RENDERED: APRIL 3, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000967-ME

MARIA ESPERANZA PALMER — APPELLANT

v.

APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE JOHN DAVID MYLES, JUDGE
ACTION NO. 01-CI-00119

MARVIN A. PALMER, JR. — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: NICKELL AND VANMETER, JUDGES; GRAVES,[1] SENIOR JUDGE.

NICKELL, JUDGE: Maria Esperanza Palmer (Maria) appeals from a final order entered by the Shelby Circuit Court on April 17, 2008, reducing the child support arrearage owed by her former husband, Marvin A. Palmer (Marvin), from

[1] Senior Judge J. William Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

$39,609.00 to $7,320.00. The recalculation of child support resulted from Maria's failure to submit herself and her child for genetic testing despite a court order directing her to do so. We reverse and remand for further proceedings consistent with this opinion.

Maria and Marvin were married in February of 2000 and separated in August of 2000. A daughter was born during their union on September 17, 2000. On March 7, 2001, Marvin petitioned the Shelby Circuit Court to dissolve the marriage. Both Marvin and Maria asked for sole custody of the child. On July 17, 2001, the court granted temporary custody to Maria and required Marvin to pay child support pursuant to the guidelines found in KRS 403.212(7).

In September of 2001, there was a substitution of counsel for Maria. In June of 2002, Marvin asked the court to order genetic testing of himself, Maria and the child. Marvin attended a hearing on the motion with counsel on July 3, 2002. The record shows notice of the hearing was sent to Maria via her new attorney, but neither appeared. After the hearing, the court entered an order directing Marvin, Maria and the child to undergo paternity testing at Marvin's expense.

On August 8, 2002, Marvin asked that the issues of child support and property distribution be reserved, but otherwise moved the court to dissolve the marriage since the petition for dissolution had been pending for more than a year. On December 19, 2002, Marvin asked the court to set aside the temporary custody/child support order entered on July 17, 2001 on the grounds that he had

sent notice[2] of the genetic testing date to Maria's attorney, but twice Maria had failed to appear for testing. On January 13, 2003, Marvin renewed his motion to dissolve the marriage.

On January 30, 2003, the court entered its Findings of Fact, Conclusions of Law and Decree of Dissolution, reserving the issues of property division, custody and child support. That same day, Marvin moved the court to require Maria to show cause why she should not be held in contempt of court for failing to appear for testing. Marvin also repeated his request that the court set aside its order of July 17, 2001. On March 5, 2003, because Maria had failed to appear for testing, had missed three scheduled court appearances, and Marvin's attorney could not reach Maria's attorney by telephone, the court set aside[3] the temporary custody/child support order but allowed Maria to appear at any time, upon proper motion, "to address the matter."

The case was neglected until January 27, 2006, when Maria, through her third attorney, requested a trial on the reserved issues and asked that she and Marvin be ordered to complete genetic testing. Maria said she had only recently learned of the court's prior order for testing because she had not been in contact with her second attorney since 2002. In the same motion, Maria asked for

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[2] From the record certified to us for review, we cannot determine whether Maria received actual notice of the order directing that she, her daughter, and Marvin undergo genetic testing.

[3] The order stated in part, "IT IS HEREBY ORDERED that the Temporary Custody and Child Support Order entered by this Court on July 17, 2001 is set aside." A court speaks through its written orders. *Midland Guardian Acceptance Corp. of Cincinnati v. Britt*, 439 S.W.2d 313 (Ky. 1968); *Commonwealth v. Wilson*, 280 Ky. 61, 132 S.W.2d 522 (1939). Contrary to Maria's contention, the order entered in this case made no mention of holding anything in abeyance.

reinstatement of the support order entered on July 17, 2001. Marvin opposed reinstatement of the order until paternity was established.

On February 15, 2006, the Domestic Relations Commissioner (DRC) recommended entry of an order requiring all parties to be tested at Maria's expense and reinstatement of the prior child support order. Marvin filed an exception to the recommendation, again arguing he should not be required to pay child support until paternity was established. Maria objected contending KRS 406.011 presumes "[a] child born during lawful wedlock . . . is . . . the child of the husband and wife." Since the child was born during the marriage, Maria argued Marvin was presumed to be the father and he should pay child support until he proved otherwise. On February 24, 2006, the DRC amended his recommendation to require only that the parties undergo paternity testing at Maria's expense.

Counsel for both Maria and Marvin appeared at a hearing on March 8, 2006, during which the court stated the former circuit judge had set aside the 2001 child support order because of Maria's lack of cooperation. The court further stated the paternity issue should be resolved first and then, depending upon the result, an order for support could be made retroactive and related back to the date Maria had filed for child support. When the hearing concluded, the circuit court signed an order requiring testing at Maria's expense.

DNA samples were ultimately collected from Maria, Marvin and the child on July 5, 2006. Test results showed there was a 99.99998 percent probability that Marvin was the child's father. Having established paternity, on

September 13, 2006, Maria moved the court to order Marvin to pay support pursuant to the statutory guidelines and to make his obligation retroactive to Maria's original request for child support in 2001.

On February 8, 2008, Maria moved the court to have Marvin arrested for contempt because he still had not filed the mandatory case disclosure statement and he had not paid any child support. Maria stated in her motion,

> [p]reviously, an Order was entered in this Court placing the payment of child support in abeyance, pending the completion of paternity testing. The paternity tests have been completed and the results are conclusive and inclusive of [Marvin] being the natural father of the child of the parties. The suspension of child support payments did not relieve [Marvin] from owing such payments while the Order of Abeyance was in effect.

(emphasis in original). Maria refiled the motion on February 22, 2008.

The court ordered Marvin to show cause on March 13, 2008, why he should not be held in contempt for failing to file a mandatory financial disclosure report. All other pending matters were to be heard at the same time. Maria attended the hearing with counsel. Despite attempts by the court to locate Marvin, he did not attend the hearing in person or through counsel.[4] Afterwards, the court issued its Findings of Fact, Conclusions of Law and Order in which it found the child had lived solely with Maria since birth; Maria was earning $303.00 monthly while Marvin was earning $892.00 monthly; Marvin was the child's father; Marvin had paid no child support; and Marvin had not complied with any of the court's

[4] Marvin's attorney was allowed to withdraw from the case on June 26, 2007, however, the same attorney filed documents on Marvin's behalf in 2008.

orders regarding child support. Additionally, the court awarded sole custody of the child to Maria; directed Marvin to pay $366.00 in monthly child support retroactive to June 28, 2001; and ordered Marvin to serve six months in the detention center for contempt, although he could purge himself of the contempt by paying Maria $39,609.00. Finally, Marvin was ordered to pay $2,500.00 for Maria's attorney's fees. A bench warrant[5] was issued for Marvin's arrest on March 14, 2008.

A few days later, Marvin filed a motion pursuant to CR[6] 59.05 and CR 60.02 arguing there was no child support order to reinstate because the order entered on July 17, 2001, had been set aside in 2003, and no other support order had been entered until March 13, 2008. He argued his support obligation should not begin until 2006 when Maria and the child finally submitted themselves for testing. Marvin also asked the court to issue a new order awarding joint custody to him and Maria, designating Marvin as the primary residential custodian, and allowing Maria reasonable visitation. Maria filed a written response to Marvin's CR 59.05/CR 60.02 motion on May 31, 2008, in which she argued the trial court had merely abated the child support payments awarded on July 17, 2001, and then reinstated them in its order entered on March 13, 2008. According to Maria, the court never terminated the payments as Marvin had claimed. Maria also argued that any sanction for her failure to timely complete the genetic testing should be

[5] The bench warrant was recalled on April 3, 2008.

[6] Kentucky Rules of Civil Procedure.

levied against her, not her child. Additionally, she opposed Marvin being awarded joint custody since he had had virtually no contact with the child since her birth, and she asked the court to impose sanctions on Marvin for his failure to pay child support for six years.

On April 16, 2008, in open court, Maria's attorney filed a motion to alter, amend or vacate a proposed order the court had faxed to counsel for both parties the previous day. Marvin and his attorney were also at the hearing, but Maria was not. Maria's written motion, which counsel repeated during the hearing, asked that the child support award be made retroactive to June 28, 2001, because "[c]hild support is a benefit that is personal to the child and is not to be used as a sanction against a parent for non-compliance with a Court's order." Maria's attorney also argued that when the court "ordered that [Marvin] did not have to pay child support during the pendency of his Motion; this was only an abatement, not a dispensation, of child support."

The court rejected Maria's abatement argument saying once an order has been set aside it "is no longer in effect." The order entered on March 5, 2003, "set aside" the temporary custody/support order and said nothing about placing anything in abeyance. Finally, the court said it would have made the support order retroactive to July 17, 2001, had Marvin failed to appear for testing, but it was Maria who caused the delay.

On April 17, 2008, the court entered an order requiring Marvin to pay child support and making his obligation retroactive to September 13, 2006, the date

of Maria's last request for support. The court also acknowledged there was a mistake in the calculation of the arrearage stated in its proposed order and reduced the amount from $39,609.00 to $7,320.00 ($366.00 per month for twenty months). Finally, the court granted Marvin visitation; denied all other aspects of Marvin's motion to alter, amend or vacate; and denied Maria's motion to alter, amend or vacate *in toto*. It is from this order that Maria now appeals.

Now that Marvin has conclusively been shown to be the child's father, the relevant question is when Marvin's child support obligation began. Maria says it began with the filing of her initial request for support in 2001. Marvin has not filed a brief in this appeal, but in the trial court he argued his obligation should not begin until paternity was established. The court ordered Marvin's child support payments to be retroactive to September 13, 2006, the date paternity was established and Maria filed her last request for support. Since Marvin did not file a brief for appellee, CR 76.12(8)(c) authorizes us "to reverse the judgment if the appellant's brief reasonably appears to support such a result." *Plattner v. Plattner,* 228 S.W.3d 577, 579 (Ky. App. 2007). Upon review of Maria's brief, the record and the law, we have determined it is necessary to reverse in part and remand for further proceedings and entry of an order consistent with this opinion.

We review a family court's denial of a motion to alter, amend, or vacate a child support order for abuse of discretion. *Bickel v. Bickel*, 95 S.W.3d 925, 927-28 (Ky. App. 2002). Under this standard of review, we cannot substitute our judgment for that of the circuit court if there is substantial evidence supporting

its decision, *id.* at 928, and we cannot set aside its factual findings unless they are clearly erroneous. *Wheeler v. Wheeler*, 154 S.W.3d 291, 296 & n. 16 (Ky. App. 2004).

Our research has not uncovered another case in which a parent seeking child support has failed to timely present herself and her child for genetic testing despite a court order to do so and as a result the court has set aside an order of support. Thus, the fact pattern presented by this appeal appears to be a matter of first impression.

We begin our review by noting that in Kentucky a father is primarily liable for the nurture and education of his child until her eighteenth birthday. KRS 405.020(1). Here, Marvin was presumed to be the child's father because the birth occurred while he was married to the child's mother. KRS 406.011. As the child's father, Marvin was statutorily obligated to make child support payments as they accrued.[7] "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*, 627 S.W.2d 586, 589 (Ky. 1982); *see also Burton v. Burton,* 748 S.W.2d 166, 167 (Ky. App. 1988); *Clay v. Clay,* 707 S.W.2d 352, 353 (Ky. App. 1986); KRS 403.213(1).

On March 5, 2003, after Maria had missed three scheduled court appearances, the court set aside its July 2001 child support order as Marvin had

[7] While Marvin did not initially oppose Maria's request for child support, or challenge the order requiring him to make monthly child support payments, there is no proof he paid any child support until mid-April 2008.

requested. Setting aside the order relieved Marvin of responsibility for *future* payments, but did not excuse payments that had already accrued. *Stewart,* 627 S.W.2d at 589. Because the circuit court's order of April 17, 2008, did not reflect that Marvin was obligated to make payments for June 28, 2001, through March 5, 2003, we must reverse and remand for calculation of the amount of child support that accrued during that time and entry of an order requiring payment of the arrearage.

Furthermore, we believe the trial court abused its discretion in not requiring Marvin to support his child between March 6, 2003, and September 15, 2006. While paternity was not conclusively established until 2006, Marvin was presumed at all times to be the child's father under KRS 406.011 because the birth occurred during his marriage to Maria. Thus, Marvin may not have had an obligation pursuant to a valid child support order, but he still had a statutory duty to provide for the child under KRS 406.011.

We recognize the court refused to make the child support order retroactive to 2001 because Maria did not submit herself and her daughter for genetic testing. While we acknowledge a court's ability to enforce its orders and to sanction those who disobey them, the record shows both Maria and Marvin were in violation of court orders. Maria may not have appeared for the court-ordered testing, but Marvin had not paid any court-ordered child support since 2001. Thus, it would be egregious to reward either of them for their non-compliance. Here, in what we deem to be an arbitrary act, the court chose to make Marvin's financial

obligation retroactive only to September 13, 2006, and thereby punished the child in the guise of punishing Maria. *Dalton v. Dalton,* 368 S.W.2d 840, 843 (Ky. 1963), prohibits such a result. For this reason, we reverse and remand with direction that the court calculate an amount of child support, if any, owed by Marvin for the period of March 6, 2003, through September 12, 2006, and enter an appropriate order.

For the foregoing reasons, we reverse in part the Shelby Circuit Court's order of April 18, 2008, and remand for proceedings consistent with this opinion which shall include calculation of child support owed between June 28, 2001, and September 12, 2006, and entry of an appropriate order. We affirm that portion of the court's order directing payment of child support forward from September 13, 2006.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Brian K. Darling Louisville, Kentucky	No brief filed.