

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001660-DG

AYNN C. DILLARD

APPELLANT

ON DISCRETIONARY REVIEW FROM JEFFERSON CIRCUIT COURT
v. HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 01-XX-000084

THOMAS K. STONE

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, JOHNSON, AND SCHRODER, JUDGES.

BUCKINGHAM, JUDGE: We granted discretionary review of an opinion and order of the Jefferson Circuit Court relating to the child support obligation of Thomas K. Stone to Aynn C. Dillard. Having reviewed the briefs and the record, we affirm.

Dillard and Stone are the parents of Kendall Owen Dillard, born December 3, 1989. On November 20, 1991, Dillard filed a petition for custody in the Jefferson Family Court and a paternity action in the Jefferson District Court. The two cases

were consolidated in the Jefferson Family Court. On July 28, 1992, the family court entered an order directing Stone to "pay \$54 per week child support on a temporary basis."

The case was set for trial on May 18, 1993. However, the parties announced to the court on that date that they had reached a settlement, and the terms of the settlement agreement were dictated on the record. Dillard subsequently refused to execute the settlement agreement, and the case remained unresolved for several years.

Due to inactivity in the case, on September 3, 1998, the court issued a notice to the parties pursuant to CR¹ 77.02(2). That prompted Dillard to move the court on September 30, 1998, to set the case for trial. The court issued another notice pursuant to CR 77.02(2) on February 22, 1999. Dillard again moved the court to schedule the case for trial, and the court set a trial date of September 1, 1999.

On the trial date, the parties announced that they had reached an agreement as to paternity and custody. Pursuant to that agreement, the court entered an order on the same day determining that Stone was the child's father and that Dillard should be awarded sole custody. The issues of child support and arrearages remained to be determined.

¹ Kentucky Rules of Civil Procedure.

On November 22, 1999, the court issued Findings of Fact, Conclusions of Law and Order. The court determined that, according to KRS² 403.213(1), modified child support was retroactive only to the date of the filing of the motion rather than to the child's date of birth. The court found the child support due from the 1992 order until the filing of Dillard's motion on September 30, 1998, to be \$17,388. The court further found that Stone was entitled to a credit in the amount of \$12,554.50. Thus, the court determined the arrearage as of the filing of the motion to be \$4,833.47.

The court then determined that Stone's current support obligation was \$171.05 per week. As that amount was retroactive to the filing of the motion, the court calculated the arrearage in that regard to be \$10,263. When that amount was added to the arrearage that had accrued prior to the filing of the motion, the court determined a total child support arrearage of \$15,096.47. The court ordered that amount reduced to judgment for which Dillard could pursue collection. The court also noted that the judgment would bear interest at the rate of 12% and that Stone had a continuing support obligation of \$171.05 per week.

Dillard appealed to the Jefferson Circuit Court. In an opinion and order entered on January 31, 2003, by the circuit

² Kentucky Revised Statutes.

court, the order of the family court was affirmed. Dillard then petitioned this court for discretionary review, which was granted.

Dillard argues that the July 28, 1992, order of child support was a *pendente lite* order entered pursuant to KRS 406.025. She thus asserts that the family court's award of child support should have been retroactive to the date of the child's birth, not to the date of her motion for support, pursuant to KRS 406.031.

We first note that KRS 406.025 did not become effective until July 15, 1996, approximately six years after the family court's 1992 order. More importantly, we agree with the circuit court that the 1992 order is not within the purview of KRS 406.025. Although Dillard claims that an evidentiary hearing was not held prior to the entry of the order, the circuit court correctly noted that such a hearing did take place. In fact, the order itself noted that a hearing had been held on May 26, 1992. In short, although Dillard attempted to characterize her September 30, 1998, motion as one to establish "permanent" child support, it was actually a motion to modify support. Therefore, as noted by the family court and the circuit court, KRS 403.213(1) was applicable, and the modification of support payments related only to those payments due subsequent to the filing of the motion. KRS 403.213(1)

makes no distinction between temporary or permanent child support orders, and it "applies to 'any' action to modify an award of child support." See Tilley v. Tilley, 947 S.W.2d 63, 66 (Ky.App. 1997).

Next, Dillard argues that the family court erred by failing to include passive income and certain deductions in Stone's income for the purpose of setting child support. She does not specifically state what such income and deductions are that were not considered by the family court. We note that KRS 403.212(2)(c) states in part that "[i]ncome and expenses from self-employment or operation of a business shall be carefully reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support obligation." As this court stated in Snow v. Snow, 24 S.W.3d 668, 672 (Ky.App. 2000), KRS 403.212(2)(c) "confronts trial courts with the unenviable task of distinguishing between a self-employed child-support obligor's taxable income and what may be called his or her disposable income."

The family court determined Stone's income based on his adjusted gross income as stated in his 1998 federal and state tax returns. On appeal to the circuit court, the circuit court stated it was satisfied that the family court had carefully reviewed Stone's income and expenses and determined his income accordingly.

"The test for abuse of discretion in reviewing the trial court's decision is whether the decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Clary v. Clary, 54 S.W.3d 568, 570 (Ky.App. 2001). Like the circuit court, we find no abuse of discretion in the family court's determination of Stone's income for purposes of determining his child support obligation.

Finally, Dillard argues that the family court erred by crediting Stone for payment of medical expenses for the child in the amount of \$1,825.79. She complains that the court credited this amount to Stone's child support and that a parties' obligation to pay extraordinary medical expenses are treated separately from a child support obligation. In support of her argument, Dillard cites KRS 403.211(8). We conclude, as did the circuit court, that the family court did not abuse its discretion in crediting Stone's arrearage with these payments since he was under no order to pay the child's medical expenses when he did so.

The opinion and order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Louisville, Kentucky

BRIEF FOR APPELLEE:

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