RENDERED: JANUARY 11, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000759-ME

TYLER HARLOW — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LIBBY G. MESSER, JUDGE
ACTION NO. 12-CI-03886

HOLLI N. LAWSON — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: GOODWINE, MAZE, AND NICKELL, JUDGES.

GOODWINE, JUDGE: Tyler Harlow appeals from that portion of a judgment of the Fayette Family Court which ordered him to pay child support and made the award retroactive to a prior 2012 judgment. After reviewing the record in conjunction with applicable legal authority, we affirm in part, reverse in part, and remand.

BACKGROUND

Tyler Harlow and Holli Lawson were involved in a romantic relationship which resulted in the birth of a child in 2006. In a 2008 paternity action, the Jessamine Circuit Court determined that Harlow was the child's father. After the parties' relationship ended, Lawson filed a verified petition in Fayette Family Court seeking sole custody of the child and requesting child support. Because attempts to obtain personal service on Harlow failed, the family court appointed a warning order attorney whose final report stated that service could not be accomplished. The family court subsequently entered a 2012 judgment granting Lawson sole custody of the child, limiting Harlow to supervised visitation, and awarding Lawson $318.78 per month in child support.

In January 2018, Harlow filed a motion to reopen the original custody case, requesting shared custody of the child. In addition, Harlow filed a motion to vacate the 2012 judgment of the family court on the basis it had never obtained personal service on him. After conducting a hearing on Harlow's motion to vacate, the family court granted Harlow's motion to set aside the 2012 child support award on the basis that the court lacked personal jurisdiction over him when the judgment was entered. The family court also ordered that the 2012 judgment remain in effect concerning custody of the child and ordered Harlow to pay prospective child support in the amount of $318.78 per month. In addition, the family court ordered

that the child support award be retroactive to the date of the original judgment, November 30, 2012.

This appeal followed the entry of that judgment.

STANDARD OF REVIEW

We review the establishment, modification, and enforcement of child support obligations for abuse of discretion. *McCarty v Faried*, 499 S.W.3d 266, 271 (Ky. 2016). "The test for abuse of discretion is whether the trial court's decision was 'arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Id.* at 271 (quoting *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001)).

ANALYSIS

We begin by noting that Lawson has not filed an appellee's brief in this case. Kentucky Rule of Procedure ("CR") 76.12(8)(c) sets out the possible sanctions this Court *may* impose for the failure of an appellee to file a brief: "(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." Because this appeal involves issues of support for a minor child, we have elected to review the entire record to address the appeal on the merits.

Harlow advances three issues in support of his contention that the 2018 judgment must be reversed: 1) that the 2012 award of child support is void for lack of personal jurisdiction over him; 2) that he did not waive the issue of personal jurisdiction by filing a motion to set aside the 2012 judgment; and 3) that, absent a motion by one of the parties, a family court is without authority to award child support either prospectively or retroactively. As to the first issue, in its 2018 judgment, the family court specifically vacated that portion of the 2012 judgment which awarded child support on the basis that personal jurisdiction over Harlow had not been obtained when that judgment was entered. We are thus persuaded that Harlow's first argument has been rendered moot by the family court's 2018 order; the family court has already afforded Harlow the same relief he seeks in this appeal. The Supreme Court of Kentucky reiterated this mootness principle in *Commonwealth, Kentucky Bd. of Nursing v. Sullivan University System, Inc.*, 433 S.W.3d 341 (Ky. 2014), stating:

> this case is moot because Spencerian has already received the relief it sought—removal from probationary status. In other words, the ADN program's removal from probationary status moots this action as this Court is now unable to "grant meaningful relief to either party."

Id. at 344.

We therefore focus our review on Harlow's remaining contentions. First, we consider Harlow's argument that he did not waive the lack of personal

jurisdiction by moving to set aside the 2012 support award or by seeking time sharing with the child. In its 2018 judgment, the family court determined that by filing a motion to reopen the 2012 judgment concerning custody, Harlow voluntarily submitted himself to the family court's jurisdiction regarding custody and child support. In *Soileau v. Bowman*, 382 S.W.3d 888 (Ky. App. 2012), this Court examined the concept of submitting to jurisdiction in terms of an "appearance" in a proceeding, describing that term as "arising 'by implication from the defendant's seeking, taking, or agreeing to, some step or proceeding in the cause, beneficial to himself or detrimental to the plaintiff, other than one contesting jurisdiction only.'" *Id*. at 891 (quoting *Smith v. Gadd*, 280 S.W.2d 495, 497 (Ky. 1955)). In *Gadd*, the former Court of Appeals undertook a thorough analysis of what actions constitute an appearance, concluding that the question for the court

> is not whether the defendant has submitted himself to the jurisdiction of the court, **but whether or not he has so participated in the action as to indicate an intention to defend. There must be some act which would signify that the defendant is contesting liability rather than admitting it,** and therefore would be likely to contest the motion for judgment if given notice.

280 S.W.2d at 498 (emphasis added). Harlow, by filing the 2018 motion to modify custody and support, availed himself of the jurisdiction of the family court and signaled his intention to defend against the previous custody judgment. He thereby

submitted himself to the jurisdiction of the family court for all purposes regarding the issues of custody and support.

Which brings us to the family court's judgment of May 2018. Harlow does not contest those portions of the judgment relating to custody and visitation. He does argue, however, that absent a motion by a party to the 2018 proceeding, the family court cannot grant child support either prospectively or retroactively. We start with a discussion of whether the family court had authority to order Harlow to pay child support prospectively from the date of the May 2018 judgment. We are convinced that the family court had such authority.

The fact that Lawson did not file a motion seeking child support did not preclude the family court from ordering child support in the best interests of the child. Harlow did not and does not dispute that his paternity has been established. The very purpose for obtaining a statutory determination of paternity is to provide support for a child. As the Supreme Court of Kentucky recognized in footnote 1 of its opinion in *Cummins v. Cox*, 799 S.W.2d 5 (Ky. 1990), KRS 406.021 "provides for a judicial determination of paternity, for purposes of providing child support." *Id.* at 7 n.1.

Furthermore, KRS 403.270(2) requires courts to determine custody based upon the best interests of the child. Here the family court took into consideration that Lawson was the sole custodian of the child and that Harlow was

not paying and had not paid any child support for his child. Therefore, we do not find it to be outside the family court's authority to assess child support as part of its best-interest analysis in granting of custody. Importantly, the issue of support for the child was expressly before the court.

Once Harlow submitted to the jurisdiction of the family court, the court had ample authority to establish child support prospectively even absent a motion. The issue of child support arose several times during the hearing in the family court. Lawson, her mother, and Harlow's mother all discussed the fact that Harlow was not paying child support and testified that they had mentioned it to Harlow as well. Our review of the record convinces us that the issue of child support was tried by the implied consent of the parties as the family court heard testimony on the issue from witnesses called by both Harlow and Lawson.

In *Nucor Corp. v. General Electric Co*., 812 S.W.2d 136 (Ky. 1991), our Supreme Court expressly adopted the *Kentucky Practice* explanation of how CR 15.02 should apply when issues are tried by express or implied consent:

> Bertelsman & Philipps [*Kentucky Practice*, 4th Ed, Civil Rule 15.02] explains "[o]ne of the reasons" for the rule "is to take cognizance of the issues that were actually tried." *Id*.
>
> "The Rule goes further than authorizing amendments to conform to the evidence. **It provides that if issues not raised by the pleadings are tried by express or implied consent, they shall be treated as if they had been so raised.**

> . . . .
>
> The decision whether an issue has been tried by express or implied consent is within the trial court's discretion and will not be reversed except on a showing of clear abuse.
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> . . . .
>
> **It seems clear that at the trial stage the only way a party may raise the objection of deficient pleading is by objecting to the introduction of evidence on an unpleaded issue. Otherwise he will be held to have impliedly consented to the trial of such issue."** *Id*. at 318-19.
>
> We adopt these quotes as a fair statement of how the rule should apply, and how it was applied by the trial judge, in this case.

Id. at 145-46 (emphases added). As previously noted, Harlow not only failed to object to testimony concerning child support, he called witnesses of his own who testified on the issue. Thus, we are convinced that the family court acted well within its authority over custody and best interests of the child in providing the child with prospective support from her father, Harlow.

However, the same cannot be said of the award of retroactive support. In reaching this conclusion, we are not unsympathetic to the family court's dilemma. More than one witness at the hearing testified that Harlow had knowledge of the proceedings in 2012, had copies of the order entered as a result of those proceedings, and was fully aware of the child support provisions contained

therein. Although the record clearly establishes that Harlow knew about the 2012 custody order and its provision that he pay child support, the fact remains that the family court never obtained personal jurisdiction over him in the 2012 proceedings. Absent an appearance by the party, constructive service alone is insufficient to obtain personal jurisdiction over a party for the purpose of imposing child support obligations. *Solieau v. Bowman*, *supra.*

In *McCarty v. Faried,* the Supreme Court of Kentucky offered a clear statement concerning a trial court's authority to make an award of child support retroactive:

> Finally, as to the retroactivity of the trial court's order, we find no error. Faried argues that making the order retroactive was an abuse of discretion in that McCarty had not incurred additional expenses for Kyra after the temporary support order was set and therefore incurred no expenses for which she should be reimbursed by an arrearage judgment. We find no merit to this argument for two reasons. First, **it is undisputed that the effective date of any increase in child support is within the sound discretion of the trial court.** *Giacalone v. Giacalone*, 876 S.W.2d 616, 620 (Ky. App. 1994) (citing *Ullman v. Ullman*, 302 S.W.2d 849, 851 (Ky. 1957)). Here, the court forewarned through its temporary order that any increase in child support would be made retroactive to the date of McCarty's motion for child support (a common practice), and the court did just that in its final child support order.

499 S.W.3d at 274-75 (emphasis added). However, a trial court's wide discretion in this area is not unlimited. A child support award cannot be made retroactive to a

time prior to the court obtaining jurisdiction over the party obligated under the judgment. Thus, the award of child support in this case can be made retroactive only to the date on which Harlow availed himself of the family court's jurisdiction. As we have previously determined, that is the date upon which the family court first obtained personal jurisdiction on him.

Discerning no abuse of the family court's discretion in awarding Lawson child support prospectively from the date of the May 2018 judgment, we affirm its judgment on that issue. However, we conclude that the family court erred when, in 2018, it attempted to retroactively assess child support against Harlow dating back to the 2012 hearing, a period when it lacked jurisdiction over him. However, upon remand, the family court may wish to reconsider making the award retroactive to the date of Harlow's motion to set aside the 2012 judgment.

CONCLUSION

Based upon the foregoing, the judgment of the Fayette Family Court is affirmed in part, reversed in part, and remanded for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kevin Palley
Lexington, Kentucky

NO BRIEF FILED FOR APPELLEE