v. Price*, 912 S.W.2d 44 (Ky. 1995); KRS 403.213. As such, as each child support payment becomes due, it must be paid. As far as the trial court was concerned, when it ordered that Appellee was the primary physical custodian, she would remain so until a modification was sought.

Appellant also argues in his brief that he did not have a final support order from which he could have sought modification. We disagree. The September 11 order clearly grants Appellee primary physical custody and required Appellant to pay child support. Additionally, it seems to have taken into account the two months Tiffany resided with her father prior to the order, hence the two month reduction in retroactive support. If Tiffany began primarily residing with Appellant, or in fact never began residing with Appellee, then he should have sought a modification. Appellant sought a modification of the original order obligating him to pay child support. There was no reason he could not have done the same with the September order if he was not satisfied with its outcome.

For the above reasons, we affirm the trial court and hold that Appellant is to pay the \$3,399 in back child support.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FILED FOR APPELLEE

Christopher A. Dawson
Flatwoods, Kentucky