

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002360-MR

RACHEL KAY THARPE, now KROENING

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE T. STEVEN BLAND, JUDGE
CIVIL ACTION NO. 86-CI-01051

DAVID BRUCE THARPE

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER, BUCKINGHAM, and MINTON, Judges.

MINTON, Judge: Rachel Kroening appeals from an order of the Hardin Circuit Court which denied her claim against her ex-husband, David Tharpe, for statutory interest on child support arrearages. We affirm the circuit court's decision because we conclude that it did not abuse its discretion in determining that the imposition of interest on unpaid child support would be inequitable under the facts of this case.

The Hardin Circuit Court granted Rachel and David a divorce in 1986. They had one child, born March 15, 1980. Following the terms of a separation agreement that became incorporated into the final decree, Rachel was granted custody of their child subject to David's right of reasonable visitation. David agreed to pay Rachel \$250 per month as child support during the child's minority. David paid child support regularly through April 1991 when the circuit court denied his motion to change the custody of the child to him. From May 1991 forward, he paid no more child support to Rachel. According to David, he stopped making the payments to Rachel when she stopped allowing him unsupervised visits with their child. He never made a motion to enforce his visitation rights. The child reached the age of majority on March 15, 1998, and graduated from high school in June of that year, thus ending David's monthly support obligation. According to Rachel, she did not take action on child support sooner because she thought that "it was the best thing to do."

On June 28, 2002, Rachel filed a motion in Hardin Circuit Court demanding a common law judgment against David for the child support arrearage, plus interest. The Domestic Relations Commissioner (DRC) who heard the evidence on the motion recommended to the circuit court that Rachel be granted a judgment against David for \$21,500, the stipulated sum of the

missed monthly payments for the period May 1991 through June 1998, plus interest at the statutory judgment rate of 12 percent from the date of the judgment. The DRC recommended against Rachel's claim for nearly \$30,000 more from David, representing interest at 12 percent from the date each missed payment accrued until date of judgment.

The DRC recommended to the circuit court that an award of what the DRC mischaracterized as "pre-judgment interest" to Rachel on each missed payment would be inequitable. The DRC explained her recommendation as follows:

This recommendation is made for several reasons. Not only does this Commissioner believe that the cited law is not applicable to the matter at hand, but that even if it were, Rachel is deemed to have waived her right to receive pre-judgment interest by failing to take action sooner. Rachel received the consideration of David not coming around and disrupting her household. Rachel was quite happy with the situation as it was during that period of time, and she should not receive the benefit of her inaction under these circumstances whether it be under principles of equity, estoppel or laches or even a simple contractual unspoken agreement. David agreed not to come around if he did not have to pay child support.

The circuit court overruled Rachel's timely objections to the DRC's report and entered judgment accordingly on October 21, 2002.

On appeal, Rachel argues that the circuit court erred in refusing to recognize that the law mandates interest at the judgment rate of 12 percent from and after the due date of each unpaid child support payment. Rachel also suggests in her Brief that the incorporation of the child support obligation from the settlement agreement into the judgment somehow supports her interest argument. The settlement agreement is silent on the awarding of interest on unpaid child support. In light of our discussion regarding the general rule below, we find this point to be a distinction with a difference. Alternatively, Rachel argues that even if the award of interest on the unpaid child support is not mandatory, the circuit court improperly relieved David of the interest obligation.

Under Kentucky law, an order for the periodic payment of child support is a binding and final judgment of the court until modified, and any payments which may become due previous to modification "constitute a fixed and liquidated debt vested in favor of the judgment creditor against the judgment debtor."¹ Such judgments are subject to the provisions of Kentucky Revised Statutes (KRS) 360.040, which mandates that "[a] judgment shall bear twelve (12%) percent interest compounded annually from its date." As a general proposition, statutory post-judgment interest should be awarded for unpaid child support as of the

¹ Stewart v. Raikes, Ky., 627 S.W.2d 586, 588 (1982).

date each periodic payment became due;² however, this rule is not mandatory if payment of interest is deemed inequitable.³

Rachel argues that the circuit court erred by finding that equity weighed against the award of interest in this case. The standard we must apply to our review of the circuit court's conclusion on this issue is abuse of discretion. "'Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision' ... The exercise of discretion must be legally sound."⁴

The record on appeal contains the hearing log of the DRC, which confirms that she conducted an evidentiary hearing on August 13, 2002, at which the parties testified, exhibits were received, and counsel for both sides made argument. Unfortunately, the certified record does not contain the

² See, Hardin v. Hardin, Ky.App., 711 S.W.2d 863 (1986).

³ Guthrie v. Guthrie, Ky., 429 S.W.2d 32, 36 (1968) (applying the rule that interest should be awarded on unpaid child support in the absence of factors making it inequitable); See also, Young v. Young, Ky., 479 S.W.2d 20, 22 (1972); Courtenay v. Wilhoit, Ky.App., 655 S.W.2d 41, 42-43 (1983).

⁴ Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994) (citations omitted); See also, Sherfey v. Sherfey, Ky.App., 74 S.W.3d 777, 782-783 (2002).

videotape of this evidentiary hearing. We must presume that the evidence supports the findings reported by the DRC.⁵ The DRC, who had the opportunity to hear and to observe the testimony first-hand, alluded to a tacit mutual acceptance of more than a decade of inaction by Rachel and David. The matter stood at impasse until their child reached adulthood. Then, Rachel came forward to assert her support rights but only after David's ability to assert his visitation rights had become a nullity. The circuit court's order accepted the DRC's recommended finding that Rachel had waited so long, and she should be estopped from insisting on interest on unpaid child support. We are unable to say that it was an abuse of discretion for the court to find it inequitable under these facts to award Rachel nearly \$30,000 in addition to the arrearage. We cannot say that the circuit court's decision is unreasonable or unfair.

For the reasons set forth above, the order of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Radcliff, Kentucky

BRIEF FOR APPELLEE:

Robert L. Martin
Louisville, Kentucky

⁵ Wells v. Wells, Ky., 406 S.W.2d 157 (1966).