**[Cite as *McGowan v. McDowell*, 2009-Ohio-5891.]**

**THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**PORTAGE COUNTY, OHIO**

| | | |
|---|---|---|
| CYNTHIA LEE McGOWAN, | : | **O P I N I O N** |
| Plaintiff-Appellee, | : | **CASE NO. 2008-P-0112** |
| - vs - | : | |
| RONALD GARY McDOWELL | : | |
| Defendant-Appellant, | : | |
| (PORTAGE COUNTY CHILD SUPPORT ENFORCEMENT AGENCY, | : | |
| Appellee). | : | |

Civil Appeal from the Portage County Court of Common Pleas, Juvenile Division, Case No. 2000 JPI 00025.

Judgment: Reversed and remanded.

*Cynthia Lee McGowan*, pro se, 1021 Park Avenue, Ravenna, OH 44266 (Appellee).

*Ronald Gary McDowell*, pro se, 44 East Belmeadow Lane, Chagrin Falls, OH 44022 (Appellant).

*Victor V. Vigluicci*, Portage County Prosecutor, and *Roxana R. Lyle*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Appellee-Portage County Child Support Enforcement Agency).

DIANE V. GRENDELL, J.

**{¶1}** Defendant-appellant, Ronald Gary McDowell, appeals the decision of the Portage County Court of Common Pleas, Juvenile Division, overruling his objections and adopting the magistrate's ruling following a mistake of fact hearing. For the reasons that follow, we reverse the decision of the court below and remand this matter for further proceedings.

**{¶2}** The present action began on February 18, 2000, when plaintiff-appellee, Cynthia Lee McGowan filed a Complaint to Determine Parentage with respect to two children, one born on December 25, 1984, and the other on January 22, 1987.

**{¶3}** On June 22, 2000, McDowell was determined to be the father of both minor children and ordered to pay child support and provide health insurance coverage. McDowell's monthly support obligation was subsequently modified and McGowan ultimately became responsible for the children's health care.

**{¶4}** On May 26, 2006, the Portage County Child Support Enforcement Agency issued a Notice of Child Support Investigation/Termination of Support, a form identified as JFS 07617. This Notice provided that CSEA had conducted an investigation, pursuant to R.C. 3119.89, "to determine if any reason exists for which the support order for one or more of the children should be terminated." The results of the investigation were that there were no minor children "remaining subject to the support order for whom payments should continue."

**{¶5}** Part of the Notice was set aside for reporting arrearages, however, this part of the form was left blank. The Notice did provide that "[p]ayments for arrearages

owed will be $226.29 monthly," plus a $4.53 processing charge, for a total ongoing monthly obligation of $230.82.

**{¶6}** The Notice also advised McDowell that he was entitled to request an administrative hearing if he disagreed with the investigation results in the Notice.

**{¶7}** On August 3, 2006, the court of common pleas entered a Termination of Support Order, approving and adopting the findings contained in the Notice of Child Support Termination.

**{¶8}** On June 25, 2008, a Notice of Default and Potential Action was issued to McDowell, "advising him that C.S.E.A. would initiate an administrative arrearage payment in the amount of $226.29 per month on arrearages in the amount of $10,540.27 as of June 24, 2008." McDowell requested a mistake of fact hearing with respect to the arrearage.

**{¶9}** On July 29, 2008, a mistake of fact hearing was held. The hearing officer determined that McDowell owed an arrearage balance of $10,753.33 as of May 31, 2008, and authorized CSEA "to implement the appropriate administrative actions to collect the defaulted arrearage."

**{¶10}** On August 15, 2008, McDowell filed a Motion for Appeal of Mistake of Fact Hearing and Relief of Actions in the court of common pleas.

**{¶11}** On October 14, 2008, a hearing on McDowell's motion was held before a magistrate. McDowell argued that the issue of child support arrearage was res judicata by virtue of the trial court's August 3, 2006 Termination of Support Order. According to McDowell, the Notice did not specify any amount owing for arrearages. Once adopted by the trial court, the issue of arrearages became settled: CSEA had "conducted an

investigation and the results proved no arrearages existed." The magistrate overruled McDowell's motion.

**{¶12}** McDowell duly filed objections to the Magistrate's Decision.

**{¶13}** On November 26, 2008, the trial court entered a Journal Entry overruling McDowell's objections. The court expressly rejected the claim that the issue of arrearages was res judicata: "This Court's August 3, 2006 Order merely stopped the running of the current child support Order and ensured that the Court's records were consistent with the Child Support Enforcement Agency's. No determination was made by this Court regarding the existence or amount of any arrearages that may have accumulated on Defendant's obligation to pay child support for his two (2) children." The court acknowledged, conversely, that the issue of arrearages was not yet determined. The court recognized that CSEA would be "fil[ing] a Motion to determine the arrearage, if any, due and owed by the Defendant," and he would have an opportunity to contest CSEA's determination at that time.

**{¶14}** On December 23, 2008, McDowell filed his Notice of Appeal. On appeal, McDowell raises the following assignments of error.

**{¶15}** "[1.] The trial court erred to the prejudice of defendant-appellant, in ruling that it made no determination to the facts presented in the Court's Order of August 2006."

**{¶16}** "[2.] The trial court erred to the prejudice of defendant-appellant in allowing CSEA to continue actions and allowing them leave to file actions contrary to the Court's August 2006 Order."

**{¶17}** There are two distinct issues raised in this appeal. The first is whether CSEA is precluded from determining the amount of McDowell's child support arrearage on the grounds of res judicata. The second is whether CSEA may continue collection proceedings against McDowell in the absence of a determination as to the amount of arrearage owed. We affirm the lower court's judgment with respect to the first issue, i.e. CSEA is not precluded from determining the arrearage owed, but reverse with respect to the second, i.e. CSEA may not continue collection proceedings until the amount of arrearage is determined.

**{¶18}** The application of res judicata in a case is a question of law and, therefore, such an order is review de novo. *Zamos v. Zamos*, 2008-P-0021, 2009-Ohio-1321, at ¶14

**{¶19}** In his first assignment of error, McDowell argues the trial court erred by failing to hold that the issue of arrearages was settled with finality by the August 3, 2006 Order, which did not indicate the existence of any arrearage owed by him. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 1995-Ohio-331, at syllabus ("[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action"); *State ex rel. Kincaid v. Allen Refractories Co.*, 114 Ohio St.3d 129, 2007-Ohio-3758, at ¶8 (collateral estoppel "applies equally to administrative proceedings").

**{¶20}** We conclude, as did the trial court, that the issue of arrearages was not conclusively decided by the lower court's August 3, 2006 Order. In order for res judicata, more precisely claim preclusion or collateral estoppel, to apply, the issue of arrearages must have been "actually and directly at issue in a previous action, and ***

passed upon and determined by a court of competent jurisdiction." *Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395, 1998-Ohio-435. Although at issue, the fact that no amount whatsoever was indicated in the Order demonstrates that the amount of arrearage remained undetermined, not that no arrearage existed. Cf. *Lane v. Cincinnati Civil Serv. Comm.* (1997), 122 Ohio App.3d 663, 666 (declining to apply collateral estoppel where the trial court's judgment was silent as to a particular issue).

**{¶21}** This construal of the August 3, 2006 Order is consistent with the fact that the same order provided that "[p]ayments for arrearages owed will be $226.29 monthly [in addition to a processing charge]" and that "[a]ny income/financial institution withholding order currently in effect will *** continue at $230.82." McDowell's conclusion that he owed no arrearage is not reasonable given the fact that the August 3, 2006 Order unambiguously imposed the monthly obligation to pay $230.82 toward arrearages.

**{¶22}** The first assignment of error is without merit.

**{¶23}** In the second assignment of error, McDowell argues the trial court erred by allowing CSEA to continue to pursue collection proceedings against him when a definitive amount of arrearages has not been established.[1] We agree.

**{¶24}** When conducting its investigation as to whether a support order should terminate, a child support enforcement agency "shall determine *** [w]hether the obligor

1. In its appellate brief, CSEA argues "no evidence has been developed in this matter on the arrearage balances, and what, if any, collection activity was being pursued in 2006-2007." In the Mistake of Fact Hearing Finding of Fact Report, however, the administrative hearing officer accepted $10,753.33 as the "arrearage balance" and authorized the implementation of "appropriate administrative actions to collect the defaulted arrearage." At the objection hearing before the trial court, McDowell testified that money was being taken out of his paycheck and that his accounts were being attached.

owes any arrearages under the order." R.C. 3119.89(A)(3); former Ohio Adm.Code 5101:12-60-50(E)(1)(c). "The JFS 07617 [form] will be used to advise parties to an administrative order of the investigation results and to advise the court of those results." Former Ohio Adm.Code 5101:12-60-50(E)(1) and (F)(1). "If arrears are owed, those amounts shall be included in the JFS 07620 and an arrears order shall be recommended in an amount equal to the terminating obligation." Former Ohio Adm.Code 5101:12-60-50(E)(3).

**{¶25}** "The JFS 07617 advises the obligor and obligee of their right to request an administrative hearing ***." Former Ohio Adm.Code 5101:12-60-50(F)(1). "On completion of the hearing, the CSEA shall issue a decision utilizing the JFS 07620 ***." Former Ohio Adm.Code 5101:12-60-50(G)(1).

**{¶26}** In the present case, the procedure outlined in the Administrative Code was not followed, in that the JFS 07617 failed to inform McDowell of the amount of arrearage he purportedly owes. Accordingly, McDowell was not afforded a meaningful opportunity to contest the purported arrearage by requesting a hearing. Instead, McDowell did not learn of the amount of purported arrearage until collection proceedings were initiated in June 2008, almost two years after the Notice of Child Support Investigation was issued.

**{¶27}** At the hearing before the magistrate, the Assistant Prosecutor advised the court that "our records indicate that Mr. McDowell owes approximately ten thousand dollars ($10,000.00) in arrears." Before the trial court, the Assistant Prosecutor was not able to offer any "calculations or computations" in support of that figure. "The Agency would normally under these circumstances file a Motion to Determine Arrearage. We

have not done so in this matter because of the posture for which the case is before the Court in an Objection to an administrative action [i.e. collection proceedings] that the Agency took." The lower court's judgment acknowledged that "the arrearage, if any, due and owed by *** McDowell" has yet to be determined.

**{¶28}** While the failure to determine the amount of arrearage owed in the JFS 07617 does not allow McDowell to avoid responsibility for outstanding support obligations, neither does it allow CSEA to initiate collection proceedings for those arrearages. There has been no judicial determination as to the amount of arrearage nor has McDowell had the opportunity to contest the matter.

**{¶29}** The second assignment of error is with merit.

**{¶30}** For the foregoing reasons, the decision of the court below is reversed to the extent that it determines the amount of arrearage to be $10,540.27 and authorizes CSEA to implement administrative actions to collect the purportedly defaulted arrearage. In all other respects, the judgment below is affirmed and this matter is remanded for further proceedings consistent with this opinion. Costs to be taxed against appellee.

COLLEEN MARY O'TOOLE, J., concurs,

MARY JANE TRAPP, P.J., concurs in part, dissents in part, with a Dissenting Opinion.

MARY JANE TRAPP, P.J., concurs in part, dissents in part, with a Dissenting Opinion.

**{¶31}** I agree with the majority's determination that the doctrine of res judicata does not preclude CSEA from determining or collecting any arrearage owed.

**{¶32}** I disagree, however, with the majority's resolution of Mr. McDowell's second assignment of error. Specifically, the majority determined that "the trial court erred in allowing CSEA to continue to pursue collection proceedings against him when a definitive amount of arrearages has not been established." Thus, the majority reversed the trial court and remanded the case. Such action is premature as the question of arrearage determination was not before the court.

**{¶33}** On May 26, 2006, CSEA issued a Notice of Child Support Investigation and Termination of Support. In the notice, CSEA properly advised Mr. McDowell that his continuing monthly child support payment would be $226.29 per month, plus a 2% processing fee, for arrearages owed; and that the income-withholding currently in effect would continue. Neither party requested a hearing.

**{¶34}** On August 3, 2006, the court issued a termination order due to the minor child's emancipation, approving and adopting CSEA's notice. The order terminated future child support payments, except for past arrearages owed, without determining the total amount of the arrearage.

**{¶35}** Almost two years later, on June 25, 2008, CSEA sent Mr. McDowell a Notice of Default and Potential Action advising him that CSEA would initiate administrative arrearage payments of $226.29 per month for a total amount of $10,540.27, as of June 24, 2008. The notice further advised him that he had seven business days to request a mistake of fact hearing.

**{¶36}** During the mistake of fact hearing, Mr. McDowell challenged the 2006 termination order, which incorporated CSEA's notice that payments toward his arrearage would continue in the amount of $226.29 per month. The notice left two blank spaces and, indeed, did not contain the exact amount of arrearage. Thus, at the mistake of fact hearing Mr. McDowell's *sole* argument was that because there were blank spaces on the form, he did not owe any past due child support because the blank spaces somehow translated into a judicial determination that no arrearage was owed. He offered no evidence to dispute the administrative officer's findings that Mr. McDowell did, indeed, owe $10,753.33 as of May 31, 2008.

**{¶37}** During the hearing before the magistrate, Mr. McDowell again offered no evidence to dispute the amount of the arrearage owed, but rather confined his argument to the blank spaces on the arrearage line of CSEA's form sent to him in 2006.

**{¶38}** The magistrate concluded that the termination order did not purport to determine arrearages owed or to eliminate the arrearage. The magistrate also found that Mr. McDowell was notified at the time that monthly payments to be applied to the arrearages would continue to be deducted, and that he never objected to the order until two years later, when CSEA attempted to collect the past due amount.

**{¶39}** The termination of a child support order does not abate the authority of CSEA to collect arrearages. R.C. 3121.36 states, in relevant part, "[t]he termination of a court support order or administrative child support order does not abate the power of any court or child support enforcement agency to collect any overdue and unpaid support or arrearage owed under the terminated support order or the power of the court to punish any person for a failure to comply with, or to pay any support as ordered in,

the terminated support order. *The termination does not abate the authority of the court or agency to issue any notice *** or to issue any applicable order *** to collect any overdue and unpaid support or arrearage owed under the terminated support order.* If a notice is issued pursuant to section 3121.03 of the Revised Code to collect the overdue and unpaid support or arrearage, the amount withheld or deducted from the obligor's personal earnings, income, or accounts shall be at least equal to the amount that was withheld or deducted under the terminated child support order." (Emphasis added.)

**{¶40}** Thus, both CSEA and the trial court correctly followed statutory procedures in issuing their termination notice, termination order, and the subsequent issuance of a R.C. 3121.03 withholding notice.

**{¶41}** Mr. McDowell took no action as to the August 3, 2006 termination order. No administrative hearing was requested or held. During the mistake of fact hearing before the magistrate, CSEA explained the typical procedure after an order terminating child support is issued when arrearages are outstanding as: "*** Our office, in circumstances like this, often at the request of one of the Parties, would prepare Motions to determine arrears."

**{¶42}** Neither party filed a motion to determine arrearage until Mr. McDowell received a notice to his employer to withhold a monthly amount more than two years after the issuance of the termination order. Only then did he file a motion for a mistake of fact hearing, addressing only the original termination hearing. He failed to file a motion for a determination of arrearage, which was necessary in order to bring the issue properly before the court.

**{¶43}** Thus, the trial court did not have to determine the amount of arrearage owed because that question was not before the court during the termination hearing, and it could not address the arrearage amount in the hearing regarding the termination order because the issue was not properly before it. Child support was properly terminated as the youngest of Mr. McDowell's children had reached the age of 19 and the court properly followed the statutory mandate by continuing a wage order due to an arrearage.

**{¶44}** As the court succinctly stated during the mistake of fact of hearing: "What this thing did was stop the meter, so that you didn't continue to accrue charges that you shouldn't. It doesn't erase any past due amount. It made no determination of that. It stopped your current child support for the youngest of your two (2) children. That's it [sic] sole affect [sic]."

**{¶45}** The typical procedure for the determination of arrearage was further explained in the following colloquy between CSEA, the court, and Mr. McDowell during the objections to the mistake of fact hearing:

**{¶46}** "Ms. Lyle [for CSEA]: *** The Agency would normally under these circumstances file a Motion to Determine Arrearages. We have not done so in this matter because of [sic] the posture for which the case is before the Court is in an Objection to an administrative action that the Agency took.

**{¶47}** "The Court: Okay. Tell me what you're saying, Ms. Lyle. Tell me exactly what you're saying. We're talking procedure here, internal procedure within the agency?

**{¶48}** "Ms. Lyle: That's part of it, your Honor. We have not filed a Motion to Determine Arrearages, so there are no calculations or computations. There were none before the Magistrate and there are none before, your Honor. It was unclear from time to time after Mr. McDowell filed his Objections whether he, in fact, agreed or disagreed with the application of payments and charges."

**{¶49}** Thus, in his motion for a mistake of fact hearing, as well as his objections to the magistrate's findings, Mr. McDowell never raised the issue or offered any evidence on the determination as to the arrearage payments or charges.

**{¶50}** Therefore, in denying Mr. McDowell's objections to the mistake of fact hearing, the court ruled solely on the issue Mr. McDowell raised as to the termination order, concluding, "*** So, it's not that I'm ruling on the issue of whether or not you owe arrearages or not; that's not what I'm doing here. I'm ruling on the issue that you don't have an objection to the fact that because there's a termination order that it terminates the arrearages. Your child support order was terminated in regard to your son, was it your son was 19 years old at that time, okay. So, that order was terminated. A calculation will be brought before the court on why the agency believes you have past child support due and owing and you'll have an opportunity to challenge that in this court on another day at another time. ***"

**{¶51}** After the court issued its order on November 26, 2008, CSEA appropriately filed a motion to determine arrearage and payment. On December 8, 2009, the court scheduled a hearing on the motion for February 3, 2009.

**{¶52}** Instead of going forward with the hearing, Mr. McDowell chose to file this appeal regarding the termination order, raising again the meritless claim regarding the

"blank" spaces on CSEA's 2006 form, conceivably in an attempt to circumvent his outstanding obligations. Due to the pendency of this appeal, the trial court granted Mr. McDowell's motion for a continuance pending our ruling, and thus, the merits of the arrearage motion have yet to be determined.

**{¶53}** Thus, I would affirm the court's order denying Mr. McDowell's objections to the mistake of fact hearing, because it properly ruled on the only issue Mr. McDowell raised. Any judicial determination as to the amount of arrearage owed would have been premature, as it was not an issue properly before the trial court. Further, the statute is clear that a termination order does not abate authority to collect arrearages. Mr. McDowell slept on his rights, and then, facing a withholding order and bank attachment, chose the "all or nothing" line of defense in his mistake of fact hearing. Instead of seeking a determination of the arrearage, which he clearly had the opportunity to do, he took a gamble and lost.

**{¶54}** Finding no error in the trial court's order, as the court properly determined and disposed of the only issue posed during the mistake of fact hearing, I would affirm on Mr. McDowell's second assignment of error as well.