RENDERED: MAY 10, 2019; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001940-ME

SHAWN P. MARTIN APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS III, JUDGE
ACTION NO. 17-CI-00311

COMMONWEALTH OF KENTUCKY
CABINET FOR HEALTH AND
FAMILY SERVICES APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

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

ACREE, JUDGE: Appellant, Shawn Martin, appeals the September 12, 2017 order of the Nelson Circuit Court requiring him to pay $161.00 per month in child support and $25.00 per month toward an arrearage to his former spouse, Diana

Martin. For the reasons stated below, we vacate the order and remand with instructions.

FACTS AND PROCEDURE

Diana and Shawn Martin were married in Nelson County on March 23, 2002. They are the biological parents of three children: Dakota, born in 2000; Destiny, born in 2003; and Danica, born in 2010. When the parties separated, Diana secured legal counsel who prepared a settlement agreement. Diana chose to file her petition for divorce in neighboring Hardin County.

It seems Shawn was unrepresented because the clerk's certificate distributing copies of the Hardin Family Court's final decree and incorporated settlement agreement were sent directly to Shawn. (Record (R.) 40).

Before entering the decree, the Hardin Family Court considered the provisions of the parties' separation agreement. The specific language affecting this review states:

> 4. IT IS AGREED, that [Diana] and [Shawn] shall have joint legal custody of the parties' children . . . . [Diana] shall be the primary residential custodian of the parties' children . . . and [Shawn] shall have visitation as agreed upon between the parties.
>
> 5. IT IS AGREED, that parties shall not pay any amount of child support to either party as agreed upon between the parties. The parties have knowingly and voluntarily agreed to deviate from the Kentucky Child Support Guidelines and child support worksheet filed herewith and attached hereto. The parties' children are covered

> for health insurance purposes by Passport.[1] The parties shall equally divide the costs of any uncovered medical, dental and eye-care for the parties' children.
>
> [Diana] shall claim the parties' children for federal and state income tax exemption/dependent purposes and earned income tax status purposes each year.

(R. 42-43).

As the decree noted, the parties attached to the settlement agreement a Kentucky Worksheet for Monthly Child Support Obligation. (R. 48). The worksheet showed Diana's monthly income as a state employee at $2,008 and Shawn's Supplemental Security Income from his disability at $660.[2] The worksheet, designating Shawn as the non-custodial parent, indicated his monthly child support obligation would have been $192.50.

Assessing the whole agreement, the family court found it to be fair, equitable, and not unconscionable, and accepted the parties' stipulation that both Shawn and Diana would pay $0 in child support. The family court incorporated the settlement agreement into its decree and entered it on August 16, 2016.

In May 2017, about nine months after entry of the divorce decree, Diana went to the Nelson County Attorney's Office, Division of Child Support, for

---

[1] Passport Health Plan (Passport) is a local nonprofit community-based health plan administering Kentucky Medicaid benefits.

[2] Diana testified that Shawn began receiving those payments about the time of their marriage.

help collecting child support from Shawn. When asked if she had been receiving any support, Diana responded, "Absolutely not. . . . Not for lack of asking." (Video Transcript (VT) 9/6/2017; 11:07:45 – 11:08:24).

On May 23, 2017, Diana assigned to the Cabinet for Health and Family Services (CHFS) her right to "all child, medical, and spousal support due me" and "authorize[d] CHFS, to collect on my behalf all current and/or past-due child support, medical support and spousal support payable to me for the benefit of myself and/or my minor child(ren)." (R. 4).

A week later, the Nelson County Attorney, on behalf of CHFS, filed an action in Nelson Circuit Court against Shawn. As we explain more fully in the analysis, the complaint CHFS filed did not comply with FCRPP[3] 9(4). Rather, it simply demanded the court to order Shawn "to pay temporary and continuing child support according to the Kentucky child support guidelines . . . [plus] an amount equal to all sums paid by [CHFS] for Medical Assistance . . . [plus] the cost of health insurance . . . [plus] the cost of extraordinary medical expenses in proportion to [Shawn's] income[.]" (R. 2). The complaint also sought a wage assignment. Notably, the complaint makes no reference to the Hardin Family Court decree that established Shawn's obligations regarding child support and unreimbursed medical, dental, and vision costs.

[3] Kentucky Family Court Rules of Procedure and Practice.

The Nelson Circuit Court conducted a hearing on September 6, 2017. Diana testified that she was employed by the Commonwealth and her monthly salary had increased to $2,427.44. The children's medical care was still covered by Passport.

Shawn testified he receives disability-related Supplemental Security Income of $735.00 per month, identifying that as his sole source of income. He stated he does not work otherwise and has no money left from paying necessities such as rent and bills to support his children. He also testified that he lives with his new wife. He acknowledged they went on vacation to Florida but stated his father-in-law paid the trip costs. Shawn also stated he recently got a tattoo costing $40, and that he has paid for three tattoos over the last three years which encompasses time before the parties' divorce. He testified he also has a cellular phone.

CHFS put on no evidence of having paid any amounts for "Medical Assistance," despite having sought reimbursement for any such payments. After the hearing, the Nelson Circuit Court took the matter under submission.

The order the court entered on September 12, 2016, recognizes the Hardin Family Court decree and its incorporation of the parties' settlement agreement. However, after noting that a court addressing child custody, support, and visitation is not bound by a separation agreement, the Nelson Circuit Court rejected Shawn's argument that Diana waived the right to claim child support. The

court also rejected Shawn's argument that the court was required to factor into the child support calculation any payment received by his children from the Social Security Administration on account of his disability. (R. 82-83).

Further discounting the effect of the Hardin Family Court decree, the Nelson Circuit Court identified the nature of CHFS's claim as an "action to *establish* child support" as though the Hardin Family Court had not already done so. (R. 82 (emphasis added)). The court then proceeded to set child support by applying KRS[4] 403.211. Specifically, the circuit court ordered that Shawn:

> be required to pay temporary and continuing child support according to the Kentucky child support guidelines. . . .
>
> That [Shawn] be required to pay [CHFS] an amount equal to all sums paid by [CHFS] for Medical Assistance to the date of any order or judgment entered herein . . .
>
> That [Shawn] be required to pay the cost of health care insurance . . .
>
> [and] to pay all such amounts to the Division of Child Support . . . .

(R. 2).

The court stated that, based on the child support worksheet, Shawn's support obligation would be $256.28 per month. However, applying KRS

[4] Kentucky Revised Statutes.

403.211(3)(g), the court found that amount "would be 'unjust or inappropriate' because Shawn would not be able to meet his monthly needs." (R. 83).

Although the complaint sought more, the court only ordered:

> 1. That the defendant, Shawn P. Martin, shall pay child support in the amount of $161.00 per month retroactive to May 30, 2017.
>
> 2. That any arrearage shall be paid at the rate of $25.00 per month.
>
> 3. That this Order is final and appealable with no just cause for delay.

(R. 84). Shawn filed a motion to amend the circuit court's order. After a hearing on November 1, 2017, the court denied the motion. Shawn immediately appealed.

PRELIMINARY ISSUES

CHFS tendered a brief more than thirty days after its due date accompanied by a motion for additional time to file it. The Court denied the motion and the clerk returned the tendered brief. This circumstance affords the reviewing court certain options. The applicable rule says:

> 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.

CR 76.12(8)(c).

The simple course is to deem all facts in Shawn's brief admitted. *Karem v. Bryant*, 370 S.W.3d 867, 868 (Ky. 2012) ("As the Appellee in this matter has failed to file a brief, the facts are undisputed."). However, this Court's inclination is to review the record to confirm an appellant's version of the facts when "the record is neither large nor unwieldy, and we can readily find all the information we need with little difficulty . . . ." *Eplion v. Burchett*, 354 S.W.3d 598, 602 (Ky. App. 2011). Still, "we strongly suggest that the best practice is to file a[timely] appellee brief, as the failure to do so exposes appellees to the penalties in CR 76.12(8)(c)." *Hawkins v. Jones*, 555 S.W.3d 459, 461 (Ky. App. 2018).

Next, a reviewing court must be ever mindful of jurisdictional infirmities. Both Hardin Family Court and Nelson Circuit Court have subject matter jurisdiction over cases involving child support. However, in this action for divorce and child support, the Hardin Family Court was first to exercise particular case jurisdiction. "Subject matter jurisdiction and particular case jurisdiction are related, but they are different in that the former concerns a more broad, general class; whereas, particular case jurisdiction focuses on a more limited or narrow fact-specific situation." *Hisle v. Lexington-Fayette Urban County Government*, 258 S.W.3d 422, 429 (Ky. App. 2008). "While the former can never be waived by

the parties, the latter can be waived if the error is not presented to the trial court." *Goodlett v. Brittain*, 544 S.W.3d 656, 660 (Ky. App. 2018).

The Hardin Family Court's particular case jurisdiction attached when the parties pursued their dissolution issues there. "[A] court may retain jurisdiction over a particular case by operation of rule or statute and also by operation of its own judgment provided it is not precluded by any statute from doing so." *Hyatt v. Commonwealth*, 72 S.W.3d 566, 578 (Ky. 2002). The court that first exercises particular case jurisdiction in a divorce, custody, and support case "maintains a continuing jurisdiction over support provisions that pertain to wholly dependent persons" and, in this case, those wholly dependent persons are Shawn's and Diana's minor children. *Nelson v. Nelson*, 287 S.W.3d 667, 670 (Ky. App. 2009); *see* KRS 403.824(1) ("a court of this state which has made a child custody determination consistent with KRS 403.822 or 403.826 has exclusive, continuing jurisdiction over the determination").

CHFS could have moved to intervene in the Hardin Family Court action. *Cabinet for Human Resources v. Houck*, 908 S.W.2d 673, 675 (Ky. App. 1995). Instead, it initiated a new action in Nelson Circuit Court. Even though this approach runs counter to the concept of "[u]nified family courts, with their holistic approach to families (the one-family one-judge idea)," *Morgan v. Getter*, 441 S.W.3d 94, 105 (Ky. 2014), nothing prohibits the separate action.

Shawn responded to CHFS's complaint, *pro se*, by sending a handwritten letter to the circuit court. Shawn's counsel, once engaged, raised no objection to the Nelson Circuit Court succeeding the Hardin Family Court in exercising particular case jurisdiction. Subsequent objection to Nelson Circuit Court being the improper forum was thus waived. *See Stipp v. St. Charles*, 291 S.W.3d 720, 725 (Ky. App. 2009) ("Anna waived objection to improper venue by filing the petition and Michael waived objection to improper venue by failing to assert it in compliance with CR 12.").

The Nelson Circuit Court proceeded on a proper jurisdictional footing to consider CHFS's effort to revisit Shawn's child support obligation. As we will emphasize in our analysis, this does not mean the Nelson Circuit Court can act as a reviewing court overseeing the Hardin Family Court's decree respecting child support, nor does it allow a collateral attack on the Hardin Family Court decree, nor does it mean the Nelson Circuit Court is writing on a blank slate.

STANDARD OF REVIEW

"[M]odification, and enforcement of child support obligations" is within the circuit court's discretion. *Plattner v. Plattner*, 228 S.W.3d 577, 579 (Ky. App. 2007). When reviewing orders modifying child support, this Court applies the abuse of discretion standard. *Holland v. Holland*, 290 S.W.3d 671, 674 (Ky. App. 2009). 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

The cornerstone of Shawn's several arguments is that the circuit court "gave no merit to the separation agreement." We do not agree that the circuit court gave it no merit whatsoever. We do agree, however, that it failed to recognize the Hardin Family Court decree as having established Shawn's initial child support obligation under KRS 403.211, and failed to apply KRS 403.213 to determine whether the facts of the case justified modification of the order setting the initial child support obligation.

The circuit court's only ruling was that Shawn "shall pay child support in the amount of $161.00 per month retroactive to May 30, 2017." The right to compel judicial determinations regarding Shawn's obligation to support his children originally belonged to Diana. On May 23, 2017, when she executed the Assignment of Rights and Authorization to Collect Support, she assigned that right to CHFS. It is essential we know the extent of that right because "'an assignee . . . acquires no greater right than was possessed by his assignor . . . .'" *Unifund CCR Partners v. Harrell*, 509 S.W.3d 25, 29 (Ky. 2017) (quoting *Whayne Supply Co. v. Morgan Constr. Co.,* 440 S.W.2d 779, 782 (Ky. 1969)).

The right to child support can be fluid. During the parties' divorce, Diana's right "to establish" Shawn's child support obligation was codified at KRS 403.211(1). With assistance of counsel and by judicial decree, Diana did establish that obligation at zero. If the Hardin Family Court had ordered Shawn to pay an amount greater than zero, Diana could have relied on the same statute to take "action to . . . enforce child support . . . ." KRS 403.211(1).

If Diana was displeased with the decree setting the award at zero, she had two routes to directly attack it. "A direct attack on a judgment can only be made in the manner pointed out in [Kentucky statutes[5]], or by appeal, and any other attack is a collateral attack." *White v. White*, 294 Ky. 563, 172 S.W.2d 72, 74 (1943) (citing *Logsdon v. Logsdon*, 204 Ky. 104, 263 S.W. 728, 730 (1924) (applying the rule in a dissolution action to a collateral attack launched, as in this case, from a different county court)). Diana did not appeal the decree. But we can avoid characterizing the Nelson Circuit Court action as a collateral attack on the decree by identifying a statutory right belonging to Diana – a right she could and did assign to CHFS. That right is the right to modify the existing child support award – a right granted by the legislature when it enacted KRS 403.213.

As assignee of Diana's right under KRS 403.213, CHFS "simply

[5] The original statutes cited were from the Civil Code of Practice (1938), § 344 ("Grounds discovered after term; practice; divorce cases"), § 414 ("Time allowed for new trial, except as to divorce"), and § 518 ("Modification or vacation of judgment after term by court rendering").

stands in the shoes of [Diana], subject to all equities and defenses which could have been asserted against the chose in the hands of the assignor at the time of the assignment." *Whayne Supply Co.,* 440 S.W.2d at 782-83. Because Shawn owed no support, Diana's only right at that time regarding his support obligation was the right to seek its modification pursuant to KRS 403.213. That was all Diana assigned to CHFS, which then stood in her shoes. CHFS's complaint should have been brought and adjudicated in accordance with KRS 403.213.

Just as CHFS stood in Diana's shoes, the Nelson Circuit Court, as the successor to particular case jurisdiction, stood in the place of the Hardin Family Court, bound by its decree and its ruling that Shawn's child support obligation was initially set at zero. However, CHFS's complaint did not provide the Nelson Circuit Court with the full context of the case. Furthermore, CHFS's complaint failed to satisfy the requirements for modifying *or establishing* child support.

As noted, the assignment of a right carries with it all the requirements for claiming that right. As assignee of Diana's right to pursue modification of the Hardin Family Court's child support award, CHFS was required to comply with all rules "applicable to the procedure and practice in all actions pertaining to . . . child support . . . ." FCRPP 1(2). Regarding both modification *and establishment* of child support, Kentucky's Family Court Rules for Procedure and Practice state as follows:

> (a) A motion to establish or modify child support shall be accompanied by the following:
>
> > (i) A completed child support guidelines worksheet with movant's portion completed.
> >
> > (ii) Copies of the movant's last three pay stubs or, if movant is self-employed, proof of the movant's current income.
> >
> > (iii) The most recently filed federal and state income tax returns.
> >
> > (iv) Verification of the cost of health insurance for the child(ren) only.
> >
> > (v) A notice of hearing accompanying a motion for child support which shall contain the following statement:
> >
> > "You must file with the Court, at least 24 hours prior to the time of the hearing, a completed child support guidelines worksheet and copies of your last three pay stubs or, if self-employed, proof of your current income and the most current federal and state tax returns."
>
> . . . .
>
> (c) In addition, in cases that are Title IV-D[6] cases, counsel shall certify, prior to the hearing being held, that

---

[6] We previously described Title IV-D as follows:

> In 1975, in an effort to address the significant problem of nonsupport of children, the United States Congress passed legislation creating the Child Support Enforcement Program. The program is generally referred to as Title IV-D of the Social Security Act (the IV-D program). 42 U.S.C. 651 *et seq.* The IV-D program provides federal matching funds to states to assist in locating absent parents, in establishing paternity, obtaining child support and enforcing child support orders for families who receive Aid to Families with Dependent Children

> reasonable efforts were made to resolve all the issues in dispute.

FCRPP 9(4)(a), (c). At most, we can credit CHFS with giving Shawn notice. The complaint shows no other compliance with this rule. In fact, our search of the full record failed to discover any of the documentation the rule calls for.

Furthermore, we agree with Shawn that "the complaint has no allegation of 'change of circumstances' showing any legitimate claim under KRS 403.213(1)." (Appellant's brief, p.4). This is another failing of the complaint. "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). Even more significantly, CHFS presented no evidence at the hearing or otherwise of any material change in circumstances that is substantial and continuing. And, of course, that explains why the Nelson Circuit

---

> (AFDC) and for those who do not qualify for such benefits. States are required to have a IV-D program in order to remain eligible for AFDC funding. Since its inception, the program has been administered in Kentucky by the Cabinet for Human Resources (the Cabinet) and more specifically, the Cabinet's Department for Social Insurance, Division of Child Support Enforcement. *See* Kentucky Revised Statutes (KRS) 205.710 *et seq.*

Kenton County Fiscal Court v. Elfers, 981 S.W.2d 553, 554 (Ky. App. 1998). CHFS's complaint does not indicate it is brought pursuant to KRS 205.710 *et seq.*, although that may have been CHFS's intent. Even in such cases, FCRPP 9 applies.

Court's order fails to make such a finding. Absent any evidence, there could have been no such finding. Absent such a finding there can be no modification.

The order modifying Shawn's child support obligation from $0 to $161 must be vacated. It fails to comply with procedural and statutory requirements and lacks evidence for doing so. That is, the order is unsupported by sound legal principles and constitutes an abuse of discretion. Because CHFS's complaint fails to state a claim for modification in accordance with FRCPP 9(4)(a), it should be dismissed without prejudice.

CONCLUSION

For the foregoing reasons, we vacate the Nelson Circuit Court's September 12, 2017 order and remand the case with instructions to dismiss the complaint without prejudice.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Douglas Hubbard
Bardstown, Kentucky

NO BRIEF FOR APPELLEE.