RENDERED: DECEMBER 3, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002180-ME

GEORGE AVERY — APPELLANT

v.

APPEAL FROM MARTIN CIRCUIT COURT
HONORABLE JANIE MCKENZIE-WELLS, JUDGE
ACTION NO. 01-CI-00062

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY; AND MARY E. AVERY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND THOMPSON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

CAPERTON, JUDGE: The Appellant, George Avery, appeals the October 14, 2009, Order of the Martin Family Court denying his request for modification of his

[1] Senior Judge Joseph E. Lambert, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and the Kentucky Revised Statutes (KRS) 21.580.

child support obligation and motion to hold child support obligation in abeyance. Having reviewed the record, the arguments of the parties, and the applicable law, we affirm.

On October 22, 2007, the Office of the Martin County Attorney, Child Support Division, filed a motion to show cause against Avery for failing to make his child support payments of $279.84 per month. According to the records of the Child Support Division, Avery had not made a child support payment since June 9, 2007. Thereafter, a show cause order was issued for Avery on November 16, 2007, ordering him to appear before the Martin Family Court on November 28, 2007. At the show cause hearing, Avery was sentenced to 180 days in the regional detention center, probated on condition of regular, timely payments. Subsequently, Avery was convicted of sexual abuse in the first degree and sentenced to incarceration until June of 2012.

Thereafter, on April 13, 2009, Avery mailed a letter to the Martin Family Court discussing his incarceration and sent a second similar letter on May 7, 2009. These letters essentially noted that he was unable to make his child support payments and further detailed the lack of cooperation he allegedly received from the Centralized Collection Unit.

On June 8, 2009, Avery filed a motion for modification of child support as well as a motion to hold payments in abeyance. However, because a

copy of that motion was not sent to the Cabinet and there was no notice of hearing, the motion was not placed on the court docket. On October 2, 2009, Avery refiled his motion and included a notice of hearing for October 14, 2009. The Cabinet did not receive a copy of that motion either. Nevertheless, at the October 14, 2009, hearing, the Court denied both the motion for modification and the motion to hold the child support obligation in abeyance.

On appeal, Avery argues that he is unable to meet his child support obligations at the present time because he is incarcerated and without meaningful employment. He asserts that his income is only $60.00 per month, which makes him unable to meet the previously ordered support imposed by the Martin Family Court.

In response, the Cabinet asserts that incarceration is a form of voluntary unemployment and that, accordingly, Avery's child support obligation should not be modified as a result. This Court is compelled to agree. Our law is clear that criminal conduct of any nature cannot excuse the obligation to pay child support. *See Redmon v. Redmon*, 823 S.W.2d 463 (Ky. App. 1992). Likewise, in *Marshall v. Marshall*, 15 S.W.3d 396 (Ky. App. 2000), this Court stated that when child support statute KRS 403.212(d) was modified in 1994, it specifically isolated only two groups of parents (those who were incapacitated and those who cared for children under three years of age), to be exempted from the obligation to impute income. In addressing incarcerated parents, this Court specifically held that:

> [T]he legislature's refusal to include incarcerated parents among those identified as being excepted from imputed income

> convinces us that incarcerated parents are to be treated no differently than other voluntary unemployed, or underemployed parents owing support.

Marshall at 402.

In the matter *sub judice*, Avery's behavior was criminal and resulted in his conviction and incarceration. The court below was aware of that conviction and of Avery's continued incarceration, but did not consider it to be a sufficient reason for modifying his support obligation. Stated simply, there are few matters over which a trial court has more discretion than those involving domestic relations issues. *Marshall* at 400. As long as the trial court's decision comports with the guidelines or any deviation is adequately justified in writing, this Court will not disturb the trial court's ruling in this regard. *See Marshall, supra, and Bradley v. Bradley,* 473 S.W.2d 117, 118 (Ky. 1971).[2] In the matter *sub judice*, we believe that the trial court acted well within its discretion in making this determination and see no reason to find otherwise on appeal.

Wherefore, for the foregoing reasons, we hereby affirm the October 14, 2009, order of the Martin Family Court denying Avery's request to modify child support and hold child support payments in abeyance, the Honorable Janie McKenzie-Wells, presiding.

ALL CONCUR.

[2] Holding that, "a judgment concerning child support will not be disturbed 'unless there has been a clear and flagrant abuse of the powers vested in that court.'"

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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