[J-54-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

DONNA K. CHRISTIANSON,	:	No. 113 MAP 2002
	:	
Appellee	:	Appeal from the Order of the Superior Court entered November 8, 2001 at No. 236MDA2001 which Affirmed the
v.	:	Order of the Snyder County Court of Common Pleas entered December 27, 2000 at No. 97-0137.
ROBERT M. ELY,	:	
	:	
Appellant	:	
	:	SUBMITTED: May 13, 2003
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	:	
	:	

DISSENTING OPINION

MR. JUSTICE EAKIN **DECIDED: DECEMBER 17, 2003**

I dissent for two reasons, the first procedural. This appeal is of an order from a complaint filed in 1999; despite the eclectic procedural history, the fact remains that while appellee filed **a** complaint in 1988, she filed **this** complaint in 1999, and to this complaint alone appellant conceded paternity. There are no currently relevant proceedings pursuant to the 1988 complaint; indeed, there have been none since the trial court ordered, unsuccessfully, the "final processing" of this stagnant matter. The rule of retroactivity makes support presumptively applicable from the filing the complaint which results in the order, which is 1999; it should not be retroactive to the filing of a complaint abandoned long ago.

Appellee never revived or amended the 1988 complaint; she filed a new complaint in 1999, which commenced a new action. Rule 1910.4(a) states: "An action shall be commenced by filing a complaint with the domestic relations section of the court of common pleas." Pa.R.C.P. 1910.4(a). (emphasis added). The filing of subsequent complaints did not resuscitate the 1988 complaint, nor were any of them an amendment of the last; amendments require consent or court approval, and appellee had neither. See Pa.R.C.P. 1033. Even if they were amendments, they would replace, not revive, the first complaint; either way, their filing took the 1988 complaint off the table. See, e.g., Skelton v Lower Merion Township, 178 A. 387, 388 (Pa. 1935) (amendment virtually withdraws originally filed pleading); see also 5 Standard Pa. Practice 2d, 34:89 ("[W]hen an amended complaint is filed it withdraws the original complaint…."). These filings did not incorporate the 1988 complaint by reference, and it must be deemed withdrawn. Although the 1988 complaint was never formally dismissed or "processed," any subsequent complaint is a "commencement," and thus a manifestation of the intent to abandon the previous one. See, e.g., Pa.R.C.P. 231 ("After a discontinuance or voluntary nonsuit the plaintiff may commence a second action upon the same cause of action upon payment of the costs of the former action."). Were it otherwise, courts would face multiple complaints for the same action.

Procedural impropriety aside, the majority's result is concurrently unfair to appellant, and unavailing to the child. Had appellant been the cause of this delay, I would afford him no sympathy or relief. However, he is not. He challenged the first complaint and won, the matter being remanded for proceedings that were never scheduled, and which appellee never requested or pursued. Appellant was not the moving party; there was no obligation on his part to pursue anything. Indeed, when faced with an order of the Superior Court that she present evidence to overcome the

parental presumption, appellee did nothing. The logical conclusion appellant or the trial court could draw from her inactivity is that she could not meet her burden.

The only subsequent court action was Judge Bromfield's order to "process" the inactive case. Rule 1901 of the Pennsylvania Rules of Judicial Administration established the policy when dealing with inactive, abandoned claims:

> It is the policy of the unified judicial system to bring each pending matter to a final conclusion as promptly as possible consistent with the character of the matter and the resources of the system. Where a matter has been inactive for an unreasonable period of time, the tribunal, on its own motion, shall enter an appropriate order terminating the matter.

Pa.R.J.A. 1901(a). This Court gave effect to this policy in Pa.R.C.P. 230.2(a), which provides: "The court may initiate proceedings to terminate a case in which there has been no activity of record for two years or more by serving a notice of proposed dismissal of the court case." Id. President Judge Bromfield clearly meant to terminate this stale, inactive claim when he ordered it be remanded in 1992 to the Court of Common Pleas of Snyder County for "final processing pursuant to the Pa. Rules of Civil Procedure." R.R., at 451 (emphasis added). His purpose is evident from the reasoning he included in the order: appellee "has not taken any actions to resolve the issue of paternity of Tenaya Christianson for the past three years." Id. Regardless of the reason this was not accomplished, the lack of action was not at appellant's hands.

The majority suggests appellant "acquiesced" to the 1988 claim's validity by failing to pursue a judgment of non pros, under Rule 1037. That Rule allows a non pros for failure to file a complaint on demand; it does not apply to failing to act on the complaint already filed. Appellant could not seek a non pros under this Rule.

Appellant questioned paternity in the face of the 1988 complaint, pointing out that appellee was still living with her husband at the time of conception; his position was upheld at the appellate level. See Christianson v. Ely, 568 A.2d 961 (Pa. Super. 1990).

If there was something to acquiesce in, it was his victory in the Superior Court, and the order of the trial court sending the case for "final processing"; this, the functional equivalent of a non pros, was an order to which appellee also "acquiesced." Appellant had no duty to do anything more on the dormant, dismissed-but-not-processed matter. It was appellee who acquiesced to the legal demise of her 1988 complaint by years of inactivity in the face of an order putting the burden to proceed on her, an unchallenged order to end the case, and by her multiple subsequent complaints.

The rule of retroactivity ensures children do not lose their right to support as a result of the delay inherent in the system or the recalcitrance of the paying parent. "There is a sound policy favoring retroactivity in most cases, because the party entitled to support should not be penalized for having to resort to time-consuming court proceedings." Sutliff v. Sutliff, 489 A.2d 764, 781 (Pa. Super. 1985), affirmed in part, remanded in part, 528 A.2d 1318 (Pa.1987) (internal citations omitted). This policy is sound, but not in a case where a decade of delay is at the hands of the obligee. Where such delay lies at the feet of the obligee, the policy of total retroactivity becomes illogical. Here, in my judgment, is just such a case. Four years retroactive application may be warranted; 15 years retroactivity is not.

The custodial parent seeking support has an affirmative duty to file for support, and, I believe, an obligation to pursue it actively. Retroactivity does not date from pre-filing status or events; the Rules require a parent to file a claim for support in order to start the clock running on retroactivity. See Pa.R.C.P. 1910.17(a) ("An order of support shall be effective from the date of the filing of the complaint unless the order specifies otherwise."). If appellee's delay before filing is not grounds for retroactivity, why is post-filing procrastination?

The practical irony of the majority's result is that this child is unlikely to benefit from this punitive order of retroactivity. The total monthly payment, the base order of $562.45, plus an amount toward arrears, will not be higher one way or the other. Appellant is assessed 15 years arrears; the child will be the subject of the primary order for only another three years. Appellant will be ordered to pay support for those three years according to his means (about $6,750 a year), to which will be added a payment toward the arrears. That is, the order will reflect his ability to pay, plus the maximum additional amount he can afford toward the arrears. Regardless of the total of the arrears, the periodic support payment will be as much as he can lawfully be made to pay, regardless of the total arrears owed.

If retroactive to the 1999 complaint, as I believe it should be, appellant would have four years of accumulated arrears (about $27,000); to fulfill his obligation by the time the child is 18, he would have to pay seven years total support (about $47,250) in three years. He is very likely incapable of accomplishing this while the child will be a minor. Retroactivity for 11 more years will not increase his monthly obligation from this order, which is already at the maximum; what it will do is extend by many years the time he will need to pay the accumulated arrears. Arrears of $87,000 will not benefit this child - it will only benefit the litigationally lethargic appellee to whom the money will flow after the child is gone from her care. Her dilatory conduct and indifference left this child without support through the formative years, but she is rewarded with support sums that will continue after the child has left her home. Fifteen years retroactivity sanctions appellee's delay and rewards her imprudence.

Parents must attend to the best interests of their children; if they file a support claim, we must require that they follow through with it. We should not tolerate, much less encourage, the hibernation displayed by appellee here. She abandoned her 1988

complaint. She offered legal apathy in the face of court orders. She filed new complaints without explanation for her languish and apathy in the intervening years. Seeing a result that goes against the grain of retroactivity's purpose and rewards her inaction, I respectfully offer my dissent.

Messrs. Justice Castille and Lamb join in this dissenting opinion.