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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001983-ME

GEORGE C. STEGE, III — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE ELEANORE GARBER, JUDGE
ACTION NO. 02-CI-500923

DIANE P. STEGE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, TAYLOR AND THOMPSON, JUDGES.

THOMPSON, JUDGE: George C. Stege, III, (Dr. Stege) appeals the denial of his motion seeking to recoup $35,989.30 in child support from Diane P. Stege, his former wife. The issues presented are whether the doctrine of *res judicata* barred Diane's defenses and whether the Jefferson Family Court erred when it found that Dr. Stege was not entitled to recoupment of excess child support payments voluntarily paid to Diane. We conclude that there was no error and affirm.

Dr. Stege and Diane were married on June 18, 1976, and the marriage was dissolved by decree on March 13, 2003. At the time of the divorce, the couple had two children that had reached the age of majority and one child who was twelve-years old. In addition to the division of property and custody matters, the judgment of dissolution provided for the payment of child support and the child's private education at Louisville Collegiate School as follows:

> If the parties jointly decide to continue (the child) in Collegiate after the present school year, then each shall be responsible for payment of tuition in proportion to the family income, 61% for Dr. Stege and 39% for Diane Stege. Dr. Stege shall be permitted to deduct his share of the tuition from his child support payments to Diane.

From 2003-2007, the child continued to attend Collegiate during which time Dr. Stege paid sixty-one percent of her tuition directly to Collegiate and Diane paid thirty-nine percent of her tuition. In addition, Dr. Stege continued to pay child support as required by the 2003 order in an amount equal to sixty-one percent of $1,700, without any deduction for the child's tuition.

In 2007, Dr. Stege filed a motion seeking to recoup from Diane his portion of the tuition which he failed to deduct from his child support payments made between May 2004 and May 2007. Diane objected arguing that the parties and the court had consistently interpreted the 2003 order to allow Dr. Stege to deduct thirty-nine percent of tuition payments from child support only if he paid the entire tuition amount and, therefore, that it would be inequitable to permit

recoupment. She further alleged that all excess child support had been expended for the benefit of the child.

Following a hearing, the family court found that Dr. Stege's proposed interpretation of the 2003 order did not comport with the court's intent and, utilizing CR 60.01, amended the 2003 order to state:

> If the parties jointly decide to continue (the child) in Collegiate after the present school year, then each shall be responsible for payment of tuition in proportionate to the family income, 61% of Dr. Stege and 39% for Diane Stege. Dr. Stege shall be permitted to deduct Diane Stege's share of the tuition from his child support payments to Diane.

Under the terms of the amended 2003 order, the family court found that there was no overpayment of child support and denied Dr. Stege's motion.

Dr. Stege appealed the family court's order and, in an unpublished opinion, this Court held that the family court incorrectly utilized CR 60.01 to make a substantive change to the 2003 order and reversed and remanded the case to the family court.

On remand, Dr. Stege renewed his motion for recoupment. Following a hearing, the family court denied his motion because Dr. Stege consented to the child's attendance at Collegiate and, therefore, the overpayment of child support was voluntary and Dr. Stege was not otherwise entitled to recoupment pursuant to *Clay v. Clay*, 707 S.W.2d 352 (Ky.App. 1986).

Dr. Stege's initial contention is that Diane was precluded from asserting her defenses to his claim for recoupment because the family court's 2007

order and this Court's 2008 opinion conclusively adjudicated the matter. Dr. Stege argues for the application of the doctrine of *res judicata* but does so with little explanation of the law or how it might apply to the facts.

In *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459 (Ky. 1998), the concept of *res judicata* and its two-subparts, claim preclusion and issue preclusion, were explained. To preclude repetitious suits involving the same cause of action, claim preclusion bars a party from relitigating a previously adjudicated cause of action in an entirely new action while issue preclusion bars parties from relitigating an issue litigated and finally resolved in an earlier action. *Id*. at 464. Both components require the finality of a prior litigation and a subsequent action.

The litigation concerning the potential recoupment of child support does not involve multiple litigations. Dr. Stege filed a motion to recoup child support and, although Diane presented her defenses, the family court chose to apply CR 60.01. After this Court concluded that the family court erred when it relied on CR 60.01, we remanded the case and the family court resolved the issue on the merits. Under the circumstances, Dr. Stege's assertion that *res judicata* barred the family court's consideration on the merits is baseless.

For similar reasons, we reject his contention that this Court's prior Opinion in which we reversed the family court's application of CR 60.01 without addressing the merits of the claim for recoupment or Diane's defenses precluded the family court from considering the merits. To the contrary, this Court remanded the matter to the family court for a decision on the merits.

The substantive issue presented on appeal is whether Dr. Stege was entitled to recoup child support payments from Diane.

The pivotal case in this Commonwealth regarding the recoupment of child support is *Clay v. Clay*, 707 S.W.2d 352. In *Clay*, the Court recognized the prevailing rule that recoupment of child support is not permitted but held it may be permitted when involuntary overpayments are made pursuant to a successfully appealed court order. However, the holding is limited to situations where recoupment is not detrimental to the child and the custodial parent has not expended the overpayment for the support of the child and has it, or its equivalent, available for repayment. *Id*. at 354. The facts in *Clay* are materially distinguishable from the present.

Dr. Stege voluntarily paid his daughter's tuition and child support without seeking clarification of the 2003 order or otherwise objecting to the payments. No public policy prevents parents from being as generous to their child as they wish and, consequently, parents may agree to pay child support in excess of their legal obligations. *Pursley v. Pursley*, 144 S.W.3d 820 (Ky. 2004). As a result, unlike in *Clay* where the child support order was reversed and vacated on appeal and the custodial parent knew that the amount of child support was contested, Diane had no reason to believe that Dr. Stege considered the payments excessive and would subsequently seek recoupment.

Secondly, in *Clay*, the Court did not mandate that recoupment be allowed but only remanded the case for findings of fact regarding recoupment. In doing so, it stressed that recoupment remained within the trial court's discretion:

> Whether, and to what extent, the receiving parent in fact used the "overpayment" for the support of the child and has the funds from which to permit a proper recoupment without depriving the child, is a determination that must necessarily be made by the trial court, exercising its discretion upon the relevant evidence before it. The scope of discretion, and the principles applicable to its exercise, with respect to allowing recoupment must be substantially the same as pertain to the fixing of child support in the first instance; and thus, the determination of the court will not be disturbed on appeal unless it is found to be clearly erroneous. (Emphasis in original.)

Id. at 354. In the present case, the trial court acted within its discretion when it denied recoupment based on its findings of fact.

At the second hearing, Dr. Stege did not dispute that Diane spent the excess child support payments for the child's benefit but argued that the amount spent was for unnecessary luxuries, including designer clothing. We agree with the family court that the relevant inquiry is whether the funds were expended for the benefit of the child and whether funds are available from excess child support payments. Regardless of the necessity of the expenditures, it remains that there was no evidence that funds were available from the accumulation of excess child support. We conclude that the family court's determination was not clearly erroneous. *Id*.

Based on the foregoing, the order of the Jefferson Family Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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Louisville, Kentucky

BRIEF FOR APPELLEE:

Richard H. Nash, III
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