

RENDERED: OCTOBER 1, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001027-MR

RICKY D. BLAIR

APPELLANT

v. APPEAL FROM MORGAN CIRCUIT COURT  
HONORABLE KRISTI HOGG GOSSETT, JUDGE  
ACTION NO. 08-CI-00039

COMMONWEALTH OF KENTUCKY AND  
BRENDA BLAIR

APPELLEES

OPINION  
AFFIRMING IN PART,  
VACATING IN PART AND  
REMANDING

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BEFORE: ACREE, DIXON AND STUMBO, JUDGES.

DIXON, JUDGE: Ricky D. Blair appeals from a judgment of the Morgan Circuit Court modifying his child support obligation and ordering him to pay a significant child support arrearage to his former wife, Brenda Blair. We affirm in part, vacate in part, and remand for further proceedings.

Ricky and Brenda married in June 1989, and they divorced in December 1998. Two children, Brandon and Whitney, were born during the marriage. The decree granted Ricky primary custody of Brandon and granted Brenda primary custody of Whitney. The decree also established Ricky's child support obligation of \$58.00 per week.

In 2008, the Commonwealth, on Brenda's behalf, initiated an action in Morgan Circuit Court against Ricky to collect unpaid child support and to modify his support obligation due to Brandon's emancipation. An evidentiary hearing convened on February 16, 2009. Brenda testified that, during the marriage, Ricky earned a good living as a cattle buyer, and she worked part-time cleaning houses. After their divorce, Brenda stated that Ricky sporadically visited with Whitney. Brenda further acknowledged that she currently worked full-time and earned \$15.00 per hour.

Ricky testified that he lives with his 80-year-old parents on their 250-acre farm. Ricky asserted that he is not employed; rather, he assists his parents with their daily needs and maintains their farmland and livestock. In exchange, Ricky's parents pay all of his living expenses. Ricky testified that he previously worked for a national livestock company as a cattle buyer until 2004, when Brandon was severely injured in a tractor accident. Ricky testified that he cared for his son's daily needs throughout 2004 and 2005, until Brandon was no longer confined to a wheelchair. As Brandon's condition improved, Ricky began taking on more responsibility caring for his aging parents and their farm. In 2005, Ricky

married his second wife, Sherri, although they were separated at the time of the hearing. Ricky introduced tax returns indicating that he earned \$13,361.00 in 2005, and that Sherri and he reported joint income of \$12,537.00 in 2006. Additionally, Ricky acknowledged that it was possible to earn more than \$50,000.00 annually as a cattle buyer, although it would require several days and nights away from home each week. He stated that, due to his obligations caring for his parents and their farm, he could not return to cattle buying as it required such frequent traveling. As to local opportunities as a cattle-buyer, Ricky asserted that local buying was not as profitable as national buying, with income potential of \$15,000 to \$20,000 per year. The court also heard testimony from Sherri, Ricky's estranged wife. She testified that he had focused on taking care of his parents and Brandon since 2004, and that either Ricky's parents or she paid all of his expenses.

On May 4, 2009, the court rendered findings of fact and conclusions of law. The order granted Brenda judgment against Ricky for child support arrearages of \$25,072.17. As to modification of child support, the court imputed to Ricky a weekly wage of \$500.00, which was his wage at the time of the parties' divorce in 1998. Accordingly, the court increased Ricky's child support obligation to \$294.00 per month. This appeal followed.

We are mindful that "the establishment, modification, and enforcement of child support is generally prescribed by statute and largely left, within the statutory parameters, to the sound discretion of the trial court."

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

As a reviewing court, we defer to the trial court's discretion as long as its decision was not "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001).

### I. Arrearage Calculation

Ricky asserts that, as to the arrearage, the court should not have included in its calculation the two years he served as Brandon's caretaker following his injury. Ricky acknowledges he never sought to modify the support obligation, and he concedes that KRS 403.213(1) allows only prospective modification of child support. Nevertheless, he theorizes that it was unconscionable for him to pay child support for Whitney during the time of Brandon's health crisis. Ricky further opines that equitable defenses of laches and estoppel preclude Brenda from obtaining an arrearage judgment. We disagree with Ricky's assertions.

"Past due payments for child support and maintenance become vested when due." *Pursley v. Pursley*, 144 S.W.3d 820, 828 (Ky. 2004). In *Whitby v. Whitby*, 306 Ky. 355, 208 S.W.2d 68, 69 (1948), overruled on other grounds by *Knight v. Knight*, 341 S.W.2d 59 (Ky. 1960), the Court explained:

We perceive that no distinction can be made between a judgment based upon a claim for alimony or maintenance and a judgment based upon any other legal right. After the judgment is entered, although it may be subject to modification at a subsequent date, it is binding and final until modified; and any payments which may have become due previous to such modification constitute a fixed and liquidated debt in favor of the judgment creditor against the judgment debtor.

Furthermore, as “matters of maintenance and child support have the same effect as a money judgment[,]” equitable defenses of laches and estoppel are unavailable during the applicable limitations period. *Heisley v. Heisley*, 676 S.W.2d 477, 477 (Ky. App. 1984). We are likewise mindful of the sound policy consideration that underscores this issue, as delay by the custodial parent in enforcing a child support order “cannot be attributed to the children for whose benefit the original maintenance award was made.” *Holmes v. Burke*, 462 S.W.2d 915, 918 (Ky. 1971). Although Ricky urges us to depart from the well-settled reasoning of *Heisley* and entertain his equitable arguments, we decline to do so. In light of the foregoing authority, we find no error in the judgment as to the child support arrearage owed by Ricky.

## II. Imputed Wage

Next, Ricky asserts that the court’s imputation of a \$500.00 weekly wage to him was an abuse of discretion. After careful review, we agree.

In its findings of fact, the trial court specifically found that Ricky was unemployed, lived with his parents and that they paid all of his expenses in exchange for care giving. The court’s findings also acknowledged Ricky’s testimony that cattle buying on the local or regional level could yield an annual income between \$15,000.00 and \$20,000.00.

In its conclusions of law, the court stated as follows:

The current support obligation should be calculated based upon the same income attributed to Rick at the time that

the decree of dissolution of marriage was entered. Rick has presented no meaningful evidence to this Court by which the Court could properly determine a child support award. Further, although the parties acknowledge that during the marriage Rick earned between \$50,000.00 and \$100,000.00 annually, the decree of dissolution establishes Rick's gross monthly income at \$500.00 per week, which computes to only \$26,000.00. There was no evidence put before the Court to explain why Rick's child support would have been based upon such a figure. Furthermore, although Rick testified that he could still engage in cattle trading, there was no evidence that the earnings would be the same now as they were over ten years ago. The Court concludes therefore that child support in accordance with the Kentucky Child Support guidelines based upon an imputed wage of \$500.00 per week to Rick, and Brenda's \$15.00 per hour income at a 40 hour work week, that child support should be established in the amount of \$294.00 per month and that Rick should be responsible for 45 percent of all extraordinary medical expenses.

KRS 403.212 addresses the application of the child support guidelines, and the statute defines "income" as "actual gross income of the parent if employed to full capacity or potential income if unemployed or underemployed."

KRS 403.212(2)(a). The statute further states:

If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income . . . . Potential income shall be determined based upon employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community.

KRS 403.212(2)(d).

In its findings of fact, the court clearly found that Ricky is unemployed - a finding that is supported by substantial evidence. In light of that finding, we conclude the court was obligated to apply the factors delineated in KRS 402.212(2)(d) to establish Ricky's potential income. *See Gripshover v. Gripshover*, 246 S.W.3d 460, 468-69 (Ky. 2008). Accordingly, we vacate the portion of the judgment relating to the calculation of Ricky's modified support obligation and remand for further proceedings consistent with this opinion.

For the reasons stated herein, the judgment of the Morgan Circuit Court is affirmed in part, vacated in part, and remanded.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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