RENDERED: July 13, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002723-MR

BILLY BELCHER — APPELLANT

v.

APPEAL FROM PIKE FAMILY COURT
HONORABLE KATHRYN BURKE, JUDGE
ACTION NO. 82-CI-01337

ANGELA POTTER AND
CABINET FOR FAMILIES AND CHILDREN — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, JOHNSON AND TACKETT, JUDGES.

JOHNSON, JUDGE: Billy Jo Belcher appeals from a judgment of the Pike Family Court which ordered him to pay child-support arrearage in the amount of $58,500.00 to his former wife, Angela Potter. Belcher claims (1) that the Cabinet for Families and Children lacked standing to intervene in this action; (2) that he and Potter, by implication, had agreed to revert to a previous agreement whereby his child-support obligation was waived; and

(3) that the doctrine of laches should bar this claim. Having found no error, we affirm.

On November 30, 1982, a final decree was entered in Belcher and Potter's dissolution action which set Belcher's visitation rights with his child and the amount of child support that he was to pay Potter. On March 1, 1983,[1] the parties entered into a supplemental agreement, which stated in relevant part:

> 2. The Petitioner agrees that she will make no claim against the Respondent for child support, medical or dental bills, or other money or consideration to be paid by the Respondent to the Petitioner for and in behalf of the parties' child, Kelly Ann[e] Belcher.
>
> 3. The Respondent agrees that he relinquishes all parental contact, control, visitation rights, custody rights, or other rights in and to Kelly Anne Belcher. He agrees to consent to any adoption by her which may be begun in a Court of competent jurisdiction, or name change, provided his consent is necessary.
>
> 4. The parties hereto agree that, should the Respondent change his mind about the provisions hereof and demand parental privileges, that he shall owe the Petitioner child support at the rate of $300.00 per month from March 1, 1983 to the date that the said parental privileges shall be reinstated.

This supplemental agreement was approved and adopted by the circuit court in a supplemental decree entered on March 18, 1983.

On October 4, 1984, Belcher moved the circuit court to have the March 1, 1983, supplemental agreement set aside because

[1]The supplemental agreement was filed on March 2, 1983.

he decided he wanted to visit his child. On November 7, 1984, the circuit court entered an order setting aside the supplemental agreement and reinstating the final decree entered on November 30, 1982. The circuit court also determined that Belcher owed Potter $6,000.00 in child-support arrearage and that he would have to make an initial payment of $2,000.00 to Potter before he could visit his daughter. Both parties agree that this payment was never made.[2]

No court action was taken in this case from November 6, 1984, until September 17, 1998, when the Pike County Attorney filed a motion to intervene.[3] On March 2, 1999, the Pike Family Court entered a judgment and order requiring Belcher to pay Potter $58,500.00 in child-support arrearage that had accrued through June 1997. On March 9, 1999, Belcher filed a "motion to set aside judgment and order" on the grounds "that neither he nor his attorney received notice of the Hearing on March 1, 1999." On March 25, 1999,[4] the family court judge signed an order

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[2]Belcher claims that he attempted to make this payment but Potter refused to accept it and denied him visitation. Potter, however, claims that Belcher never made any attempt to pay the arrearage and instead took a trip to Hawaii. There is no support for either allegation in the record.

[3]The motion to intervene states, "[c]omes the Commonwealth, by and through the County Attorney, on behalf of the Cabinet for Families and Children and/or Petitioner[,] and respectfully requests that the court allow the Commonwealth to intervene in this matter to aid the Petitioner in pursuing his/her right to collect child support." While the Cabinet was not listed as a party below, the parties are in agreement that the case has been practiced with the understanding that the Cabinet is a party.

[4]The order was not entered until April 9, 1999.

setting aside the March 2, 1999, judgment and order because "it appear[ed] to the Court that neither the Respondent nor his attorney were notified of the hearing." On March 29, 1999, Belcher filed a "motion to relieve respondent from order of November 7, 1984," wherein he asked the family court to "reinstate the parties to the Supplemental Decree of March 18, 1983." A hearing on all pending motions was finally held on September 27, 1999. On October 1, 1999, the family court entered an order which "overruled" Belcher's motion to be relieved from the November 7, 1984, order. The family court also "overruled" Belcher's motion to set aside the judgment and order entered on March 2, 1999.[5] On October 11, 1999, Belcher filed a motion to vacate the October 1, 1999, order. This motion was denied on October 15, 1999. This appeal followed.

We will first address Belcher's claim that the Cabinet lacked standing to intervene in this action. In Thurman v. Commonwealth, Cabinet for Human Resources, ex rel. Thurman,[6] this same argument failed. In Thurman, James and Susan were married in 1971 and were divorced in 1979, with one child who was then 8 years old. In 1989, after the child had reached her eighteenth

[5]This was a peculiar choice of wording since the family court had already "set aside and held for naught" the same March 2, 1999, order and judgment due to lack of notice. We assume the family court intended to reinstate the judgment and order of March 2, 1999, and the parties have conducted themselves accordingly.

[6]Ky.App., 828 S.W.2d 368(1992).

birthday, the Cabinet for Human Resources[7] filed an action on behalf of Susan to collect child-support arrearage totaling $31,300.00.

James argued that since Susan had never applied for nor received public assistance on behalf of the child, the Cabinet lacked standing to enforce the child-support obligation. This Court concluded that the Cabinet had standing to intervene and stated:

> KRS 205.010 et seq. contain significant and comprehensive child support recovery provisions. KRS 205.712 provides, in pertinent part:
>
> > (1) The division of child support enforcement is established in the cabinet for human resources.
> >
> > (2) The duties of the division of child support, or its designee, shall include:
> >
> > . . .
> >
> > (c) Serve as collector of all court-ordered or administratively ordered child support payments pursuant to Part D of Title IV of the Social Security Act; and
> >
> > (d) Enforce Kentucky child support laws, including collection of court-ordered child support arrearages and prosecution of persons who fail to pay child support.
>
> In addition, KRS 205.721 provides, in part:
>
> > (1) All services available to

[7]The Cabinet for Human Resources was a predecessor to the Cabinet for Families and Children.

> individuals receiving aid to families with dependent children (AFDC) benefits shall also be available to individuals not receiving AFDC benefits, upon application by the individual with the cabinet.
>
> . . .
>
> (3) Except as provided in subsection (2) of this section, the cabinet may charge an application fee for the services based on a fee schedule, which shall take into account the applicant's net income. No application fee shall be required from individuals receiving public assistance.[8]

From our review of the statutes, we agree with the Court in Thurman that "[i]t is clear from these statutes that child support collection services are available to a parent, even though that parent does not receive[ ] AFDC benefits. . . [and] that the Cabinet is required to collect court-ordered child support arrearages."[9]

Belcher argues that pursuant to Cabinet for Human Resources v. Houck,[10] the Cabinet's authority to collect child-support arrearage is limited to "appear[ing] in any judicial proceeding on behalf of the dependent child in order to secure support for the child from his parent or parents." He attempts to distinguish his case from Houck based on the fact that his child had reached the age of majority by the time the Cabinet

[8]Id. at 369.

[9]Id.

[10]Ky.App., 908 S.W.2d 673, 674 (1995).

intervened. Belcher refers us to KRS 205.710(4), which defines "[d]ependent child" or "needy dependent child" as:

> [A]ny person under the age of eighteen (18), or under the age of nineteen (19) if in high school, who is not otherwise emancipated, self-supporting, married, or a member of the Armed Forces of the United States and is a recipient of or applicant for services under Part D of Title IV of the Social Security Act[.]

We believe Belcher has read the statutes and the cases too narrowly. In Thurman, the father challenged the Cabinet's standing on the grounds that the child had reached the age of majority and did not reside with the mother at the time the collection effort was made. This Court determined that the child's age and residence were of no consequence, and stated:

> He argues that the 'spousal support' referred to in the statute means support solely for the benefit of minor children. We do not agree with this strained construction. The statute is clear. It covers both child support and spousal support obligations as distinct and separate matters. Under 42 U.S.C. § 654, spousal support can be collected if a child is living with its parent. Child support can be collected at any time [emphasis original].[11]

Thus, pursuant to Thurman, Belcher's child-support arrearage "can be collected at anytime."

Furthermore, this Court's ruling in Houck supports the Cabinet's standing. In Houck, this Court clearly held that under Part D of Title IV of the Social Security Act and the statutes at KRS 205.710 through KRS 205.800, which were enacted in response

[11] Id. at 370.

to the federal funding directives, "the local county attorney shall be considered the designee of the cabinet for purposes of administering the program of child support recovery within a county." This Court noted that "[u]nder KRS 205.765, the cabinet or its designee may appear in any judicial proceeding on behalf of the dependent child in order to secure support for the child from his parent or parents."[12] This Court cited with approval cases from other states which had recognized that a parent who had not received AFDC benefits was entitled to the same agency representation as a parent who had received AFDC benefits.

Belcher next argues that the parties, by implication, reverted to their supplemental agreement of March 1, 1983; and consequently, that their supplemental agreement modified the circuit court order of November 7, 1984, which had set aside the supplemental agreement. In the supplement agreement, the parties agreed that no child support would be paid and that Belcher would relinquish all rights to his child. This supplemental agreement was approved by a supplemental decree entered by the circuit court on March 18, 1983. On October 4, 1984, Belcher moved the circuit court to set aside the agreement and asked that his visitation be reinstated.[13] Belcher claims that Potter refused to accept his arrearage payment of $2,000 that would have allowed him to begin his visitation pursuant to the November 7, 1984,

[12]Id. at 673-74.

[13]In his motion to have the supplemental agreement set aside, Belcher claimed the supplemental agreement was "unconscionable and void."

order; and thus, that the parties, by implication, reverted to the March 1983, supplemental decree, pursuant to which he was not required to pay any child support. Belcher argues that since no court action was taken to collect child-support arrearage from 1984 until the Cabinet intervened in 1998, the parties were conducting themselves pursuant to their supplemental agreement and the March 1983 supplemental decree.

In Whicker v. Whicker,[14] this Court summarized the law concerning private modifications as follows:

> There is conflicting law on the issue of whether the parties to a divorce and support agreement may privately modify such an agreement without judicial approval. One line of cases holds that private agreements, even oral agreements, are permissible. Such agreements may be enforced by the courts against the parties so long as (1) they are proved with "reasonable certainty," and (2) the court finds that the agreement is equitable and fair to the affected children under the circumstances [citations omitted].
>
> A second line of cases supports the traditional view that there is an absolute duty to support one's child and that such obligation may not be diminished by contract between the parties [citations omitted].
>
> The issue is further complicated by KRS 403.250(1), which states in pertinent part:
>
> > Except as otherwise provided . . . the provisions of any decree respecting maintenance or support may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable.
>
> KRS 403.250(1) provides the exclusive

[14]Ky.App., 711 S.W.2d 857 (1986).

method for effecting a modification of an award of child support where a parent paying support has not agreed to automatic increases based upon a percentage of earnings [citation omitted].

Several policy considerations regarding private modification of child support seem fundamentally clear. First, any agreement between the parties to a divorce which avoids the adversarial judicial process is to be encouraged. Second, such agreements, to be enforceable, must be approved by a court of law, which must make its determination according to the existing equities under the circumstances. In enforcing any modification, furthermore, the interests of the children involved must be a major consideration. Finally, a parent's obligation to support a child may not be absolutely waived by any contract between the parties [emphasis added].

With the foregoing discussion in mind, we hold that oral agreements to modify child support obligations are enforceable, so long as (1) such agreements may be proved with reasonable certainty, and (2) the court finds that the agreement is fair and equitable under the circumstances. In order to enforce such agreements, a court must find that modification might reasonably have been granted, had a proper motion to modify been brought before the court pursuant to KRS 403.250 at the time such oral modification was originally agreed to by the parties. Furthermore, in keeping with prior decisions, such private agreements are enforceable only prospectively, and will not apply to support payments which had already become vested at the time the agreement was made [citation omitted].

Parties who decline to use the procedures set out in KRS 403.250 run the risk of having their private agreements declared invalid by a court when the parties attempt to have the agreements judicially enforced. Those agreements which attempt to accomplish privately what a court could not order legally will be declared invalid and

will not be enforced [emphasis added].[15]

In Whicker, the trial court had found that the parties had orally agreed to modify child-support payments, whereby the father would forego repaying an arrearage of $7,280.00, and his current child-support payment would increase from $75.00 per month to $80.00 per month; and it ruled that the mother was not entitled to any child-support arrearage. In reversing the circuit court, this Court held that the agreement was unenforceable and the wife was entitled to the arrearage:

> The trial court abused its discretion, however, in enforcing the agreement. First, the terms are manifestly unfair to the affected child. The agreement, as enforced, allowed the custodial parent to forego $7,280.00 in return for a promise to pay a total of $270.00 over approximately 54 months until the child's majority. Such an agreement is inequitable on its face and should not have been enforced.[16]

While some of the language in Whicker is confusing, and perhaps inconsistent, it has been followed twice by our Supreme Court. In Brown v. Brown,[17] the Court referred to Whicker as follows:

> Although our Court has decided no similar cases since the effective date in 1972 of the new divorce code, our so-called no fault divorce law, the Kentucky Court of Appeals has considered the matter in Whicker[, supra], and reached the same decision under the new law that we reached under the pre-1972 law. Whicker considers an

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[15]Id. at 859.

[16]Id. at 860.

[17]Ky., 796 S.W.2d 5 (1990).

oral modification of an agreement for child support, and states:

> [W]e hold that oral agreements to modify child support obligations are enforceable, so long as (1) such agreements may be proved with reasonable certainty, and (2) the court finds [when subsequently challenged] that the agreement is fair and equitable under the circumstances.[18]

Furthermore, in Bustin v. Bustin,[19] the Court stated "[t]his proposition fails, in our view, as it is settled that a parent's obligation to support his/her minor child cannot be waived."

In the case sub judice, the trial court ruled in Potter's favor and ordered Belcher to pay her child-support arrearage of $58,500.00. While the family court did not specifically address Belcher's argument that the parties had an oral agreement that reinstated the supplemental decree by implication, there can only be one of two possible conclusions drawn from the family court's ruling: it did not believe the parties reached an oral agreement, or the oral agreement was unconscionable and unenforceable. Under the circumstances of this case, we hold that even if such an agreement existed, it would be unconscionable and unenforceable. As stated in Whicker, "a parent's obligation to support a child may not be absolutely waived by any contract between any parties" and "[t]hose agreements which attempt to accomplish privately what a court

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[18]Id. at 8.

[19]Ky., 969 S.W.2d 697, 699 (1998).

could not order legally will be declared invalid and will not be enforced."

If Belcher's argument is viewed as a contention that since he has been denied visitation, he is not obligated to pay support, it also fails. We are not aware of any case law that supports such a result. "A father, on his own initiative, may not cease to make monthly support payments for his offspring even though visitation rights are made impossible by a mother[']s taking the children out of the state" [citations omitted].[20]

Belcher's final argument is that the arrearage claim should be barred by the doctrine of laches. The former Court of Appeals in Holmes, supra, rejected the defense of laches in a similar case. When Charlotte Holmes and Charles Burke were divorced in 1961, Charles was ordered to pay Charlotte child support for their three children. Over the following seven years, Charles had very little contact with the children and he became delinquent in his child-support obligation. Charlotte sought to recover $9,732.96 in child-support arrearage, but she was denied recovery by the circuit court on a legal basis the Court of Appeals referred to as "vague." The Court noted that Charles "concedes that the defense of laches is not effective as against the children in an action for their benefit, but he insists that it is effective where the mother is the real party in interest and is seeking reimbursement." The Court further noted that the claim was not for reimbursement because "the claim

[20]Holmes v. Burke, Ky., 462 S.W.2d 915, 918, (1971).

is for judgment for definitely fixed, past-due periodic payments" and not "an actual out-of-pocket expended sum of money." Similarly, in the case sub judice, "the claim is fixed by judgment;" and Belcher has failed to demonstrate any justification for applying the equitable doctrine of laches.

Having found no error, the judgment of the Pike Family Court is affirmed.

TACKETT, JUDGE, CONCURS.

BUCKINGHAM, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

BUCKINGHAM, JUDGE, DISSENTING: I respectfully dissent from the majority opinion based on my views on the laches issue. The trial court did not address the laches issue, and the majority notes that the child support claim was fixed by judgment and states that Belcher failed to demonstrate any justification for applying the laches doctrine. Further, the majority relies on the Holmes v. Burke case.

In Holmes, the court implied that the laches doctrine would not apply because the support was for the benefit of the children, who were under the age of eighteen. Id. at 918. Further, in Glanton v. Renner, 285 Ky. 808, 149 S.W.2d 748 (1941), the children were held to be the real party in interest. However, where the action to enforce the child support order was instituted after the children reached the age of majority, the party seeking enforcement is the real party in interest. Harvey v. McGuire, Ky.App., 635 S.W.2d 8, 9 (1982). Because the party seeking enforcement of the child support order (Potter) is the

real party in interest in the case *sub judice*, laches may be invoked against her to prevent enforcement. See 47 Am Jur 2d, Judgments § 978, pages 427-28.

It is troublesome to me that Potter waited approximately fourteen years before attempting to collect past due child support. During this interim, Belcher apparently had no visitation with the child. It was only after the child reached the age of majority that Potter sought to collect the past due support. While I realize that Potter's action was not barred by the statute of limitations, I believe the matter of laches should be addressed by the trial court before Belcher is made to pay in excess of $58,000, not including any interest that may be owed. I would vacate and remand for further findings by the trial court.

BRIEF FOR APPELLANT:

Joseph W. Justice
Pikeville, KY

ORAL ARGUMENT FOR APPELLANT:

Della M. Justice
Pikeville, KY

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

Howard Keith Hall
Pikeville, KY