

RENDERED: August 1, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000832-MR

KELLY JO ANDERSON (F/K/A KELLY JO THURMAN)

APPELLANT

v. APPEAL FROM ANDERSON CIRCUIT COURT
HONORABLE WILLIAM F. STEWART, JUDGE
ACTION NO. 01-CI-00157

DONALD GREGORY THURMAN

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING
* * * * *

BEFORE: GUIDUGLI, KNOFF, AND SCHRODER, JUDGES.

KNOFF, JUDGE: Kelly Jo Anderson (formerly Kelly Jo Thurman) appeals from an order of the Anderson Circuit Court which granted her motion to increase the child-support obligation of her former husband, Donald Gregory Thurman. She argues that the trial court erred by failing to include Donald's capital gains as income in its calculation under the child-support guidelines, and by failing to make the modification of support retroactive to the date she filed her motion seeking an exchange of

financial information. We agree that the trial court erred by excluding the capital gains from Donald's income. However, the trial court did not err by making the modification of support effective only from the date that Kelly Jo filed that motion. Hence, we affirm in part, reverse in part, and remand for further proceedings.

Kelly Jo and Donald Thurman were married on April 6, 1991. Two children were born of the marriage. In August of 1999, Donald filed a petition for dissolution of the marriage in the Shelby Circuit Court. On April 19, 2000, that court entered a decree dissolving the parties' marriage and adopting their separation and property settlement agreement.

Under that agreement, the parties agreed to joint custody of the children, with Kelly Jo designated as the primary residential custodian. Donald agreed to pay child support in the amount of \$500.00 per month for 60 days, and \$152.87 per week thereafter. In May of 2001, Donald filed a motion to increase his visitation and to set a specific holiday visitation schedule. He also moved the court to transfer the action to Anderson County, where all of the parties and the children now reside. As Kelly Jo had no objection to the motion for a change of venue, the Shelby Circuit Court ordered the case transferred to the Anderson Circuit Court on June 12, 2001.

Around the same time, Kelly Jo filed a motion to require the parties to exchange financial information to determine if a child-support modification was warranted. Prior to transferring the case, the Shelby Circuit Court granted the motion. Following the transfer, Kelly Jo renewed her motion, which the Anderson Circuit Court granted in an order entered on October 2, 2001.

On January 24, 2002, Kelly Jo formally made a motion for modification of child support. She noted that Donald had reported \$16,419.00 of capital gains on his 2000 tax return and \$2,096.00 of capital gains on his 2001 tax return. Based on the application of the child-support guidelines, Kelly Jo sought child support in the amount of \$1,146.28.

In an order entered on March 21, 2002, the trial court held it had the discretion to exclude the capital gains from its calculation of Donald's income. Based upon the application of the child-support guidelines to the parties' income without consideration of the capital gains, the trial court ordered that Donald's child support obligation be increased to \$218.30 per week, or \$946.00 per month. The trial court also denied Kelly Jo's motion to make the increase retroactive to June of 2001. Rather, the court made the increase retroactive only to January 1, 2002. This appeal followed.

Kelly Jo first argues that the trial court erred by excluding Donald's capital gains income from its calculation under the child-support guidelines. We agree. In Clary v. Clary,¹ this court noted that KRS 403.212(2)(b) defines "gross income" broadly to include income from any source and explicitly includes capital gains. The statute does not specifically exclude non-recurring income and the list includes items, such as bonuses, gifts, severance pay, and prizes, that are typically singular, non-recurring events. Consequently, Clary holds that when a parent receives income from a non-recurring event, the trial court must include that amount in the year received and then apply the guidelines pursuant to the table in KRS 403.212 to determine the child-support obligation.²

Based upon its reading of Clary, the trial court concluded that it had discretion to refuse to include capital gains as gross income. This interpretation of Clary was incorrect. Although a court has discretion to deviate from the amount established under the guidelines, it does not have discretion to exclude a party's capital gains from his or her gross income.

¹ Ky. App., 54 S.W.3d 568 (2001).

² Id. at 574.

Donald urges that, given the unique circumstances of this case, his capital gains income for 2000 and 2001 should not be considered when calculating his child-support obligation. Donald states that he realized these gains from the sale of marital property, and that he used the proceeds to reimburse Kelly Jo for her interest in the marital residence and the retirement accounts, as required by the property settlement agreement. Donald also notes that he had been required to pay taxes on these gains. Consequently, Donald argues that the trial court should not be required to consider these capital gains when calculating his income for child-support purposes.

We are not unsympathetic to this reasoning. However, KRS 403.212(2)(b) and Clary require the trial court to include capital gains as gross income, even if the gain is based upon a single, non-recurring sale. A trial court is not permitted to consider the reasons why the gains were realized. Moreover, KRS 403.211(3) requires a trial court to make a specific finding that the application of the child-support guidelines would be unjust or inappropriate before it may deviate from the amount specified by the guidelines. The trial court made no such findings, nor does Donald argue that any of the factors set out in KRS 403.211(3)(a)-(g) apply in this case.

Consequently, we hold that the trial court's calculation of Donald's income was clearly erroneous, and this

matter must be remanded to the trial court for a proper calculation of his child-support obligation. We recognize that, since Donald's capital gains were based on a non-recurring event, he will have to return to court to seek another adjustment of his support obligation. While this will undoubtedly be inconvenient for both parties, we must conclude that this is what the statute requires.

Kelly Jo next argues that the trial court erred by making the modification of child support retroactive only to January of 2002, rather than June of 2001. We disagree. "The provisions of any decree respecting child support may be modified only as to installments accruing *subsequent to* the filing of the motion for modification . . . ".³ Kelly Jo's June 7, 2001 motion, in which she asked the court to require the parties to exchange financial information, cannot be considered the equivalent of a motion to modify child support.⁴

³ KRS 403.213(1). See also Giacalone v. Giacalone, Ky. App., 876 S.W.2d 616, 620 (1994).

⁴ Kelly Jo's motion states, in pertinent part, as follows: "Comes the Petitioner and moves the Court to require the parties to exchange current financial information for the purpose of determining whether it is appropriate for there to be a modification of the child support. Petitioner then moves the Court that if the financial income of the parties and the recognized expenses justify a modification of the child support, then said child support should be modified". While the second sentence of the motion could be construed as a motion to modify child support, the language used is conditional upon the court entering an order requiring an exchange of financial

Furthermore, there is no allegation that Donald engaged in any unnecessary delay which prevented Kelly Jo from filing an earlier motion to modify child support. Consequently, the trial court did not err in making the modification of support retroactive to January of 2002.

Accordingly, the judgment of the Anderson Circuit Court is affirmed in part, reversed in part, and remanded for a re-calculation of the child support as set out in this opinion.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
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information. Indeed, her January 24, 2002, motion asks the trial court to enter an amended support order based upon the information provided by Donald. Consequently, we do not read her motion as a current motion to modify child support, but only as expressing an intention to move for a modification of child support should the financial information support it.