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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001662-MR

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY — APPELLANT

v. — APPEAL FROM PIKE CIRCUIT COURT
HONORABLE LARRY E. THOMPSON, JUDGE
ACTION NO. 05-J-00331

R.C., Jr. — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; COMBS AND TAYLOR, JUDGES.

COMBS, JUDGE: L. S. (Mother) appeals the judgment of the Pike Circuit Court which ordered her to reimburse appellee, R. C., Jr. (Father), for child support that he had paid. After our review, we vacate and remand.

Mother and Father were never married but are the parents of a child born on October 19, 2004. Although Father had very little contact with the child, he

consistently paid child support after paternity was established. On February 25, 2011, Father's parental rights were involuntarily terminated so that the child could be adopted by his stepfather. Father appealed, and the Kentucky Court of Appeals affirmed the termination on March 9, 2012.

On April 23, 2012, Father wrote a letter to the trial court, which the court treated as a motion. Father asked the court to award him the child support that he had paid during the previous fifty-three months. The court conducted a hearing on August 1, 2012. On August 31, 2012, the court entered its findings and order awarding Father reimbursement of previously paid child support commencing on February 25, 2011 – the date that his parental rights were terminated. The court calculated the amount to be $1989.00. This appeal follows.

Matters concerning child support are to be considered according to statute and by discretion of the trial court. *Nosarzewski v. Nosarzewski*, 375 S.W.3d 820, 822 (Ky. App. 2012). We will disturb its findings only if it has abused its discretion by making decisions that were "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Clary v. Clary*, 54 S.W.3d 568, 571 (Ky. App. 2001).

In this case, the family court's findings – in their entirety – were as follows: "[t]he Petitioner was aware that the Respondent's parental rights were terminated by this Court as of February 25, 2011 and she continued collected [sic] child support."

In cases involving termination of parental rights, the parent whose rights have been terminated usually does not continue his child support obligation. Therefore, we are unable to find any case law or statute that addresses the exact scenario before us. However, while Kentucky courts have not addressed payment of child support following termination of parental rights, they have confronted the issue of overpayment by a parent. The established rule is that "restitution or recoupment of excess child support is inappropriate unless there exists an accumulation of benefits not consumed for support. . . . [T]his is a finding addressed to the trial court." *Clay v. Clay*, 707 S.W.2d 352, 354 (Ky. App. 1986).

Where findings are made by a court rather than a jury, the court is required to make ***thorough, written*** findings. *Anderson v. Johnson*, 350 S.W.3d 453 (Ky. 2011). Our Supreme Court has emphasized this requirement in *Keifer v. Keifer*, 354 S.W.3d 123, 125-26 (Ky. 2011) as follows:

> Consideration of matters affecting the welfare and future of children are among the most important duties undertaken by the courts of this Commonwealth. In compliance with these duties, it is imperative that the trial courts make the requisite findings of fact and conclusions of law to support their orders.

In this case, the order lacks the supporting findings mandated by the Supreme Court in *Anderson* and *Keifer*. The court did not apply the *Clay* rule by supporting its findings with legal authority or by explaining how it calculated the amount of restitution.

Mother argues that it will create a hardship if she has to pay the restitution and that, therefore, the child's well-being will be affected. The family court based its decision in part on its assessment of the conduct of Mother. If indeed misconduct on her part were involved, restitution would be an appropriate remedy. Our Supreme Court has held that when overpayment of child support is the result of fraud or misrepresentation by one of the parents, restitution can be ordered. *Denzik v. Denzik*, 197 S.W.3d 108 (Ky. 2006). However, there are no specific findings regarding fraud or misrepresentation.

Additionally, we have not been provided with a complete record. Because there is no copy of the hearing, we are unable to determine what arguments were presented to the court that affected its decision. See *Elkins v. Elkins*, 359 S.W.2d 620, 622 (Ky. 1962). Furthermore, the briefs do not provide sufficient legal authority[1] or citations to the record for us to make an informed decision. We cannot base our decision on speculation.

Therefore, due to the lack of information before this Court, we are compelled to remand this case to the Pike Circuit Court for entry of findings in support of its order.

TAYLOR, JUDGE, CONCURS.

ACREE, CHIEF JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ACREE, CHIEF JUDGE, DISSENTING: Respectfully, I dissent.

[1] Mother's brief cites two cases, of which one is not relevant. Father's brief does not contain any legal authority.

I believe the majority reads too broadly the case of *Clay v. Clay*, 707 S.W.2d 352 (Ky. App. 1986). In *Clay*, a father was ordered to pay child support of $300 per month. Later, without complying with Kentucky Rules of Civil Procedure (CR) 52.01, the trial court increased the amount to $500. The latter ruling was appealed, vacated, and remanded; upon remand, the trial court again set child support at $300, but made no allowance for what the father considered a $200-per-month overpayment under the subsequently vacated $500 support order. *Id.* at 352. The issue in *Clay* then was not *whether* there was an obligation of child support; the issue was the *amount* of that obligation.

To resolve the question of whether the father could recoup the $200 per month he paid under the vacated order, *Clay* relied almost exclusively on, and quoted extensively from, the Maryland Court of Appeals case of *Rand v. Rand*, 392 A.2d 1149 (Md. App. 1978). The foundation of *Rand* and *Clay* was that "[t]he obligation of a parent to support his (or her) minor child is required by public policy and is expressly imposed by statute." *Id.* at 353 (quoting *Rand*): *see* KRS 405.020(1). *Rand*, and therefore *Clay*, further states that

> determination of the amount of support . . . is an implementation of that public policy [and] recoupment because an appellate court disagrees as to the ***amount*** of support ordered, and directs the lower court to revise its decree by reducing the support allowance, would run the substantial risk of thwarting the clearly expressed public policy.

Id. at 353-54 (emphasis in original).

In the case before us, there is no risk of thwarting this public policy because, beginning on the date appellee's parental rights were terminated, the obligation imposed by public policy and statute was extinguished as to him; in the case now before us the public policy upon which *Clay* and *Rand* are based is not a consideration at all. The courts deciding *Clay* and *Rand* first took the father's support obligation as a given and then emphasized that, under the facts of such a case, the courts would not quibble over "the ***amount*** of support" required of that obligation. *Id*. at 354 (emphasis in original). Those are not the facts here.

In *Clay*, a support obligation existed; here it did not. Father owed no obligation whatsoever, either to the child or the child's mother, subsequent to the termination of his parental rights. The issue before the trial court was simply whether the appellant had received and improperly retained money to which neither she nor her child was entitled. I believe, in this case, the trial court's order finding that mother received and retained money to which neither she nor her child was entitled constituted sufficient findings under CR 52.01. In particular, I am certain father was not required to establish fraud on mother's part as the majority suggests by its citation to *Denzik v. Denzik*, 197 S.W.3d 108 (Ky. 2006), nor should the trial court be required to make such a finding.

I would affirm.

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