

RENDERED: June 17, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000855-MR

COMMONWEALTH OF KENTUCKY, EX REL
PAMELA A. YAZELL (NOW STEPHENS)

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 96-CI-01394

DONALD YAZELL

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: HENRY AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: The Commonwealth of Kentucky, ex rel.

Pamela A. Yazell (now Stephens) appeals from a judgment

modifying the child support obligation owed by Donald Yazell.

The issue presented is whether child support ordered to be paid

for multiple children can be retroactively modified based on the

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.

emancipation of one or more of the children. We hold that KRS² 403.213(1) does not permit a retroactive reduction in child support and reverse.

Patricia and Donald were divorced on November 14, 1996, and pursuant to a Separation and Property Settlement Agreement incorporated into the decree, Donald was ordered to pay child support for the parties' four minor children in the amount of \$171.22 per week "until the youngest child reaches 18 years of age or graduates from high school." On April 14, 1999, Donald pleaded guilty to flagrant non-support and was sentenced to three years incarceration, probated for five years. In September, 2000, after Donald violated his probation, a warrant for his arrest was issued, but he was not arrested until two years later. During the period the arrest warrant was active, the appellant petitioned the court for a lump sum judgment and an order attaching and assigning Donald's retirement account. On November 29, 2001, a Qualified Domestic Relations Order was issued finding Donald in arrears in the amount of \$30,268.31 as of October 26, 2001.

Following his arrest on October 3, 2002, Donald filed a motion to set child support, requesting that his obligation be determined for one child, the only child who had not been emancipated. The motion was granted and on January 21, 2003,

² Kentucky Revised Statutes.

Donald requested that the court determine his arrears by retroactively modifying his support as of the dates of emancipation of his three older children. On March 29, 2004, the court ordered that Donald's child support obligation be retroactively reduced upon the dates of emancipation of each child, reducing his arrears to \$19,012.

KRS 403.213(1) provides that 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" The circuit court found that mere emancipation of a child terminates the support obligation and, therefore, the arrears are to be calculated from the emancipation date and not, as required by the statute, the date that the motion for modification was filed.

The support set in the decree obligates Donald to pay a designated amount for the support of all four children and is not on a per-child amount. In Pecoraro v. Pecoraro³ this court held that where there is more than one child included in the child support order and support is not set at a per child amount, emancipation of less than all of the children does not relieve the parent from paying the ordered amount of support. As this court noted, the child support guidelines are not set in direct proportion to the number of children in the home and

³ 148 S.W.3d 813 (Ky.App. 2004).

support does not automatically decrease by one half when one of two or more children is emancipated.⁴

Pursuant to KRS 403.213(1) and Pecoraro, Donald's arrears must be calculated from the date he filed the motion for modification of support, October 3, 2002. The order is reversed and this case is remanded for a recalculation of arrears in accordance with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Megan Abbott
Assistant Kenton County
Attorney
Covington, Kentucky

BRIEF FOR APPELLEE:

No brief filed

⁴ Id. at 815.