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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001021-MR

JUDITH GAYLE LINDSEY — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 02-CI-501266

JAMES EDWARD TORGERSON — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM, KNOPF, AND TAYLOR, JUDGES.

BUCKINGHAM, JUDGE: Judith Gayle Lindsey appeals from an order of the Jefferson Family Court in favor of her ex-husband, James Edward Torgerson, Jr., denying her motion to collect past due child support obligations allegedly owed by Torgerson. We vacate and remand.

Lindsey and Torgerson were married in Tennessee on February 20, 1965. They are the parents of two daughters, Karen

and Patricia. Karen was born on December 5, 1968, and Patricia was born on September 23, 1971.

Lindsey and Torgerson were divorced by a decree entered in Bibb County, Georgia, on November 24, 1975. The Georgia divorce decree incorporated a settlement agreement wherein the parties agreed that Torgerson would pay $150 per month per child, for a total of $300 per month, as child support.

According to Lindsey, Torgerson failed to meet his obligations under the Georgia decree. This led her to file a U.R.E.S.A.[1] action to enforce Torgerson's child support obligations in Jefferson County, Kentucky, the county and state where she resided, in September 1985. Pursuant to U.R.E.S.A., Lindsay's complaint was transferred to Sarasota, Florida, Torgerson's place of residence, for enforcement of Torgerson's support obligations under the Georgia decree.

Torgerson apparently did not defend the action, and a support order was entered against him by the Florida court on March 13, 1986.[2] Under the order, the court found that Torgerson owed $25,000 in past due child support through December 1985. It also ordered him to pay $75 per month as current support and $20 per month on the arrearages.

[1] Uniform Reciprocal Enforcement of Support Act.

[2] Torgerson testified that he was not served with summons in the case.

During the years that followed, Lindsey made various attempts to enforce Torgerson's child support obligation. She maintains that she was unsuccessful because she was unaware of his whereabouts. In support of her position, she points to documents from state child support agencies in Kentucky and Florida covering the period from April 1989 to December 1993 that indicate the various addresses at which the agencies unsuccessfully attempted to locate Torgerson. There is no indication that Lindsey made further attempts to enforce Torgerson's obligation after 1993 until she initiated the present action approximately ten years later.[3]

On April 2, 2003, Lindsey filed a petition in the Jefferson Family Court to register the Georgia divorce decree setting Torgerson's child support obligation. This action was filed pursuant to KRS[4] 407.5601.[5] The petition requested the court to enter an order of child support arrearage against Torgerson.

Lindsey also filed a motion seeking to compel Torgerson to respond to her discovery request for bank records. In that motion, she claimed that Torgerson had not responded to

[3] Lindsey stated in an affidavit that sometime around 1993 she received a tip advising her of Torgerson's whereabouts.

[4] Kentucky Revised Statutes.

[5] This statute is part of the Uniform Interstate Family Support Act (U.I.F.S.A) that replaced U.R.E.S.A.

her request for production of documents and that such documents would demonstrate that Torgerson had not paid child support in the past to the extent he claimed. Further, she moved the court to hold Torgerson in contempt for failing to meet his support obligations.

Torgerson moved to dismiss the action against him on the ground that the statute of limitations for the enforcement of any child support obligation that might have been owing by him had run. The court held an evidentiary hearing on January 9, 2004. In addition to the parties, an assistant county attorney testified for Lindsey, and Paula Torgerson, Torgerson's second ex-wife, testified for Torgerson. At the hearing, Lindsey brought the court's attention to the Florida support order for the first time.

On April 23, 2004, the court entered an order wherein it rejected Lindsey's action to hold Torgerson in contempt and for a common law judgment for child support arrearages. After the court denied Lindsey's motion to vacate, she filed a notice of appeal.

In its order dismissing Lindsey's claim, the court ruled in three parts. First, the court ruled that enforcement of the March 13, 1986, Florida order was barred by the 15-year statute of limitations for the enforcement of judgments in KRS 413.090(1) because Lindsey's action had not been commenced until

April 2, 2003, more than 15 years after the entry of the order. Further, the court found that Torgerson had not concealed himself so as to toll the limitations period. See KRS 413.190(2).[6]

Second, citing Harvey v. McGuire, 635 S.W.2d 8 (Ky.App. 1982)[7], the court held that the statute of limitations for any support accruing after the date of the Florida order began to run once the children turned 18 years of age. Because Karen was born on December 5, 1968, the court reasoned that any action for child support arrearages for her should have commenced prior to December 5, 2001. Because Lindsey did not file this action until April 2003, the court concluded that any claim for unpaid child support owed for Karen was barred by the statute of limitations.

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[6] KRS 413.190(2) provides in relevant part that:

> When a cause of action mentioned in KRS 413.090 to 413.160 accrues against a resident of this state, and he by absconding or concealing himself or by any other indirect means obstructs the prosecution of the action, the time of the continuance of the absence from the state or obstruction shall not be computed as any part of the period within which the action shall be commenced.

[7] In Bollengier v. Charlet, 141 S.W.3d 14, 16 (Ky.App. 2004), this court held that the Harvey case had been "effectively overruled" by Stewart v. Raikes, 627 S.W.2d 586 (Ky. 1982).

Third, as to Lindsey's claim for arrearages owed for Patricia, the court concluded that Torgerson had met his burden of proving that the payments had been made. The court based this finding on the testimony of Torgerson and his ex-wife, Paula Torgerson. Although Torgerson did not present any documents supporting his assertion that he had paid his child support, the court concluded that it was "unreasonable to expect Mr. Torgerson to have retained records of every child support payment he made as the parties have been divorced for almost thirty years and their youngest child is now thirty-two years old."[8]

We immediately note several problems in this case. First, we see a problem with the way the court treated the Florida U.R.E.S.A. order. When Lindsey filed this action against Torgerson in April 2003, she sought to register the Georgia divorce decree and to have it enforced. No mention was made of the Florida U.R.E.S.A. order. At the evidentiary hearing before the circuit court, Lindsey brought up the Florida U.R.E.S.A. order, which she claimed was "newly discovered evidence that there is a Florida judgment." Torgerson apparently did not object to the introduction of the Florida order for the court's consideration, and he urged the court to

[8] Torgerson also testified that his apartment was destroyed by fire in 2000, causing him to lose all records of child support payments.

accept the order as a judgment and to hold that the enforcement of it was barred by the 15-year statute of limitation. The court accepted the order as a judgment and accepted Torgerson's argument that the enforcement of it was barred by the statute.

In our view, the circuit court should not have considered the Florida U.R.E.S.A. order as a judgment for two reasons. First, if the Florida order was truly a judgment subject to enforcement in Kentucky, then Lindsey should have complied with the Uniform Enforcement of Foreign Judgments Act set forth in KRS 426.950-.990 before seeking to have it enforced by the court. Specifically, KRS 426.955 requires that a copy of the judgment, authenticated in accordance with the act of Congress or the statutes of this state, must be filed before the judgment may be enforced. Although Lindsey filed a copy of the Florida order, it was not properly authenticated as required by the statute. Thus, it was not subject to enforcement.

Regardless, we believe the parties and the court improperly accepted the Florida U.R.E.S.A. order as a judgment. The judgment setting forth Torgerson's support obligations was the Georgia divorce decree. The U.R.E.S.A. proceeding instituted by Lindsey in Kentucky and transferred to Florida was merely a proceeding to enforce the George decree. The order entered by the Florida court was an enforcement order and not a judgment. Nevertheless, although the Florida order was not a

judgment, Torgerson is precluded from challenging the arrearage determination made therein based on *res judicata*. See Jaynes v. Black, 655 S.W.2d 493, 495 (Ky.App. 1983). As a consequence, to the extent Lindsey may be able to collect support for months prior to and including December 1985, Torgerson cannot now relitigate the issue of payment for those months.

The second problem we note concerns the manner in which the court dealt with the statute of limitations issue. As we have noted, the court held that the statute of limitations for enforcing Torgerson's past due support obligations began to run when each child turned 18 years of age. The court based this determination on the Harvey case. However, one month after the family court entered its order, this court rendered an opinion in Bollengier, 141 S.W.3d at 16, that held that the Kentucky Supreme Court had "effectively overruled" the Harvey case in Stewart, 627 S.W.2d at 586. The Stewart case held that "each installment of child support becomes a lump sum judgment, unchangeable by the trial court when it becomes due and is unpaid." Id. at 589. In other words, it is unnecessary to reduce a claim for support arrearages to a lump sum judgment for purposes of enforcement. Id. at 589. In short, for purposes of determining whether Lindsey's enforcement of Torgerson's allegedly delinquent support payments was barred by the statute of limitations, the court should have examined the issue in a

manner consistent with the Stewart case rather than the Harvey case.[9] Thus, as we consider the statute of limitations issue on appeal, we do so in accordance with Stewart rather than Harvey.

Next, in determining whether Lindsey's action to enforce the George divorce decree is barred by the applicable statute of limitations, we must consider whether the statute of limitations in Kentucky or the statute of limitations in Georgia applies. This matter is directly addressed in KRS 407.5604(2), which provides that "[i]n a proceeding for arrearages, the statute of limitation under the laws of this state or of the issuing state, whichever is longer, applies." As we have noted, Kentucky has a 15-year statute of limitations for the enforcement of judgments. See KRS 413.090(1). The statute of limitations in Georgia for the enforcement of child support arrearages is ten years. See Bryant v. Bryant, 205 S.E.2d 223 (Ga. 1974), and Owens v. Dep't. of Human Resources, 566 S.E.2d 403, 405 (Ga.Ct.App. 2002). Therefore, the Kentucky 15-year statute of limitations applies.

As these legal principles apply to the facts of this case, the statute of limitations as to support obligations for Karen has run unless the statute was tolled pursuant to KRS 413.190(2). Because the last support obligation for Karen was due just before her 18th birthday in December 1986, Lindsey had

[9] It is understandable that the family court applied the wrong analysis since Bollengier had not been rendered when the family court entered its order.

until December 2001 to enforce the unpaid child support obligations. Because Lindsey did not file this action until April 2003, the statute had run as to all monthly obligations unless there was tolling.

As for Torgerson's support obligation for Patricia, the 15-year period expired in September 2004 unless there was tolling. Thus, since Lindsey filed this action in April 2003, any unpaid monthly support obligations for the last approximately 18 months before Patricia turned 18 were still enforceable regardless of whether the statute had been tolled.

The first argument raised by Lindsey in this appeal is that the circuit court erred when it determined that the tolling statute, KRS 413.190(2), did not apply because "Mr. Torgerson did not conceal his whereabouts from Miss Lindsey." The court's findings were based on two determinations. First, the court noted that the evidence indicated Lindsey made no effort to enforce Torgerson's child support obligations after 1993. Second, the court reasoned that Patricia lived with Torgerson pursuant to Lindsey's consent during the 1984-85 school year and that "[i]t is hard for this Court to believe that Miss Lindsey sent their teenage daughter to Florida without knowing where the child would be residing or without speaking to her during her entire stay with her father."

This court may "set aside the trial court's findings [of fact] only if those findings are clearly erroneous." Moore v. Asente, 110 S.W.3d 336, 353-54 (Ky. 2003), citing CR[10] 52.01. When determining whether such findings are clearly erroneous, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01. "[J]udging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court." Moore, 110 S.W.3d at 354.

A finding of fact is said to be clearly erroneous if it is not supported by substantial evidence. Id. Substantial evidence "is evidence that a reasonable mind would accept as adequate to support a conclusion." Id. Further, substantial evidence is evidence that, "when taken alone or in light of all the evidence,. . . has sufficient probative value to induce conviction in the minds of reasonable men." Id. This is so, regardless of whether there is conflicting evidence or whether the reviewing court would have reached a contrary finding based on the evidence as a whole. Id.

The above two reasons cited by the family court to support its finding that Torgerson did not conceal himself to avoid enforcement of his child support obligations do not constitute substantial evidence. First, although Lindsey may

[10] Kentucky Rules of Civil Procedure.

have known of Torgerson's whereabouts between 1993 and the filing of her action in 2003, that fact covers only a 10-year time period and is not dispositive of whether she knew his whereabouts between April 1989 and December 1993. The records of the Jefferson County Attorney's Child Support Division are evidence that Torgerson could not be located during this four-year period. Second, the fact that Lindsey may have known where Torgerson was residing in 1984-85 when Patricia was living with him also is not dispositive of the question of whether Lindsey knew of Torgerson's whereabouts during the 1989-93 period. In short, neither of these reasons constitutes substantial evidence to support the finding that Torgerson did not conceal himself during the 1989-93 period.

When evidence was presented to the court on the issue of tolling, it was not restricted to the period from April 1989 to December 1993. Therefore, the court did not address the issue as it related only to that period of time. In fact, the two reasons cited by the court to support its finding that Torgerson did not conceal himself do constitute sufficient evidence to support its findings as to periods of time before 1989 and after 1993. They are not, however, relevant to the 1989-93 period.

As we have noted, there is evidence that Torgerson could not be located during that time period. Although Lindsey

provided addresses and phone numbers for Torgerson to the authorities in an attempt to collect child support pursuant to U.R.E.S.A., the documents indicate that Torgerson was not located at those addresses. While these facts are some evidence of concealment during this time, the court may have relied on other facts in determining there was no concealment. In short, we conclude that this matter should be remanded to the family court for the entry of additional findings and determinations directly addressing whether the statute should be tolled for the April 1989 to December 1993 period.

Furthermore, the court was premature in its finding that Torgerson had presented evidence, sufficient under Raymer, supra, to show he had met his support obligation from January 1986 on.[11] While the court was free to accept the evidence presented by Torgerson on this issue, Lindsey was entitled to present evidence to rebut it. By failing to grant Lindsey's motion to compel discovery of bank records, Lindsey was denied the right to discover and present such evidence. It appears from the record that at the time her motion to compel was before the court, the court was focused only on the issue surrounding the statute of limitations and tolling. On remand, Lindsey

[11] As we previously noted, to the extent tolling applies and allows Lindsey to recover child support due prior to December 1995, Torgerson is precluded by *res judicata* from relitigating his obligation for those months.

should be allowed the opportunity to discover and present such records.

The order of the Jefferson Family Court is vacated and remanded for further proceedings consistent with this opinion.

TAYLOR, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS IN PART AND DISSENTS IN PART AND FILES SEPARATE OPINION.

KNOPF, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: While I agree with much of the reasoning contained in the majority opinion, I must dissent from the majority's decision to remand this case for additional findings concerning tolling of the statute of limitations. KRS 413.190 provides that the statute of limitations is tolled during any period that the defendant absconds or conceals himself "or by any other direct means obstructs the prosecution of the action." The trial court found no evidence that Torgerson concealed his whereabouts from Lindsey.

The majority agrees that there was evidence that Lindsey knew Torgerson's whereabouts during the period from 1984 until at least 1989. Likewise, there was no evidence that Lindsey made any effort to locate Torgerson after 1993 or that he concealed his location after that time. Regarding the period from 1989 to 1993, Torgerson moved back and forth between Kentucky and Florida during that period. There were records

introduced showing that the Jefferson County Attorney had contacted the Florida child-support agency requesting assistance in locating Torgerson. On the other hand, both children had reached the age of majority after 1989 and Torgerson's on-going obligation to pay child support had ended. Therefore, it is not clear that Torgerson had any duty to keep Lindsey apprised of his whereabouts during that period.

The statute of limitations is an affirmative defense that Torgerson bore the burden of proving. CR 8.03; Lynn Mining Co. v. Kelly, 394 S.W.2d 755, 759 (Ky., 1965). The trial court found that the fifteen-year statute of limitations had lapsed with respect to all of the arrearages owed for Karen and most of the arrearages owed for Patricia. The majority agrees that this conclusion is supported by substantial evidence.

Consequently, the burden then shifted to Lindsey to prove such facts that would toll the statute. Southeastern Kentucky Baptist Hospital, Inc. v. Gaylor, 756 S.W.2d 467, 469 (Ky. 1988). Moreover, Lindsey bore the risk of non-persuasion on this issue. The trial court conducted an evidentiary hearing, at which Lindsey was given an opportunity to present evidence. Following that hearing, the trial court found insufficient evidence to show that Torgerson had concealed himself during the limitations period.

The majority, however, shifts the burden to Torgerson to prove that he did not conceal himself. Although there was some evidence that would support a contrary determination, the trial court was not obliged to accept Lindsey's evidence. Furthermore, there is no indication in the record that Lindsey requested more specific findings concerning the period from 1989 to 1993. CR 52.04. Therefore, I do not believe that it is necessary to remand this matter for additional findings on this issue.

Finally, the trial court found that Torgerson has met his burden of proving that he has paid all enforceable arrearages owed for Patricia. I agree with the majority that Lindsey should have been given an opportunity to discover and present evidence to rebut this proof. However, the trial court correctly noted that Lindsey's lack of diligence has made proof on this issue difficult. Torgerson testified that many of his personal records were destroyed in a fire in 2000. Likewise, it is unlikely that twenty-year-old bank records will be available. The purpose of the statute of limitations is to avoid precisely the type of problems with obtaining proof as are presented in this case. Subject to this understanding, however, I agree with the majority that this matter should be remanded for additional findings concerning the amount of the enforceable arrearage which remains owed by Torgerson.

BRIEF FOR APPELLANT:

Allen McKee Dodd
Louisville, Kentucky

BRIEF FOR APPELLEE:

G. Phillip Deeb, Sr.
Louisville, Kentucky