

IN THE SUPREME COURT OF OHIO

Christina Lynn Byrd nka Reeder, : SUPREME COURT
: CASE NO: 07-1913
Appellee :
V. : On Appeal From The
: Clermont County
: Court Of Appeals
Brian Kelly Knuckles : Twelfth Appellate
Appellant, : District
:

MERIT BRIEF OF APPELLANT
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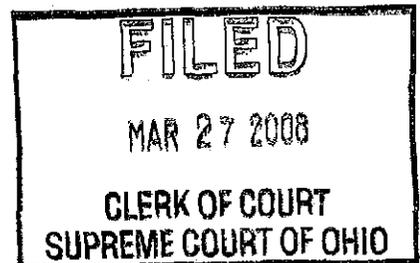


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STATEMENT OF FACTS

A Motion was filed on January 5, 2006, in the Juvenile Court of Clermont County to abate or forgive child support based upon an out-of-court agreement of the parties. (T.d. 26.) A hearing was held before the Magistrate setting forth the agreement, who then rendered a decision denying the Motion to abate past due child support arrearage. (T.d. 29). The Magistrate held that the parties' agreement to abate half of the arrearage was unlawful, and denied Appellant's Motion. Objections were filed and heard resulting in an entry denying the Objections. (T.d. 35). The Court of Appeals upheld the Magistrate, September 4, 2007.

This case arises from an agreement where the parties agreed that the father would consent to the adoption of the minor child and assist the mother, Christina Byrd Reeder and her husband in the adoption of the child, and that a portion of the past due child support arrearage due the mother would be abated, waived, or forgiven.

This matter came before the Trial Court on January 26, 2006 on Defendant Brian Kelly Knuckles' Motion to Abate and Terminate Child Support. The termination of future child support based on the adoption was granted by the Court by a previous Entry filed by Child Support Enforcement. Therefore the only remaining issue was the abatement of a portion of the past due arrearage.

A brief hearing took place in Court when the Magistrate brought attention of counsel to the Bonenfant vs. Bonenfant Butler App. No. CA 2005-03-065, 2005-Ohio-6037 opinion, decided by the 12th District Court of Appeals on November 14, 2005, and indicated that it appeared to resolve this issue against Defendant-Appellant. An agreed factual statement was made by Defendant's Counsel. Christina Byrd Reeder, restated the

agreement, and made a statement to the Court that the parties had made an agreement between themselves to abate one-half of the child support owed by Brian Kelly Knuckles to Christina Byrd Reeder in this case, based on the adoption of the child by Christina Byrd Reeder's present husband. The agreed amount to abate was \$3,710.08. The abatement was against Christina Byrd Reeder's portion, and did not involve public assistance or the processing fee. The arrearage at that time owed to Christina Byrd Reeder was \$7,420.16. After the credit of \$3,710.08, the remaining total arrearage would be reduced to \$4,570.92. (T.p. 2-5).

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law I.

An out-of-court voluntary agreement by father and mother to forgive or reduce child support arrearage shall be adopted by a Court if the Court finds proper consideration for the agreement or the agreement is reasonable.

In this case, the parties have brought the Court an agreement not requiring statutory or equitable interpretation, where the parties actually changed the custody of the child through Court action by adoption prior to requesting the abatement by this Court of the child support. The abatement was a resolution reached by the parties themselves. The Court was only asked to change the public record at Child Support Enforcement to show the proper arrearage amount. In this case, over approximately one year, the parties have indicated to the Court when this matter has come into Court on contempt issues on child support, that they were adjusting their differences by way of agreement to abate child support and accomplish an adoption. The defendant has implemented the adoption by agreement, and changed his position legally, to his prejudice, and consented to the adoption, based on the agreement between the parties to abate or forgive child support.

The Magistrate believed he had no authority to grant the Motion and must deny the motion to abate or forgive some past-due child support.

People will always have child support problems and sometimes a need for Court intervention, hearing, and decision. It is argued that the Court should assist parties to implement reasonable agreements which they have made to support their children, including adjustment of child support arrearage, when the agreement is fair and reasonable, does not involve public assistance or the processing fee, and is between the parties. In this case the Court is not being asked to do anything other than change the arrearage. The arrearage is not owned by the Court or CSEA. CSEA has a duty to correctly keep the arrearage account and adjust the account when appropriate.

In Nelson v. Nelson (1990), 65 Ohio App.3d 800, the 11th District Court of Appeals held in a step-parent adoption there was sufficient consideration that an agreement to forgive past child support is enforceable but that parents cannot waive future child support because "court-ordered child support is for the benefit of the children rather than the custodial parent." *Id.*, 65 Ohio App.3d 800, at 804. The Twelfth District has held child support can be terminated if the parties make an out-of-court agreement and there is forbearance to institute legal process as consideration for the agreement where the obligee later tries to collect the arrearage. Crow v. Crow, 1990 WL 44218 (Ohio App.12 Dist. 1990).

In the Beiter v. Beiter 24 Ohio App.2d 149, 265 N.E.2d 324(1970) case, the 5th District Court of Appeals held: Power of Common Pleas Court to enter a lump sum judgment for installments of alimony and/or support is limited to those installments which are, in fact unpaid and also undiminished by any facts in abatement or any

agreement between parties. Agreement between husband and wife subsequent to and different from the Order of Court will be binding upon wife in action by her to recover unpaid installments of Court's support and/or alimony award. The party against whom lump sum judgment is sought on claim that installments under alimony and/or support order are unpaid has a right to show that installments have been, as between parties, paid, satisfied by agreement, or otherwise abated by changed circumstances, and to avail himself of all other appropriate defenses, including but not limited to, waiver, estoppel, and/or laches.

In an agreement arrived at in Court and reduced to writing by the Magistrate giving credit against arrearage for three years extended visitation, the Court of Appeals approved the actions of the trial court in accepting the agreement. Davis v. Davis, 1992 WL 41823 (Ohio App. 2 Dist.1992).

The case of Green vs. Green, (1963), 120 Ohio App 112, 191 N.E.2d 217 (8th Dist. App. Cuyahoga) held that an agreement to abate child support could be a defense to a contempt motion for failure to pay child support.

Most commentators do not recognize the position of the 12th District in this case. Annotation: Validity and Effect, as between former spouses, of agreement releasing parent from payment of child support provided for in an earlier divorce decree, 100 ALR 3d 1129. This annotation finds broad support for agreements between former spouses so long as the interests of the child are not adversely affected, where future support is not an issue, and where there is some accord and satisfaction present. The annotation cites many Ohio cases.

In Baldwin's Ohio Domestic Relations Practice Section 20.27, Contempt

Defenses-Forgiveness of Arrearage by Obligee, where it states:

“As a general rule, arrearages may be forgiven by the obligee as long as public assistance is not involved. If the residential parent and children are not receiving public assistance, the obligee is allowed to forgive arrearages. The obligee may do this voluntarily but should understand that the money forgiven can never be reclaimed. As a practical matter, money should never be forgiven unless the obligee does so in open court and signs the journal entry in evidence of the obligee's understanding and consent. In this situation the obligee may forgive all of the arrearage or any part thereof and may even request that the current support order be suspended or terminated. This should only be allowed where public assistance is not involved.”

Some limits to agreements are discussed in Baldwin's Ohio Domestic Relations Practice §19.30. Effect of agreements between parents.

In this case the parents worked together with an agreement and assistance of counsel for the good of the child. If the agreement is sufficient to avoid contempt, why shouldn't the court recognize the agreement directly?

The legislature recognizes that the mathematical calculation of child support is not always in the best interest of the child by permitting a deviation. R.C. §3119.22 and §3119.23. Reasons for deviation in child support may sometimes be seen at the beginning of the process. Courts frequently permit agreements to reduce or forgive temporary child support arrearage pendente lite, in separation agreements and final decrees. However, this is a case where the parents have looked back and agreed that there is a reason for deviation in retrospect. The Magistrate has ruled that this can never happen. A deviation is an adjustment in the amount of child support before the final order. The legislature has decided that deviations are proper to consider. This Court should also permit modifications of arrearage in an adversarial setting involving the

Court or CSEA when the parties agree to the need and have worked together to accomplish goals for their child. However, where there is no agreement, the legislature has determined that retroactive modification of arrearage is only permitted after motion, notice, and hearing R. C. §3119.83.

Factually, the Bonenfant case is different from this case because the Bonenfant case is based on an adversarial hearing, lack of agreement between the parties, where equitable relief was requested in the face of a contrary statutory provision prohibiting retroactively modifying a duty to pay an amount of child support, where no change of custody occurred through Court proceedings, nor was there was an intention to change custody between the parties and where equitable theories were attempted to be used to overcome statutory language.

The Court of Appeals agreed in paragraph 15 of Reeder that Bonenfant was distinguishable from Reeder. The answer to the Court of Appeals rhetorical question of why R.C. §3119.83 does not apply is that this section by its own terms states:

“...a court or child support enforcement agency may not retroactively modify an obligor’s duty to pay a delinquent child support payment.”

This section does not bar parties from agreeing to do what the Court or CSE cannot do.

The section is a limitation on governmental power, not the power of parties to agree.

Proposition of Law II

Where the parties have agreed to forgive child support arrearage, it is an abuse of discretion when a Court, without sound reasoning, refused to adopt the agreement.

The Magistrate states in his written decision filed April 24, 2006, page 2:

“This effort to distinguish the Bonenfant case fails. The support is for the benefit of the children not the parents. Parents cannot

waive their children's rights. The statutory basis is absolute."

The Trial Judge's ruling, filed September 12, 2006 on the Magistrate's Decision found:

"...the Objections to be not well taken and hereby overrules same."

The essence of the Magistrate's and Trial Court's position is that under no circumstances can past due support be waived by a parent. This is not the law of the State of Ohio. The court is refusing to apply the law. This is unreasonable and an abuse of discretion.

Abuse of Discretion is defined in Clements v. Bd. of Ed. of Hillsboro, 228 F. 2d 853, 59 Ohio Op. 229 (6th Cir 1956).

"Discretion, when applied to a court of justice, ordinarily means sound discretion, not willful or arbitrary, but regulated by well-known and established principles of law, or such as may be exercised without violating any principle of law. Using the term in this sense, the rule generally applicable is that an order or ruling made, or act done, by a court in a matter within its discretion will not be disturbed by a reviewing court unless it plainly and manifestly appears that there has been an abuse of discretion, and that thereby the rights of the party complaining have probably been prejudiced.

"It is difficult to define exactly what is meant by 'abuse of discretion', and practically impossible to lay down any general rules to what it consists of, since it depends upon the facts in each particular case. As the term is ordinarily used, it has been said to imply not merely an error in judgment, but perversity of will, passion, or moral delinquency-that there was an unreasonable, arbitrary, or unconscionable attitude on the part of the trial court. The trial court abuses its discretion when it fails or refuses properly to apply the law to conceded or undisputed facts. But whatever the term implies, one of the essentials, in order for the action of the court below to constitute reversible error, is that its action must plainly appear to effect an injustice to one of the parties". Ankrom v. Ankrom, 1981 WL 6388, (Ohio App. 5 Dist.).

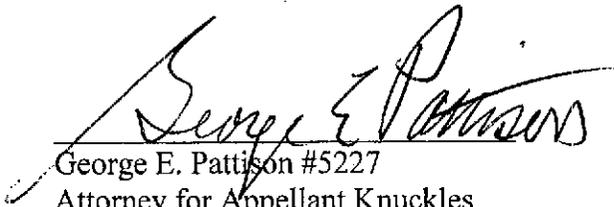
It is an abuse of discretion if the decision is unreasonable, in that

“There is no sound reasoning process that would support that decision”. Proctor & Gamble Co. v. Stoneham, (2000) 140 Ohio App. 260, 276, citing AAAA Enterprises, Inc. vs. River Place Community Urban Redevelopment Corp. (1990), 50 Ohio St. 3d 157, 161, 553, N.E. 2d 597, 601. The Court of Appeals in Reeder v. Knuckles gave no reason for choosing one line of authority over the cases it followed at paragraph 16 of its Opinion. The Court gave no reason why the agreement of the parties should not be implemented. Therefore, there was no sound reasoning by the Court to support its Decision.

CONCLUSION

The trial court erred to the prejudice of the Defendant-Appellant in denying the motion to abate some past-due child support where there was consideration of an adoption by a step-parent where no future child support or public assistance is involved, and the agreement was voluntary and reasonable. The agreement was reasonable, not illegal, and made between parents to resolve complex family matters. The court was only asked to ratify the agreement and change the public record of CSEA.

Respectfully submitted,



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PROOF OF SERVICE

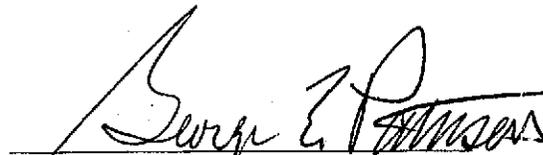
I hereby certify that a copy of the foregoing was sent by ordinary U.S. mail this 26th day of March 2008 to:

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George E. Pattison #5227
Attorney for Appellant Knuckles

IN THE SUPREME COURT OF OHIO

07-1913

Christina Lynn Byrd nka Reeder

Appellee

V.

Brian Kelly Knuckles

Appellant,

:
: On Appeal From The
: Clermont County
: Court Of Appeals
: Twelfth Appellate
: District
:
: Court of Appeals
: Case No. 2006 CA 11 095

NOTICE OF APPEAL OF APPELLANT BRIAN KELLY KNUCKLES

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COURT OF APPEALS
FILED
OCT 22 2007
BARBARA A. WIEDENBEIN
CLERK
CLERMONT COUNTY, OH

Christina Lynn Byrd, nka Reeder, Pro se

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FILED
OCT 18 2007
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APPX. PAGE 1



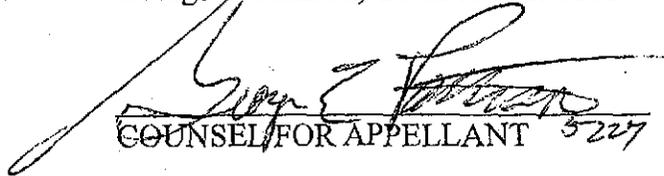
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NASCT

Notice of Appeal of Appellant Brian Kelly Knuckles

Appellant Brian Kelly Knuckles hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Clermont County Court of Appeals, Twelfth Appellate District, entered in Christina Lynn Byrd (nka Reeder) v. Brian Kelly Knuckles Court of Appeals Case No. 2006 CA 11 095 on September 4, 2007.

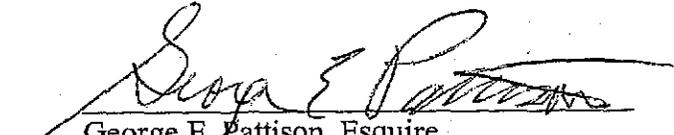
This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,
George E. Pattison, Counsel of Record


COUNSEL FOR APPELLANT 5227

Proof of Service

I certify that a copy of the Notice of Appeal was sent by ordinary U. S. mail to Appellee, Christina Lynn Byrd, nka Reeder, Pro se, 224 George Street, Apt. 4, New Richmond, OH 45157, and to Theresa B. Ellison and Gayle Walker, Esquire, CSEA, 2400 Clermont Center Drive, Batavia, OH 45103 this 17th day of October 2007.


George E. Pattison, Esquire
COUNSEL FOR APPELLANT

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

CHRISTINA LYNN BYRD nka REEDER, :

Plaintiff-Appellee, :

CASE NO. CA2006-11-095

: JUDGMENT ENTRY

- vs -

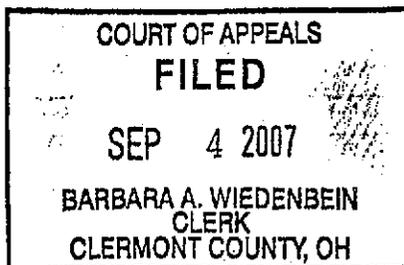
BRIAN KELLY KNUCKLES, :

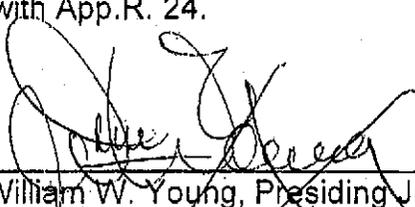
Defendant-Appellant. :

The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

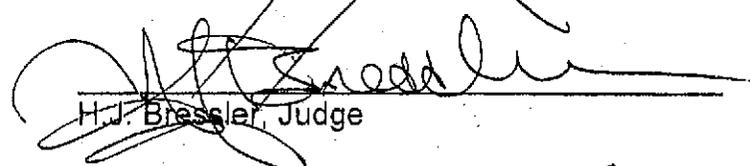
It is further ordered that a mandate be sent to the Clermont County Court of Common Pleas, Juvenile Division, for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

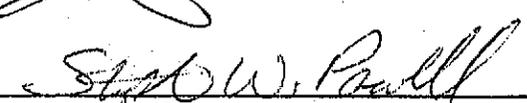




William W. Young, Presiding Judge



H.J. Bressler, Judge



Stephen W. Powell, Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

COURT OF APPEALS
FILED
SEP 4 2007
BARBARA A. WIEDENBEIN
CLERK
CLERMONT COUNTY, OH

CHRISTINA LYNN BYRD nka REEDER;

Plaintiff-Appellee,

CASE NO. CA2006-11-095

- vs -

OPINION
9/4/2007

BRIAN KELLY KNUCKLES,

Defendant-Appellant.

APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. 2001 JH 9775

Christina Lynn Byrd nka Reeder, 224 George Street, Apt. 4, New Richmond, Ohio 45157,
plaintiff-appellee, pro se

George E. Pattison, 285 East Main Street, Batavia, Ohio 45103, for defendant-appellant

Gayle A. Walker, 2400 Clermont Center Drive, Suite 107, Batavia, Ohio 45103, for Clermont
County Child Support Enforcement Agency

BRESSLER, J.

{¶1} Defendant-appellant, Brian K. Knuckles, appeals the trial court's decision
denying his motion to abate his child support arrearage.¹ We affirm the trial court's decision.

{¶2} On August 14, 2001, plaintiff-appellee, Christina Lynn Byrd n.k.a. Reeder, filed

1. Pursuant to Loc.R. 6(A), we sua sponte remove this case from the accelerated calendar and place it on the
regular calendar for purposes of issuing this opinion.

a complaint for support against appellant, the natural father of his minor child. In part, appellee alleged that appellant failed to adequately support the child. On November 13, 2001, the juvenile court ordered appellant to pay appellee \$374.20 per month for child support.

{13} On January 15, 2002, the Clermont County Department of Job and Family Services, Child Support Division, ("CCDJFS") filed a motion requesting that appellant be found in contempt for failing to pay his child support obligation, and alleged that appellant owed appellee \$1,014.33 as of January 1, 2002 in arrearage. On March 28, 2002 the juvenile court reduced appellant's obligation and ordered him to pay appellee \$273.17 per month for child support, and \$43.33 per month to satisfy his arrearage. The juvenile court did not find appellant to be in contempt at this time.

{14} On November 21, 2002, CCDJFS filed a second motion requesting that appellant be found in contempt for failing to pay his child support obligation, and alleged that appellant owed appellee \$3,508.55 as of September 19, 2002 in arrearage. On December 23, 2002, the juvenile court dismissed CCDJFS's complaint without prejudice.

{15} On July 25, 2003, CCDJFS filed a third motion requesting that appellant be found in contempt for failing to pay his child support obligation, and alleged that appellant owed appellee \$5,171.37 as of July 10, 2003 in arrearage. When appellant failed to appear for the hearing on CCDJFS's motion, the juvenile court issued a bench warrant for appellant's arrest.

{16} On May 24, 2004, the juvenile court found appellant in contempt for failure to pay child support, and ordered appellant to be incarcerated in the Clermont County Jail for 30 days unless he satisfied his arrearage by September 13, 2004. The juvenile court issued another bench warrant for appellant's arrest after appellant failed to satisfy his arrearage by that date, and failed to appear at the jail as previously ordered by the court. Appellant was

arrested and taken to jail pursuant to this bench warrant. The juvenile court granted appellant's motion to mitigate his sentence, after appellant served 21 days of his sentence.

{¶7} On December 29, 2005, CCDJFS filed a motion indicating that appellee's husband, Brad A. Reeder, had adopted the child, and requested that appellant's child support obligation be terminated. The juvenile court granted the motion with respect to appellant's future child support obligation.

{¶8} On January 5, 2006, appellant moved to abate one half of his child support arrearage, based on the child's adoption. At a hearing on appellant's motion before the juvenile court magistrate, appellant and appellee indicated that the current amount of appellant's arrearage was \$7,420.16, and that appellee agreed to waive or forgive half of that amount, such that appellant's obligation would be reduced to \$3,710.08. The magistrate took the matter under advisement, and permitted appellant to file a brief on the issue. After considering the evidence and appellant's brief, the magistrate held that the parties' agreement to abate half of the arrearage was unlawful and denied appellant's motion. Appellant objected to the magistrate's decision, and the juvenile court adopted the magistrate's decision. Appellant appeals the trial court's decision, raising the following assignment of error:

{¶9} "THE MAGISTRATE ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY OVERRULING HIS MOTION TO ABATE OR REDUCE PAST DUE CHILD SUPPORT."

{¶10} Appellant raises two issues in his assignment of error. First, appellant argues that the magistrate erred in overruling his motion to abate half of his arrearage, since the parties mutually agreed to reduce the arrearage by half. Second, appellant argues the trial court misapplied the law to the undisputed facts of this case. We disagree.

{¶11} Initially, we note that a trial court has broad discretion in matters concerning

child support, and its decision on a motion to modify child support will not be reversed absent an abuse of discretion. *Pauly v. Pauly*, 80 Ohio St.3d 386, 390, 1997-Ohio-105, citing *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144. An abuse of discretion is more than an error of law or judgment; rather, it implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶12} It is well-established in Ohio that past-due child support cannot be modified retroactively, as a juvenile court is without jurisdiction to make such a modification. See *Harless v. Lambert*, Meigs App. No. 06CA6, 2007-Ohio-2207, ¶11, citing *McPherson v. McPherson* (1950), 153 Ohio St. 82; *Bonefant v. Bonefant*, Butler App. No. CA2005-03-065, 2005-Ohio-6037, ¶11; R.C. 3119.83.

{¶13} R.C. 3119.83 provides, in relevant part, "a court or child support enforcement agency may not retroactively modify an obligor's duty to pay a delinquent support payment."

{¶14} In denying appellant's motion to abate his arrearage, the juvenile court cited this court's decision in *Bonefant*, in which we relied on R.C. 3119.83 in reversing a trial court's decision to eliminate a father's child support arrearage. Appellant maintains that *Bonefant* is inapplicable to this case, as the parties in this case mutually agreed to reduce appellant's arrearage, and no such agreement existed in *Bonefant*.

{¶15} While appellant is correct in his assertion that this case is factually distinguishable from *Bonefant*, appellant has failed to demonstrate why the plain language of R.C. 3119.83 does not apply to this case. R.C. 3119.83 clearly provides that neither the juvenile court, nor CCDJFS may modify appellant's child support arrearage. Some courts have recognized extreme circumstances where equitable considerations may permit retroactive modification of child support arrearages. See *Osborne v. Osborne* (1992), 81 Ohio App.3d 666, 674. However, it was within the juvenile court's discretion to determine whether the facts of this case justify equitable relief, and we find that the juvenile court did

not abuse its discretion in its decision.

{¶16} We recognize that appellant relies on decisions of other appellate courts which are inconsistent with our holding in this case. See *Eckliff v. Walters*, 168 Ohio App.3d 727, 2006-Ohio-4817; *Davis v. Davis* (1992), Montgomery App. No. 12564; *Nelson v. Nelson* (1990), 65 Ohio App.3d 800; *Beiter v. Beiter* (1970), 24 Ohio App.2d 149; *Green v. Green* (1963), 120 Ohio App. 112. Some of these cases are factually dissimilar to this case, but none of these courts applied or analyzed R.C. 3119.83, or the statute it amended and replaced, R.C. 3113.21(M)(3). We are not persuaded by the reasoning in any of these decisions.

{¶17} Rather, we agree with the decision in *Hedrick v. Wyno* (July 5, 2001), Summit App. No. 20380, in holding that once it is determined past-due child support is owed, a court cannot modify that amount, notwithstanding an agreement between the parties to the contrary. As the court stated in *Brady v. Brady*, Montgomery App. No. 19006, 2002-Ohio-1879, "the amount of the arrearage is fixed and cannot be modified by the court—now or ever."

{¶18} Judgment affirmed.

YOUNG, P.J., and POWELL, J., concur.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>

FILED

SEP 12 2006

CLERMONT COUNTY JUVENILE COURT
STEPHANIE WYLER, JUDGE

**COURT OF COMMON PLEAS
JUVENILE DIVISION
CLERMONT COUNTY, OHIO**

CHRISTINA LYNN BYRD nka REEDER,

2001 JH 9775

PLAINTIFF,

-VS-

ENTRY ON OBJECTIONS

BRIAN KELLY KNUCKLES,

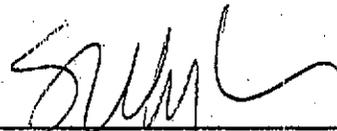
DEFENDANT.

This cause came on for hearing this 14th day of August, 2006, on Objections to the Magistrate's Report, filed herein by the Defendant. Present in Court were the Defendant, represented by counsel George Pattison, and the Plaintiff, unrepresented by counsel; Gayle Walker appeared as counsel for C.S.E.A.

The Court had the benefit of oral arguments at said hearing, as well as a review of the proceedings before the Magistrate and the pertinent statutory and case law:

Based upon the arguments presented by the parties, as well as a review of all pertinent pleadings, the Court finds the Objections to be not well taken and hereby overrules same.

IT IS THEREFORE ORDERED that the Magistrate's Decision of April 24, 2006 shall be affirmed in its entirety.



JUDGE STEPHANIE WYLER

Certificate of Service

I hereby certify that a copy of the foregoing was (mailed) delivered to opposing counsel () parties this 12 day of Sept 2006

W. Fawcett

Atty Pattison + CSEA Walker

COURT OF COMMON PLEAS
JUVENILE DIVISION
CLERMONT COUNTY, OHIO

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FILED

APR 24 2006

CLERMONT CO. JUVENILE COURT
STEPHANIE WYLER, JUDGE

MAGISTRATE'S DECISION AND
ENTRY

Christina Lynn Byrd, nka Reeder
Plaintiff

vs

Brian Kelly Knuckles
Defendant

Case No: 2001 JH 9775

This matter came before the Magistrate on January 26, 2006 on Father's motion filed January 5, 2006 to abate and terminate child support. Both parties were present. Father was represented.

The case was taken under advisement. Father was given sixty days to file a brief. Father filed his brief on March 16, 2006.

The parties stated that their agreement was to reduce the arrearage owed to Mother by ½ to the sum of \$3,710.08.

In *Bonefant v Bonefant* CA 2005 - 03 - 065 (12th District 11-14-05) the Court stated "in pertinent part, R.C. 3119.83 provides: "(A) court of child support enforcement agency may not retroactively modify an obligor's duty to pay a delinquent support payment." Accordingly, appellant contends, the trial court abused its discretion in eliminating the arrearage. For the reasons that follow, we agree.

(12) "The function of equitable relief is to supplement the law where the law is insufficient to remedy a wrong." *Barone v Barone*, Geauga App. No. 2004-G-2575, 2005-Ohio-4479. A court of equity is authorized to render an award "on the principle that it may exercise its equitable jurisdiction to the extent of administering (the) full relief which the case demands." *Sandusky Properties v. Aveni* (1984), 15 Ohio St. 3d 273, 276.

(13) A court does not, however, have unfettered discretion to award equitable relief. Various long-standing maxims, such as "equity follows the law," limit a court's application of equity. "When the rights of parties are clearly defined and established by law (especially when the source of such definition is through constitutional or statutory provision) the maxim 'equity follows the law' is usually strictly applied." *Civil Service Personnel Ass'n., Inc. v. City of Akron* (1976), 48 Ohio St. 2d 25, 27. (Emphasis added.)

(14) Thus, while it is often tempting to decide difficult cases on the subjective principles of equity, courts have an obligation to resist that temptation and follow the law. *Schwaben v. School Emp. Retirement Sys.*, 76 Ohio St. 3d 280, 285, 1996-Ohio-48. See, also,

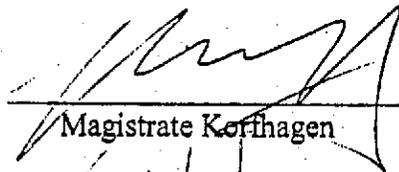
In re Adoption of Zschach (1996), 75 Ohio St. 3d 648, 664 (strictly applying a statute to terminate the rights of a putative father who failed to properly object to an adoption)."

In his brief, Father argues that the Bonefant case is distinguishable as the parties herein have brought to the Court "an agreement not requiring statutory or equitable interpretation where the parties actually changed the custody of the child through Court action by adoption prior to requesting the abatement of this Court of the child support."

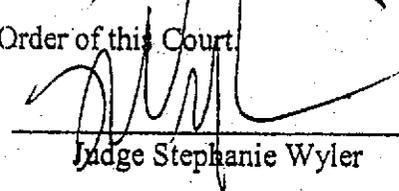
This effort to distinguish the Bonefant case fails. The support is for the benefit of the child not the parents. Parents cannot waive their children's rights. The statutory basis is absolute.

Accordingly, Father's motion is denied.

This decision shall serve as the Court's entry.


Magistrate Kerthagen

The foregoing Orders are hereby adopted as an Order of this Court.


Judge Stephanie Wyler

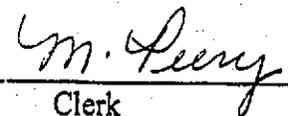
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by regular U.S. Mail this 25th day of April, 2006 to:

Gayle Walker, Esq.
2400 Clermont Center Dr.
Suite 107
Batavia, Ohio 45103

George E. Pattison, Esq.
285 Main Street
Batavia, Ohio 45103

Christina Reeder
224 George Street, Apt. 4
New Richmond, Oh 45157


Clerk

COPY

COURT OF COMMON PLEAS
JUVENILE DIVISION
CLERMONT COUNTY, OHIO

CHRISTINA LYNN BYRD : CASE NO. 2001-JH-9775
nka CHRISTINA LYNN REEDER : SETS NO. 7024538741

Plaintiff,

-vs-

BRIAN KELLY KNUCKLES

Defendant.

APPEARANCES

On behalf of Clermont Co. Child Support Enforcement: GAYLE A. WALKER, ESQ. 2400 Clermont Center Dr. Batavia, Ohio 45103 Batavia, Ohio 45103	On behalf of Defendant: GEORGE E. PATTISON, ESQ. 285 E. Main Street Batavia, Ohio 45103
--	--

BE IT REMEMBERED that the above captioned
cause came on to be heard on the 26th day of January,
2006, before Magistrate John C. Korfhagen in Clermont
County ^{Juvenile} ~~Municipal~~ Court.

TRI-COUNTY COURT REPORTING & VIDEO TAPE SERVICE
95 S. Fourth Street
Batavia, Ohio 45103
(513) 732-1477

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THE COURT: This is on the record, Case Number 01J9775, Christina Byrd, now known as Reeder, versus Brian Knuckles. This is scheduled today for hearing on a January 5, 2006 motion to abate determining child support. The motion was served on Ms. Knuckles -- or Mrs. Reeder on January 7, 2006 by certified mail. Prior to going on the record I had a brief pretrial discussion with counsel for Father, George Pattison. Mrs. Reeder, I want you to understand, and, Mr. Knuckles, I want you to understand the discussion. Mr. Pattison indicated to me that the two of you have worked out an agreement whereby certain amounts of the back support order were going to be waived. There have been two recent decisions, one from the Twelfth District Court of Appeals, which I've handed Mr. Pattison a copy of, and another one from the Seventh District Court of Appeals called In Re Moore, 158 Ohio App 3rd, 679, which state that this type of agreement cannot be reached. So I've given those cases to Mr. Pattison; he's asking for an opportunity to research the issue and present me with legal arguments as to why I can grant this motion. So what we're going to do today is, Mr. Pattison has indicated that the two of you

1 have reached an agreement. We're going to put the
2 agreement on the record. I'm going to take the
3 matter under advisement so that Mr. Pattison can
4 provide me with the case authority that I can do
5 what the two of you are requesting that I do.

6 So raise your right hands.

7 (Parties duly sworn by the Court.)

8 MS. WALKER: I'd like to point out
9 that there was a motion and entry filed December
10 29th which terminated the current order for
11 support due to the adoption of Brian Knuckles.
12 The motion was filed by Mike Masterson from our
13 office and the entry was signed by the Judge.

14 THE COURT: I know, it terminated the
15 current support but it doesn't address the
16 arrearage.

17 MS. WALKER: That's correct.

18 THE COURT: They're asking that the
19 arrearage, portions of the arrearage be waived.
20 So, Mr. Pattison, are you sure you want to do
21 this? Because you may need to put some facts on
22 it as to the basis for the request for
23 modification. Are you ready to do that today?

24 MR. PATTISON: Probably not.

25 THE COURT: Why don't we re-set it,

1 then.

2 MR. PATTISON: I'll put on the record
3 maybe just what the agreement was.

4 THE COURT: Well, then if you need it,
5 if you wish to have an evidentiary hearing, you'll
6 ask for it?

7 MR. PATTISON: Yes.

8 THE COURT: Okay, that's fine.

9 MR. PATTISON: More than a year before
10 this date -- and I'll try to check back in my files
11 to find out exactly when -- an agreement was reached
12 between Christina Reeder and Brian Knuckles that
13 there be an adoption, the child, and that the child
14 support arrearage that belonged to Mrs. Reeder would
15 be reduced by one-half. That amount of arrearage is
16 \$7,420.16. One-Half of that amount would be
17 3710.08, which would reduce the total arrearage at
18 this point to ~~\$~~4570.92. Since the agreement, in
19 furtherance of that agreement I have assisted
20 Christina Reeder in doing the adoption which is
21 complete, as the Court has been notified. Is that
22 correct, Mrs. Reeder?

23 MRS. REEDER: Yes.

24 MR. PATTISON: All right. Is that
25 correct, Mr. Knuckles?

1 MR. KNUCKLES: Yes, sir.

2 THE COURT: Parties agree that the
3 arrearage of Mother should be reduced by one-half,
4 to 3710.08, correct?

5 MR. PATTISON: Yes.

6 THE COURT: Okay. How long do you
7 need for briefs? I'll take the matter under
8 advisement. I'll give you 30 days to file a
9 brief.

10 MR. PATTISON: Could you make that 60
11 because I've got --

12 THE COURT: All right, 60 days. So
13 your brief is due at the end of March.

14 MR. PATTISON: Okay.

15 THE COURT: Okay, that's all for
16 today.

17 MR. PATTISON: Thank you much.

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19 HEARING CONCLUDED

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C E R T I F I C A T E

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STATE OF OHIO :
:ss
COUNTY OF CLERMONT:

I, Evelyn Charles, Notary Public for the State of Ohio and Transcriptionist for the Court of Common Pleas, Juvenile Division, Clermont County, Ohio, do hereby certify that the foregoing was transcribed by me from an audio recording of said proceeding and thereafter transcribed into typewriting by computer under my supervision, and that the same is true and correct in all respects as transcribed from said audio recording.

I further certify that I am not counsel, attorney, relative, or employee of any of the parties hereto, or in any way interested in the within action.

IN WITNESS WHEREOF, I have hereunto set my hand and notarial seal on this 1st day of June, 2006.

MY COMMISSION EXPIRES
NOVEMBER 20, 2010


EVELYN CHARLES
NOTARY PUBLIC-STATE OF OHIO

Westlaw

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Page 1

Slip Copy, 2005 WL 3031893 (Ohio App. 12 Dist.), 2005 -Ohio- 6037
(Cite as: Slip Copy)

C

Bonenfant v. Bonenfant Ohio App. 12 Dist., 2005.
CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Twelfth District, Butler
County.

Shera C. BONENFANT, Plaintiff-Appellant,

v.

Richard J. BONENFANT, Defendant-Appellee.

No. CA2005-03-065.

Decided Nov. 14, 2005.

Background: Mother appealed decision of the
Court of Common Pleas, Butler County, No.
DR88-01-0085, granting motion of father to
eliminate his child support arrearage.

Holding: The Court of Appeals, Powell, P.J., held
that trial court abused its discretion in eliminating
father's child support arrearage.

Reversed and remanded.

Child Support 76E ↩450

76E Child Support

76EIX Enforcement

76Ek447

Arrearages;

Retroactive

Modification

76Ek450 k. Amount Owed. Most Cited

Cases

Child Support 76E ↩458

76E Child Support

76EIX Enforcement

76Ek447

Arrearages;

Retroactive

Modification

76Ek458 k. Circumstances of Obligor.

Most Cited Cases

Trial court abused its discretion in eliminating

father's child support arrearage; although father, in
support of his motion to eliminate arrearage, argued
that he should not be required to pay child support
for period during which son lived with him and was
supported by him, no change of custody order was
ever issued, and statute prohibited court or child
support enforcement agency from retroactively
modifying obligor's duty to pay delinquent support
payment. R.C. 3119.83.

Appeal from Butler County Court of Common
Pleas, Domestic Relations Division, Case No.
DR88-01-0085.

Fred S. Miller, Hamilton, for plaintiff-appellant.

Sidney C. Lieberman, Cincinnati, for
defendant-appellee.

POWELL, P.J.

*1 {¶ 1} Plaintiff-appellant, Shera Bonenfant,
appeals the decision of the Butler County Court of
Common Pleas, Domestic Relations Division,
granting the motion of defendant-appellee, Richard
Bonenfant, to eliminate his child support arrearage.
We reverse.

{¶ 2} The record reveals the following facts
relevant to this appeal: The parties were divorced
on December 21, 1988. The divorce decree named
appellant as the residential parent for Joseph, the
parties' minor son. Child support was initially set at
\$146 per week. On May 5, 1992, however, the
parties filed an agreed entry increasing the child
support to \$892 per month.

{¶ 3} Appellant is a teacher with the Cincinnati
public school system. As a teacher in the public
school system, she is permitted to enroll Joseph in
any school in the district. Joseph wished to attend a
performing arts high school that was located in
close proximity to appellee's residence. The parties
agreed that attending the school would be in
Joseph's best interest. Accordingly, the parties
informally agreed to allow Joseph to live with

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APPX. PAGE 18

Slip Copy, 2005 WL 3031893 (Ohio App. 12 Dist.), 2005 -Ohio- 6037
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appellee while attending the school for performing arts.

{¶ 4} It is undisputed that pursuant to their arrangement, Joseph lived with appellee from June 30, 2002 until December 31, 2003. Appellant did not pay appellee any support money during this period, and appellee provided for Joseph while he lived in his home. Appellant remained Joseph's legal custodian, however, so that Joseph could attend the school of performing arts.

{¶ 5} The record reflects that during the time Joseph resided with appellee, appellee accumulated a child support arrearage totaling \$12,761.98. Consequently, on August 19, 2004, appellant filed a motion in domestic relations court requesting that appellee be found in contempt for, among other things, failing to make child support payments.

{¶ 6} On his behalf, appellee moved to eliminate his support arrearage. In the motion, filed September 30, 2004, appellee argued that, because Joseph was living with him and supported by him for 18 months, he should not be required to pay child support for that time period.

{¶ 7} A hearing was held before a magistrate on November 15, 2004. On December 10, 2004, the magistrate issued a written decision granting appellee's request to eliminate his support arrearage. On February 22, 2005, after a hearing on objections to the magistrate's decision, the trial court issued a written opinion upholding the decision of the magistrate. This appeal followed, in which appellant raises the following single assignment of error:

{¶ 8} "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT WHEN IT GRANTED DEFENDANT-APPELLEE'S MOTION TO ELIMINATE HIS CHILD SUPPORT ARREARAGE."

{¶ 9} We first note it is well-settled that a trial court has broad discretion in matters affecting child support, and its decision on a motion to modify child support will not be reversed absent an abuse of discretion. *Booth v. Booth* (1989), 44 Ohio St.3d

142, 144, 541 N.E.2d 1028. An abuse of discretion is more than an error of law or judgment; rather, it implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

*2 {¶ 10} In the decision granting appellee's request to eliminate the support arrearage, the magistrate, relying on two cases from this court, *Viox v. Metcalfe* (Mar. 2, 1998), Clermont App. No. CA97-03-026, and *Flynn v. Flynn* (1984), 15 Ohio App.3d 34, 472 N.E.2d 388, reasoned that requiring appellee to pay child support for the time period during which Joseph lived with him would be inequitable.

{¶ 11} Appellant contends that equity notwithstanding, the domestic relations court disregarded the plain mandate of R.C. 3119.83 by retroactively reducing appellee's child support obligation. In pertinent part, R.C. 3119.83 provides: "[A] court or child support enforcement agency may not retroactively modify an obligor's duty to pay a delinquent support payment." Accordingly, appellant contends, the trial court abused its discretion in eliminating the arrearage. For the reasons that follow, we agree.

{¶ 12} "The function of equitable relief is to supplement the law where the law is insufficient to remedy a wrong." *Barone v. Barone*, Geauga App. No.2004-G-2575, 2005-Ohio-4479. A court of equity is authorized to render an award "on the principle that it may exercise its equitable jurisdiction to the extent of administering [the] full relief which the case demands." *Sandusky Properties v. Aveni* (1984), 15 Ohio St.3d 273, 276, 473 N.E.2d 798.

{¶ 13} A court does not, however, have unfettered discretion to award equitable relief. Various long-standing maxims, such as "equity follows the law," limit a court's application of equity: "When the rights of parties are clearly defined and established by law (especially when the source of such definition is through constitutional or statutory provision) the maxim 'equity follows the law' is usually strictly applied." *Civil Service Personnel*

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Ass'n, Inc. v. City of Akron (1976), 48 Ohio St.2d 25, 27, 356 N.E.2d 300. (Emphasis added.)

{¶ 14} Thus, while it is often tempting to decide difficult cases on the subjective principles of equity, courts have an obligation to resist that temptation and follow the law. *Schwaben v. School Emp. Retirement Sys.*, 76 Ohio St.3d 280, 285, 667 N.E.2d 398, 1996-Ohio-48. See, also, *In re Adoption of Zschach* (1996), 75 Ohio St.3d 648, 664, 665 N.E.2d 1070 (strictly applying a statute to terminate the rights of a putative father who failed to properly object to an adoption).

{¶ 15} Furthermore, *Viox* and *Flynn*, the two cases from this court that the trial court relied on to justify its decision, are distinguishable from the case at bar, and were improperly applied to the facts of this case.

{¶ 16} In *Viox*, the parties had a shared parenting plan, "SPP." Under the plan, father was the residential parent of the parties' three minor children for school purposes, and mother had the children for the summer. There was no support to be paid by either parent to the other. On motion, the trial court terminated the SPP and awarded custody to mother and visitation to father, as well as a support order from father to mother. Father appealed, and later asked for a stay of the custody order pending appeal, which this court granted. While the case pended, the parties continued to operate under the SPP, where the parties' three minor children stayed with father during the school year, and with mother in the summer. At one point, the oldest child went to live with mother. No support was paid by either parent. This court affirmed the trial court's custody award to mother, and, sometime thereafter, mother took custody of all three children. Thereafter, the CSEA sought support arrearages from father dating back to the original custody award to mother. Father again appealed saying he should not have a support obligation while the children were with him. This court ruled in father's favor to the extent that he was not obligated for support while the children were with him under the SPP pursuant to the stay. This court remanded the support question to the trial court to sort out the confusing fact pattern as to which children were with father or mother for what

periods of time and to calculate support accordingly. The factors impacting the calculation should have been the lack of a support obligation under the SPP, the six-month delay in father requesting a stay of the new custody order pending appeal, the stay pending appeal, the oldest child going to mother while the younger two children stayed with father in the middle of the appeal period, and father going to court and preserving his status under the SPP while trying to resolve the matter, rather than sitting idly on all issues and asking for credit after the fact.

*3 {¶ 17} In *Flynn*, an agreed entry signed by the parties and the court effectuated a temporary change in custody of the parties' only minor child. The agreed entry was silent with respect to modifying or temporarily suspending support payments. We held in that case that the parent with temporary custody pursuant to a court order was not required to make support payments while that parent had temporary custody of the parties' minor child.

{¶ 18} In the instant case, no legal change of custody ever took place through the court. In fact, the parties in this case intended not to change custody in their private arrangement in any way whatsoever. The court was only made aware of the child's living arrangements, and appellee's failure to pay child support, when the parties filed their respective motions as to the support arrearage approximately two years later.

{¶ 19} Since, in the case at bar, no change of custody order was ever issued, the application of R.C. 3119.83 is clear. Equity is inapplicable. Thus, we find the trial court erred in applying *Viox* and *Flynn* to the facts of this case.

{¶ 20} For all the foregoing reasons, we find the trial court abused its discretion in eliminating appellee's child support arrearage. The judgment of the trial court is reversed, and this case is remanded to the trial court for further proceedings consistent with this opinion, and according to law.

{¶ 21} Judgment reversed and remanded.

YOUNG and BRESSLER, JJ., concur.

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APPX. PAGE 20

Not Reported in N.E.2d, 1990 WL 44218 (Ohio App. 12 Dist.)

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, **Twelfth** District, Butler County.
Marjorie M. **CROW**, Plaintiff-Appellant,

v.

John Harrison **CROW**, Defendant-Appellee.

No. CA89-06-087.

April 16, 1990 .

John F. Holcomb, Butler County Prosecuting Attorney, Patrick G. Moeller, Hamilton, for plaintiff-appellant.

Carl Morgenstern Co., L.P.A., Roger S. Gates, Hamilton, for defendant-appellee.

OPINION

KOEHLER, Judge.

*1 This case is on appeal from a judgment of the Butler County Court of Common Pleas, Domestic Relations Division, whereby the court made a finding that child support had been terminated by agreement of the parties.

Plaintiff-appellant, Marjorie M. **Crow**, and defendant-appellee, John Harrison **Crow**, were divorced on June 31, 1977. One minor child, Michelle, was born to the parties on November 13, 1971. Pursuant to the separation agreement incorporated into the dissolution decree, custody was granted to appellant, with appellee ordered to pay child support in the amount of \$80 per month. Appellee was granted visitation rights.

During the year following the divorce, appellee exercised weekend visitation as well as regular evening visits. In the summer of 1978, appellant remarried and moved to Michigan with her daughter and a new husband. Due to Michelle's difficulty in adjusting to the move and to her new family situation, the parties began discussing increased visitation, expenses and child support. As a result, the parties agreed that frequent visits would be beneficial. Therefore, an agreement was negotiated whereby appellee's child support was suspended in order for greater visitation to occur between appellee and daughter.

Appellee faithfully and consistently visited his daughter. At first, the visits occurred two weekends every month which was later modified to one weekend. In 1981, appellant moved to Tucson, Arizona necessitating less frequent visitation. However, appellee still continued to visit his daughter six weeks during the summer months and two weeks at Christmas.

The evidence indicates that appellee expended over \$27,000 on his daughter in connection with visitation since 1978. Appellant never demanded monies for child support during this period of time. Further, at the request of appellant in 1988, appellee did resume child support not including any alleged arrearages.

On December 20, 1988, a petition was forwarded to the Butler County Juvenile Court by the state of Arizona, Pima County Child Support Services, under the Uniform Reciprocal Enforcement of Support

Act (URESAs). Subsequent to service of process, appellee filed a motion requesting the Butler County Domestic Relations Court to combine the URESA petition with the original divorce action, DR77-05-818, and assume jurisdiction over arrearage and current support issues. The court granted this motion and assumed jurisdiction.

The Butler County Domestic Relations Court heard this case on April 19, 1989. In an entry dated May 9, 1989, the court found that the parties terminated child support by agreement in 1978. Accordingly, the court below held that no arrearage was due appellant herein, but did increase the regular support obligation from \$80 to \$300 per month.

Appellant contends that there was never an agreement by the parties to modify the court's child support order and, as a result, now brings this appeal setting forth the following assignments of error:

***2 First Assignment of Error:**

"The Butler County Court of Common Pleas finding that an agreement existed between the parties to suspend child support payments was not supported by sufficient evidence and was against the weight of evidence."

Second Assignment of Error:

"Assuming that an agreement to suspend child support payments existed between former spouses, Butler County Common Pleas Court erred to the prejudice of Appellant in enforcing such agreement because the enforcement would be contrary to law and contrary to the best interests of the minor child."

Appellant, in her first assignment of error, asserts that an "agreement" to suspend court-ordered child support never existed between the parties and, therefore, is against the manifest weight of the evidence. We disagree.

The lower court in its opinion found that the parties agreed to suspend child support payments, as follows:

"Upon the testimony and the evidence, the court finds that the parties terminated child support by agreement in 1978. The reason for the termination was to allow John **Crow** additional money to spend in extensive visitation with his minor child. In reliance upon the agreement, Mr. **Crow** expended in excess of twenty-seven thousand dollars (\$27,000) on visitation with his daughter between 1978 and 1988. When Mr. **Crow** was asked to resume child support he did so at the original level."

Appellant contends that the evidence presented was insufficient to support a finding that an "agreement" had been entered into by the parties.

The evidence indicates that the parties through phone conversations desired to increase appellee's visitation with his daughter in order to help the child adjust to her new home and family situation. Due to the distance from Oxford, Ohio to either Ann Arbor, Michigan or Tucson, Arizona, travel expenses incurred by appellee would greatly increase. Therefore, forbearance of child support in exchange for frequent visits and time with the minor child was agreed to by the principals involved. This fact is buttressed by appellant's failure for a ten-year period to pursue such child support.

Judgments supported by competent, credible evidence going to all the essential elements of a particular action will not be reversed by a reviewing court as against the manifest weight of the evidence. Seasons Coal Co., Inc. v. Cleveland (1984), 10 Ohio St. 3d 77; C.E. Morris Co. v. Foley Construction Co. (1978), 54 Ohio St. 2d 279. The Court in Seasons Coal Co., supra, stated:

"We believe that an appellate court should not substitute its judgment for that of the trial court when there exists, as in this case, competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial judge. ***"

doctrine will operate has been materially prejudiced by the delay of the person asserting his claim."

Smith, *supra*, at 447; see, also, Connin v. Bailey (1984), 15 Ohio St. 3d 34; Kinney v. Mathias (1984), 10 Ohio St. 3d 72.

We find that appellant's failure to enforce the existing support order bars her from collecting any arrearage. Appellee has clearly been materially prejudiced. As a result of the agreement between the parties, appellee refrained from pursuing a child support modification and incurred substantial expenses in connection with the agreement benefiting the minor child. Thus, detrimental reliance by appellee, as well as material prejudice, renders the doctrine of laches applicable to preclude appellant's claim of child support arrearage.

Appellant's second assignment of error is not well-taken and is hereby overruled.

Judgment affirmed.

YOUNG, J., concurs separately.

YOUNG, Judge, concurring separately.

No doubt our decision today will be cited by those who seek to avoid child support arrearages by claiming an oral agreement to modify existed between the parties. I write separately only to emphasize, on the first assignment of error, that the narrow issue before us is whether the finding of the trial court was against the manifest weight of the evidence. There is plenty of competent, credible evidence to support the finding of the trial court that such an agreement existed, and this court may not substitute its judgment for that of the trial court.

As to the second assignment of error, the record shows that appellee expended \$27,000 for the benefit of the child during the period of time that support payments were suspended by agreement. This factor, when combined with the other matters considered by the trial court, clearly establishes that the enforcement of the agreement was not contrary to the best interests of the child.

JONES, P.J., dissents.

JONES, Presiding Judge, dissenting.

*4 The majority has established a dangerous precedent of dubious validity in holding that a father can ignore a court order to support his minor child on the basis of an alleged oral agreement with the child's mother. There is no doubt that a support agreement can be modified by agreement between the parents, if done in writing and with the court's approval. An alleged oral agreement is highly suspect when claimed by a father who has been in default for ten years. Other written contracts cannot be altered by the unilateral assertions of only one of the contracting parties, and there certainly is no rule of law permitting an exception to a father in default of his agreement to support his child.

It is a fact of life that absconding fathers contribute greatly to the problems of welfare departments in providing aid to dependent children. The record reveals the father of the child in this case is well educated. It would have been an easy matter to express any modifications of the support agreement in writing. Nelson v. Nelson (Dec. 29, 1989), Lake App. No. 88-L-13-199, unreported, cited by the majority is distinguishable for that precise reason. The child's mother in Nelson, supra, advised the court in writing on three separate occasions that support money was neither desired nor expected.

*5 Although I cannot grant my Imprimatur to the modification of written agreements absent unusual circumstances and a higher degree of proof, I must acknowledge that the doctrine of laches may at times be applicable. Laches, of course, was not the basis of the trial court's decision. The court simply found that child support was terminated by oral agreement, despite denial by the child's mother. Rest assured that any father who fails to support his children henceforth will claim an oral agreement to avoid payment of accumulated deficiencies. Finally, it is no defense to any order requiring support payments to assert, as here, that large sums were spent to send the child to Paris and other exotic places. Paris trips do not provide food and clothing for a growing child.

Ohio App., 1990.

Crow v. Crow

Not Reported in N.E.2d, 1990 WL 44218 (Ohio App. 12 Dist.)

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(Cite as: Not Reported in N.E.2d)

Davis v. Davis Ohio App. 2 Dist., 1992. Only the Westlaw citation is currently available. CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Second District,
Montgomery County.

Jane DAVIS (Hull), Plaintiff-Appellee,

v.

Keith P. DAVIS, Defendant-Appellant.

No. 12564.

March 3, 1992.

John Huber, Beavercreek, for plaintiff-appellee.
Lawrence J. Greger, Dayton, for
defendant-appellant.

OPINION

ARCHER E. REILLY, Judge, Retired, Sitting By
Assignment.

*1 This is a judgment of the Common Pleas Court
of Montgomery County, Ohio, Division of
Domestic Relations.

The parties were divorced on July 1, 1986.
Appellee filed a motion on December 20, 1989 to
reduce visitation along with other matters.
Appellant filed a motion on January 31, 1990
concerning child support and the property
settlement. The case was heard by a referee who
submitted findings of facts and conclusions of law
including recommendations, which were approved
by the trial judge pursuant to Civil Rule 53(E)(7).

Both parties objected to the referee's report. The
court adopted the report. Subsequently, the trial
court submitted a decision and judgment which
reaffirms the referee's report.

Appellant presented two issues, which will be
considered as assignments of error:

I. A TRIAL COURT ERRS WHEN IT RELIES
UPON CIVIL RULE 53(E)(6) IN OVERRULING
TIMELY-FILED OBJECTIONS TO A
REFEREE'S REPORT, BY REQUIRING A
TRANSCRIPT OR AN AFFIDAVIT WHEN
THERE IS SUFFICIENT EVIDENCE BEFORE
THE COURT, BY BOTH THE AGREEMENT OF
THE PARTIES AND PRIOR FILINGS
CONTAINED IN THE COURT'S OFFICIAL
FILE, TO DEMONSTRATE THE REFEREE'S
ERROR.

II. AS A MATTER OF LAW, THE REPORT AND
RECOMMENDATION OF THE REFEREE
FAILED TO COMPLY WITH OHIO RULES OF
CIVIL PROCEDURE, RULE 53(E)(5) IN THAT
THE FINDINGS OF FACT ARE INSUFFICIENT
FOR THE TRIAL COURT TO MAKE AN
INDEPENDENT ANALYSIS OF THE ISSUES
AND APPLY APPROPRIATE RULES OF LAW
THERE TO.

Appellant's first assignment of error is not well
taken. The trial court in its decision and judgment,
wrote in pertinent part:

Parties' objections, in effect, contest the findings of
fact as made by the referee. However, neither a
transcript nor any affidavits were filed with this
court. The law is clear that a party cannot object
that a referee's report is against the manifest weight
of the evidence without a transcript (*Fryman v.*
Fryman (Nov. 23, 1981), Montgomery App. No.
7187), or, in certain instances, an affidavit (Civ.R.
53(E)(6); *Moeller v. Moeller* (Apr. 20, 1988),
Montgomery County App. No. 10713).

Both parties allege disagreement with the visitation
as ordered by the referee, contending that it is
against an agreement of the parties. However,
since there is no transcript of the parties it will be
presumed that the referee's report is correct.

The parties allege that they agreed on September

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23, 1987 to modify the summer visitation period from four to six weeks and that the father's duty to support would abate during the six weeks.

In their memoranda opposing the referee's report and recommendations they contend that the referee erred by calculating the arrearage based upon a four week visitation and abatement for the years 1987, 1988, and 1989. The trial court, however, was not bound by such allegation between the parties.

The referee in her recommendation concerning the finding of facts referred to appellee's motion to modify visitation in pertinent part as follows:

With respect to plaintiff's motion to modify visitation, the parties, after some discussion at the hearing, were able to arrive at a general agreement as to modifications which are set forth in detail in the recommendations below....

*2 ... Certain adjustments were made in the visitation schedule. At the hearing on this matter, the parties' appeared to be substantial agreement with respect to modification. This referee's understanding of the parties' wishes regarding visitation is contained in the recommendation portion of the report and recommendation and permanent order.

The referee further wrote as to the above aspect of appellee's motion:

Branch III: Records of the Support Enforcement Agency show an arrearage of \$1,562.76 as of March 2, 1990. Pursuant to the parties' separation agreement, defendant is entitled to an abatement of support for a maximum of four weeks during his vacation. The parties' have agreed to a credit of \$115.12 per week for the maximum period in 1987, 1988, and 1989, or \$1,383.24. This leaves an arrearage of \$179.52.

This statement is supported by an addendum to her report processed by the Montgomery County Support Agency regarding the agreement of the parties. In sum, the trial court did not abuse its discretion by adopting the referee's report and

recommendation. *Blakemore v. Blakemore* (1985), 5 Ohio St.3d 219.

Appellant's first assignment of error is overruled.

As to appellant's second assignment of error the referee's report includes sufficient findings concerning child support in the following summary of facts for the trial court to make an independent analysis:

Branch IV: Defendant is employed in the insurance business. In 1989, he reported total earnings of \$43,729.28. His business expenses were \$17,524.29, leaving net earnings of \$26,294.99. Defendant testified that in 1986, he earned \$28,000. Plaintiff is self-employed in the insurance business. She earns \$103 per month at present. She has remarried. Her husband earns approximately \$3,300 per month. The children have no unusual medical or educational needs. The child support computation sheet attached hereto and incorporated into the findings of fact, indicates a child support obligation of \$57 per child per week. There has been no substantial change in circumstances since the time of the divorce in 1986. Therefore, no child support increase is warranted at this time.

There was a motion for an increase in child support filed by appellee and a motion for a decrease submitted by appellant. The same rationale applied to both an increase as well as a decrease. The referee, as indicated above, specifically stated that "there have been no substantial changes in circumstances since the time of the divorce in 1986." That is the basic test for a modification of child support.

The trial court in its decision and judgment wrote as to the property settlement as follows:

In this case the referee found that the amount of money to be paid to the plaintiff from the defendant was in the nature of property division. Defendant is attempting to introduce evidence that is not in the record and nor (sic) supported that this represents alimony and that is a violation of the separation agreement. Further as the court stated in paragraph

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two since there is no record that the parties cannot object that the referee's report is against the manifest weight of the evidence without a transcript or an affidavit (*Fryman, supra, Moeller, supra*), the parties wish (sic) to have objected to that they should have sought a transcript pursuant to L.R. 4.18. The court has carefully considered the findings of fact contained in the report of the referee as well as the merits of the objections and the memoranda contra....

*3 The purpose of Civil Rule 53 is to assist the trial court. The final determination is the province of the court. The discretion of a trial court is not unlimited; but it has the authority to do what is equitable and its judgment should not be reversed unless it abuses its discretion. *Cherry v. Cherry* (1981), 66 Ohio St.2d 318. This record does not show an abuse of discretion by the trial court in adopting the referee's findings of fact and conclusions of law or in its decision and judgment.

Appellant's second assignment of error is overruled and the judgment is affirmed.

BROGAN and GRADY, JJ., concur.

(Honorable Archer E. Reilly, Retired of the Court of Appeals, Tenth Appellate District, Sitting by Assignment of the Chief Justice of the Supreme Court of Ohio).

Ohio App. 2 Dist., 1992.

Davis v. Davis

Not Reported in N.E.2d, 1992 WL 41823 (Ohio App. 2 Dist.)

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➔3119.22 Deviation of amount of child support ordered

The court may order an amount of child support that deviates from the amount of child support that would otherwise result from the use of the basic child support schedule and the applicable worksheet, through the line establishing the actual annual obligation, if, after considering the factors and criteria set forth in section 3119.23 of the Revised Code, the court determines that the amount calculated pursuant to the basic child support schedule and the applicable worksheet, through the line establishing the actual annual obligation, would be unjust or inappropriate and would not be in the best interest of the child.

If it deviates, the court must enter in the journal the amount of child support calculated pursuant to the basic child support schedule and the applicable worksheet, through the line establishing the actual annual obligation, its determination that that amount would be unjust or inappropriate and would not be in the best interest of the child, and findings of fact supporting that determination.

(2000 S 180, eff. 3-22-01)

HISTORICAL AND STATUTORY NOTES

Ed. Note: RC 3119.22 contains provisions analogous to portions of former RC 3113.215(B)(1) and analogous to former RC 3113.215(B)(2)(c), repealed by 2000 S 180, eff. 3-22-01.

→3119.23 Factors considered for deviation

The court may consider any of the following factors in determining whether to grant a deviation pursuant to section 3119.22 of the Revised Code:

- (A) Special and unusual needs of the children;
- (B) Extraordinary obligations for minor children or obligations for handicapped children who are not stepchildren and who are not offspring from the marriage or relationship that is the basis of the immediate child support determination;
- (C) Other court-ordered payments;
- (D) Extended parenting time or extraordinary costs associated with parenting time, provided that this division does not authorize and shall not be construed as authorizing any deviation from the schedule and the applicable worksheet, through the line establishing the actual annual obligation, or any escrowing, impoundment, or withholding of child support because of a denial of or interference with a right of parenting time granted by court order;
- (E) The obligor obtaining additional employment after a child support order is issued in order to support a second family;
- (F) The financial resources and the earning ability of the child;
- (G) Disparity in income between parties or households;
- (H) Benefits that either parent receives from remarriage or sharing living expenses with another person;
- (I) The amount of federal, state, and local taxes actually paid or estimated to be paid by a parent or both of the parents;
- (J) Significant in-kind contributions from a parent, including, but not limited to, direct payment for lessons, sports equipment, schooling, or clothing;
- (K) The relative financial resources, other assets and resources, and needs of each parent;
- (L) The standard of living and circumstances of each parent and the standard of living the child would have enjoyed had the marriage continued or had the parents been married;
- (M) The physical and emotional condition and needs of the child;
- (N) The need and capacity of the child for an education and the educational opportunities that would have been available to the child had the circumstances requiring a court order for support not arisen;
- (O) The responsibility of each parent for the support of others;
- (P) Any other relevant factor.

The court may accept an agreement of the parents that assigns a monetary value to any of the factors and criteria listed in this section that are applicable to their situation.

If the court grants a deviation based on division (P) of this section, it shall specifically state in the order the facts that are the basis for the deviation.

→3119.83 Retroactive modification of duty to pay delinquent support payment prohibited

Except as provided in section 3119.84 of the Revised Code, a court or child support enforcement agency may not retroactively modify an obligor's duty to pay a delinquent support payment.

(2000 S 180, eff. 3-22-01)

HISTORICAL AND STATUTORY NOTES

Ed. Note: RC 3119.83 contains provisions analogous to former RC 3113.21(M)(3), repealed by 2000 S 180, eff. 3-22-01.