STATE OF MICHIGAN

COURT OF APPEALS

JUANNELIOUS MURRAY,

Plaintiff-Appellee/Cross-Appellant,

and

THEOLA MCCUIEN MURRAY,

Intervenor-Cross-Appellant,

v

TANIA MURRAY, a/k/a TANIA JACKSON,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
April 20, 2010

No. 281077
Wayne Circuit Court
Family Division
LC No. 90-017589-DM

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

PER CURIAM.

Defendant appeals by leave granted an October 6, 2006, order reducing a lien for child support arrearages from $85,323.89 to $45,000 which the Office of Child Support (OCS), Central Disbursement Unit placed on a bank account jointly owned by plaintiff and intervenor. Plaintiff and intervenor cross-appeal regarding the same order and a subsequent one entered June 29, 2007, permitting disbursement of $42,616.44 from the bank account to the OCS and also awarding attorney fees to defendant. We affirm in part, reverse in part, and remand.

A. EFFECT OF STATUE OF LIMITATIONS

Defendant argues that the trial court erred by reducing the lien from $85,323.89 to $45,000 because the statute of limitations for enforcing a corresponding amount of the child support arrearage owed to defendant had expired. Specifically, defendant argues the statute of limitations does not preclude recovery of the full amount of arrearage. We disagree and note that the reduced lien was still more than the amount of arrearage that defendant could recover.

When there are no disputed questions of fact, this Court reviews de novo whether a cause of action is barred by the statute of limitations. *Citizens Ins Co v Scholz*, 268 Mich App 659, 662; 709 NW2d 164 (2005).

The relevant statute of limitations is found in MCL 600.5809, which sets a ten-year period of limitation to enforce child support orders. *Rzadkowolski v Pefley*, 237 Mich App 405, 409-410; 603 NW2d 646 (1999). Before 1997, "the ten-year period of limitation began to run against each [child support] payment when that payment became due." *Id.* 1996 PA 275 amended the statute effective January 1, 1997, to provide that the ten-year period to enforce a support order starts to run the day the *last* child support payment is due. *Rzadkowolski*, 237 Mich App at 411. The amended statute applies prospectively only so the applicable statute of limitations is that which was in effect at the time the cause of action arose. *Id.*

In this case, the oldest child, Dajuan, turned 18 years of age on October 24, 1996, and the youngest child, Juannelious, Jr., turned 18 years of age on March 29, 1998. Defendant, relying on *Wayne Co Soc Services Director v Yates*, 261 Mich App 152; 681 NW2d 5 (2004), claims that when multiple children are involved in a single support order, the statute of limitation that was in effect when the youngest child turned 18 controls for both children. Defendant maintains that since the amended statute was in effect when the youngest child turned 18, it controls enforcement of support ordered for both children, thereby extending the statute of limitations to ten years after the youngest child turned 18. Plaintiff, however, argues that such a view would give 1996 PA 275 an impermissible, retroactive effect. We agree with this latter view.

First, defendant's reliance on *Yates* is misplaced. The *Yates* Court stated in a footnote, "However, this Court has held that the amendment does not apply retroactively and that the pertinent section of the statute that applies is determined by the date the youngest child turned eighteen, in this case 1990, before the statute was amended." *Yates*, 261 Mich App at 154 n 2 (citing *Rzadkowolski*, 237 Mich App at 411). In *Yates*, the two children that were the subject of the child support order both turned 18 before the amendment took effect. The *Yates* Court was not making a pronouncement that the time the youngest child turns 18 *always* dictates which version of the statue of limitations controls. It was simply stating, albeit in not the clearest language, that because the youngest child turned 18 before 1997, the statute of limitations applicable to the child support arrearages regarding *both* children was MCL 600.5809(3) rather than subsection 4, which was added by 1996 PA 275. Any other view would result in a direct conflict with the principle announced in the quoted *Yates* footnote: the amended statute of limitation is not to be applied retroactively. See also *Rzadkowolski*, 237 Mich App at 411.

Guided by the principle that 1996 PA 275 applies prospectively only, we conclude that there are two different "groups" of child support arrears at issue here: those for which payments were due before January 1, 1997, and those for which payments were due after January 1, 1997. The earlier child support arrears are governed by MCL 600.5809(3) before it was amended by 1996 PA 275, resulting in each pre-1997 missed support payment's triggering its own, separate ten-year limitations period. The second group of payments consists of all the missed payments due after January 1, 1997. This second group is governed by MCL 600.5809(4), which provides that the ten-year limitations period starts to run only after the last payment from that group was due.

Applying the analysis described above to the facts of the present case, we conclude it is clear that because Dajuan turned 18 before 1997, a claim for each support payment for Dajuan not paid when due is governed by a separate ten-year limitations period.

The missed payments for Juannelious, Jr. spanned both before and after January 1, 1997. All pre-1997 missed payments triggered individual ten-year limitations periods. All payments due after January 1, 1997, triggered a single ten-year period that did not begin to run until the last payment was due, which presumably occurred when Juannelious, Jr. turned 18 on March 29, 1998. Consequently, the child support arrears accruing after January 1, 1997, were subject to a limitations period that did not expire until March 29, 2008.

Accordingly, considering the OCS's placing a lien on the bank account on September 5, 2006, as bringing an "action" under MCL 600.5809, the only child support payments accruing before 1997 that are enforceable under the old statute of limitations are the ones that accrued after September 5, 1996. All of the unpaid child support payments that were due after January 1, 1997, were within the amended limitations period ending March 29, 2008, and recoverable. Therefore, on remand, the trial court must determine the amount due from all the payments that accrued after September 5, 1996, for both children and adjust the lien to match this amount.

B. NOTICE FOR LIEN

Plaintiff argues that he was denied his right to due process because the OCS failed to provide notice as required by law. We decline to address this unpreserved issue.

Plaintiff raises his due process claim for the first time here on appeal. This Court will review unpreserved constitutional issues where there is no question of fact and it is in the interest of justice to do so. *In re RFF*, 242 Mich App 188, 204; 617 NW2d 745 (2000). Here, the issue was not raised below; consequently, the record does not contain all facts necessary to address this issue. Therefore, we decline to consider this unpreserved issue.

C. AWARD OF ATTORNEY FEES

Plaintiff also argues that the court abused its discretion when it awarded defendant attorney fees. We disagree.

A trial court's decision regarding the granting of attorney fees is reviewed for an abuse of discretion. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). The trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Id*.

Michigan follows the "American rule" under which attorney fees are not recoverable unless a statute, court rule, or common-law exception exists. *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004). MCR 3.206(C), however, provides:

> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.
>
> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that

> (a) the party is unable to bear the expense of the action, and that the other party is able to pay, or
>
> (b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

This Court reviews for clear error any findings of fact underlying an award of attorney fees. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 296; 769 NW2d 234 (2009). We will find clear error when, although there is evidence to support it, the entire record creates a definite and firm conviction that a mistake was made." *Id.*

Here, the trial court found that MCR 3.206(C)(2)(b) was implicated because it determined that defendant's costs in this proceeding were directly attributable to plaintiff's failing to comply with a previous child support order when plaintiff had the means to comply. Plaintiff had paid nothing on the child support obligation, even though he later received a large settlement of $230,000, of which 50 percent, or $115,000, was presumably his. Patently, this $115,000 share was sufficient to meet his $85,000 arrearage.

Plaintiff contends, however, that defendant brought the attorney fees on herself by bringing "her action despite a clear bar due to the statue of limitations." As discussed, *supra*, plaintiff's premise that the statute of limitations acted as a complete bar is incorrect. We do not have a definite and firm conviction on the basis of this record that the trial court's findings were a mistake. If plaintiff had complied with the child support order when he had the means to do so, then this litigation would not have been unnecessary. Accordingly, the trial court did not abuse its discretion when it awarded attorney fees to defendant.

D. LIEN ON JOINT ACCOUNT

Intervenor argues that attaching a lien to the joint bank account was erroneous because at the time of attachment, the funds in the account were the sole property of intervenor. We disagree.

There is a rebuttable presumption of equal ownership in joint accounts, which means that plaintiff and intervenor are presumed to be equal contributors to the account, and each is presumed to own 50 percent of the joint account. *Danielson v Lazoski*, 209 Mich App 623, 625-626; 531 NW2d 799 (1995). The facts show that the account was created with a joint deposit of nearly $230,000. Intervenor argues that this means that initially she and plaintiff each held an equal $115,000 interest in the account. But intervenor also argues that she effectively rebutted the presumption of equal ownership at the time the lien was levied by showing that plaintiff withdrew over $122,000 of the $230,000 funds in the account. Thus, intervenor argues that because she never made any withdrawals from the account, the funds remaining at the time the lien was served were hers and not subject to execution to satisfy plaintiff's debt.

Plaintiff testified that he withdrew various amounts from the joint account: $101,110 on July 31, 2006, $9,338.95 on August 31, 2006, $44,599.09 on September 18, 2006, and $40,000 on October 11, 2006. These withdrawals totaled $195,048.04. Although plaintiff also testified

that he spent some of the money on living expenses, he added that he does not remember how all the money was spent, or if he even spent it.

Based on the testimony, we conclude the trial court did not clearly err in finding that it was impossible to specify how the money was spent and for whose benefit it was spent. Because plaintiff was not able to recall how nearly $200,000 was spent, the court could not reasonably have reached any other conclusion. The money could have been used for joint purposes, such as business purposes, since the fund was created as a result of plaintiff and intervenor's maintaining a business.

As a result, the trial court presumed that plaintiff and intervenor each owned 50 percent of the $85,232.89 in the account at the time the lien was served.[1] Consequently, plaintiff held an interest in the account amounting to $42,616.44. Though the evidence introduced at the March 15, 2007, hearing and the October 6, 2006, hearing raise questions as to the amount that was in the account at the time the lien was placed, the finding that plaintiff held a 50 percent interest in the account is not clearly erroneous. Plaintiff's interest ranged anywhere from $42,616.44 up to $70,000. Therefore, since intervenor was not the sole owner of the account funds at the time of levy, there was no error in attaching the lien to the bank account, and intervenor's claim fails.

We affirm in part, reverse in part, and remand for recalculation consistent with this opinion of the amount of child support arrears not barred by the statute of limitations. We do not retain jurisdiction. No party having prevailed in full, taxable costs under MCR 7.219 are not awarded.

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher

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[1] The trial court was going with the premise that the original lien captured all of the funds of the account. We note, however, that at the October 6, 2006, hearing, counsel for plaintiff stated that there was approximately $130,000 to $140,000 in the account at the time the lien was placed. This would correlate to plaintiff's having up to a $70,000 interest in the account. We further note that if one takes the original $230,000 balance and subtracts the withdrawals that plaintiff made before the lien, approximately $119,500 remained in the account, without considering any gains due to interest ($230,000-$101,110-$9,339 = $119,551). This would correlate to plaintiff's having nearly a $60,000 interest in the account.