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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2002-CA-002114-ME

PATRICIA FIELDS KINSEY

APPELLANT

v. APPEAL FROM BUTLER CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 96-CI-00142

BOOSTER LAVERNE KINSEY

APPELLEE

AND

NO. 2003-CA-001490-ME

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM BUTLER CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 96-CI-00142

BOOSTER LAVERNE KINSEY;
AND PATRICIA FIELDS KINSEY

APPELLEES

OPINION

(1) AFFIRMING CASE NO. 2002-CA-002114-ME

AND

(2) REVERSING AND REMANDING CASE NO. 2003-CA-001490-ME

** ** * * * * *

BEFORE: JOHNSON AND McANULTY, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

JOHNSON, JUDGE: Patricia Fields Kinsey has appealed from an order of the Butler Circuit Court adopting the recommendations of the Domestic Relations Commissioner and ordering a change of custody of the parties' minor children from Patricia to her ex-husband, appellee Booster Laverne Kinsey (Case No. 2002-CA-002114-ME). In a related matter, the Commonwealth of Kentucky, an intervener in the circuit court case seeking to collect child-support arrearages it claims is owed by Booster, appeals from an order of the Butler Circuit Court adopting the Commissioner's conclusion that Booster owes no such arrearages, and accordingly, denying the motion of the Commonwealth for recoupment.² (Case No. 2003-CA-001490-ME). Having concluded the circuit court's findings of fact are supported by substantial evidence, it applied the correct law, and it did not abuse its discretion by awarding custody to Booster, we affirm in Case No. 2002-CA-002114-ME. Having concluded the circuit court erred in determining that Booster did not have child-support arrearages subject to the Commonwealth's claim for recoupment, we reverse and remand in Case No. 2003-CA-001490-ME.

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

² The Commonwealth contends it is entitled to recoupment on the basis that it paid Patricia Aid for Families with Dependent Children (AFDC) benefits during the period it alleges Booster accrued child-support arrearages.

Booster and Patricia Fields Kinsey began dating sometime in 1990. Their first child, Carl Fields Kinsey, was born on March 6, 1993, and they married in Kentucky on December 25, 1993. Their second son, Casey Fields Kinsey, was born on September 25, 1995. The couple maintained a home in Georgia both prior to their marriage and after the marriage.

On June 17, 1996, Patricia left Georgia with the children and moved to Kentucky, where she had family. After failed attempts at reconciliation, Booster and Patricia separated on July 1, 1996. On October 4, 1996, Booster filed a complaint for divorce in the Superior Court of Camden County, Georgia. The Georgia Superior Court entered a temporary order on October 31, 1996, and an amended temporary order on November 14, 1996, granting temporary custody of the children to Booster.

Patricia filed her own petition for custody on November 14, 1996, in Kentucky in the Butler Circuit Court (96-CI-00142). On November 19, 1996, Booster filed a separate complaint in the Butler Circuit Court (96-CI-00144), seeking to register the Georgia amended temporary order that had awarded him custody.

A jurisdictional dispute was resolved in favor of Butler Circuit Court being the proper venue to litigate custody. On March 26, 1998, the Butler Circuit Court entered an order approving and adopting as its own the recommendations from the

Commissioner's Report as to the issue of custody. The order granted the parties joint custody, with Patricia as primary residential custodian. Following various post-judgment litigation, Booster appealed the matter to this Court. On November 9, 2000, this Court entered an order affirming the judgment of the circuit court.³

The litigation leading to the present appeal began on January 2, 2002, when Booster filed a motion for sole custody of the children. A hearing on the motion was held on January 10 and January 11, 2002. On January 17, 2002, the DRC entered a "continuing trial order" continuing the hearing until April 30 and May 1, 2002. On April 30 and May 1, 2002, the hearing on Booster's motion for modification of child support was concluded.

On June 26, 2002, the Commissioner issued his report containing his recommendations to the circuit court. The report recommended that Booster be awarded custody of the children; that Patricia's visitation be restricted to one hour of telephone visitation per week; and that Patricia be required to pay child support of \$183.00 per month.

Patricia and Booster each filed exceptions to the Commissioner's report. Patricia's exceptions challenged the Commissioner's analysis in recommending that Booster be awarded

³ Case No. 1998-CA-003183-MR, rendered November 9, 2000, not-to-be published.

primary residential custody of the children and substantially mirror the arguments raised in this appeal.

After the June 26, 2002, Commissioner's report was issued, events occurred which led to the Commonwealth's appeal in this case. In summary,⁴ the Commonwealth was granted leave to intervene in the case for the purpose of seeking recoupment of AFDC payments made to Patricia from child-support arrearages the Commonwealth alleged had accrued during the period of AFDC payments.

On September 22, 2002, the circuit court entered an order accepting and adopting all recommendations contained in the Commissioner's June 26, 2002, report concerning custody issues. The order, however, remanded to the Commissioner the issue concerning whether the Commonwealth was entitled to recoupment of AFDC benefits. Patricia's appeal of custody issues relates to the circuit court's September 22, 2002, order.

On March 6, 2003, the Commissioner issued his recommendations concerning the AFDC recoupment issue. The Commissioner determined that Booster owed no child-support arrearages related to the period of AFDC payments, and accordingly, concluded that the Commonwealth was entitled to no recoupment. On June 17, 2003, the circuit court entered an order confirming and adopting the Commissioner's March 6, 2003,

⁴ See the discussion under the section of this Opinion addressing Case No. 2003-CA-001490-ME for a more detailed discussion of these events.

recommendations relating to AFDC recoupment. The Commonwealth has appealed from the circuit court's June 17, 2003, order.

CASE NO. 2002-CA-002114-ME

Patricia raises numerous arguments in her appeal. While most of her arguments concern the circuit court's child-custody decision, she also raises arguments concerning child support and visitation. To facilitate continuity, we have reordered and combined certain portions of her arguments.

CHILD-CUSTODY ISSUES

First, Patricia contends that the circuit court abused its discretion by awarding primary residential custody to Booster. In reviewing a child-custody determination, we review the factual findings of the circuit court pursuant to the clearly erroneous standard.⁵ Findings of fact are clearly erroneous only if they are manifestly against the weight of the evidence.⁶ Since the circuit court is in the best position to evaluate the testimony and to weigh the evidence, an appellate court should not substitute its own opinion for that of the circuit court.⁷ Ultimately, a circuit court's decision regarding custody will not be disturbed absent an abuse of discretion.⁸

⁵ Kentucky Rules of Civil Procedure (CR) 52.01; Reichle v. Reichle, 719 S.W.2d 442, 444 (Ky. 1986).

⁶ Wells v. Wells, 412 S.W.2d 568, 570 (Ky. 1967).

⁷ Reichle, 719 S.W.2d at 442.

⁸ Cherry v. Cherry, 634 S.W.2d 423, 425 (Ky. 1982).

Abuse of discretion implies that the circuit court's decision is unreasonable or unfair.⁹ In reviewing the decision of the circuit court, therefore, the test is not whether the appellate court would have decided it differently, but whether the findings of the circuit judge were clearly erroneous or he abused his discretion.¹⁰

In Scheer v. Zeigler,¹¹ this Court held that the same criteria apply for a modification of joint custody as apply to a modification of sole custody. Thus, in order for there to be a modification of joint custody, as in all custody cases, the party seeking modification must first meet the threshold requirements for modification contained in KRS 403.340.

For a proposed modification occurring more than two years after the initial custody award, KRS 403.340(3) sets forth the threshold circumstances which must be met in order for the circuit court to reconsider an initial custody award:

If a court of this state has jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act, the court shall not modify a prior custody decree unless after hearing it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, that a change has occurred in the circumstances of the child or his

⁹ Kuprion v. Fitzgerald, 888 S.W.2d 679, 684 (Ky. 1994).

¹⁰ Cherry, 634 S.W.2d at 423.

¹¹ 21 S.W.3d 807 (Ky.App. 2000).

custodian, and that the modification is necessary to serve the best interests of the child. When determining if a change has occurred and whether a modification of custody is in the best interests of the child, the court shall consider the following:

- (a) Whether the custodian agrees to the modification;
- (b) Whether the child has been integrated into the family of the petitioner with consent of the custodian;
- (c) The factors set forth in KRS 403.270(2) to determine the best interests of the child;
- (d) Whether the child's present environment endangers seriously his physical, mental, moral, or emotional health;
- (e) Whether the harm likely to be caused by a change of environment is outweighed by its advantages to him; and
- (f) Whether the custodian has placed the child with a de facto custodian.

The factors circuit courts must use to determine the best interests of the child is codified in KRS 403.270(2). This statute states, in pertinent part:

The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:

- (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;

- (b) The wishes of the child as to his custodian;
- (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
- (d) The child's adjustment to his home, school, and community;
- (e) The mental and physical health of all individuals involved;
- (f) Information, records, and evidence of domestic violence as defined in KRS 403.720[.]

The Commissioner's report included extensive findings of fact, including findings concerning testimony that Patricia had a history of making unsubstantiated allegations of abuse upon the children by Booster; that Kevin Wiloughby of Life Skills, a licensed social worker, had concerns that Patricia made statements derogatory of Booster to the children and subjected the children to emotional abuse; that Patricia sent the children to a visitation with Booster with inadequate clothing; and that Patricia suffered from depression and was unable to cope. In addition, the Commissioner's report concluded that "Petitioner, Patricia Kinsey, is suffering from severe acute depression and that her past record of absconding with the children at times of court ordered visitation creates a situation in which further visitations will expose the children

to physical dangers including further anal examinations, kidnapping or possible severe or fatal physical damage to the children. The father should be awarded custody of the boys"

The record amply demonstrates that Patricia suffers from a history of depression which has interfered with her judgment and her ability to provide proper care for the children. Patricia further has a history of failing to cooperate in facilitating the children's relationship with their father and, in addition, testimony supports Booster's allegation that Patricia has actively attempted to demean Booster by means of false charges of abuse. We are of the opinion that the circuit court's factual findings are supported by substantial evidence and that its custody ruling based on those factual findings was not an abuse of discretion.

Next, Patricia contends that the circuit court erred in awarding custody to Booster because Booster did not have a full psychological evaluation prior to the custody award and because he was not administered a psychological test by Dr. Walter Bratcher. Patricia does not cite us to her preservation of this issue as required by CR 76.12(4)(c)(iv), and we will not search the record on appeal to make that determination.¹² In addition, the underlying basis for this argument is that a

¹² Robbins v. Robbins, 849 S.W.2d 571 (Ky.App. 1993).

psychological evaluation would demonstrate that Booster has previously engaged in domestic violence against her and such would be confirmed by the evaluation. However, this presupposition is based totally upon speculation. Further, the Commissioner addressed the issue of Patricia's repeated allegations of abuse and found the accusations not to be credible, stating, "the Commissioner has heard abuse claims claimed by Patricia since 1996 and none of them have been substantiated." This argument does not merit reversal of the circuit court's custody decision.

Next, Patricia contends that the circuit court's custody award was erroneous because it amounts to rewarding Booster for his verbal, physical, and mental abuse of Patricia. As just noted, the Commissioner determined Patricia's repeated allegations of abuse by Booster to be generally not credible. In addition, the custody decision was primarily based upon the parental shortcomings of Patricia, and the appellant's contention that the decision was intended to "reward abuse" is a mischaracterization of the circuit court's reasoning in awarding custody to Booster.

Next, Patricia contends that she did not receive equal time to present her case at the custody hearings. Again, Patricia does not cite us to her preservation of this issue by citing us to any request for additional time to present her

case, nor does she identify any witnesses or evidence which she was precluded from presenting as a result of the time allocations.¹³ Further, it is within the sole discretion of the trial judge to decide how much time should be allotted for arguments.¹⁴ In determining the proper amount of court time to be devoted to a matter, "the importance of the case, the legal questions involved . . . [and] the extent and character of the testimony, are all elements that must be considered" [citations omitted].¹⁵

In this case, four days of hearings were held. Booster presented his case first, and admittedly he received most of three days to present his case while Patricia received only one day. However, this computation of time ignores that the witnesses called by Booster overlapped with the witnesses on Patricia's witness list, and there is no allegation that Patricia was hindered in her ability to cross-examine any witness called during Booster's case-in-chief. In this respect, the time calculations presented by Patricia are misleading. Particularly, since Patricia did not specifically request more

¹³ CR 76.12(4)(c)(iv).

¹⁴ Asher v. Golden, 244 Ky. 56, 50 S.W.2d 3 (Ky. 1932). See also Reed v. Craig, 244 S.W.2d 733 (Ky. 1951).

¹⁵ Asher, 50 S.W.2d at 4.

time to present her case, the Commissioner did not abuse his discretion in limiting the hearing to four days.

Next, Patricia contends that her depression was not serious enough, and, further, did not result in physical damage to the children, so as to justify removal of the children from her custody. While Patricia presented evidence supporting this position, on the other hand, conflicting evidence was presented to the effect that she suffered from acute depression which interfered with her ability to cope and led to problems with her ability to care for the children. In instances of such conflicting evidence, it is for the trier of fact to resolve the conflict, and we will disturb the resulting decision only if clearly erroneous. There is substantial evidence in the record to support the circuit court's decision regarding the extent and the consequences of Patricia's depression, and we will not disturb the circuit court's findings concerning this issue.

Next, Patricia contends that the circuit court erred in its conclusion that she had violated 38 court orders whereas Booster refuses even to permit her to have telephone visitation with the children. The Commissioner's report refers to Patricia as having "violated thirty-eight (38) Court orders." In her brief, Patricia does not deny this finding, rather, she criticizes Booster for having violated court orders at least 40 times by denying her telephone visitation with the children.

Even if the Commissioner miscounted the number of occasions Patricia has violated court orders, we are of the opinion that this is a rather insignificant element of the custody decision and does not amount to reversible error. As for the alleged violations of telephone visitation by Booster, her remedy is not a reversal of the custody decision in this case, but, rather, is by appropriate motion to enforce the circuit court's visitation orders.

Next, Patricia contends that the circuit court's custody decision was erroneous because the children were "suddenly removed" from her home. The events referred to in this argument relate to a December 2001 motion by Booster for Christmas visitation with the children. Following a hearing, Patricia was ordered to immediately prepare and send the children for visitation in Georgia. While the manner in which events unfolded on this occasions were less than ideal - especially for the children - we note that by this time Patricia had a history of uncooperativeness in complying with visitation orders, and the circuit court did not abuse its discretion by ordering the immediate preparation of the children for visitation. In any event, the December 2001 visitation incident has little relevance to the disposition of the custody decision at hand. The events related to the December 2001 Christmas

visitation do not require the reversal of the circuit court's ultimate custody decision.

Next, Patricia contends that it was inappropriate for custody to have been changed by an ex parte order and for her not to be allowed time to obtain counsel. The circuit court's December 27, 2001, order captioned as "Ex Parte Amended Order" in substance merely changed the date the children's holiday visitation was to end from January 2, 2002, until January 9, 2002, an extension of one week. Again, even if we were to agree with Patricia that there were procedural and due process problems surrounding this holiday visitation, since that time she has been afforded a full opportunity to present her case opposing Booster's motion for a change in custody. The events surrounding the holiday visitation, even if unfair, do not vitiate the circuit court's subsequent custody decision.

CHILD SUPPORT

The circuit court ordered Patricia to pay Booster child support of \$183.00 per month retroactive to January 10, 2002. Patricia contends that the circuit court erred by including in her income for purposes of calculating child support \$354.00 per month she receives in Supplemental Security Income (SSI) payments and in ordering the child support to be effective retroactively.

KRS 403.212(2)(b) specifically provides that SSI benefits must be included in a party's gross income for purposes of calculating child support. In Commonwealth ex rel. Morris v. Morris,¹⁶ the Supreme Court held that this provision was not superseded by Federal Law limiting legal proceedings against SSI benefits because child support was exempted from such Federal protections.

Other than to generally complain that her SSI benefits should not be included in the child-support calculation, Patricia provides no legal basis for the exclusion of the income. While she cites us to Youngblood v. James,¹⁷ the version of KRS 403.212(b) in effect at the time Youngblood was rendered specifically excluded SSI benefits from income for purposes of child-support calculations.¹⁸ As the statute has since been amended to specifically include benefits in calculations under the guidelines, Youngblood is no longer pertinent authority.

Patricia also complains that the child support was ordered retroactive to January 10, 2002. However, it is well settled that child support may be ordered retroactive to the date a motion for modification was made.¹⁹ Booster filed his

¹⁶ 984 S.W.2d 840 (Ky. 1998).

¹⁷ 883 S.W.2d 512 (Ky.App. 1994).

¹⁸ Id. at 513.

¹⁹ Weldon v. Weldon, 957 S.W.2d 283, 286 (Ky.App. 1997).

custody motion on January 7, 2002. At that time, and since, he has had custody of the children; hence, implicit in the motion was a request for modification of child support. The circuit court did not abuse its discretion by ordering child support retroactive to January 2002.

VISITATION

Patricia contends that the circuit court erred by restricting her visitation with the children to one hour of telephone visitation per week rather than permitting her regular in-person visitation. The controlling statute is KRS 403.320, which states:

(1) A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health. Upon request of either party, the court shall issue orders which are specific as to the frequency, timing, duration, conditions, and method of scheduling visitation and which reflect the development age of the child.

(2) If domestic violence and abuse, as defined in KRS 403.720, has been alleged, the court shall, after a hearing, determine the visitation arrangement, if any, which would not endanger seriously the child's or the custodial parent's physical, mental, or emotional health.

(3) The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless

it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health [emphasis added].

As used in the statute, the term "restrict" means to provide the non-custodial parent with something less than "reasonable visitation."²⁰ In restricting Patricia's visitation to telephone visitation, the circuit court stated as follows:

The Court finds that the Petitioner, Patricia Kinsey, is suffering from severe acute depression and that her past record of absconding with the children at times of court ordered visitation creates a situation in which further visitations will expose the children to physical dangers including further anal examinations, kidnapping or possible severe or fatal physical damage to the children.

The circuit court's findings regarding potential endangerment to the children absent the restrictions imposed on visitation are supported by substantial evidence. In light of the portentous nature of these findings, the circuit court did not abuse its discretion in restricting visitation.

CASE NO. 2003-CA-001490-ME

The Commonwealth appeals from an order of the Butler Circuit Court which affirmed the conclusion of the Commissioner that Booster be adjudged as owing no child-support arrearage and, correspondingly, that it was not entitled to recoupment for

²⁰ Kulas v. Kulas, 898 S.W.2d 529, 530 (Ky.App. 1995).

payment of AFDC benefits to Patricia associated with the period during which the arrearages allegedly arose.

Beginning in September 1996, Patricia applied for and received AFDC benefits for the children.²¹ The AFDC benefits were in the amount of \$262.00 per month, and continued until March 1999. The total amount of AFDC benefits paid by the Commonwealth to Patricia was \$7,964.00. It is uncontested that to the extent that Booster accrued child-support arrearages during the period that AFDC benefits were being paid out to Patricia, the Commonwealth is entitled to recoupment up to the amount of arrearages accrued. We now turn to the issue of whether there is a child-support arrearage associated with this period.

On April 23, 1998, the circuit court entered an order setting Booster's child-support obligation at \$159.00 per week, retroactive to September 23, 1997. On May 8, 1998, Booster filed a motion requesting modification of the child-support order. By its own admission, the circuit court never ruled upon Booster's motion to modify, and, it follows, the child-support level established in the April 23, 1998, order remained in effect.

²¹ The AFDC benefits commenced based on a perjured domestic violence petition filed by Patricia in the Butler Circuit Court. Patricia has since pled guilty to perjury in the second degree.

On August 13, 1998, a hearing was held in association with a motion filed by Booster to hold Patricia in contempt of court for failing to comply with the court-ordered visitation schedule. At the August 13, 1998, hearing the circuit court made the following comments:

[Q]uite frankly, I do not know why there was no court order for child support, or why that was never brought back up and rectified.

Quite frankly, I'm embarrassed about that, because there's one thing that I expect, is that every father will pay child support and that every mother will allow visitation.

And I've failed in both of those instances in this particular case.

. . . .

As part of the contempt ruling you will provide transportation to and from Georgia for visitation.

Insofar as any child support arrearage that may be outstanding, because of that court order, that's set aside.

There is a ruling, there is no child support arrearage, because of the added expense that he has had in coming back and forth for these hearings. And having to go to Louisville to pick up the children, whenever that occurred.

There will be other sanctions that will be coming down. I will not visit those sanctions today.

. . . .

Draw the order, Mr. Thornton.

We note that the circuit court's August 13, 1998, comments from the bench are self-contradictory and conflict with the record. On the one hand the circuit court states that "there was no court order for child support," when, in fact, a child-support order had been entered on April 23, 1998. It is possible the circuit court was confused by its failure to rule on Booster's May 8, 1998, motion. Further, the circuit court, in contradiction of its previous statement, then states "[i]nsofar as any child-support arrearage that may be outstanding, because of that court order, that's set aside." Having previously stated that there was no child-support order, it is unclear what order the circuit court was referring to.

In his exceptions to the Commissioner's June 26, 2002, report, among other things, Booster requested that a specific finding be made that he owed no child-support arrearage. In furtherance of this argument, on July 28, 2002, Booster filed a motion requesting a ruling that he had no child-support arrearage and requested that the August 13, 1998, bench ruling by the circuit court to the effect that there was no arrearage as of that time be reduced to writing.

In an affidavit accompanying his July 28, 2002, motion, Booster stated that after filing his tax return for the years 1998 through 2002, he was due an income tax refund of \$7,360.00, but that the refund was being held by the Cabinet for

Families and Children "due to a misconception" that he had a child-support arrearage. Booster requested that an order be entered requiring the Cabinet to forward the income tax refund to the Butler Circuit Court Clerk. On July 26, 2002, the Commissioner entered an order that the Cabinet distribute the funds to the circuit clerk, who would retain the funds until further orders of the court.

On December 9, 2002, the Commonwealth, on behalf of Patricia, filed a motion to intervene in this case, stating that because Patricia received AFDC benefits from the Cabinet to support the children, Booster had a duty to reimburse the Cabinet for those benefits to the extent that he had accrued child support arrearages during the period AFDC payments were being made. On December 10, 2002, the circuit court entered an order permitting the Commonwealth to intervene.

On March 6, 2003, the Commissioner issued his recommendations concerning Booster's alleged child-support arrearage and the aforementioned income tax refund. The Commissioner recommended that the circuit court's August 13, 1998, bench ruling to the effect that Buster owed no child-support arrearage as of that time should be entered as a written order nunc pro tunc. Because there was no rebuttal evidence to Booster's proof that he paid child support from January 1999 through December 2001 (when he was awarded custody of the

children) the Commissioner determined that Booster owed no child-support arrearage at all, and that the income tax refund being held by the Butler Circuit Court Clerk was to be returned to Booster.

The Commonwealth filed exceptions to the Commissioner's report claiming that any order releasing Booster from any alleged child-support arrearage was effective only as to the support allegedly owed to Patricia, and did not apply to any obligation of Booster to reimburse the Commonwealth for AFDC benefits paid to Patricia. On June 17, 2003, the circuit court issued an order confirming and adopting the Commissioner's March 6, 2003, and ordering that all monies being held by the Butler Circuit Court Clerk be forwarded to Booster.

In its appeal, the Commonwealth claims that because Patricia received AFDC benefits from the Cabinet the Commonwealth is entitled to recover those benefits in the form of any child-support arrearage owed by Booster. Further, the Commonwealth argues that the circuit court abused its discretion by setting aside any alleged child-support arrearage Booster owed in its nunc pro tunc order. The principle issue for us to resolve is whether the circuit court was correct in determining that Booster did not owe a child-support arrearage.

It is uncontested that on April 23, 1998, the circuit court entered an order requiring Booster to pay child support of

\$159.95 per week retroactive to September 23, 1997. It also appears to be uncontested that Booster made no payments under this order through December 1998. Booster presumably did not comply with the order because on May 8, 1998, he had filed a motion to modify child support.

We first consider the effect of the circuit court's ruling at the August 13, 1998, hearing, which it later memorialized in writing nunc pro tunc, to the effect that any arrearage Booster owed as a result of his failure to make payments in compliance with the April 23, 1998, child-support order was, in effect, forgiven on the basis that Patricia had caused him to incur additional expenses as a result of her having failed to comply with the circuit court's visitation orders.

It has long been understood "that unpaid periodical payments for maintenance of children, . . . become vested when due."²² As a result and "[a]s a matter of fact, each installment of child support becomes a lump sum judgment, unchangeable by the trial court when it becomes due and is unpaid" [emphasis added].²³ Accordingly, the "courts are without authority to

²² Dalton v. Dalton, 367 S.W.2d 840, 842 (Ky. 1963).

²³ Stewart v. Raikes, 627 S.W.2d 586, 589 (Ky. 1982).

'forgive' vested rights in accrued unpaid maintenance"
[citations omitted].²⁴

The circuit court's attempted forgiveness of the accrued child-support arrearage at the August 13, 1998, hearing is diametrically contrary to the foregoing authorities. The circuit court was without the authority to forgive or excuse any unpaid child support which had accrued as of August 1998. As such, the subsequent nunc pro tunc order seeking to memorialize the ruling in writing is void.

As a result, we reverse the circuit court's determination that Booster did not owe any child-support arrearages during the period that the Commonwealth was paying AFCD benefits to Patricia. We accordingly remand for disposition in favor of the Commonwealth based upon the arrearages accrued during this period.

However, upon remand a final housekeeping matter will need to be first addressed, namely, Booster's May 8, 1998, motion to modify child support. This motion remains without a ruling. Since the motion was filed only 15 days following the April 23, 1998, order establishing child support, we are doubtful that the motion will comply with the provision of KRS 403.213 which provides that "child support may be modified only . . . upon a showing of a material change in circumstances that

²⁴ Mauk v. Mauk, 873 S.W.2d 213, 216 (Ky.App. 1994); Price v. Price, 912 S.W.2d 44, 46 (Ky. 1995).

is substantial and continuing.” However, in the event that the circuit court’s ruling on the motion to modify child support is favorable to Booster, this may affect the applicable arrearage. If so, this should be considered in the circuit court’s calculations of any amounts owing to the Commonwealth.

For the foregoing reasons, we affirm in Case 2002-CA-002114-ME, and reverse and remand in Case No. 2002-CA-001490-MR for additional proceedings consistent with this Opinion.

ALL CONCUR.

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