ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, JUDGE

DIVISION II

CA06-1451

JUNE 20, 2007

STATE OF ARKANSAS, OFFICE of CHILD SUPPORT ENFORCEMENT APPELLANT	APPEAL FROM THE POLK COUNTY CIRCUIT COURT [NO. DR96-316]
V.	HON. J.W. LOONEY, JUDGE
TYALEAH M. LEACH APPELLEE	REVERSED AND REMANDED

Appellant State of Arkansas, Office of Child Support Enforcement, appeals from the Polk County Circuit Court's decision that retroactively modified appellee Tyaleah Leach's child-support obligation. On appeal, appellant argues that the circuit court erred in retroactively abating child-support accrual from July 18, 2001, through December 31, 2004. We reverse and remand.

Appellee and Darrell E. Page were married on April 8, 1995, and they divorced on February 5, 1997. They had one child, a son K.P., D/O/B: November 29, 1994, and Mr. Page was granted full custody at the time of the divorce. On February 10, 1999, appellant intervened and filed a motion in the matter, and on May 3, 1999, the circuit court entered a decree requiring, among other things, appellee to pay twenty-four dollars per week in child-

support payments. On May 24, 2000, appellant filed a motion for citation regarding appellee's non-payment of court-ordered child support. Copies of the motion and notice of hearing were served on appellee via first-class mail at her then current address in Gasden, Alabama. On August 16, 2000, appellee and her attorney, Orvin Foster, appeared before the circuit court on the motion, and on August 29, 2000, the circuit court entered an order that temporarily abated appellee's weekly child-support obligation because of her inability to work while caring for her critically ill child.[1] The order required appellee to provide appellant with documentation of the child's medical condition, and further provided that "this cause may be reviewed after a six-month period from the filing of the order herein, and notice of said hearing may be served upon [appellee] by first class mail."

On April 25, 2001, and again on May 16, 2001, notice of a review hearing on the matter was mailed, via first-class mail, to appellee's attorney, Mr. Foster, in an attempt to serve notice on appellee. Apparently, by that time, appellee had taken up residence in Rainbow City, Alabama, unbeknownst to either Mr. Foster, appellant, or the relevant court personnel, and she never received notice of the review hearing. The review hearing was held on July 18, 2001, and appellee was not present. There is no transcript of that hearing in the record, and there is no evidence as to whether or not appellee's attorney was present. On August 7,

[1]The child was born with brain damage, had a tracheotomy and a feeding tube, and required constant care from appellee to the point that she was unable to work. He passed away on April 7, 2004.

2001, the circuit court entered an order reinstating appellee's child-support obligation and, among other things, relieving Mr. Foster as her counsel of record.[2]

The next pleading in the record is a subsequent motion for citation filed by appellant on March 17, 2006, requesting that appellee be ordered to pay an arrearage of child-support payments in the amount of $7,704, as of the last day of February 2006. That motion was served by certified mail, restricted delivery, return receipt requested, to appellee at an address in Mena, Arkansas, where she stayed with friends from time to time after moving to Oklahoma in 2004 after the death of her child. On May 18, 2006, an order to appear and show cause was entered by the circuit court, and served on appellee through her previous attorney, Mr. Foster. A hearing on the matter was ultimately held on July 10, 2006, with both appellee and Mr. Foster in attendance, and on September 21, 2006, the circuit court entered an order abating retroactively the accrued child-support between July 18, 2001, and the end of December 2004, leaving a balance due as of July 10, 2006, in the amount of $3,345. The circuit court based the abatement on the reasoning that if appellee had not failed to appear at the previous hearing on July 18, 2001, the court would have continued the temporary abatement, and accordingly, he did so at that point in an attempt to balance the equities. Appellant filed a timely notice of appeal on October 10, 2006.

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[2] The circuit judge and Mr. Foster discussed this issue at the final hearing and neither could remember whether Mr. Foster filed a motion to be relieved, verbally expressed his request during court, or asked appellant to add the provision in the order, but Mr. Foster indicated that he likely sought to be relieved as counsel because he had been unable to contact appellee. There is no supporting documentation on this matter in the record.

Our standard of review for an appeal from a child-support order is de novo on the record, and we will not reverse a finding of fact by the circuit court unless it is clearly erroneous. *Tucker v. Office of Child Support Enforcem't*, 368 Ark. 481, __ S.W.3d __ (2007). A finding is clearly erroneous when the reviewing court, on the entire evidence, is left with a definite and firm conviction that a mistake has been made. *Id.* We give due deference to the trial court's superior position to determine the credibility of the witnesses and the weight to be given their testimony. *Id.* In a child-support determination, the amount of child support lies within the sound discretion of the trial court, and the lower court's findings will not be reversed absent an abuse of discretion. *Id.* However, a trial court's conclusions of law are given no deference on appeal. *Id.*

Arkansas Code Annotated sections 9-12-314 (b), (c) and 9-14-234 (b), (c) are identical and state:

> (b) Any decree, judgment, or order which contains a provision for the payment of money for the support and care of any child or children through the registry of the court or the Arkansas child support clearinghouse shall be final judgment subject to writ of garnishment or execution as to any installment or payment of money which has accrued until the time either party moves through proper motion filed with the court and served on the other party to set aside, alter, or modify the decree, judgment, or order.
>
> (c) The court may not set aside, alter, or modify any decree, judgment, or order which has accrued unpaid support prior to the filing of the motion. However, the court may offset against future support to be paid those amounts accruing during time periods other than reasonable visitation in which the noncustodial parent had physical custody of the child with the knowledge and consent of the custodial parent.

Both our court and the supreme court have held that these provisions prohibit the modification of a child-support order for a period prior to the filing of a motion requesting

a modification. *See Burnett v. Burnett*, 313 Ark. 599, 855 S.W.2d 952 (1993); *Martin v. Martin*, 79 Ark. App. 309, 87 S.W.3d 817 (2002).

Appellant admits that this court has recognized an equitable estoppel exception to the prohibition against retroactive modification. *See Taylor v. Payne*, 95 Ark. App. 185, __ S.W.3d __ (2006); *Office of Child Support Enforcem't v. King*, 81 Ark. App. 190, 100 S.W.3d 95 (2003); *Barnes v. Morrow*, 73 Ark. App. 312, 43 S.W.3d 183 (2001); *Ramsey v. Ramsey*, 43 Ark. App. 91, 861 S.W.2d 313 (1993); *Roark v. Roark*, 34 Ark. App. 250, 809 S.W.2d 822 (1991). However, appellant contends that appellee neither pled nor proved that Mr. Page had taken any action that would be the basis of an equitable estoppel exception, which has been applied only where a custodial parent has taken some action that would have led the paying-non-custodial parent to believe that support payments were no longer expected or required. *See Martin*, *supra*. Appellant asserts that this was not the basis of the circuit court's ruling, which was based purely on speculation as to what the then-sitting circuit judge would have done had appellee appeared for the July 18, 2001, hearing.

Appellee contends, and we agree, that the statutes to which appellant refers are not applicable in this particular situation because the August 7, 2001, order reinstating her child-support obligation was void from its entry. On April 25, 2001, appellant filed a notice of hearing and attempted to notify appellee through first-class mail sent to her attorney, and repeated the same notification process on May 15, 2001. There is no evidence before us that service by first-class mail was ever sent directly to appellee, as specifically allowed in the order,

or that she ever had notice of the hearing, was represented there by counsel, filed any type of responsive pleading, or was in any manner properly before the court.

At the June 10, 2006, hearing, appellee's first appearance before the court since the August 16, 2000, hearing that resulted in the original abatement of child support, appellee's attorney raised the issue of proper notice, which prompted a conversation between the circuit judge and the parties' attorneys as to whether Mr. Foster was still the attorney of record for appellee at the time in question, whether it was proper to notify appellee of the review hearing by notifying appellee's attorney via first-class mail, and the lack of recollection and information between all of them as to how, why, and when Mr. Foster requested to be relieved as attorney of record. Additionally, the following colloquy occurred between appellee and the circuit judge:

> COURT: I need to ask you a question. Where were you living in 2001?
>
> MS. LEACH: I was living at Cambridge Court - Cambridge Court.
>
> COURT: Where might that be?
>
> MS. LEACH: In Alabama, it's a disability place for people that have disabilities. I lived there because of my son.
>
> COURT: On August 29th you were living in Alabama?
>
> MS. LEACH: Yes, sir.
>
> COURT: Well, now, I'm just kind of curious. 506 Herzberg Circle.
>
> MS. LEACH: Okay, that's where I was living when I was pregnant with-
>
> COURT: Ma'am, I don't need to know those things.
>
> MS. LEACH: Oh.

COURT: I just need to know-

MS. LEACH: Yes.

COURT: The answers to the questions. Well, apparently you got a letter from Mr. Woodville.

MS. LEACH: That was the last time I received anything in 2000.

COURT: Well, I presume you employed Mr. Foster to represent you.

MS. LEACH: Yes.

COURT: You didn't tell Mr. Foster where you lived?

MS. LEACH: Yes, yes, I did. But, then after I received this abandonment or whatever that I didn't have to pay child support, I didn't know that I was going to have to do anything else.

COURT: You didn't read it?

MS. LEACH: Yes, yes, I read it, but my - I had an attorney in Alabama to send papers to Mr. Woodville stating everything. From my understanding offrom [sic] they said, I didn't have to do anything else.

COURT: Well, that order dated August 29, 2000 that the Defendant's current child support of $24 per week is hereby temporarily - do you know what temporary means?

MS. LEACH: Yes, sir.

COURT: Abated for a period of six months. Now you got that, didn't you?

MS. LEACH: That part I did, yes.

COURT: Yes.

MS. LEACH: But, I never received anything after that.

COURT: Oh, what were you supposed to have received after that?

MS. LEACH: I don't know. I didn't know.

COURT: Well, you knew it was stopped for six months, right?

MS. LEACH: Yes.

COURT: You didn't think it was stopped forever, did you?

MS. LEACH: Yes, I did.

COURT: You did?

MS. LEACH: Yes.

COURT: You thought six months meant-

MS. LEACH: I thought after the six months they were going to send me more stuff and tell me what I was supposed to do and I never received anything.

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COURT: Well, I believe that Mr. Foster and I - I can't help but believe that he tried to make an attempt - but it looks like you moved after you hired Mr. Foster.

MS. LEACH: Yes, sir.

COURT: Did you tell him where you moved to?

MS. LEACH: I think he knew that I was at Cambridge Courts.

COURT: How would he know that?

MS. LEACH: I had told him.

COURT: Well, I believe you got notice and I find it hard to accept your testimony that you thought six months meant forever.

MS. LEACH: I didn't quite understand it.

COURT: But you had a lawyer down there, why didn't you ask your lawyer? Did your lawyer tell you six months meant forever?

MS. LEACH: He told me that he would take care of it.

COURT: Yes, well, he's not here to defend himself.

Rule 5(b)(1) of the Arkansas Rules of Civil Procedure provides in part that whenever service is required or permitted to be made upon a party represented by an attorney, the service shall be upon the attorney, except that service shall be upon the party if the court so orders. The record is devoid of any evidence that appellee was ever sent copies of notices of hearing on April 7, 2001, or May 15, 2001, via first-class mail, in compliance with the specific allowances set out in the circuit court's order entered on August 29, 2000. Additionally, even if service upon appellee's attorney had been proper under these circumstances, there is insufficient evidence before us for this court to make a determination as to whether Mr. Foster represented appellee at the time in question. There is simply no evidence that appellee received any type of notice, written or otherwise, from Mr. Foster, appellant's counsel, or the circuit court informing her of another proceeding in the case. After the hearing in 2000, appellee received a copy of the first order that temporarily abated her support payments and she had an attorney in Alabama send the required information to appellant's attorney regarding her son's medical condition and pending lawsuits; however, the next communication she received on the case apparently was not until April 2006.

The standard of review reflects an extremely heavy burden upon an entity who attempts service of process and notice of impending default. *Meeks v. Stevens*, 301 Ark. 464, 785 S.W.2d 18 (1990). Our supreme court has stated that the statutory service requirements, being in derogation of common law rights, must be strictly construed, and compliance with them must be exact; the same reasoning applies to service requirements imposed by court

rules. *See Shotzman v. Berumen*, 363 Ark. 215, 213 S.W.3d 13 (2005); *Smith v. Sidney Moncrief Pontiac Buick GMC Co.*, 353 Ark. 701, 120 S.W.3d 525 (2003). The only proof of service offered with respect to the notice of the hearing that resulted in the reinstatement of child support were two certificates of service showing that appellant had notified Mr. Foster, on behalf of appellee, of the scheduled review hearing. Appellee argues that neither she nor Mr. Foster had agreed that he could accept service on her behalf, and the question remains as to whether he was representing her at the time in question. While this case does not deal with the initial service at the beginning of the case, but rather notice of a subsequent review hearing, the August 29, 2000, court order specifically stated that "notice of [a review] hearing may be served upon the [appellee] by First Class Mail." Appellant failed to obtain notice upon appellee.

Accordingly, appellee contends, and we agree, that the circuit court was not obligated to enforce the support provisions contained in the August 7, 2001, order, as it was void because she was not properly before the court. We reverse the circuit court's September 21, 2006, order in its entirety, and remand for further proceedings on the issue of appellee's child-support obligation subsequent to the August 29, 2000, order that originally abated her weekly child-support obligation on a temporary basis.

Reversed and remanded.

MARSHALL and MILLER, JJ., agree.