RENDERED: March 13, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-1415-MR

HORACE EDWARD THRONEBERRY, JR. APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MASON L. TRENAMAN, JUDGE
CIVIL ACTION NO. 78-CI-009570

DEBORAH K. THRONEBERRY APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: COMBS, GUIDUGLI and JOHNSON, Judges.

GUIDUGLI, JUDGE. Appellant, Horace Edward Throneberry, Jr., (Horace) appeals a Jefferson Circuit Court order which required him to pay a child support arrearage of $712.56 and unpaid medical bills and insurance premiums of $1,009 despite his having a voluntary overpayment in child support of over $2,200. Having thoroughly reviewed this matter, we affirm.

The parties to this action, Horace and Deborah K. Throneberry (Deborah), were divorced by decree entered on May 9, 1979. There was one child born of the marriage. That child, Carla Renae Throneberry, (Carla Renae), was born on August 31, 1978, and graduated from high school in June, 1996, and became eighteen on August 31, 1996. At the time of the dissolution of

marriage, the parties had entered into a property settlement agreement which was incorporated into the decree. Issues addressed in the settlement agreement, which are the basis for this appeal, are child support, medical expenses, and hospitalization (insurance) coverage. Specifically in the settlement agreement the parties agreed that Horace would pay $40 per week for the support and maintenance of Carla Renae until she reached the age of majority and that Horace agreed to maintain and keep in force at all times a hospitalization plan for the benefit of Carla Renae and to be fully responsible for any medical and dental expenses not covered by the hospitalization plan.

Sometime in 1987, criminal prosecution for non-support was undertaken by Deborah based upon child support arrearage of over $5,000.[1] According to the parties, Horace, based upon a court order emanating from the criminal prosecution, was ordered to pay regular child support of $40 per week plus an additional $20 per week towards the arrearage until said arrearage was paid in full. Horace did make the court ordered payments and on December 17, 1993, had fully paid the arrearage. Horace thereafter continued to pay the extra $20 per week. Horace claims that the payments were made so that, in the future, if he was unable to work he would not again be prosecuted for non-support. Deborah states that there was no agreement or court

[1] There is nothing in the record concerning the child support arrearage or the criminal prosecution or any court orders relating to the criminal prosecution.

order that the additional payments were to be an advancement of child support to be credited towards future obligations and that the extra money was used for the benefit of Carla Renae's necessities, such as food, clothing and shelter.

On November 28, 1995, Deborah filed motions in the dissolution action seeking an increase in child support to comply with the Kentucky Child Support Guideline (KRS 403.212), payment of past due medical and dental expenses, proof that Horace maintained a college fund for Carla Renae and that he kept the daughter listed as beneficiary of his life insurance policy. The matter was referred to the Domestic Relations Commissioner (DRC) who, after a hearing, entered his report on February 15, 1996. Each party filed exceptions to the report and the trial judge, after reviewing the exceptions and conducting a hearing, entered his order on April 5, 1996. From this order Horace appeals.

There is no dispute that Horace, by continuing to pay $20 per week from December 17, 1993, until April 5, 1996, had voluntarily overpaid his child support obligation by $2,200. However, the trial court's order declined to give Horace credit for the overpayment in child support. Relying on Clay v. Clay, Ky. App., 707 S.W.2d 352 (1986), the court found that Horace was not entitled to a set-off in any fashion against future child support. The court also found that the extra $20 per week had been used for the care, nurture and support of the minor child and allowing a set-off would in effect "take food out of the mouths of children" and be contrary to public policy.

Additionally, the court order increased the child support from $40 per week to $89.69 retroactive to the date of the filing of the motion for an increase. As to the unpaid medical and dental expenses, the trial court awarded a common law judgment against Horace in the amount of $1,009. This figure was determined by adding $809 for 1992 health insurance reimbursement, $114 for medical expense reimbursement for the calendar year 1995, and $86 for dental health insurance reimbursement for the year 1995. The other provisions of the trial court order relative to Deborah's original motions are not before this Court and, as such, need not be addressed.

On appeal, Horace contends that the trial court erred when it refused to allow him a credit or set-off for the advance child support payments he made. Horace argues that the overpayment of $2,200 should be credited to the child support increase and/or medical/dental expenses and thus he would owe nothing additional and in fact would have an ending overpayment when Carla Renae turned eighteen ($2,200 minus $712.56 and $1,009). Horace also claims that the trial court misconstrued Clay, supra, and that to allow the trial court's order would unjustly enrich Deborah and be unfair to Horace.

KRS 403.213 sets forth the criteria for modification of orders of child support. KRS 403.213(1) states that "[t]he provisions of any decree respecting child support may be modified only as to installments accruing subsequent to the filing of the motion for modification and only upon a showing of a material

change of circumstances that is substantial and continuing." Since neither party contests the increase nor the amount that issue is not before us. However, it is clear from the statute that the child support increase became effective on the date the motion was filed. Pretot v. Pretot, Ky., 905 S.W.2d 868 (1995); Price v. Price, Ky., 912 S.W.2d 44 (1995). As to appellant's argument that the lower court's order was unfair and that appellee is unjustly enriched, that simply is not true. The parties never entered into any additional agreements after the original settlement agreement of 1979 and Horace never brought the issue back to court for modification or credit. As stated in Price, supra, at 46:

> In the case before us, it is undisputed that there was no agreement between the parents as to modification of child support. We will not reach into this dispute and find an implicit agreement.
>
> Appellee urges that equitable principles require the courts to relieve him of the court ordered child support because he, in fact, supported his child while Child lived in Father's home. We understand that "equity provides relief where the law does not furnish a remedy." Heisley v. Heisley, Ky. App., 676 S.W.2d 477, 478 (1984). Here, appellee's recourse was at law, by the filing of a motion for modification of the child support decree or at least coming to an agreement with the custodial parent when circumstances warranted. Moreover, appellee took his child into his home in an attempt to correct some problems Child was having. The support given, while admirable, is the support of a parent.

Price, Id. at 46.

Later in Price, the majority concludes that:

* * * *

> If a party wishes to contribute to the support of his children in some manner other than that in which a court has directed, the court is always open to a timely application for modification. If he does it without such permission it is not incumbent on the court to give him any credit for it. (citations omitted).

Price, supra at 47. And finally, Justice Wintersheimer, in his dissent, admits that:

> This case teaches a very harsh lesson to those who are litigants in a domestic relations matter. The sad conclusion that must be drawn from such a situation is that it is always necessary to obtain such modification in writing and with the specific approval of the circuit court. It is a primary but hard lesson that voluntary payments and even beneficial conduct are simply that, only voluntary, and clearly have no legal support.

Price, Id. at 46 and 47.

Finally, Horace alleges that the trial court misapplied Clay, supra, in that the overpayment should have been applied to the increased child support or, at the very least, credited against his outstanding medical, dental and hospitalization arrearage. We can not agree nor does the record support such a claim. First, as to the increase in child support, Horace was credited with the additional $20 per week payment made from the date the child support was increased. When the trial court found, based upon the guidelines, that the support should increase from $40 to $89.69 retroactive to the date of filing, Horace was credited with paying $60 per week. Thus, the child support arrearage was determined to be the difference in the ordered support ($89.69 per week) less the actual payments ($60 per week) multiplied by the number of weeks (24) owed for the total arrearage of $712.56. Based upon statutes and case law, the trial court properly calculated the arrearage and there was no error. Clay, supra; Price, supra; KRS 403.213.

As to applying the overpayment of the medical expenses incurred by the custodial parent, again, Horace misinterprets Clay. In Clay, the Court relying on the Maryland case of Rand v. Rand, 40 Md. App. 550, 392 A.2d 1149 (1978), states that "restitution or recoupment of excess child support is inappropriate unless there exists an accumulation of benefits not consumed for support." Clay, supra, at 354. In the case sub judice, the trial court made a specific finding at pages 5 and 6 of its order that "[t]he court hereby finds that Mrs. Throneberry utilized the additional $20.00 per week that was paid by Mr. Throneberry since December of 1993 for the care, nurture, and support of the minor child of the parties. Therefore, those amounts are not recoverable under Clay v. Clay, 707 S.W.2d 352 (Ky. Ct. App. 1986) [sic] and its related lines of cases."

Appellant has not presented or pointed this Court to anything in the record which would contradict this finding nor would lead us to believe that the court's finding was clearly erroneous or an abuse of discretion. In fact, the trial court substantially reduced the amount of arrearage sought by Deborah and actually owed by Horace because she did not present the bills in a more timely fashion.

For the foregoing reasons, the Jefferson Circuit Court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Fox DeMoisey
Louisville, KY

BRIEF FOR APPELLEE:

Robert G. Lohman, Jr.
Louisville, KY