

RENDERED: FEBRUARY 8, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001290-ME

MEGAN ALICIA SPEARS

APPELLANT

v. APPEAL FROM NELSON CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 13-CI-00508

JOSHUA STEVEN GREENWELL

APPELLEE

OPINION
VACATING AND REMANDING

** **

BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

COMBS, JUDGE: Appellant, Megan Alicia Spears (Mother), raises one issue on appeal: the effective date of child support. After our review, we remand for further findings.

The parties are the unmarried parents of one minor child. According to Mother's brief, the child was born on November 3, 2008. Father has not filed a brief.

On September 10, 2013, Father filed a petition in the Nelson Circuit Court requesting that child custody and visitation be established.

On October 1, 2013, Mother filed a response and counter-petition for custody, visitation and support which reflects that the child lived either with Mother or with Father, “one or the other,” for the past five years. Mother requested an immediate order for child support “both pendente and permanent as established.” (Underline original.)

On June 12, 2014, the court entered an order *pendente lite* that the parties have joint custody, that scheduled parenting time, and that directed that *neither party* shall pay child support pending further order. Trial was set for July 25, 2014. On that date, the parties entered into an agreement for joint custody and parenting time as formalized by order entered on August 1, 2014.

On April 13, 2015, Mother filed a motion for a hearing, stating that “[Father] has advised [Mother] and her counsel that he refuses to participate in the setting of child support and exchange of financial information for setting of same.” That motion was initially noticed for May 20, 2015, and was then re-noticed for June 17, 2015. According to the court’s calendar orders, the matter was ultimately taken under submission on August 5, 2015. On that date, Father filed his wage and health insurance documentation.

On August 14, 2015, the court entered an order which provided in relevant part as follows:

This matter having come before the Court by motion of [Mother] . . .

[Father] shall be required to pay child support to [Mother] in the amount of \$492.12 per month, retroactive to the filing of the original motion for child support in this case, that being the ___ day of April, 2015.^[1]

Child support shall be payable through the Friend of the Court, with the 1st payment due on the September 1, 2015 [*sic*] and continuing on the 1st day of each month thereafter. Child support arrears shall be repaid at the rate of \$75 per month, until paid and satisfied in full.

A separate child support order shall be prepared by [Father's] attorney.

(Underline and date left blank in original.)

On August 24, 2015, Mother *served* a motion to alter amend or vacate pursuant to CR² 59, noticed for motion hour on September 16, 2015.

On September 11, 2015, the Court entered an order setting child support in relevant part:

1. That [Father] shall pay the sum of \$266.75 bi-weekly (492.12 monthly) for the support of the parties' minor child

¹ Mother's original request for child support had been made in her response/counter-petition filed on *October 1, 2013*.

² Kentucky Rules of Civil Procedure.

2. Child Support Arrears from April 13, 2015^[3] through September 1, 2015 total \$2,287.52. Arrears shall be repaid at the rate of \$75.00 monthly until paid in full.
. . .
3. The first child support payment shall be due on September 1, 2015.

The order also made provision for payment by wage assignment. The order does not contain a finality recitation.

A September 16, 2015, calendar order (the motion hour on Mother's motion to alter, amend or vacate) reflects that a hearing was scheduled for October 23, 2015. According to the October 23, 2015, calendar order, the hearing was continued -- a new date to be set after consultation with counsel.

On July 14, 2016, Mother filed a motion "to modify the child support order in the within action based upon the actual income of the parties and to schedule a hearing with regard to the establishment of child support arrearages and effective date of obligation" A hearing was scheduled for October 11, 2016, but it was placed on the October 24, 2016, docket. On October 20, 2016, Mother filed a motion to modify/update the current timesharing arrangement noticed for motion hour on October 24, 2016.

On June 28, 2017, a Form AOC-280 Notice of Submission of Case for Final Adjudication was filed. The court also entered an order on June 28 denying

³ April 13, 2015, is the filing date of Mother's motion for a hearing.

Mother's motion to alter, amend or vacate, which recites that it is "a final and appealable order; there is no reason for delay."

On July 26, 2017, Mother filed a notice of appeal. She appeals from the orders entered September 11, 2015, and June 28, 2017.⁴

On April 9, 2018, this Court entered a show cause order which was subsequently passed to this merits panel to determine whether the appeal was timely filed. The show cause order provides in relevant part:

[I]t is unclear from the record whether the motion to alter, amend or vacate subject of the June 28, 2017 order was served with 10 days of the September 11, 2015 order setting child support. CR 59.05. Therefore, it appears that the Notice of Appeal was untimely filed.

In her response, Mother maintains that the child support "order of September 11, 2015 was not final and appealable, but the order reaffirming said order was made final on June 28, 2017 with timely appeal filed therein." We agree. "A final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02." CR 54.01. The September 11, 2015, order did not adjudicate all of the parties' rights, it did not contain a finality recitation, and the court continued to

⁴ By order entered July 25, 2018, this Court granted Mother's motion to amend the notice of appeal.

exercise jurisdiction over the matter. The June 28, 2017, order was the final adjudication. Therefore, Mother's notice of appeal filed July 26, 2017 was timely.

We shall now turn to the merits. Mother contends that child support should have been awarded effective October 1, 2013, the date on which she filed her response and counter-petition requesting support. As noted above, Father has not filed a brief. Where appellee's brief has not been filed within the time allowed, CR 76.12(8)(c) provides that we 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.

That matter lies soundly within our discretion. *Roberts v. Bucci*, 218 S.W.3d 395 (Ky. App. 2007).

However, in light of the confusing procedural history of this case, coupled with our inability to determine what the court intended to do, we believe that it is necessary to remand for additional findings rather than to elect any of the options available to us under CR 76.12 (8)(c).

The August 14, 2015, order refers to child support in the amount of \$492.12 per month "retroactive to the filing of the original motion for child support in this case, that being the ___ day of April, 2015." But, Mother's *original request* for child support was made on *October 1, 2013*. In its September 11, 2015 order,

the court ordered arrears starting on April 13, 2015, which is the date on which Mother filed a motion to set a hearing. It appears that that is the effective date of child support, but we cannot determine why that date was selected or whether a clerical error occurred. To add to the confusion, the October 24, **2016**, calendar order states that the matter was continued to allow the parties to “file memoranda on issue of child support effective date.”

Accordingly, we vacate the orders of the Nelson Circuit Court entered on September 11, 2015, and on June 28, 2017, and we remand this case with instructions that the court make additional findings setting forth the effective date of child support sufficient to apprise both the parties and a reviewing court of the basis for its decision -- as well as findings regarding the start and end date of any arrears, the total amount of arrears, and how they shall be repaid.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

Mark Hyatt Gaston
Louisville, Kentucky