

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-000058-MR

JOHN Y. GAINES

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE MARY C. NOBLE, JUDGE  
ACTION NO. 91-CI-01849

COMMONWEALTH OF KENTUCKY,  
EX REL. DEBRA A. SAMPLES

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BAKER, COMBS, AND SCHRODER, JUDGES.

BAKER, JUDGE: John Y. Gaines brings this *pro se* appeal from an October 16, 2001, order of the Fayette Circuit Court.

Appellant is currently incarcerated at the North Point Training Center serving a twenty year sentence. Appellant moved the circuit court for a modification of child support pursuant to Kentucky Revised Statute (KRS) 403.213. The circuit court entered an order denying the motion thus precipitating this appeal.

Appellant contends that the circuit court erred by denying his motion. He alleges that "he meets the necessary definition of 'EXTRAORDINARY CIRCUMSTANCES' where he is currently incarcerated not by his own choice, and is currently under employed and earns no more than \$15.00, per month from an institutional job." Brief for Appellant at 2. We disagree and view as dispositive Marshall v. Marshall, Ky. App., 15 S.W.3d 396 (2000). Therein, our Court held that incarceration does not constitute a material change in circumstances that is substantial and continuing under KRS 403.213(1). The Court specifically reasoned:

It is our opinion that incarceration is simply not a change in circumstances contemplated by this statute [KRS 403.213(1)]. Our holding in this regard is the natural extension of Redmond, supra, which recites, approvingly, the broad language in Willis v. Willis, supra, that '[c]riminal conduct of any nature cannot excuse the obligation to pay child support.' It is also consistent with the policy considerations expressed in other cases emanating from this Court.

We align ourselves with those jurisdictions that equate incarceration with voluntary unemployment. It is axiomatic that a parent may not voluntarily impoverish himself in order to avoid his child support obligations. Although Randall did not file a brief in this Court, we would expect that if he had, he would argue that his status as a prison inmate was involuntary and that there was no evidence that he committed any crime to avoid his support obligation. Nevertheless, it is apparent that he

voluntarily engaged in conduct which he should have known would impair his ability to support his children.

Id. at 401. Thus, incarceration is not a material change in circumstances which constitutes grounds for modification of a child support order. The circuit court committed no error in denying appellant's motion for modification.

For the foregoing reasons, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT - *pro se*:

John Y. Gaines  
Burgin, Kentucky

BRIEF FOR APPELLEE:

R. Barry Minton  
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