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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001016-ME

ROBERT LAWRENCE BENNETT — APPELLANT

v.

APPEAL FROM SCOTT FAMILY COURT
HONORABLE TAMARA GORMLEY, JUDGE
ACTION NO. 05-CI-00476

THERESA RENEE BENNETT — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; ACREE AND COMBS, JUDGES.

ACREE, JUDGE: Appellant, Robert Bennett, appeals an order of the Scott Circuit Court[1] denying his motion to modify his child support obligation and calculating a child support arrearage of $35,038.14 in favor of appellee, Theresa Bennett.

Three questions are presented by this appeal.

First, did the circuit court commit reversible error when it adopted *in toto* the Scott County Domestic Relations Commissioner's report without allowing exceptions to be taken and without a hearing? Because the court did not comply with former Kentucky Rules of Civil Procedure (CR) 53.06(1) and (2),[2] we find reversible error and remand for a hearing and consideration of those exceptions.

Second, did the court err by denying Robert's motion to modify his child support obligation for the period beginning on the date he filed it (June 16, 2005), prior to which two of the three children covered by the prevailing child support order were emancipated? The circuit court failed to properly consider this motion; this was error. Upon remand, the court will have the opportunity to correct the error by considering these changed circumstances and determining a support obligation for the period following the filing of the motion.

Third, did the court err in calculating the child support arrearage that accrued before Robert filed his motion to modify child support by refusing to consider the

[1] This appeal is taken from the Scott Family Court. However, the order which is the subject of our review was entered prior to the creation of the Scott Family Court, after which the case was transferred to the family court. To avoid confusion, we refer generally to the circuit court. *See Hallis v. Hallis,* 328 S.W.3d 694, 698 n.7 (Ky. App. 2010)("A family court . . . is a circuit court."), *citing Walson v. Ethics Committee of Kentucky Judiciary*, 308 S.W.3d 205 (Ky. 2010).

[2] The substance of the former CR 53.06 can now be found in Kentucky Family Court Rules of Procedure and Practice (FCRPP) 4(4).

emancipation of fewer than all of the parties' children? We conclude the circuit court did not err in this regard. However, the circuit court calculated the total arrearage as though Robert's support obligation did not change even after he filed his motion to modify. Therefore, if proper consideration of Robert's motion to modify results in a change in that obligation for the period from June 16, 2005, to May 31, 2006, the total arrearage will have to be recalculated.

Facts and Procedure

This case brings with it a complex procedural history that impacts our analysis; therefore, we present a rather full exposition of the facts and procedure.

Robert and Theresa married on August 17, 1979. On February 23, 1993, Theresa filed a dissolution petition in Jefferson Family Court. At that time, Robert and Theresa had four minor children: Jennifer, born February 13, 1980; Elizabeth, born May 3, 1981; Sandra, born January 8, 1983; and Samantha, born September 3, 1987. On April 5, 1993, Theresa and Robert entered into a property settlement agreement, which was subsequently incorporated into their decree of dissolution. Under its terms, Robert was to pay Theresa $225.00 per month, per child, until each child's death, marriage, or emancipation.

On June 29, 1998, incident to Jennifer's emancipation,[3] Robert and Theresa entered into a new child support agreement whereby Robert agreed to pay $870.00 per month for the support of his three remaining children: Elizabeth, Sandra, and

[3] While Jennifer turned 18 years old on February 13, 1998, she did not graduate from high school until June of 1998. Accordingly, Jennifer was not emancipated until graduation. Kentucky Revised Statute (KRS) 403.213(3). The same circumstances of emancipation also attended the other children.

Samantha. The new child support agreement did not include a "per child" amount. The agreement was incorporated as part of the decree by order entered July 20, 1998.

In May of 2000, Elizabeth emancipated. Robert corresponded with Theresa to obtain financial information so that he could calculate a new child support amount, but Theresa did not respond. Consequently, Robert unilaterally reduced the amount of child support he paid Theresa by approximately one-third.

In June 2001, Sandra emancipated, leaving only one unemancipated child. Again, Robert corresponded with Theresa to obtain financial information to recalculate child support. Again, Theresa did not respond. Robert then again reduced the amount of child support he paid Theresa by roughly one-half.

Child support was not the only issue between the parties, however. Although Robert did not seek a court order regarding child support, beginning in February 1999, Robert was in court often pursuing a change in custody and questioning the medical and other decisions being made by Theresa for the parties' children. Despite substantial discovery, the appointment of a guardian *ad litem*, and several orders relating to the cost and need for the children's medical and dental care, the Jefferson Family Court ordered no meaningful changes in custody.

Then, on September 18, 2000, the court allowed Robert's counsel to withdraw from the case based on the attorney's "irreconcilable differences" with Robert. For the next five years, nothing appears in the record.

By the summer of 2005, Robert had moved to Florida and Theresa and the parties' remaining minor child, Samantha, had moved to Scott County, Kentucky. Robert obtained new counsel and, on June 16, 2005, filed a motion in Jefferson Family Court to amend child support and to determine arrearages.

Robert's new counsel did not serve a copy of his motion on Theresa's last attorney of record or upon her directly. Rather, he served the Scott County Attorney, Child Support Office. The Jefferson County Attorney, Child Support Office, responded to Robert's motion by filing a motion to change venue to Scott County. The motion was granted by agreed order on June 27, 2005, and Robert's motions were passed for consideration by the Scott Circuit Court.

Robert repeatedly sought a hearing on his motion. Then, in December 2005, the Scott County Attorney filed a "Notice of Assignment or Authority to Collect" the child support Robert owed Theresa because the Kentucky Cabinet for Health and Family Services had provided benefits to Samantha, and the case was scheduled to be heard on March 7, 2006. This hearing never took place. Robert filed a motion to re-schedule and the court ordered the "hearing to be set on arrears [for] May 24, 2006." (emphasis in original).

On the hearing date, Robert filed a lengthy Trial Memorandum in which he argued "that by virtue of KRS 403.213(3), his child support obligation of July 8, 1998 [sic] terminated by operation of law in June 1999 with the emancipation of Elizabeth." He also argued that requiring him to comply with the 1998 support

order would unjustly enrich Theresa. He did not argue specifically that he and Theresa had entered into an agreement modifying child support.

The Scott County Attorney appeared at the May 24, 2006 hearing on Theresa's behalf but did not file a response. The circuit court appears to have informally asked the parties to confer with a DRC during motion hour. According to a subsequent portion of the record, "Because the 'hearing' was taking place in an impromptu manner before a temporary commissioner neither party was placed under oath." The only record of this "hearing" is a notation on the docket sheet that Theresa shall "have until 6/28 to respond" to Robert's Trial Memorandum. The docket entry is not signed by any judicial officer.

On July 26, 2006, the circuit court entered an agreed order. Its primary purpose was to recognize the emancipation of the parties' youngest child, Samantha. It terminated Robert's obligation to pay any child support and also terminated the related wage assignment. No new date was set for the hearing on Robert's motion for modification of child support or to determine arrearages. However, the agreed order did again allow time for Theresa to respond "at which time the issues shall stand submitted."[4]

Theresa never responded to Robert's motion or Trial Memorandum. Instead, on July 31, 2006, through the Scott County Attorney, she filed a Motion

[4] Consistent with the May 24, 2006 docket entry, the agreed order stated "Counsel for [Theresa] shall have up to and including June 28, 2006, to file a reply to the [Robert's] Trial Memorandum. [Robert] shall have fifteen days thereafter to reply, at which time the issues shall stand submitted." Of course, that deadline had passed by the time the agreed order was entered on July 26, 2006. The signatures of the attorneys representing the parties are not dated.

for Judgment on Arrears. The motion stated that "[o]n August 23, 2006 a hearing will be held . . . for the purpose of determining amount of arrears owed." Again, the only record we have of that August 23, 2006 hearing is the docket entry stating "to be submitted." The signature on the docket sheet is unreadable but we assume that Theresa's motion for arrearages was heard by the DRC because the DRC prepared the initial report. In any event, according to the order from which this appeal is taken, the parties waived formal presentation of evidence, and stipulated to the statement of facts set forth in Robert's May 24, 2006 trial memorandum.

If the DRC complied with CR 53.06(1) by filing his report with the circuit clerk, we have no separate record of it.[5] If the DRC did file his report with the clerk, then the clerk did not, as also required by CR 53.06(1), "forthwith serve the report and notice of the filing upon all parties . . . ."

On November 16, 2006, with no prior notice to the parties of the DRC's report and recommendation, the circuit court adopted, without change, the DRC's recommendations and entered Findings of Fact, Conclusions of Law and Judgment denying Robert's motion and determining child support arrears in the amount of $35,038.14.

On November 27, 2006, Robert filed several post-judgment motions, including a timely[6] motion to alter, amend or vacate the judgment pursuant to CR

[5] It is possible that the DRC delivered the report directly to the circuit judge who signed it and instructed the clerk to enter the order and distribute it.

[6] A CR 59.05 motion "shall be served not later than 10 days after entry of the final judgment." But, "[t]he last day of the period so computed is to be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday." CR 6.01. The tenth day after the November 16, 2006

59.05 and a motion to set aside the judgment for failing to comply with CR 53.06. An order was tendered with the motions that, if entered, would have set aside the November 16, 2006 judgment and allowed the filing of exceptions.

Robert's objection to the DRC's report (presented to him for the first time as the judgment) was that the parties had stipulated to two additional facts before the DRC that were not included in the report. The first

> stipulation was that on the expiration of a single child pay order, which has been fully complied with, it is the routine practice of the Scott County Division of Child Support not to file with the court a satisfaction of judgment or order setting aside said child support order. [Robert's] second objection is that during the hearing he acknowledged before the court that he did send a letter to [Theresa] upon . . . both the emancipation of Elizabeth and then again upon the emancipation of Sandra that stated he was reducing his child support proportionately to which [Theresa] never responded.

The Scott Circuit Court's docket entry for December 7, 2006, indicates that Robert's motion "Objecting To Entry of Recommendation" was to be heard that day. The motion, however, was "passed to another date." Robert re-noticed for January 15, 2007. For reasons not indicated in the record, no hearing was held that day. It was, however, rescheduled for February 14, 2007.

On January 22, 2007, Robert filed a Verified Tender of Evidence and Motion To Participate Telephonically. The evidence Robert tendered was correspondence dated from 2000 to 2004 between the parties and between the parties' attorneys. Robert intended this evidence to support his argument that

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order was a Sunday. Thus, Robert timely filed the motion on Monday, November 27, 2006.

Theresa acquiesced in his unilateral reduction in the amount of his support payments based on the emancipation of the parties' children.

No hearing took place on February 14, 2007. Robert re-noticed all his motions to be heard on March 1, 2007, and re-noticed them again to be heard on March 14, 2007. On that date, the circuit court took the case under advisement and deemed it submitted on the record.

Before the circuit court ruled, a separate family court was established for Scott County in 2007. This case was then transferred to Scott Family Court where it lay dormant for a time. In April 2008, Theresa filed a motion for a pre-trial conference to be heard May 7, 2008, but that motion was passed. After another year, on March 20, 2009, and again on April 10, 2009, Robert filed motions for a status conference. It was not until April 17, 2009, when the county attorney, on Theresa's behalf, filed a Motion to Enforce Child Support Order that a hearing was finally scheduled. All pending motions were thus heard by the Scott Family Court on August 26, 2009.

Eight months later, on May 3, 2010, the Scott Family Court entered an order finding the denial of Robert's rights under CR 53.06(2) did "not alter the fact that the motion of [Robert] to reduce child support was denied. . . . That denial was a final and appealable order which [Robert] chose not to appeal in a timely manner." Without further addressing Robert's post-judgment motions, the family court then granted Theresa's motion to enforce the November 16, 2006 order. This appeal followed.

Before analyzing the substantive issues, we note that if the Scott Family Court's analysis in its May 3, 2010 order is correct, this Court lacks jurisdiction to consider the appeal. *United Tobacco Warehouse, Inc. v. Southern States Frankfort Co-op., Inc.*, 737 S.W.2d 708, 709-10 (Ky. App. 1987) ("Compliance with the time requirements of CR 73.02 is mandatory and jurisdictional."). The family court, however, is wrong. When Robert filed a timely CR 59.05 motion, the November 16, 2006 judgment became interlocutory until the motion was overruled. *Embry v. Turner*, 185 S.W.3d 209, 212 (Ky. App. 2006)(timely motion to modify "converts a final judgment to an interlocutory judgment"). When Robert filed a notice of appeal within thirty days of the May 3, 2010 order, this Court assumed jurisdiction to review the November 16, 2006 judgment.

Standard of Review

The "establishment, modification, and enforcement of child support obligations" are within the circuit court's discretion. *Plattner v. Plattner*, 228 S.W.3d 577, 579 (Ky. App. 2007). Thus, this Court's review is subject to the abuse of discretion standard. *Holland v. Holland*, 290 S.W.3d 671, 674 (Ky. App. 2009). An abuse of discretion occurs when the circuit court's decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001).

Analysis

As noted in the introduction, the three issues before this Court are whether the circuit court erred: (1) by failing to allow Robert to file exceptions to the

DRC's report and to have a hearing before the court; (2) by denying Robert's motion to modify his child support obligation accruing after he filed his motion; and (3) by failing to consider the emancipation of fewer than all of the parties' children as grounds for retroactively modifying Robert's child support obligation. We address each issue in turn.

Robert's right to file exceptions and to a hearing

CR 53.06(1) requires the DRC to prepare a report setting forth the DRC's recommendations upon the matters submitted to the DRC, and to file the report with the circuit clerk. Subsequently, the circuit clerk shall serve the report and notice of filing upon the parties subject to the action. CR 53.06(1). Further, CR 53.06(2) provides as follows:

> Within 10 days after being served with notice of the filing of the report *any party may serve written objections* thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in CR 6.04. The court *after hearing* may adopt the report, or may modify it, or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions.

CR 53.06(2)(emphasis supplied). In *Kelley v. Fedde*, 64 S.W.3d 812, 814 (Ky. 2002), the Kentucky Supreme Court held that it was reversible error for a circuit court to deny a party a hearing on his or her objections to the DRC's report. Thus, when a party makes a "timely objection to the DRC's report . . . [he is] entitled to a hearing on those objections pursuant to CR 53.06(2)." *Kelley*, 64 S.W.3d at 814.

In the case before us, the parties appeared before the DRC at motion hour on August 23, 2006. The matter was submitted to him. On November 6, 2006, the DRC recommended findings of facts, conclusions of law, and judgment to the circuit court. Without notice to the parties, the circuit court adopted the DRC's findings and rendered its judgment *in toto*. Robert filed a timely motion to set aside the judgment on the grounds that the circuit court had failed to comply with CR 53.06. In his motion, Robert reiterated the grounds previously stated. He also tendered exceptions to the judgment as though the judgment were the DRC's report since this was the first notice he had.[7] We find that these filings substantially complied with the procedural requirements to preserve the right to file exceptions under CR 53.06(2).

Under the rule set forth in *Kelley*, the circuit court was required to hold a hearing on Robert's objections pursuant to CR 53.06(2). *Kelley*, 64 S.W.3d at 814. The circuit court failed to grant Robert's hearing request, thereby denying him the procedure he was due under our civil rules. Accordingly, we must conclude that the circuit court erred in failing to afford the parties an opportunity to file written objections and have a hearing on those objections pursuant to CR 53.06. Granted,

[7] After receiving the circuit court's judgment, which adopted the DRC's findings of facts and conclusions of law, Robert filed three post-judgment motions: a motion to alter, amend, or vacate the judgment pursuant to CR 59.05, a motion objecting to the entry of the DRC's recommendations pursuant to CR 53.06, and a motion for additional findings pursuant to CR 52.04. In each motion, Robert set forth the same objections to the DRC's findings. Thus, we find Robert's post-judgment motions sufficient to satisfy CR 53.06(2) requirement that a party submit written objections to the DRC's report within ten (10) days after being served with notice of filing of the report.

"a full-blown evidentiary hearing is not contemplated by the rule, [but] the parties must be afforded an opportunity for oral argument." *Kelley*, 64 S.W.3d at 814.

Therefore, we will vacate the November 16, 2006 judgment and remand this matter to the circuit court for additional proceedings. Specifically, the circuit court shall permit the parties to file written objections to the DRC's recommended findings of fact and conclusions of law and, at the least, entertain oral arguments on the parties' objections prior to rendering final judgment. In accordance with CR 53.06(2), the court may also receive further evidence.

Robert's motion to modify child support

Analysis of Robert's motion to modify child support requires that we break that motion down into two parts. In the first part, Robert effectively sought modification of his support obligation for the period from the date he filed his motion until his youngest child was emancipated. In the second part, he sought retroactive modification for obligations accruing prior to the filing of his motion, beginning on the dates each of his children was emancipated. Appropriate analysis varies depending on the period under consideration. We consider first Robert's right to modification of his child support obligation that accrued subsequent to his filing of a motion to modify.

Entitlement to modification of support order subsequent to filing of motion

"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 and only upon a showing of a material change in circumstances that is substantial and continuing." KRS 403.213(1). Robert's child support obligation was established in 1998 at $870 per month and provided for the financial support of three of the parties' four children. On June 16, 2005, Robert filed his motion to modify based on the emancipation of two of those three children. There is no question that those emancipations constituted a material change in circumstances that is substantial and continuing. Therefore, absent evidence of other changes, Robert was entitled to a modification in his support obligation, but "only as to installments accruing subsequent to the filing of the motion . . . ." *Id.*

We conclude that the circuit court's denial of Robert's motion with regard to installments of child support accruing after the filing of his motion was an abuse of discretion. To that extent, we reverse the circuit court's order denying Robert's motion to reduce child support. On remand, the court shall recalculate Robert's child support obligation for the sole support of Samantha for the period from June 16, 2005, until her emancipation on May 31, 2006.

Entitlement to modification of support order antecedent to filing of motion

We do not find an abuse of discretion in the circuit court's denial of Robert's motion to modify child support with regard to installments that accrued prior to the date he filed it. As the Kentucky Supreme Court said in *Price v. Price*, "the legislature has expressly spoken on this matter. KRS 403.213 defines when and upon what circumstances a child support order may be modified." 912 S.W.2d 44, 46 (Ky. 1995). To use that Court's words and authority,

> child support can only be modified prospectively. This Court has long understood "that unpaid periodical payments for maintenance of children, . . . become vested when due." *Dalton v. Dalton*, Ky., 367 S.W.2d 840, 842 (1963). 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." *Stewart v. Raikes*, Ky., 627 S.W.2d 586, 589 (1982) (emphasis added). Accordingly, "the courts are without authority to 'forgive' vested rights in accrued maintenance." *Mauk* [*v. Mauk*], 873 S.W.2d [213,] 216 [(Ky. App. 1994)].

Id.

There is only one exception to this rule of law and that is where the obligor and recipient of child support have entered into an enforceable agreement.

> A court will enforce a private agreement between parents if it meets certain requirements. If the agreement is oral it must be proven with reasonable certainty and the court must find "that the agreement is fair and equitable under the circumstances." *Whicker v. Whicker*, Ky.App., 711 S.W.2d 857, 859 (1986). Moreover, the agreement, once proven, will only be enforced if the "modification might reasonably have been granted, had a proper motion to modify been brought." *Id*.

Id.

Robert attempted to place before the circuit court evidence that he and Theresa had an agreement to reduce the child support upon the emancipation of each of their children. The record indicates the circuit court never considered such evidence. Upon remand, the circuit court shall consider evidence from both parties to determine if such an agreement exists under the requirements set out in *Price*.

However, we find no merit in Robert's remaining arguments for modifying his child support obligation that accrued before he filed his motion. His arguments based in equity; *i.e.*, estoppel and unjust enrichment, are foreclosed by *Price*.

> We understand that "equity provides relief where the law does not furnish a remedy." *Heisley v. Heisley*, Ky.App., 676 S.W.2d 477, 478 (1984). Here, appellee's recourse was at law, by the filing of a motion for modification of the child support decree or at least coming to an agreement with the custodial parent when circumstances warranted.

Id.

Robert's final argument is not an equitable one, but a legal argument. He claims the legislature established automatic modification to his support obligation as expressed in KRS 403.213(3), which states:

> provisions for the support of a child *shall be terminated* by emancipation of the child unless the child is a high school student when he reaches the age of eighteen (18). In cases where the child becomes emancipated because of age, but not due to marriage, while still a high school student, the court-ordered support shall continue while the child is a high school student, but not beyond completion of the school year during which the child reaches the age of nineteen (19) years.

KRS 403.213(3) (emphasis supplied). We do not reach the same conclusion as Robert.

At first blush, subsections (1) and (3) of KRS 403.213 appear to conflict. They do not. "[W]here statutes seemingly conflict, it is the duty of the courts to harmonize them and give such construction as will permit both to stand, if such construction can reasonably be given." *General Motors Acceptance Corp. v. Shuey*, 243 Ky. 74, 47 S.W.2d 968, 970 (1932). We conclude that these provisions can be harmonized and have already effectively so held.

In *Pecoraro v. Pecoraro*, 148 S.W.3d 813 (Ky. App. 2004), this Court addressed facts substantially the same as in the case before us now. In *Pecoraro*, we 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 fewer than all of the children will not relieve the parent from paying the ordered amount of support. As noted in that opinion, the child support guidelines are not set in direct proportion to the number of children in the home and support does not automatically decrease by one half when one of two or more children is emancipated. *Pecoraro*, 148 S.W.3d at 815.

In fact, *Pecoraro* did not establish a new legal concept. Long before enactment of KRS 403.213 in 1990, child support obligors were making Robert's same argument based on an ancient predecessor statute. The language of KRS 405.020 (and no doubt that of KRS 403.213(3) as well) was taken from Kentucky's

old Civil Code, Kentucky Statutes (KS) 2016. The current version of KRS 405.020 says,

> The father and mother shall have the joint custody, nurture, and education of their children who are under the age of eighteen (18) . . . and for any unmarried child over the age of eighteen (18) when the child is a full-time high school student, but not beyond completion of the school year during which the child reaches the age of nineteen (19) years.

KRS 405.020(1).

In 1965, child support obligor Chilton Guthrie tried to apply this principle to retroactively avoid his monthly child support obligation of $250 for five children. *Guthrie v. Guthrie*, 429 S.W.2d 32, 34 (Ky. 1968). Presaging Robert's argument, Chilton proposed that

> the child support obligation should be considered to have been reduced by $50 per month as each child reached majority, so he was obligated to pay $250 per month only until the oldest child reached majority in March 1961, $200 per month thereafter until July 1962 when the second child reached majority, $150 per month thereafter until June 11, 1964 when the third and fourth children (twins) reached their majorities, and only $50 thereafter until the youngest child should reach his majority in February 1966.

Id. But our former Court of Appeals rejected that argument. Without specifically referencing KRS 405.020(1), but clearly recognizing its impact, the Court said,

> Chilton's contention, substantially accepted by the trial court, was that the divorce judgment in effect provided for a payment of $50 per child, and since a person ceases to be a 'child' upon reaching majority the payment for each child terminated when he or she reached majority. . . .

> . . . Chilton's contention is not acceptable because it is by no means clear from the judgment that the allowance was a separable $50 for each child. On the face of the judgment the allowance was $250 per month *for the family group*. Perhaps the judgment contemplated that a base amount would be required regardless of the number of children, and some undermined amount for each child in addition to one was included in the $250 sum. Or perhaps the judgment was made in recognition of the fact that $250 was not enough to support five children but was all the father was able to pay; in that case there would have been no intent that the payments drop off as the children respectively came of age, but the intent would have been that the payments continue to provide a better standard of living for the remaining children.

Id. at 35-36 (emphasis supplied). We would add to that list of considerations the possibility that other changes in circumstances could offset the presumed reduction based on an emancipation.

Considering the principle expressed by these cases, we believe KRS 403.213(3) can be harmonized with KRS 403.213(1). While it is true that a parent's obligation to pay child support terminates pursuant to KRS 403.213(3) upon the child's emancipation, that obligation must first be made capable of distinction from any other obligation that is a part of the same decree or order. Therefore, a support order that establishes a specific amount of child support for each child, such as the parties' original agreed order, has already accomplished the distinction. However, this is not so if, as in *Pecoraro* and *Guthrie*, child support obligations establish a lump sum for the support of multiple children. The case

before us now is such a case and, in such cases, the obligor must return to court so that it can make that distinction. KRS 403.213(1) requires it.

When the amount of a support obligation covers multiple children, the emancipation of fewer than all of them simply establishes a "material change in circumstances that is substantial and continuing," which creates the basis for a motion to modify a child support obligation pursuant to KRS 403.213(1). It remains incumbent upon the obligor to file a motion for modification at or prior to the emancipation of his or her child. *See Price,* 912 S.W.2d at 46.

The logic behind the rule is elementary. A party cannot *sua sponte* disobey a court's order. Once a court has issued an order of child support, the parties must obey it until the court decides otherwise or unless a recognized exception applies such as an enforceable agreement of the parties. *Price,* 912 S.W.2d at 46. If we adopted Robert's theory of automatic modification, we would diminish the innate authority of the judiciary over its orders.

Robert's child support obligation did not automatically modify upon the emancipation of Elizabeth in 2000 or Sandra in 2001. Instead, Robert had a duty to file a motion requesting the court to modify his child support obligation upon Elizabeth's emancipation and again upon Sandra's emancipation. Robert failed to do so. Robert is now barred from a retroactive modification of his child support obligation, absent his ability to establish to the satisfaction of the circuit court that he and Theresa agreed to do so.

Calculation of arrearage

The circuit court calculated Robert's child support arrearage by first determining that his total obligation was $83,520.00. The circuit court arrived at this figure based on the June 1998 support agreement, multiplying the monthly amount of $870.00 by the 96 months that elapsed between June 1998 and May 31, 2006, when the parties' youngest child emancipated. Then, the circuit court subtracted from $83,520.00 the amount of child support Robert actually paid during that period, $48,481.86, to reach a total of $35,038.14 in child support arrears. Because we are remanding for the circuit court to consider the merits of Robert's motion for modification for the period between the date he filed his motion, June 16, 2005, and May 31, 2006, there is a possibility that the court's calculation of the amount of support owed for the entire period is incorrect. Therefore, on remand, if necessary, the court shall recalculate Robert's child support arrearage.

Conclusion

The Scott Circuit Court committed reversible error when it rendered its judgment in violation of CR 53.06. The circuit court abused its discretion in failing to consider Robert's motion to modify child support for the period after he filed his motion. However, the circuit court correctly held that Robert was not entitled to retroactive automatic modification of the support obligation based on the emancipation of fewer than all his children covered by the prevailing support order.

Therefore, we affirm in part, reverse in part, and remand this matter to the Scott Family Court for further proceedings consistent with this opinion.

TAYLOR, CHIEF JUDGE, CONCURS.

COMBS, JUDGE, CONCURS BY SEPARATE OPINION.

COMBS, JUDGE, CONCURRING: This case is a nightmarish example of a legal pitfall for the unwary. It serves as a stunning *caveat* for the increasing number of *pro se* litigants attempting in good faith to negotiate suitable settlements only to discover – to their dismay and to their financial detriment – that the law may produce this kind of inequitable result: an arguable financial support obligation of under $500 mushrooming into a judgment of more than $35,000 in arrearage.

Mr. Bennett did not evade his obligation; he in fact provided support. The judgment in this case amounts to a penalty – facially legal, but inherently inequitable.

Under the current state of the law, we are clearly compelled to rule as we have done in this case. However, this particular set of facts is not so unique as to avoid repetition among *pro se* litigants attempting to resolve their dissolution issues among themselves. This is a case of which the General Assembly should be made aware. It may perhaps consider the merits of allowing a statutory exception to good faith negotiation to be considered by a trial court *prior* to the actual date of filing of a motion to alter or amend a child support obligation.

ORAL ARGUMENT AND BRIEF FOR APPELLANT:

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ORAL ARGUMENT AND BRIEF FOR APPELLEE:

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