RENDERED: October 19, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001462-MR

ELMER J. SEBASTIAN — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
CIVIL ACTION NO. 84-CI-00730

LINDA S. SEBASTIAN — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: DYCHE, EMBERTON and HUDDLESTON, Judges.

HUDDLESTON, Judge: Elmer J. Sebastian appeals from a Campbell Circuit Court order determining that he was obligated to pay $16,740.00 to Linda S. Sebastian (now Cornett) for unpaid child support applicable to the period March 14, 1986, to May 5, 1993.

The parties were married on March 31, 1973, and had one child during the marriage, Kimberly Dawn Sebastian, born May 5, 1975. On August 30, 1984, Linda filed a petition to dissolve the marriage. Following contentious divorce proceedings, on July 29, 1985, the trial court entered a decree dissolving the marriage.

Among other things, the decree provided that Elmer was to pay Linda $45.00 per week in child support.

Following the entry of the decree, Linda filed several motions requesting that Elmer be held in contempt for failure to pay child support. The contempt proceedings were resolved when on April 2, 1986, the parties entered into an agreed order which provided, in relevant part, as follows:

> In open Court, both [Linda] and [Elmer], individually and though counsel, addressed the Court and informed the Court that they reached on [sic] agreement to the within Motion by [Linda], and to all other matters still in controversy and that the terms of the agreement are as follows:
>
> > 1) [Elmer] shall pay to [Linda] the sum of One Thousand ($1,000.00) Dollars in full satisfaction for any and all arrearage due on child support todate [sic] of this Order . . . .
> >
> > 2) [Elmer] shall terminate all natural parental rights to the minor child of the parties by filing with the Campbell Circuit Court a Petition for Voluntary Termination of Parental Rights by April 14, 1986.
> >
> > 3) [Linda] agrees to relieve [Elmer] of any and all obligations to pay child support for the minor child of the parties in any form and for any reason from date of this Order . . . .

Pursuant to paragraph two of the agreement, on April 18, 1986, Elmer filed a petition to voluntarily terminate his parental rights to Kimberly in Campbell Circuit Court pursuant to Kentucky Revised Statutes (KRS) 199.601.[1] Service of the petition and summons was made on the Cabinet for Human Resources by certified mail on April 23, 1986; however, Linda was never served. No further steps were taken in the case, and on January 15, 1987, the Campbell Circuit Court entered an order dismissing the termination of parental rights case without prejudice based upon improper service to Linda. Following this, Elmer did not take further legal steps to revive the case.

On July 10, 1986, Linda filed a motion to hold Elmer in contempt for failure to terminate his parental rights to Kimberly. Elmer was served with the motion on July 19, 1986; however, for reasons not disclosed in the record, the motion was never ruled on. The record discloses that similar motions were filed on May 22, 1987, and July 2, 1987. It appears, however, that on both of these occasions Elmer could not be located, notice of the motion was never served, and Elmer's copy of the motion was returned to the circuit court clerk. In the current proceedings, according to the report of the Domestic Relation Commissioner (DRC), Linda testified that she did not pursue the matter any further because of threats made by Elmer to kill her, and Elmer testified that he took no further action in the case because he did not know where Linda and Kimberly were living.

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[1] Ky. Rev. Stat. (KRS) 199.601 was repealed by Acts 1986, ch. 423, § 198. For present law see KRS 625.040 to 625.120.

On November 17, 1999, the Cabinet for Families and Children, on behalf of Linda, filed a motion to hold Elmer in contempt for failure to pay child support and seeking $17,040.00 in child support arrearages. On February 22, 2000, Elmer responded with a motion to dismiss on the basis that he was absolved from any obligation to pay child support by his compliance with the April 2, 1986, agreed order and, further, that the claim for child support arrearages was barred by the Statute of Limitations, KRS 413.120, and by the doctrine of laches. The matter was subsequently referred to the court's DRC.

Following a hearing, on April 18, 2000, the DRC issued his report. The DRC determined that Elmer had failed to comply with the April 2, 1986, agreed order by failing to terminate his parental rights to Kimberly. The DRC further determined that termination of these rights as provided under paragraph two of the order was a condition precedent to the relief from child support as contained in paragraph three. As a result, the DRC recommended that Elmer be assessed child support arrearages at the rate of $45.00 per week for the period of March 14, 1986, to May 5, 1993, the date Kimberly reached the age of 18; that Linda be awarded a lump sum judgment of $16,740.00; and that Elmer be required to make arrearage payments to Linda at the rate of $50.00 per week.

On April 25, 2000, Elmer filed exceptions to the DRC's report. On May 10, 2000, the trial court entered an order overruling the exceptions and adopting the recommendations contained in the DRC's report. This appeal followed.

The tape of the DRC's hearing is not included in the appellate record. Elmer claims that the tape was lost by the DRC; however, the burden was upon Elmer to ensure that the transcript of the hearing was included in the appellate record.[2] In the absence of the tapes, Elmer could have filed a narrative statement pursuant to Kentucky Rule of Civil procedure (CR) 75.13. When evidence presented to the trial court is excluded from the appellate record, we must presume that the judgment of the trial court was supported by the missing evidence.[3]

Elmer contends that Linda's action to collect the child support arrearage was barred by the Statute of Limitations, KRS 413.120. He claims that "KRS 413.120 clearly provides that [Linda's] cause of action, if one so existed, should have been filed within five (5) years." The weakness of Elmer's argument is illustrated by his failure to cite us to which of the fourteen subsections of KRS 413.120 makes this "clear." In fact, KRS 413.120 does not explicitly establish a five year statute of limitations to bring an action to recover child support arrearages.

KRS 413.090(1) provides that an action upon a judgment or decree of any court of this state shall be commenced within fifteen years after the cause of action first accrued. Linda is seeking to enforce the $45.00 child support obligation established in the July 29, 1985, dissolution decree, and KRS 413.090 is the applicable

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[2] Burberry v. Bridges, Ky., 427 S.W.2d 583, 585 (1968).

[3] Miller v. Com., Dept. of Highways, Ky., 487 S.W.2d 931, 933 (1972).

Statute of Limitations in this case.[4] Moreover, Schmidt v. Forehan,[5] a case which also involved delinquent child support, held that limitations "would not begin to run until such time as the delinquency was reduced to a lump sum payment or until emancipation of the child, whichever was the former."

The Statue of Limitations did not begin to run until Kimberly Dawn turned eighteen on May 5, 1993. Less than fifteen years elapsed between the date on which the statute of limitations began to run and the date on which the Linda's action was filed. The action was accordingly not barred by the Statute of Limitations.

Next, Elmer contends that Linda's cause of action is barred by the equitable doctrine of laches. However, Elmer fails to identify how he was prejudiced by Linda's failure to bring the action sooner. In fact, we note that the trial court did not require interest to be paid on the child support arrearage, and, if anything, Elmer benefitted by the delay by having the opportunity to earn interest on the money he otherwise would have had to have paid to Linda. In any event, absent some prejudice, disadvantage, or change of position resulting from the bringing of a lawsuit, delay alone does not justify the application of the equitable doctrine of laches to bar the lawsuit.

Further, Holmes v. Burke[6] resolves this issue. In Holmes the parties were divorced in May 1961 and the husband

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[4] Harvey v. McGuire, Ky. App., 635 S.W.2d 8, 9 (1982).

[5] Ky. App., 549 S.W.2d 320, 323 (1977),

[6] Ky., 462 S.W.2d 915 (1971).

agreed to pay the wife $117.68 per month in child support. The husband ceased paying child support sometime in 1961 or 1962, and the wife made no demand for child support until September 1968. The husband sought to avoid the arrearage based upon laches. Kentucky's highest court rejected the argument, stating:

> Appellant made little or no demand on appellee for payment of the child support money for nearly six years and made little or no attempt to enforce collection of the judgment in any court. This inactivity and alleged laches on the part of the appellant cannot be attributed to the children for whose benefit the original maintenance award was made. Glanton v. Renner, 285 Ky. 808, 149 S.W. 2d 748.
>
> Appellee 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.
>
> We do not agree that the instant case presents a situation of "reimbursement" in the true sense. Here, the claim is for judgment for definitely fixed, past-due periodic payments. In "reimbursement" the claim consists of an actual out-of-pocket expended sum of money. In the case before us, the claim is fixed by judgment. In claims for reimbursement, on the other hand, there is no fixed determined sum to begin with, and the evidence must establish the amount expended and its purpose. In the

> instant case, the only issue is whether an excusable reason existed not to pay the sum which had already been fixed. We do not find that appellee is or should be excused from paying the monthly payments already fixed and past due[.][7]

In this case, as in Holmes, the amount of child support was fixed at $45.00 per week by the July 29, 1985, decree. While a longer period of time applies in this case, nevertheless, we are persuaded that Holmes prevents Elmer from asserting a defense of laches.

Next, Elmer contends that it would be inequitable to require him to pay the child support arrearage on the basis that he filed the petition to terminate his parental rights to Kimberly; that he honestly thought all he had to do was file the petition; he knew nothing about the dismissal of the case and thought his parental rights to his daughter had been terminated until Linda filed her motion to recover arrearages; and that it would be unconscionable for a court to make a determination that arrearages were owed after such a long time when he truly thought that he had done all he had to do to comply with the agreement.

We disagree that the trial court's order produces an inequitable result. During Kimberly Dawn's eighteen years of minority, Elmer paid little more for her support than the $1,000.00 in arrearages paid in conjunction with the April 2, 1986, agreed order. The present judgment requires him to pay an additional

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[7] Id. at 918.

$16,740.00 in child support. Counting the present judgment, Elmer's total contribution toward the support of his daughter during her minority would be in the range of $18,000.00, or approximately $1,000.00 per year. While Elmer alleges that various ailments make the payments particularly burdensome on him, we are not persuaded that the judgment against him was inequitable.

Finally, Elmer contends that the DRC should have recused himself on the basis that he had previously represented a client in a lawsuit against Elmer. According to Elmer, "[a]s soon as [he] saw the [DRC] he recognized him as an attorney who had contacted him for the collection of a debt incurred by [Linda]. [He] had talked to [the DRC] on the phone on several occasions and had been in his office at least twice making payments on the bill."

Elmer does not allege that he requested the DRC to recuse himself, and we are unable to find a recusal motion in the record. While it may be argued that it is not necessary to preserve this error in order for us to review the claim on appeal,[8] given the procedural posture of this case, we conclude that Elmer's failure to raise the recusal during the trial proceedings waives the issue for appellate review. On appeal, no factual issues are in dispute; all issues on appeal concern issues of law, which we review de novo. Because we have reviewed all appellate issues de novo, giving no deference to the conclusion of the DRC as to these issues, it is irrelevant whether the DRC was biased. Under these

[8] Nichols v. Commonwealth, Ky., 839 S.W.2d 263, 266 (1992).

circumstances, we conclude that Elmer's failure to move for the recusal of the DRC waives the issue.

In any event, the DRC's prior representation of a client in a bill collection dispute involving Elmer does not suggest the slightest trace of bias by the DRC toward Elmer. In summary, the DRC was not required to recuse himself from the case.

For the foregoing reasons, the order from which this appeal is prosecuted is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Sally J. Herald
Cold Spring, Kentucky

BRIEF FOR APPELLEE:

Mott V. Plummer
Sally A. Schatteman
CAMPBELL COUNTY CHILD SUPPORT
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