

RENDERED: MARCH 18, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001497-MR

ARNOLD DEAN LITTLE

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 93-CI-00311

BETTY CAROL LITTLE, NOW DALTON

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * **

BEFORE: LAMBERT, MOORE, and NICKELL, JUDGES.

MOORE, JUDGE: Arnold Dean Little appeals the Greenup Circuit Court's order denying his motion to set child support arrearage. After a review of the record, we reverse and remand for proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

Arnold Dean Little and Betty Little (now Dalton) were divorced on March 7, 1994. The court awarded custody of the parties' only child Bart Little, now deceased, to Arnold. At all times pertinent to this action, Betty's child support obligation was set by order of the Greenup Circuit Court at \$60.00 per month.

The parties concede that Betty was current on her child support obligation as of April 5, 2000. The only amounts in controversy are those payments due from May 2000 until Betty's obligation terminated on December 25, 2002, Bart's nineteenth birthday. Arnold, who did not seek to enforce any payments until March 31, 2009, testified that he sought enforcement in an attempt to offset any payments due from Betty's share of the distribution from Bart's estate.

A hearing was held on Arnold's motion wherein Betty conceded she owed some child support, but the amount was in dispute. Arnold had kept a ledger of payments received, and Betty introduced a number of cancelled checks for child support, two of which were in dispute.

The Greenup Circuit Court found that, in light of the fact that Arnold's records did not reflect amounts for some of the cancelled checks provided by Betty, Arnold's testimony that he had not received payments was not conclusive. The court further found that Betty's inability to provide complete documentation of all payments made was due to the fact that Arnold waited six and a half years before attempting

to recover any arrearages. Thus, the court determined that child support arrearage could not be established and did not award any amount to Arnold.

Arnold now appeals, contending that (1) the circuit court erred by failing to set an amount owed to him for unpaid child support; and (2) the circuit court erred by ruling that waiting six and a half years to recover arrearages was in error.

STANDARD OF REVIEW

We review the denial of a motion to set a child support arrearage for an abuse of discretion. *See Gibson v. Gibson*, 211 S.W.3d 601, 602 (Ky. App. 2006). Furthermore, Kentucky Civil Rule 52.01 states that “due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” *See also Miller v. Harris*, 320 S.W.3d 138, 141 (Ky. App. 2010).

ANALYSIS

Arnold first argues that the circuit court erred by failing to set an amount owed to him for unpaid child support. The Kentucky Supreme Court has recently spoken on the issue in *Lichtenstein v. Barbanel*, 322 S.W.3d 27 (Ky. 2010). In that case, the Kentucky Supreme Court determined that “once ‘the validity of an order setting child support is established, the non-custodial parent bears the burden of proving that he satisfied the obligation and owes no arrearage.’” *Lichtenstein*, 322 S.W.3d at 32 (quoting *Gibson v. Gibson*, 211 S.W.3d 601, 611 (Ky. App. 1988)). The Court further determined that the circuit court’s failure to determine the amount of arrearage constituted an abuse of discretion. *Id.* at 31.

As previously discussed, the circuit court held that there was no arrearage based upon the fact that the evidence presented by Arnold was inconclusive. The court determined that the evidence was not sufficient to prove that any arrearage existed based upon the fact that Arnold did not submit evidence indicating a credit for payments made for which Betty had submitted cancelled checks. Thus, despite the fact that Betty acknowledged that an arrearage is owed, the court found that Arnold did not present evidence sufficient to prove that an arrearage existed. Based upon these facts, the circuit court abused its discretion in placing the burden upon Arnold to prove that an arrearage is owed. *Lichtenstein*, 322 S.W.3d at 32.

Arnold also argues that the circuit court erred in ruling that waiting six and a half years to recover arrearages was in error. Under KRS¹ 413.090(5), an action to recover unpaid child support may be brought within fifteen years from the date that the cause of action first accrued. “Child support payments become vested when due.” *See Gibson*, 211 S.W.3d at 609. Thus, the cause of action accrues when the child support obligation “becomes due and is unpaid.” *Id.* (quoting *Price v. Price*, 912 S.W.2d 44, 46 (Ky. 1995)). In this case, Arnold is seeking arrears for payments owed from May, 2000 to December, 2002. The fifteen year statute of limitations has not passed, and Arnold is entitled to seek recovery for unpaid child support during that time period.

We defer to the circuit court in its finding of credibility as to the evidence presented regarding the dispute over whether two of the checks presented were

¹ Kentucky Revised Statute.

issued as child support payments. During the hearing, both parties testified as to the possibility of cash payments being made to satisfy Betty's child support obligation. The trial court did not make a finding on this. On remand, likely this will be a credibility determination for the trial court. We are not entitled to substitute our judgment for that of the circuit court's where the court had the best opportunity to ascertain the credibility of the testimony and the weight of the evidence presented. *Clark v. Bd. of Regents of W. Ky. Univ.*, 311 S.W.3d 726, 729 (Ky. App. 2010).

Accordingly, the order of the Greenup Circuit Court is reversed and remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Charles Douglas
Greenup, Kentucky

BRIEF FOR APPELLEE:

Robin Webb
Grayson, Kentucky