

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2008-CA-000843-ME

D.B.

APPELLANT

v.

APPEAL FROM CAMPBELL FAMILY COURT  
HONORABLE D. MICHAEL FOELLGER, JUDGE  
ACTION NO. 05-J-00547

COMMONWEALTH OF KENTUCKY,  
EX REL KENTUCKY FOSTER CARE

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: ACREE, CLAYTON, AND KELLER, JUDGES.

KELLER, JUDGE: D.B. appeals from an order setting child support for his daughter, E.B., and an order denying him visitation with her while he is incarcerated. This Court vacates the family court's order of child support and remands for further proceedings consistent with this opinion. Due to the fact that D.B. was released from prison on November 10, 2008, thereby removing the court-

ordered impediment to his parenting time with E.B., this Court holds this issue to be moot. The court presumes that hearings of some type were held below; however, according to an affidavit filed with this Court by the Campbell County Chief Deputy Clerk, the record is missing.

#### FACTS

In January of 2007, a judgment of paternity was entered after D.B. agreed that he was the father of the child, E.B., born in 1991. In this same order, the family court set child support in the amount of \$180.00 per month. The support is to be paid to the Commonwealth of Kentucky because E.B. is currently residing in foster care, having been removed from her mother's custody due to neglect. An arrearage of \$180.00 was calculated and the first payment was due and owing on or before the 30th day after the release of D.B. from prison. In December of 2007, D.B. filed a motion, *pro se*, requesting modification of the child support amount, and that it be held in abeyance, accompanied by a motion for visitation. Thereafter, on February 4, 2008,<sup>1</sup> D.B. filed another motion for visitation.

On March 4, 2008, an order entitled "permanency hearing" was entered, showing that only the Cabinet for Families and Children (CFC) worker was in attendance at the hearing and that CFC planned to place E.B. in another permanent living arrangement with the goal of emancipation. Neither the family

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<sup>1</sup> The motion does not bear a file stamp, but rather a notation in ink as to the date (2-4-08), with "JH 5-1-08".

court's findings, nor the order make any reference to D.B.'s motions. On March 21, 2008, D.B. wrote a letter to the family court lodging complaints about his representation by his court-appointed *Guardian Ad Litem* and questioning that a hearing had never been held on his motions.

In a letter filed on April 4, 2008,<sup>2</sup> D.B. requested a copy of his file from the family court along with transcripts of any hearings. D.B. explained in the letter that he is an indigent inmate and cannot pay for the appeal. On April 14, 2008, a docket sheet, signed by the judge, was entered with the following notation:

Father, D.B., has filed a request for visitation with the child herein while he remains in prison in Lebanon, Ohio. Court has ruled that the permanency goal for this child is not to return to either parent, but that the child be [sic] emancipated. Therefore, the court finds it's not in the child's best interest to visit the prison and DENIES father's motion. The Court also denies father's motion to terminate his child support obligation, which shall accumulate until the child's commitment rescinded [sic].

On April 28, 2008, the family court ordered that D.B. could proceed *in forma pauperis* and this appeal followed. In his initial response to the motion for child support filed in 2006 and in subsequent pleadings, D.B. has objected to the amount of \$180.00 as he is an inmate who, when not in prison, had been collecting Supplemental Security Income (SSI) since 1992. D.B. alleges that he has no outside support, real estate, or other assets and further that E.B. receives SSI benefits due to her own disability. In his brief, D. B. cites *Youngblood v. James*, 883 S.W.2d 512 (Ky. App. 1994), as dispositive of the issue. On appeal D.B.

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<sup>2</sup> Once again there is no file stamp, just the date followed by the initials "JH" written in ink pen.

asserts that he was denied a hearing on both the visitation and child support motions and that the family court did not appropriately calculate his child support pursuant to Kentucky Revised Statute (KRS) Chapter 403.

#### STANDARD OF REVIEW

Because the Appellee in this case has not submitted a brief:

the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

Rules of Civil Procedure (CR) 76.12 (8)(c). Given that this Court is reversing the matter on the merits, in the interest of judicial economy, and in order to provide guidance to the family court on remand, we choose to accept the appellant's statement of facts and issues as correct.

As are most other aspect of domestic relations law, the establishment, modification, and enforcement of child support are prescribed in their general contours by statute and are largely left, within the statutory parameters, to the sound discretion of the trial court.

*Van Meter v. Smith*, 14 S.W.3d 569, 572 (Ky. App. 2000).

In *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001), a panel of this Court discussed the standard of review for appellate courts in child support matters:

Kentucky trial courts have been given broad discretion in considering a parent's assets and setting correspondingly appropriate child support. . . . However, a trial court's discretion is not

unlimited. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

*McKinney v. McKinney*, 257 S.W.3d 130, 133 (Ky. App. 2008).

#### ANALYSIS

We have already noted the lack of any record of the proceedings related to this appeal. Therefore, additionally, there are no findings of fact and conclusions of law regarding the establishment of the amount of child support. A child support worksheet is not in the record, nor indeed, is any notation regarding how the family court arrived at the amount of \$180.00. As D.B. correctly points out, he and the mother of E.B. would have to possess joint income, or imputed income, totaling \$900.00 per month in order to warrant a monthly obligation as set by the court. The imputation of this amount of income to D.B. is unsupported by any evidence in the record. Therefore, it is impossible for us to determine whether the family court had any factual or legal basis on which to base its calculation.

However, D.B.'s contention that his SSI payments may not be used in the calculation as income is without merit under the current state of the law. The statute upon which the *Youngblood* court based its decision to exclude SSI benefits in child support calculations has since been amended. The statute now specifically includes SSI benefits in calculations under the guidelines. KRS 403.212(2)(b). Furthermore, in *Commonwealth ex rel. Morris v. Morris*, 984 S.W.2d 840 (Ky. 1999), the Supreme Court of Kentucky held that this statutory provision was not

superseded by Federal Law limiting legal proceedings against SSI benefits because child support is exempt from such Federal protections.

On remand the family court is directed to hold the hearing that D.B. is entitled to both by statute and the U.S. and Kentucky Constitutions. Following the hearing, the court shall make specific findings of fact and conclusions of law, including the appropriate calculations to determine the amount of child support owed by both D.B. and E.B.'s mother, taking into consideration the fairness and equity of the guideline amounts.

In determining whether application of the guidelines would be unjust or inappropriate, we believe that an appropriate circumstance to consider is the SSI received by the child as an independent financial resource. Considering SSI in the child's name is consistent with considering social security benefits in the parent's gross income. . . . The benefits would merely be recognized in weighing the equities and fairness of the circumstances of the child and the parents.

*Barker v. Hill*, 949 S.W.2d 896, 897-98 (Ky. App. 1997).

Should a visitation schedule between D.B.'s release and E.B.'s eighteenth birthday be requested, D.B. is likewise entitled to an evidentiary hearing on the matter before the status of his visitation rights can be determined. KRS 403.320(1) provides "[a] parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, *after a hearing*, that visitation would endanger seriously the child's physical, mental, moral, or emotional health. . . ." (Emphasis added). Following that hearing, the family court shall make written findings of fact and conclusions of law.

For the foregoing reasons the judgment of the Campbell Family Court  
is reversed and remanded.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE.

D.B., *pro se*  
Lebanon, Ohio