

RENDERED: SEPTEMBER 26, 2003; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002706-MR

COMMONWEALTH OF KENTUCKY, EX REL
PAMELA F. BRUMMETT

APPELLANTS

v. APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 89-CI-00065

JOHN L. OLIVER

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BUCKINGHAM, GUIDUGLI, AND TACKETT, JUDGES.

TACKETT, JUDGE: The Commonwealth of Kentucky, Ex Rel, Pamela Brummett, appeals from an order of the Caldwell Circuit Court wherein the Division of Child Support is ordered to pay Brummett money it received from her former spouse, John Oliver, for the support of their minor child. Because the Commonwealth has no entitlement to the money in question, we affirm.

Brummett and Oliver were divorced on January 4, 1990, by a dissolution decree entered in the Caldwell Circuit Court.

Oliver entered into an agreement to pay \$100.00 per month to Brummett to support their minor child. Oliver did not consistently make his child support payments; therefore, Brummett at times was forced to rely on AFDC benefits to provide for their child. On December 20, 1995, the Caldwell County Attorney filed a show cause motion against Oliver for failure to pay his child support. The County Attorney's motion listed the arrearages as being \$4,608.00 owed to AFDC and \$1,680.64 owed to Brummett herself. The motion was scheduled for a hearing at which Oliver, who was incarcerated at the time, was present but not represented by counsel. By order dated February 13, 1996, the trial court found Oliver in contempt and established arrearages in the amount of \$6,388.64. However, the order failed to state that a portion of the arrearage was owed to Brummett, individually.

A number of motions regarding child support enforcement and visitation issues followed; for purposes of this appeal, we begin our consideration of the trial court's record with the Commonwealth's motion, filed on March 12, 2001, on behalf of Brummett, to establish arrearages. Oliver, now represented by counsel, filed a response contesting the amount that the Caldwell County Attorney said he presently owed. On May 8, 2001, the trial court issued findings of fact, including a finding that Oliver had paid the \$6,388.64 he owed the

Commonwealth as reimbursement for AFDC benefits pursuant to the 1996 order establishing arrearages. Oliver subsequently filed a motion for findings of fact stating the following:

As grounds for this motion, the Respondent states that the stated amount of arrearage \$6,388.64 identified as being owed to the State by virtue of AFDC payments is in direct conflict with the motion of record, dated 12-10-1995 which clearly set forth the arrearage owed to the State as \$4,608.00 and specified that \$1,680.64 was owed to the Petitioner, individually. Added together those amounts are \$6288.64 and the amount owed to the State, individually, as an arrearage was set forth in the Commonwealth's own motion as no more than \$4,608.00

This was followed by a motion to alter, amend or vacate, pursuant to Kentucky Rule of Civil Procedure (CR) 59.05 wherein Oliver alleged numerous errors in the calculation of his arrearages. These motions were both served on the Caldwell County Attorney as counsel for Brummett.

On May 21, 2001, the trial court issued orders granting Oliver's motion for findings of fact and taking his motion to alter, amend or vacate under submission. Both sides were given twenty days to submit proposed findings and Brummett was given twenty days to respond to Oliver's CR 59.05 motion. Oliver's proposed findings, submitted on June 12, 2001, contained the following:

On December 10, 1995, motion was made by the County Attorney requesting orders for

payment of \$4,608.00 as an arrearage for AFDC payments. Request was made simultaneously for [\$]1,680.64 to [Brummett] individually. This motion was made while [Oliver] was incarcerated. Mistakenly, an order was issued for arrearage to be paid to the Commonwealth in the amount of \$6,388.00. The order did not specify that only \$4608.00 was an arrearage owed to the Commonwealth and \$1,680.64 was an arrearage to be paid to [Brummett]. This inadvertent error [having] been brought to the attention of the Court, it is now clear that the correct amount of \$6,288.64 should have been distributed with only \$4,608.00 being reimbursed to the Commonwealth and \$1,680.64 being paid to [Brummett] individually. . . .

The proposed findings included an order for the Commonwealth to pay Brummett \$1,680.64, together with post judgment interest, and for the erroneous addition of \$100.00 to the amount requested in the Commonwealth's 1995 motion to be credited against Oliver's arrearages.

On June 26, 2001, the trial court issued an order granting Oliver's motion to alter, amend or vacate and adopting his proposed findings. In this order, the trial court noted that it had allotted twenty days for each side to submit proposed findings and that only Oliver had done so. The trial court subsequently entered an amended order on July 11, 2001, correcting clerical errors in the amount of arrearages and ordering the Commonwealth to reimburse Brummett the money collected on her behalf and mistakenly retained. At this point, the County Attorney filed a motion, pursuant to CR 60.02, asking

the trial court to set aside its order of July 11 arguing that it been more than five years since the entry of the February 1996 order ordering the \$4,388.64 to be paid to the Commonwealth. The trial court denied the motion, and this appeal follows.

The Commonwealth, which still purports to be acting on Brummett's behalf, argues that the trial court had no authority to order it to pay Brummett the child support money collected from her ex-husband and mistakenly retained by the Commonwealth. The Commonwealth claims that the only procedure available for Oliver to obtain relief from the February 1996 judgment is authorized by CR 60 and that none of the subsections of the rule in question apply here. We disagree. CR 60.01 states as follows:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. . . .

The record in this case unequivocally establishes that, in December 1995, the Caldwell County Attorney requested an order holding Oliver in contempt for accumulating child support arrearages in the amount of \$6,288.64 of which \$4,608.00 was owed to the Commonwealth as reimbursement for AFDC and \$1,680.64 was owed to the child's mother herself. At that time Oliver's

child support obligation was \$100.00 per month. After a hearing, the trial court entered its February 1996 order setting arrearages at \$6,388.64, or \$100.00 more than the sum of the amounts requested by the Commonwealth. The trial court's order made no mention of the fact that \$1,680.64 of the established arrearage was owed directly to Brummett. The parents, Brummett and Oliver, were both indigent with the mother's interests being represented only by the County Attorney and the father, who was incarcerated at the time, representing himself. Needless to say, no one filed a motion to correct this obvious error in the trial court's February 1996 order.

In 2001, the Commonwealth filed another motion, on Brummett's behalf, to establish Oliver's arrearages. After the trial court issued a new order, it became apparent to Oliver that Brummett had never received any portion of the \$6,388.64 that he had paid to the Commonwealth pursuant to the trial court's February 1996 order. Oliver, by this time represented by counsel, filed a motion requesting that the trial court make new findings regarding his arrearage in light of the fact that the Commonwealth had collected child support arrearages from him but failed to disburse the money to Brummett. The County Attorney, as Brummett's counsel, was served with Oliver's motions for findings of fact and to alter, amend or vacate the judgment establishing his arrearage. The trial court adopted

Oliver's proposed finding that the sum of \$6,388.64 in its previous order was erroneously ordered to be paid to the Commonwealth alone.

The Commonwealth had an opportunity to object to Oliver's motions or to submit its own proposed findings to contradict the evidence that the February 1996 order simply erred by failing to provide that Brummett receive a portion of the arrearage. Now, having failed to do so, the Commonwealth comes to us and, on behalf of the mother, argues that the trial court cannot order it to pay her money which was collected for the support of her child. Because the Commonwealth has failed to demonstrate that the February 1996 order did not contain a clerical error, it cannot prevail on its argument that Oliver was not entitled to relief pursuant to CR 60.01.

For the following reasons, the judgment of the Caldwell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

H. B. Quinn
Caldwell County Child Support
Trigg County Attorney
Cadiz, Kentucky

BRIEF FOR APPELLEE:

Thresa N. Taylor
Hinton & Taylor
Eddyville, Kentucky