

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2001-CA-000420-MR

DEBRA S. HIBBERD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE MARY M.L. COREY, JUDGE  
ACTION NO. 97-FC-003516

BENNETT D. CECIL

APPELLEE

and

NO. 2001-CA-002720-MR  
and  
NO. 2002-CA-000353-MR

BENNETT CECIL

APPELLANT

APPEALS FROM JEFFERSON CIRCUIT COURT  
HONORABLE HUGH SMITH HAYNIE, JUDGE  
ACTION NO. 97-FC-003516

DEBRA CECIL, NOW HIBBERD

APPELLEE

OPINION  
AFFIRMING IN PART, VACATING IN PART AND  
REMANDING AS TO APPEAL NO. 2001-CA-000420  
AND  
AFFIRMING IN PART, VACATING IN PART AND REMANDING  
AS TO APPEAL NOS. 2001-CA-002720 AND 2002-000353

\*\* \*\* \* \* \*

BEFORE: EMBERTON, Chief Judge; BARBER and COMBS, Judges.

COMBS, JUDGE. Debra S. Hibberd appeals from orders of the Jefferson Family Court terminating maintenance, computing interest on maintenance arrearages, and computing child support arrearages. Dr. Bennet D. Cecil, her former spouse, appeals from the order modifying his child support obligation which also directed him to pay the tuition of his daughter's private school. He appeals as well from an order correcting an alleged clerical error in the court's arrearage calculations. The appeals have been consolidated for our review. With respect to both appeals, we affirm in part, vacate in part, and remand.

Dr. Cecil and Ms. Hibberd were married on May 7, 1973; they separated in March 1992 and were divorced in November 1992. The terms of the divorce decree provided that Dr. Cecil should pay \$2,850 per month to Ms. Hibberd in support of his three minor children and \$3,000 per month for ten years as maintenance. Ms. Hibberd remarried on January 2, 1998.

On March 28, 2000, following the emancipation of two of his three children, Dr. Cecil filed a motion to reduce his child support obligation. More than a year later, a hearing was held before the court's domestic relations commissioner (the DRC). Following the DRC's recommendation, the family court eventually reduced Dr. Cecil's child support obligation to \$896.86 per month. However, the modification was ordered to apply to installments accruing subsequent to April 20, 2001,

(the date of the hearing) rather than to installments accruing subsequent to March 28, 2000 (the date of Dr. Cecil's motion requesting the modification). In addition, the court ordered Dr. Cecil to pay 74% of the costs of his daughter's final year of attendance at a parochial high-school. Dr. Cecil's appeal followed.

Dr. Cecil contends that the family court erred in two respects. First, he cites the order that he pay a portion of the costs of private school tuition. Second, he claims error as to the effective date of the modification of his child support obligation: its failure to pertain to installments accruing subsequent to the filing of his motion, selecting instead the later date of the hearing - nearly eleven months later.

Following submission of the DRC's report, Dr. Cecil persuaded the family court that an order requiring him to pay the costs of his daughter's tuition had no foundation. It could not be based upon the terms of the parties' settlement agreement since they had never executed one; nor could it be based upon the court's original child support order as that order did not include a provision obligating him to pay the costs of his children's private school tuition. However, the family court concluded that Dr. Cecil should be held responsible for a percentage of the tuition costs since he had expressed a preference that [his daughter] be able to complete her education

at Sacred Heart. Relying on our decision in Giacalone v. Giacalone, Ky. App., 876 S.W.2d 616 (1994), the family court found that the intent of the parties establishes a factor of an extraordinary nature justifying a deviation from the statutory child support guidelines. Opinion and Order at 4.

In Giacalone, we held that parties may enter into a written agreement waiving the statutory requirement that a party prove a material change in circumstances prior to obtaining an increase in child support payments for educational purposes. Id. at 619. Under a separate analysis, we upheld the finding of the trial court that deviation from the statutory guidelines was justified because of the history of the parents' intention about their children's education when reviewed in light of KRS 403.211(3)(f) or (g).

The record before us reveals no evidence that Dr. Cecil agreed to waive the statutory requirement that Ms. Hibberd prove a material change in circumstances before obtaining an increase in child support payments. There was no written agreement incorporating the intention of the parties as to tuition for private schools. However, sworn testimony before the DRC revealed Dr. Cecil's clear preference that his daughter complete her final year at a private school. We believe that the trial court properly exercised its discretion in ordering that he pay the cost of such schooling separate and apart from

the issue of his child support obligation pursuant to the reasoning of Giacolone, supra. The child support payment itself was properly calculated under the statutory guidelines.

Next, we shall address the decision of the family court to give effect to the recalculated child support obligation as of the date of the hearing rather than as of the earlier date of Dr. Cecil's motion for modification. As we have noted, Dr. Cecil properly filed a motion requesting a reduction in his child support obligation following the emancipation of two of his three children. He also notified Ms. Hibberd directly by letter that he would seek to hold her accountable for his overpayment of child support since his financial obligation to two of their children had legally ended.

Following a hearing, the DRC reduced Dr. Cecil's child support obligation due to the emancipation of the two older children. However, the commissioner recommended that the modified obligation take effect only after the family court's order was finally entered. Dr. Cecil challenged that recommendation by filing exceptions. The family court ultimately determined that the date of the commissioner's hearing on April 20, 2001, should be the effective date of Dr. Cecil's reduction in his child support obligation.

Dr. Cecil contends that the family court abused its discretion by failing to set the effective date for his modified

child support obligation to coincide with the date of his filing of that requesting the reduction. We agree.

KRS 403.213(1) provides that a child support obligation may be modified to apply to installments accruing subsequent to the filing of the motion for modification. In explaining its decision to postpone the effect of the modified obligation for more than a year following the filing of Dr. Cecil's motion, the family court cited ~~A~~the circumstances surrounding the delays in the hearing of this motion. . . .@ Opinion and Order at 5. However, the delays in hearing the motion had no bearing on the essential issue underlying the motion: the effect of the emancipation of two of the three children upon the amount of Dr. Cecil's child support obligation. Neither the timing of the hearing nor the apportionment of blame for any delays was relevant to the basic reality that Dr. Cecil no longer had a legal obligation of financial support to Ms. Hibberd for the care of two emancipated children.

Additionally, the family court's reference to the general prohibition against recoupment of excess child support payments has no bearing on this case. In Clay v. Clay, Ky. App., 707 S.W.2d 352 (1986), we discussed the public policy considerations underlying the rule that once child support is paid, it is not ordinarily recoverable by the payor. However,

we noted specifically that ~~A~~the power of a court to order or permit recoupment should not be denied.@ Id. at 354.

If the direct recipient ~~C~~ the custodial parent, usually ~~C~~ has not, in fact, expended the ~~overpayment~~ for the support of the child and has it, or its equivalent (in whole or in part), available for repayment, it is only fair and just that the paying parent be able to recover it. Id.

In this case, Ms. Hibberd was aware that neither she nor Dr. Cecil bore further financial responsibility for the emancipated children. Dr. Cecil had specifically advised her that he would seek recoupment of the sums that he continued to pay until the court's support order could be modified. No good-faith argument can be made that Ms. Hibberd had spent Dr. Cecil's overpayment for the support of the emancipated children. Similarly, the general rule against recoupment cannot serve as a basis for failing to order the modification to apply to installments accruing subsequent to the filing of Dr. Cecil's motion. The decision of the family court to modify the child support obligation only as to installments accruing subsequent to the long-delayed hearing unfairly and erroneously inured to the benefit of Ms. Hibberd. We agree that it constitutes an abuse of discretion under the circumstances of this case.

Dr. Cecil next contends that the family court erred by granting Ms. Hibberd's motion filed pursuant to CR 60.01 to correct a clerical error. We disagree.

An order entered by the family court on January 12, 2001, provided that as of April 2, 2000, Dr. Cecil owed a maintenance arrearage (including interest) to Ms. Hibberd in the amount of \$14,720.93. The court's order specifically adopted the calculations and conclusions made by the DRC in her report filed on July 26, 2000. However, the report found that Dr. Cecil's arrearage as of April 2, 2000, amounted to \$20,345.93. (The amount of \$20,345.93 was later reduced to \$14,720.93 by taking into account the sum of \$5,625.00 paid by Dr. Cecil between April 3, 2000 and June 6, 2000). The family court did not err by correcting that oversight. However, we agree that the family court erred in its order of February 11, 2002, by requiring Dr. Cecil to pay the judgment - plus interest - within sixty (60) days of the entry of the order. No such provision was included in the original order. The corrections permitted by the provisions of CR 60.01 do not include this sort of amendment.

We shall now consider Ms. Hibberd's appeal. She contends first that the family court erroneously computed the interest due on Dr. Cecil's maintenance arrearage. We disagree.

In an order entered January 12, 2001, the family court accepted the DRC's calculation of interest on a common-law judgment against Dr. Cecil in the amount of \$24,000.00, representing his maintenance arrearage. Ms. Hibberd contends that the calculation failed to take into account that monthly

maintenance obligations continued to accrue after the \$24,000.00 judgment was entered on April 3, 1997. She argues that as each new monthly maintenance payment became past due, interest also began to accrue on those obligations - in addition to the accrual of interest on the original \$24,000.00 judgment. The DRC and the family court specifically rejected this method of computing the accrual of interest. The court did not err by applying Dr. Cecil's maintenance payments first toward each month's current obligation and the remainder toward reduction of the arrearage. The resulting computation of interest, compounded annually, is correct, and the family court did not err.

Next, Ms. Hibberd argues that the family court erred by concluding that Dr. Cecil had satisfied his outstanding child support arrearage. However, the court and the DRC relied on the parties' stipulations with respect to this calculation. Therefore, we cannot conclude that the family court erred in its determination that Dr. Cecil did not owe a child support arrearage.

Finally, Ms. Hibberd argues that the family court erroneously terminated her maintenance award following her remarriage in January 1998. We disagree. Moreover, we note that Ms. Hibberd has conceded at different points on the record

that her remarriage terminated Dr. Cecil's obligation to support her.

Maintenance is awarded in a dissolution proceeding only where a dependent spouse requires the financial support of her former spouse. KRS 402.200. KRS 403.250(2) provides that:

[u]nless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance.

Ms. Hibberd does not dispute the fact that the divorce decree omitted any provision extending Dr. Cecil's maintenance obligation beyond his death or her remarriage. However, she contends that specific language included in our opinion rendered March 5, 1999, precluded the family court's termination of her maintenance award despite her remarriage.

In our previous opinion, we referred to Ms. Hibberd's maintenance award as one of a "fixed sum to be paid to her in installments over a definite period of time. . . ." Opinion at 7. The quoted language refers merely to the method and expected duration of payment. It does not serve to convert Ms. Hibberd's maintenance award into a vested interest payable without regard to whether she remarried and no longer qualified as a dependent former spouse requiring Dr. Cecil's financial support. See Potts v. Tutterow, N.C., 455 S.E.2d 156 (1995). There is no

indication, as the family court noted, that the maintenance award constituted reciprocal consideration for the couple's division of property. The obligation was not discharged by Dr. Cecil's bankruptcy proceeding since it was viewed as a true maintenance obligation. To summarize, only those maintenance installments that had come due and were payable before the remarriage remained an obligation of Dr. Cecil following January 2, 1998. Ms. Hibberd's remarriage on that date terminated Dr. Cecil's obligation to pay maintenance beyond that point.

On Dr. Cecil's appeal, we affirm in part, vacate in part, and remand as to the October 23, 2001, order of the family court. We affirm in part, vacate in part, and remand as to the order entered February 11, 2002. On Ms. Hibberd's appeal, we affirm the order of the family court entered January 12, 2001.

ALL CONCUR.

BRIEFS FOR APPELLANT DEBRA S.  
HIBBERD *PRO SE*:

Debra S. Hibberd  
Louisville, Kentucky

BRIEFS FOR APPELLEE DEBRA S.  
HIBBERD:

Paul V. Hibberd  
Louisville, Kentucky

BRIEFS FOR APPELLEE BENNET D.  
CECIL:

William L. Hoge III  
Louisville, Kentucky

BRIEFS FOR APPELLANT BENNET D.  
CECIL:

Bryan Gowin  
Louisville, Kentucky