

RENDERED: December 3, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002761-MR

HEATHER ALLEN

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JOAN L. BYER, JUDGE
ACTION NO. 01-FC-003061

CHRISTOPHER BUFORD

APPELLEE

OPINION

REVERSING

** ** * * *

BEFORE: DYCHE AND McANULTY, JUDGES; EMBERTON, SENIOR JUDGE.¹

DYCHE, JUDGE: The sole issue in this appeal is whether a child who is adopted after support has been determined for another child is to be considered a "prior born child" for purposes of amending the support of the later born child.

¹ Senior Judge Thomas D. Emberton, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and KRS 21.580.

The parties to this appeal, Heather Allen and Christopher Buford, are the parents of Madison Cheyenne Baldauf-Buford, born March 25, 2001. Heather and Christopher were never married to each other. On May 2, 2001, Heather filed a verified petition for custody of Madison; Heather also sought support for the child. Christopher responded one month later. Although he did not actually deny paternity, he did seek the court to order DNA testing to eliminate any doubt that he was the father.

An agreed order was entered in December 2001: Christopher was to pay \$212.18 per week retroactive to Madison's birth date; Christopher was given a year to pay the arrearage of \$9,814.27; and a custody and visitation arrangement was set out.

Meanwhile, on June 26, 2001, Christopher had married Amy Buford. In August of the following year, Christopher adopted Amy's daughter Mikaela. Mikaela's date of birth is March 7, 2000, making her older than Madison. Christopher sought to decrease the amount of his child support payments citing KRS 403.212 (2) (g) 3. and 199.520 (2). Heather sought to have Christopher held in contempt for his utter failure to pay on the arrearage.

A hearing was held on August 28, 2003. Both parties filed simultaneous briefs stating their positions regarding the deductibility of the adopted child. The family court ultimately ruled: (1) that Mikaela should be considered prior born and

thus Christopher was entitled to a deduction for "an 'imputed child support obligation' in an amount consistent with the statutory guidelines"; (2) even using Mikaela as a deduction, Christopher was not entitled to a reduction in his support payments for Madison; (3) Christopher was ordered to pay Heather \$720 toward her attorney fees; and (4) Christopher was found in contempt regarding the arrearage; he was given thirty days to purge himself by paying Heather \$7,986.47 plus interest.

Heather appeals only the finding that Mikaela is to be considered a prior born child. Christopher files no brief before this Court. Thus we are entitled to choose from the following:

If the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

Kentucky Rules of Civil Procedure (CR) Rule 76.12(8)(c). In this instance we reverse, as "appellant's brief reasonably appears to sustain" her position that Christopher should not have been given a deduction for Mikaela under the circumstances presented to the family court.

KRS 403.212 (2) (g) 3. provides:

(2) For the purposes of the child support guidelines:

(g) "Combined monthly adjusted parental gross income" means the combined monthly gross incomes of both parents, less any of the following payments made by the parent:
3. A deduction for the support to the extent payment is made, if a parent is legally responsible for and is actually providing support for other prior-born children who are not the subject of a particular proceeding. If the prior-born children reside with that parent, an "imputed child support obligation" shall be allowed in the amount which would result from application of the guidelines for the support of the prior-born children.

(Our emphasis.) And KRS 199.520 (2) states:

Upon entry of the judgment of adoption, from and after the date of the filing of the petition, the child shall be deemed the child of petitioners and shall be considered for purposes of inheritance and succession and for all other legal considerations, the natural child of the parents adopting it the same as if born of their bodies. Upon granting an adoption, all legal relationship between the adopted child and the biological parents shall be terminated except the relationship of a biological parent who is the spouse of an adoptive parent.

(Emphasis added.) Both statutes contemplate that the adopted child be a member of the household at the time support is determined, not, as here, that the child's adoption be considered retroactively to reduce an already set amount. This finding of the Jefferson Family Court is reversed. However, as

it contained no adverse implications on Madison's support, there is no need to remand the matter.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

Armand I. Judah
Louisville, Kentucky