RENDERED: April 27, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001410-MR

DEBBIE PFANNENSCHMIDT (NOW RICHARDSON) AND ALLEN K. GAILOR — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 88-CI-000706

JOHN M. PFANNENSCHMIDT — APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: HUDDLESTON, KNOPF, AND MILLER, JUDGES.

KNOPF, JUDGE: Debbie Richardson (formerly Pfannenschmidt) appeals from December 7, 1998, and May 18, 1999, orders of the Jefferson Family Court denying her motion for child-support arrearages allegedly due from her former husband, John Pfannenschmidt. Debbie's claim is based on a 1992 ruling of this Court that John's support obligation be recalculated to reflect the support of two children rather than one. The trial court ruled that Debbie's delay in asserting her right precluded the retroactive application of this Court's 1992 order. Persuaded that claims for child support generally are not barred by the claimant's delay, we reverse and remand.

In October 1990, a decree of dissolution ended the Pfannenschmidts' marriage of nearly eleven years. The couple had had two children. The decree awarded custody of the children to Debbie and ordered John to pay child support in the amount of $826.00 per month. In April 1991, Debbie and John filed competing motions to modify John's support obligation. The trial court granted John's motion to reduce the obligation, but, by awarding the amount of support stipulated in the guidelines[1] for one child ($418.00) instead of two, it entered a larger reduction than it should have. Debbie appealed, and in Pfannenschmidt v. Pfannenschmidt,[2] this Court affirmed the judgment in all other respects, but remanded so that the erroneous award of child support could be recalculated.

The mandate was filed in the circuit court on October 23, 1992. Debbie promptly moved for an order giving effect to the Court of Appeals' judgment, but before the trial court could act, she remanded the motion, her counsel explaining in a letter to the court that the parties were "endeavoring to settle all matters between them." "If the parties cannot fully agree to the balance of claims made," counsel's letter continued, "they will motion the court." Although Debbie denies it, John claims that the parties did in fact agree that he would pay some but not all of the increase that would have resulted from a recalculation.

In any event, Debbie did not seek implementation of this Court's order until September 1998, nearly six years later.

---

[1]KRS 403.212.

[2]No. 91-CA-001803-MR (rendered 10/2/92; final 10/23/92).

At that time, she sought the difference (allegedly about $2,000.00) between what John had actually paid from April 1991 to September 1998 and what he would have owed during that period had his obligation been recalculated as ordered. In denying Debbie's motion, the court relied on the general rule that child-support orders are not to be modified retroactively. Although it is true that modified support orders can be and usually are given effect as of the date of the motion raising the issue, the court believed that in this case counsel's 1992 letter removing the matter from the active docket and the substantial delay following that letter had broken the connection with the April 1991 motions. Debbie's 1998 motion raised what was essentially a new matter, according to the court, for which there could only be prospective relief. Apparently prospective relief was not appropriate either, for the court noted that by an earlier order it had abated John's support obligation. In effect, the trial court ruled that this Court's 1992 mandate has become moot. Debbie maintains that the trial court erred by refusing to correct John's support obligation as of April 1991 and by failing to measure his arrearages from that time until September 1998 accordingly. We agree.

It is well established in Kentucky that the parties to a child-support order may modify its provisions (prospectively) by private agreement, without the intervention of a court, but they do so at some risk. A court will enforce such a private agreement between parents if, but only if, it meets certain requirements. The agreement must exist, of course, and its

existence and terms must be proven with reasonable certainty. It must be fair and equitable in the circumstances. And there must be a reasonable likelihood that it would have been approved by a court if, at the time it was made, it had been the basis of a proper motion to modify the existing order.[3] If a court determines that an alleged private agreement modifying a support order either does not exist or is otherwise unenforceable, an obligor under the order will be held to the order's terms,[4] and this is so regardless of how long (short of the fifteen-year statute of limitations) the obligee challenging the agreement has acquiesced in the purported modification. A custodian's laches has been held not to bar the assertion of what is primarily the child's right to support.[5]

John maintains, and the trial court found, that, in November 1992, he and Debbie agreed to change his support obligation from the $418.00 per month the trial court had erroneously ordered to $519.00 or $520.00 per month. There is no dispute that this amount is less than his obligation would have been had it been recalculated under the guidelines as this Court had ordered. There is also no dispute, apparently, that John fulfilled this modified obligation. Debbie denies, however, that the parties truly agreed to this modification, and much of her

---

[3]Price v. Price, Ky., 912 S.W.2d 44 (1995); Mauk v. Mauk, Ky.App., 873 S.W.2d 213 (1994); Whicker v. Whicker, Ky.App., 711 S.W.2d 857 (1986).

[4]Price v. Price, *supra,* Whicker v. Whicker, *supra.*

[5]Holmes v. Burke, Ky., 462 S.W.2d 915 (1971); Heisley v. Heisley, Ky. App., 676 S.W.2d 477 (1984).

present argument to this Court concerns what she believes was the trial court's premature finding--without benefit of an evidentiary hearing--that an agreement existed. Although we agree with Debbie that an evidentiary hearing would be necessary if this issue were material, it turns out that it is not. For though the court found that an agreement existed, it also found that the agreement cannot be enforced. The agreement was unfair, the court found, and unlikely to have been approved had there been a proper motion to modify. John has not challenged these findings by cross-appeal. Even if the agreement existed, therefore, it does not provide the measure of John's obligation and does not shield John from Debbie's claim. The trial court's error, if any, in disallowing discovery and the introduction of evidence on the issue of the agreement's existence was therefore harmless.

Under the authorities cited above, the fact that the purported agreement is invalid means that John's obligation is what it would have been in the absence of the agreement. But what obligation was that? Technically, an appellate court's mandate ordering the modification of a judgment is not self-executing.

> [I]n a case where the mandate (based on the opinion) directs some additional, corrective action to be taken by the lower court there is **no** final determination of the rights of the parties [unless] and until the proper judgments, order, etc., are prepared, signed and filed of record in the lower court. If anything remains to be done following the

> directive of the mandate, the litigation is incomplete.[6]

In the absence of a new judgment giving effect to this Court's mandate, therefore, the mandate itself does not alter John's obligation from the incorrectly determined $418.00 per month. John maintains, moreover, and the trial held, that Debbie's delay in moving for a new judgment bars her from now having John's obligation corrected retroactively. We disagree.

Against the trial court's conclusion, Debbie argues that, because a child-support modification order is typically deemed effective as of the date of the motion giving rise to it, the corrected modification of John's obligation, once entered, can and should be given effect as of the April 1991 motions to modify support. We agree. Technically, perhaps, the obligation that preceded John and Debbie's agreement and that revived once that agreement was declared invalid is the erroneous one for $418.00 per month. Nevertheless, the obligation that in fact prompted the agreement, and the one that should be revived by the agreement's failure, is the obligation implicit in the mandate from this Court. That mandate is still effective, and we agree with Debbie that, despite her delay, it relates back to April 1991.

In so ruling, we are mindful that a party is free to settle or abandon a claim at any time in the litigation, even after appeal.[7] Debbie has been found not to have settled hers,

---

[6]Begley v. Vogler, Ky., 612 S.W.2d 339, 341 (1981) (emphasis in the original).

[7]Jones v. Conner, Ky. App., 915 S.W.2d 756 (1996).

however, and we are not persuaded that she abandoned it. We do not condone Debbie's lengthy delay in seeking to have this Court's order implemented, but, as noted above, courts have been extremely reluctant to find that a custodial parent has abandoned his or her child's right to support.

It is also true, as illustrated by Duvall v. Duvall,[8] that a party's failure to advance the litigation in a timely manner can, in some instances, foreclose a right gained on appeal. Yet unlike Duvall, in which the respondent died not long after the appellate court rendered its judgment, and the petitioner failed to revive the action against the respondent's estate within the strict time limitations of the revivor statutes,[9] this case does not involve the clear breach of a rule. Debbie's dilatoriness does not seem to have violated any specific time limit.

There are, of course, general time limits as well. CR 41.02 and CR 77.02 provide generally for the dismissal of unprosecuted claims. Like the doctrine of laches, however, these rules should be applied narrowly to claims for child support. Furthermore, neither of these rules has been properly raised. In these circumstances, we do not believe that either of these general rules justifies the trial court's decision. In short, a remand is necessary.

Finally, Debbie also contends that the trial court erred by denying her motion for attorney fees. The trial court

---

[8]Ky., 550 S.W.2d 506 (1977).

[9]KRS 395.275 and KRS 395.276.

enjoys broad discretion in ruling on such motions, and we cannot say that its denial of fees in this case was an abuse of that discretion. Because this matter is to be remanded for additional proceedings, however, Debbie is free to renew and the trial court to reconsider a motion for fees.

In sum, we are persuaded that the trial court erred by denying Debbie's motion for child-support arrearages. Debbie's delay in asserting it did not, as the trial court believed, dismiss her right to have John's erroneously determined child-support obligation corrected. The corrected obligation, not the erroneous one, is what should replace the parties' invalid agreement. For this reason, we reverse the December 7, 1998, order of the Jefferson Family Court and remand for new proceedings that give effect to this Court's mandate of October 1992.

HUDDLESTON, JUDGE, CONCURS.

MILLER, JUDGE, CONCURS IN RESULT.

BRIEF FOR APPELLANT:

Allen K. Gailor
Gailor Law Office
Louisville, Kentucky

BRIEF FOR APPELLEE:

R. Dale Warren
Louisville, Kentucky