

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-001160-MR

BRYAN STUART CARKIN

APPELLANT

v. APPEAL FROM MERCER CIRCUIT COURT  
HONORABLE DOUGLAS BRUCE PETRIE, JUDGE  
ACTION NO. 03-CI-00365

BARBARA F. BURTON (FORMERLY CARKIN)

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, MINTON, AND TACKETT, JUDGES.

BARBER, JUDGE: This appeal stems from an Order and Decree entered by the Mercer Family Court relating to child support.

On December 30, 2003, Appellee, Barbara F. Carkin (Barbara) filed a Petition for Award/Modification of Child Support<sup>1</sup>

(Petition) against Appellant, Bryan Stuart Carkin<sup>2</sup> (Bryan).<sup>3</sup> The

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<sup>1</sup> Also included in the Petition, was a request for the family court to exercise jurisdiction of the matter, as well as, register all Orders from Wisconsin.

<sup>2</sup> Bryan is a resident of Virginia.

parties were married September 16, 1989 and had one daughter during the marriage.<sup>4</sup> The parties were later divorced June 11, 1997 in Milwaukee County, Wisconsin.<sup>5</sup> Child support was established pursuant to their Final Marital Settlement Agreement (Agreement), which was incorporated into the final decree, in the amount of \$265.00 per month. The amount of child support was later reduced by order entered December 12, 2000 to the amount of \$105.00 per month.<sup>6</sup> This was the last order entered relating to child support prior to Barbara's Petition filed December 30, 2003.

Bryan responded to Barbara's Petition and motions<sup>7</sup> by filing a motion pro se.<sup>8</sup> A hearing on all pending motions was held February 24, 2004. Barbara was present with counsel and

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<sup>3</sup> Bryan was personally served by Kenneth Ball with the Petition, civil summons, Barbara's motions (for child support modification; to require Bryan to produce records; for registration of the Wisconsin orders; for attorney's fees; and to schedule an evidentiary hearing), and Barbara's affidavit while in the Commonwealth on January 3, 2004.

<sup>4</sup> The daughter's date of birth is July 29, 1994.

<sup>5</sup> Barbara and parties' daughter had been residents of Kentucky since October 15, 1995.

<sup>6</sup> The December 12, 2002 order also amended the parties' insurance obligations on their daughter. In the original Agreement, Bryan agreed to maintain medical insurance on their daughter through his employer or in the event such coverage was unavailable to contribute fifty percent (50%) of the cost of such medical insurance with Barbara. The December 12, 2000 order required Barbara to provide all medical insurance for their daughter.

<sup>7</sup> In addition to the motions served upon Bryan when the summons was served, Barbara filed a motion January 20, 2004 requesting the court to grant her the tax exemption for their daughter. Prior to the Petition, the parties alternated use of the tax exemption pursuant to the December 12, 2000 order.

<sup>8</sup> Bryan filed a motion for Barbara to produce records, for the court to reschedule the hearing, and for the tax exemption on the parties' daughter. Bryan gave no reason for his request for the reschedule the upcoming hearing.

Bryan did not attend nor was he represented by counsel.

Following the hearing, the family court on March 24, 2004 ordered each party to produce proof of their respective incomes and for the Wisconsin orders to be registered. All remaining motions were scheduled to be heard May 7, 2004.

Prior to the May 7, 2004 hearing, Barbara filed her income information<sup>9</sup> April 12, 2004; Bryan did the same May 7, 2004.<sup>10</sup> Bryan also filed a motion May 5, 2004 to reschedule the May 7, 2004 hearing to coincide with the parties' custody exchange, but gave no reason why he was unable to attend court on the scheduled date. The hearing was held May 7, 2004 as scheduled and the family court entered an order May 17, 2004. The court ordered Bryan to pay \$84.23 per week effective December 29, 2003, as well as, an additional \$20.00 per week towards an accrued arrearage<sup>11</sup> of \$1,140.00. Barbara was allowed to claim the parties' daughter as an exemption for tax purposes.<sup>12</sup> The court also ordered that a wage assignment be

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<sup>9</sup> Barbara filed her 2001, 2002, and 2003 tax returns.

<sup>10</sup> Bryan forwarded his 2003 tax return to Barbara's counsel who subsequently filed it with the court during the hearing.

<sup>11</sup> Bryan had an arrearage due to the effective date of modification being December 29, 2003. Bryan was given a credit for all child support paid (\$105.00 per month) through May 7, 2004.

<sup>12</sup> The family court judge stated that he typically divides such exemption between the parties, but because there was no opposition provided, he found for Barbara. However, he stated that the issue could be revisited and proof put on if requested by Bryan. Also, Barbara's motion for attorney fees was overruled.

issued after Bryan submitted needed information to Barbara's attorney.<sup>13</sup>

A wage assignment order<sup>14</sup> was entered July 7, 2004 after Barbara's counsel located the required information from a web site.<sup>15</sup> The court found that as of June 30, 2004, Bryan had an arrearage of \$1,584.41 and included the same in the wage assignment order. Bryan now appeals to our court.

Bryan makes the following arguments in his pro se brief: (1) he should have been granted a continuance to appear in court;<sup>16</sup> (2) he requests our court to stop the child support arrearage and be reimbursed for monies already paid; (3) he requests our court to allow him to claim their daughter as a dependency exemption for tax purposes; and (4) for our court to order all custody exchanges taken place in Dunbar, West Virginia. Before we analyze Bryan's arguments, we would first like to discuss one of Barbara's arguments included in her brief.

Barbara argues that the May 17, 2004 order was not a final and appealable order. We disagree. "A final or

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<sup>13</sup> The May 17, 2004 order was prepared by Barbara's counsel. It did not state that it was "Final and Appealable."

<sup>14</sup> The July 7, 2004 order was prepared by Barbara's counsel. It stated that it was "Final and Appealable."

<sup>15</sup> Bryan failed to provide the information ordered by the court May 17, 2004.

<sup>16</sup> This issue is related to the May 7, 2004 hearing.

appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding . . ." CR 54.01. The finality of an order is determined by whether it grants or denies the ultimate relief sought in the action. State Farm Mutual Automobile Insurance Co. v. Caudill, 136 S.W.3d 781, 783 (Ky.App. 2003). The May 17, 2004 order granted relief on all items sought by the parties. Barbara did not request a wage assignment in her Petition or her motions. A request for a wage assignment was made for the first time orally by Barbara's counsel near the end of the May 7, 2004 hearing. The July 7, 2004 wage assignment order established the wage assignment using information from Barbara's attorney to enforce the court's May 17, 2004 order. Bryan did not appeal either of the wage assignment orders. Therefore, we believe the May 17, 2004 order was a final and appealable order as defined by CR 54.01. We turn now to Bryan's first argument.

Bryan claims that he should have been granted a continuance to appear in court. In its May 17, 2004 order the court stated as follows:

. . . FIND that [Bryan's] request for a continuance to be unsupported by any basis on which the relief should be granted, all parties having been made aware of the scheduling of the hearing for May 7, 2004, and [Barbara] and her counsel have objected to a continuance;

Following a review of the record, we agree with the family court. The rule applicable to the basic requirements of a motion is CR 7.02(1). Kentucky Rule of Civil Procedure 7.02(1) states, in pertinent part, that "An application to the court for an order shall be by motion . . . shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought." Bryan's May 5, 2004 motion fails to state a reason upon which he is requesting the rescheduling of the May 7, 2004 hearing. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999). Absent Brian providing a reason to the family court for the request of a continuance, we believe the ruling of the family court was neither an abuse of its discretion or clearly erroneous.

Bryan's second and third arguments directly relate to the May 17, 2004 order related to child support and the child dependency exemption for the parties' daughter. Each party submitted tax returns to the court. Barbara also testified at the May 7, 2004 hearing that her current salary was \$400.00 per week, which was more than the reported income on her tax returns. The family court used Bryan's 2003 gross income figure and Barbara's current salary in calculating the proper amount of

child support in accordance with the guidelines of KRS 403.212(7).

The family court also included figures for additional childcare costs and the child's health insurance premium cost in making its determination in accordance with KRS 403.211 (6) and (7). There was no explanation in the order where the amount of child care expenses or health insurance premium came from, the same being simply included in the attached child support worksheet. However, Barbara testified at the May 7, 2004 hearing that her current husband paid a total of \$115.00 per month for health insurance coverage on four people, which the court allocated \$28.75 per month to the parties' daughter. Barbara also testified that her daughter's after school care was \$42.00 per week, but that her daughter had no day care expenses when school was not in session. Accordingly, the family court allocated \$140.00 per month for child care expenses in the child support calculation.<sup>17</sup> There is no specific requirement that such expenses be documented and Bryan does not argue these additional expenses are incorrect. Accepting the validity of the additional expenses, the child support was calculated in accordance with the KRS 403.212(7) guidelines. Therefore, the

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<sup>17</sup> The family court found that the parties' daughter incurred care expenses for forty (40) weeks during the year.  $\$42 \times 40 \text{ weeks} = \$1,680 \text{ per year} / 12 \text{ months} = \$140 \text{ per month}$ .

court's finding in relation to the amount of child support was neither clearly erroneous nor an abuse of discretion.

In relation to the accrued arrearage, we also agree with the family court. [C]hild support may be modified only as to installments accruing subsequent to the filing of the motion for modification. KRS 403.213(1); see also Pretot v. Pretot, 905 S.W.2d 868, 871 (Ky.App. 1995). The family court acted in accordance with statutory and case law in awarding Barbara child support retroactive to December 30, 2003, the date she filed her Petition. Bryan did receive a credit for all child support paid until the date of the hearing to reduce his arrearage. Therefore, we believe the family court neither erred nor abused its discretion in relation to its award of an arrearage against Bryan.

Bryan's final argument requests our court to order all custody exchanges take place in Dunbar, West Virginia, which is half-way between the parties. This issue was never brought up by either party at the family court level. The appropriate method to be heard on this matter would be for Bryan to file a motion with the Mercer Family Court. Because it is not properly before us at this time, we decline to make any determinations related to visitation.

Based on the foregoing, we believe the May 17, 2004 order of the family court was neither clearly erroneous nor was

an abuse of its discretion. Therefore, we affirm the Mercer Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Bryan S. Carkin, Pro Se  
Salem, Virginia

BRIEF FOR APPELLEE:

Edward D. Hayes  
Danville, Kentucky