

IN THE SUPREME COURT OF OHIO

CHRISTINA LYNN BYRD, nka REEDER,

and

STATE of OHIO, *ex rel* CLERMONT
COUNTY DEPARTMENT OF JOB AND
FAMILY SERVICES,

Plaintiffs/Appellees,

vs.

BRIAN KELLY KNUCKLES,

Defendant/Appellant.

Case No. 2007-1913

On Appeal From The Clermont
County Court of Appeals, 12th
Appellate District

Court of Appeals Case No. CA2006-
11-095

**MERIT BRIEF OF APPELLEE CLERMONT COUNTY DEPARTMENT
OF JOB & FAMILY SERVICES, DIVISION OF CHILD SUPPORT
ENFORCEMENT**

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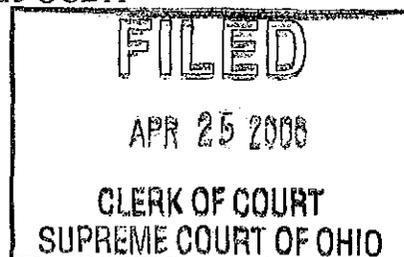


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I. STATEMENT OF THE CASE

A. INTRODUCTION

This case involves the relatively limited issue of whether the Revised Code prevents parents from entering into an enforceable agreement to reduce or eliminate past due child support amounts. These parents were not married, and the custodial parent/Mother agreed to forgive one-half of the Father's child support arrearage in return for Father consenting to adoption of the parties' child by Mother's husband. This case has no bearing on situations where parents have not reached an explicit agreement to reduce their arrearages.

Nothing in the language of the statute - RC 3119.83 - expressly prohibits such agreements. Indeed the legislative history demonstrates that the statute does not preclude such agreements. And such agreements frequently advance the child's best interests, e.g., here, the agreement prompted the father to consent to his son being adopted into a stable, two-parent home.

Plaintiff/Appellee Clermont County Child Support Enforcement ("CSE") administers thousands of child support orders. Requests from custodial parents/obligees to forgive arrearages are not uncommon. The parties' reduction of arrears by agreement frees up CSE's resources for use on other cases. So the outcome of this appeal will have a measurable affect on this Appellee's resource allocation and on the efficient use of resources by support enforcement agencies across the state.

B. FACTS

At issue is support for the parties' only child Bryan A. Knuckles, born April 14, 2001. On August 14, 2001 CSE filed a Complaint for Support (T.d. 1) on behalf of Plaintiff/Mother/Appellee Christina Byrd ("Mother") against Defendant/Father/Appellant Brian

K. Knuckles ("Father"). Mother and Father being unmarried, CSE filed the Complaint in the Juvenile Division of the Clermont County Common Pleas Court. The Juvenile Court entered a child support order on March 28, 2002, requiring Father to pay child support of \$272.17 per month, effective August 14, 2001. (T.d. 6). Not long thereafter, Father defaulted in payments (See T.d. 7, Motion for Contempt, filed November 22, 2002).

Over the next several years, Father's payments were less than exemplary, and he remains in default to this day. The Juvenile Court found him in contempt on May 3, 2004, and sentenced him to 30 days in jail beginning September 13, 2004. Father did not report to jail voluntarily and was therefore arrested. After serving 21 days of his sentence, Father was released on March 21, 2005 after filing a Motion to Mitigate (T.d. 19). The support arrearage on the date of his release was \$7,576.70. (T.d. 20), all of which was owed to the custodial parent, i.e. Bryan's mother, Plaintiff/Appellee Christina Byrd.

By this time, Mother had married Brad Reeder and is known as Christina Reeder. Mr. Reeder wanted to adopt young Bryan, who was then four years old, and Father's written consent was required for the adoption. Consequently, in or around June 2005, Mother agreed to forgive one-half of the back support in return for Father consenting to the adoption. (T.p. 4, line 9 – T.p. 5, line 5). Accordingly, the adoption was approved, and Bryan was now to be raised in a two-parent, stable family environment. At CSE's request, the Juvenile Court then terminated Father's ongoing support obligation, effective December 19, 2005. (T.d. 25).

Having performed his side of the bargain, Father filed a Motion on January 5, 2006 asking the Juvenile Court to approve reduction of the arrearage. (T.d. 26). At the hearing on that Motion, both Mother and Father appeared, and in open court acknowledged and corroborated

their agreement: forgiveness of one-half of the arrearage in return for consent to adoption. (T.p. 4, line 9 – T.p. 5, line 5).

C. PROCEDURAL POSTURE

By Decision docketed April 24, 2006, the Juvenile Court Magistrate refused to allow the parties to reduce the arrearage. The Magistrate repudiated any discretion to allow the waiver/compromise, ruling that the “statutory basis [i.e., R.C. 3119.83] is absolute.” (T.d. 29). Father filed Objections to the Magistrate’s Decision pursuant to ORCP 53. (T.d. 31). The Juvenile Court Judge overruled the objections and affirmed the Magistrate’s decision without opinion. (T.d. 35).

Father timely filed his Notice of Appeal to the 12th District Court of Appeals. (T.d. 36). The Appeals Court affirmed, noting that “it was within the juvenile court’s discretion to determine whether the facts of this case justify equitable relief” and concluding that the trial court did not abuse its discretion. (T.d. 51, pp. 4-5). The Appeals Court also noted that there are “decisions of other appellate courts which are inconsistent with our holding in this case.”

Given the apparent conflict between the districts, CSE determined to file a Motion to Certify a Conflict. Unfortunately, CSE’s decision to so file was delayed and the time for requesting certification under App. R. 25 expired. Therefore, CSE’s Motion for Leave to File Out of Time (T.d. 52) (which was accompanied by its Motion to Certify Conflict (T.d. 53)) was denied (T.d. 54), in accordance with App. R. 14.

Father timely filed a Notice of Appeal to this Court (T.d. 55) and a brief in support of jurisdiction, urging that the case is of great public importance. This Court agreed and accepted jurisdiction. (T.d. 56).

II. ARGUMENT

A. FIRST PROPOSITION OF LAW:

REVISED CODE 3119.83 DOES NOT PRECLUDE JUDICIAL APPROVAL OF THE PARTIES' AGREEMENT TO REDUCE OR ELIMINATE CHILD SUPPORT ARREARAGE.

The lower courts' application of R.C. 3119.83 (attached as Appendix 1) in this case was error. The statute does not preclude agreements to forgive or reduce child support arrearage. Neither the specific language of R.C. 3119.83, the statutory scheme of which it is a part, nor the legislative history obviate voluntary agreements between parents to compromise, reduce or waive arrearages.

Revised Code 3119.83 (and its predecessor, R.C. 3113.21(M)(3)) states:

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.

R.C. 3119.84 (attached as Appendix 1)(and its predecessor, R.C. 3113.21(M)(4)), provide in relevant part:

A court with jurisdiction over a support order may modify an obligor's duty to pay a support payment that becomes due after notice of a petition to modify the court support order has been given to obligee and to the obligor.

1. ***Read in pari materia with all of Chapter 3119, Section 3119.83 limits only the effective date of modification when a Motion to Modify is granted.***

Revised Code 3119.83 must be construed in light of its related code sections. See, *Kimble Clay & Limestone v. McAvoy* (1979), 59 Ohio St.2d 94, 391 N.E.2d 1030 (where various sections of statute concerned same subject matter, court is to construe sections *in pari materia*). Subtitled "Review of Child Support Orders," R.C. Sections 3119.60 through 3119.94 all govern

modification or termination of current support orders.¹ Thus, this subchapter of the Code deals entirely with contested modifications and terminations of current support, not with modification of arrears by agreement.

Modifications to current support are most often driven by changes in one or both parents' incomes or by changes in custody. Of necessity, the change in income or custody usually precedes the filing of a motion to modify support. So the issue arises: if modification is appropriate, is it effective from the date the income or custody changes, or from the date the motion for modification is filed, or from the date the parties receive notice of the request for modification? The sole purpose of R.C. 3119.83 and 3119.84 is to resolve this issue: modifications are retroactive only back to the date parties receive notice that a motion for modification has been filed. Conversely, R.C. 3119.83 has no application when parties have an agreement to adjust back support.

2. The legislative history of RC 3119.83 explicitly dichotomizes retroactive modification of current support and compromise/forgiveness of arrearage.

Legislative history corroborates that the scope of RC 3119.83 is limited to contested motions. As noted in the Brief of *Amicus Curiae* Ohio Child Support Directors Association (OCDA), Ohio's child support program must comply with the federal child support regulations in order to receive federal funding. 45 CFR 302.70 (a)(9)(attached as Appendix 2) and 303.106 (attached as Appendix 3) embody the federal requirements regarding modification of orders. The federal regulations provide that,

¹ Sections 3119.60 to 3119.76 govern administrative modification of current support. R.C. 3119.79 to 3119.84 speak to judicial modification of current support orders. Sections 3119.86 to 3119.91 cover administrative termination of current support. Sections 3119.91 to 3119.92 relate to judicial termination of current support orders. Finally, R.C. 3119.93 to 3119.94 deal with the termination of collection procedures and disposition of previously collected funds upon termination.

(a) The State shall have in effect and use procedures which require that any payment or installment of support under any child support order is, on and after the date it is due:

- (1) A judgment by operation of law...;
- (2) Entitled as a judgment to full faith and credit [in all states]; and
- (3) Not subject to retroactive modification by such state or any other state except as provided in paragraph (b) of this Section.

(b) The procedures referred to in paragraph (a)(3) of this section may permit modification with respect to any period during which there is pending a petition for modification, but only from the date that notice of such petition has been given [to the obligee or obligor].

45 CFR 303.106.

Plainly, R.C. 3119.83 and 3119.84 (in conjunction with R.C. 3123.18 regarding judgments for past due support), implement these federal requirements. Thus, the comments of the enacting federal agency inform the interpretation of the state statutes at issue.

In its Policy Interpretation Questions (PIQ) on the federal regulations cited above, the federal Office of Child Support Enforcement (OCSE) states unequivocally that the agreed compromise of arrearage is entirely separate and distinct from the statutory and regulatory prohibition against retroactive modification of support orders:

States must have laws prohibiting retroactive modification of arrearages, which prohibit a court or administrative body from taking action to erase or reduce arrearages that have accrued under a court or administrative order for support, in effect altering the obligor's obligation without the concurrence of the obligee (or the state in the case of arrearages permanently assigned to the State). Compromising arrearages on the other hand involves the satisfaction of arrearages by specific agreement of both of the relevant parties in accordance with state law on the same grounds as exist for any other judgment in the state. (emphasis supplied)

OCSE PIQ-00-03, p.2 (attached as Appendix 4). Thus, the office that promulgated the applicable federal regulations, which in turn spawned the enactment of R.C. 3119.83 and 3119.84, states that these enactments are not intended to prohibit inter-party agreements to compromise arrears.

To the contrary, OCSE goes on to state that compromise agreements are permitted:

Child support arrearages that have been permanently assigned to the State [under title IV-A or IV-E] may be compromised by an agreement between the obligor and the State (as the assignee of the obligee). Any compromise of child support arrearages that have not been permanently assigned to the state would require the agreement of the obligee. (emphasis supplied).

Id., at p. 3. In short, the legislative history of the statute at issue makes clear that the statute is not intended to apply to, much less prohibit, agreements to compromise support arrearage.

3. Child support arrearages are a judgment under R.C. 3123.18, and Ohio law clearly permits parties to compromise judgments.

After default in payment, child support loses its character as an ongoing, court-ordered payment and takes on the characteristic of a judgment, and Ohio litigants are plainly permitted to reduce or eliminate judgments on whatever terms they see fit. Under R.C. 3123.18 (attached as Appendix 5), once a court or CSE determines that payment of current support is in default, then

...each payment or installment that was due and unpaid under the support order that is the basis for the default determination plus any arrearage amounts that accrue after the default determination and during the period of default shall be a final judgment which has the full force, effects, and attributes of a judgment entered by a court of this state for which execution may issue under Title XXIII [23] of the Revised Code.

See also, Smith v. Smith (1959), 168 Ohio St. 447, 156 N.E.2d 113 (obligee entitled to judgment for back child support); *McPherson v. McPherson* (1950), 153 Ohio St. 82, 90 N.E.2d. 675 (future installments of support stand on different footing than past-due installments; past due amounts constitute an ordinary judgment for money).

Parties in Ohio are free to compromise judgments. *Gholson v. Savin* (1941), 137 Ohio St. 551, 31 N.E. 2d 858 (settlement of debt/judgment for less than full payment is valid, even though lacking in consideration, when made a part of court record and carried into a filed entry); *see also, Bd. of Commissioners of Columbiana County v. Samuelson* (1986), 24 Ohio St.3d 62, 493 N.E.2d 245 (proponent of motion to satisfy judgment must demonstrate what parties intended as replacement for judgment awarded). Since child support arrearage is by statute a judgment, it

can be compromised in the same fashion as any other judgment, and the court below erred in prohibiting such compromise.

4. **R.C. 3119.83 applies only to court or CSE abrogation of a "duty" to pay "delinquent" support**

In addition to legislative history and related Code sections, the plain language of R.C. 3119.83 does not preclude agreement between the parties to reduce or eliminate arrearage. The statute states that "a court or child support enforcement agency may not retroactively modify an obligor's duty to pay a delinquent support payment." When the parties agree to modify the amount of past due support, the obligor no longer has a "duty" to pay that past due amount. And when the parties so agree, it is the parties, not the Court or CSE, which have eliminated the duty. Further, if the parties agree that past support is no longer owed, then there is no longer a "delinquent support payment."

In short, the parties' agreement to reduce or eliminate child support arrearages removes the situation from the plain language of the statute: the parties' agreement removes the "duty" and "obligation." The Court or CSE's involvement is simply then to ensure that official CSE and Court records of the child support account correctly reflect the parties' agreement.

B. SECOND PROPOSITION OF LAW:

IF R.C. 3119.83 APPLIES WHEN PARTIES AGREE TO WAIVE OR COMPROMISE ARREARAGE, THE TRIAL COURT HAS DISCRETION TO APPROVE SUCH AGREEMENTS.

The trial court seems to have disclaimed any discretion in applying R.C. 3119.83, stating that "the statute is absolute." (T.d. 29, p. 2). In contrast, the Appellate Court stated that "it was within the juvenile court's discretion" to grant relief. (T.d. 51, p. 4). This Court has held that in family cases, the courts must have discretion to do what is equitable based upon the facts

and circumstances of the particular case. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144, 541 N.E.2d 1028, 1030.

There are examples of Ohio courts exercising discretion and allowing retroactive modification of past due support, even where the parties have not agreed to such modification. See e.g., *Viox v. Metcalfe*, 1998 Ohio App. LEXIS 800 (12th App. Dist.)(attached as Appendix 6)(retroactive modification of arrearage permitted where obligor receiving physical custody of children was not accompanied by motion to modify support). Similarly, various Ohio Courts have allowed unmarried custodial parents to forgive arrearage in return for the absent parent's consent to adoption. *Eckliff v. Walters* (2006), 168 Ohio App.3d 727, 861 N.E.2d 843; *Nelson v. Nelson* (1989), 65 Ohio App.3d 800, 585 N.E.2d 502; *Tressler v. Tressler* (1972), 32 Ohio App.2d 79, 288 N.E.2d 339; *Lawhorn v. Lawhorn*, 1990 Ohio App. LEXIS 3880 (2^d App. Dist.)(attached as Appendix 7). On the other hand, at least one other court views R.C. 3119.83 as precluding agreements to reduce child support arrearage. *Hedrick v. Wyno*, 2001 Ohio App. LEXIS 3003 (9th App. Dist.)(attached as Appendix 8).

Given the disparate results among the districts, this Court's pronouncement is needed. CSE urges the Court to recognize that frequently, compromise of arrearage furthers a child's best interests. In the case at bar, Father may not have consented to adoption absent the incentive of reduced arrearage. Adoption in turn benefited the parties' son by creating a more stable parenting environment. Conversely, refusal of courts to honor such agreements in this type of situation will contravene a child's best interests.

Agreements to reduce arrearage would also advance children's interests in other situations—for example, where the parents reconcile and are cohabiting; where interstate or wide geographic separation of the parents exist, such that the obligor could spend money travel to visit

the child, or to pay the arrearage, but not both; or where the absent parent pays for car, or private education or other "big ticket" item that is in the child's best interests in return for the custodial parent's agreement to reduce arrearage.

The reasons for parents to agree to compromise arrearages are varied. Perhaps the parents agree that absent parent will pay for the child to study in Europe rather than pay off back child support. Or perhaps the absent parent is an alcoholic and a bad influence on the child, so the custodial parent agrees to waive past due support in return for the absent parent entering treatment and staying sober.

In the foregoing examples, prohibiting custodial parents from forgiving arrearages would actually harm the children's best interests. Conversely, allowing parents the freedom to forgive past due support preserves their ability to act in their children's best interests.

The Magistrate's opinion suggests, incorrectly, that the child, and not the parent, has the right to the past due support. Without citation to authority, the Magistrate opined, "the support is for the benefit of the child not the parents. Parents cannot waive their children's rights." (T.d. 29). This conclusion has no legal foundation with respect to past due support.

Past due support is an asset of the obligee, not the child, because the custodial parent has in fact already expended the funds necessary to care for and support the child. *Miller v. Miller* (1991), 73 Ohio App.3d 721, 725, 598 N.E. 2d. 167, 170; *see also, Smith v. Smith* (1959), 168 Ohio St. 447, 156 N.E.2d 113 (obligee mother entitled to judgment for back support 14 years after majority of child for whom support was owed). So where a custodial parent is entitled to back support, the arrearage is essentially a repayment of funds already expended by the custodial parent to care for the child. Thus, the obligee should be free to waive such repayment where appropriate. It is the obligee's right to waive, not the child's.

Denying parents the freedom to waive or forgive past support has a broader impact: in this era of declining funding for support enforcement agencies, this appeal raises issues of administrative efficiency. Support enforcement agencies should not be forced to collect arrearages, nor maintain arrearages on the books, in defiance of the wishes of both parents. Maintaining uncollected arrearages hurts federal incentive funding for support enforcement agencies CSEs, and collecting unwanted funds saps resources better spent on cases where the custodial parents truly need and want the back support.

With many current support orders going unpaid across the state, it does not make sense for the Courts or agencies to use resources collecting money where parents have agreed to waive that money. CSE's resources are finite, and collecting unwanted/compromised arrearage drains resources that could be better spent on other cases. Conversely, elimination of arrears by agreement quickly frees up CSE's resources for use on other cases. So allowing voluntary reduction of arrearages by the parties will increase administrative efficiency.

III. CONCLUSION

The parties' agreement to reduce arrearage in this case resulted in the adoption of their child. There is no practical or legal reason the trial court should not have approved this agreement. The history of R.C. 3119.83 and the related Code sections demonstrate that the statute applies only to contested motions to modify support. Arrearage is treated differently than current support: arrearage is a judgment in the obligee's favor and like any Ohio judgment, the judgment creditor is free to enforce, modify or waive his or her entitlement.

Even if R.C. 3119.83 did apply to arrearage compromise agreements, the Court has discretion to approve such agreements. Where the agreement does not contravene the child's best interest, that discretion should be exercised in favor of approving the agreement.

For these reasons, Appellee CSE requests that the Court of Appeals decision be reversed and that this Court approve the agreement between the parties and order CSE to amend its records to reduce the arrearage as previously agreed to by the parties.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed by ordinary U.S. Mail, this 7th day of April, 2008, to the following:

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Edward E. Santen

3119.83 Modifying duty to pay delinquent support retroactively.

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.

Effective Date: 03-22-2001

3119.84 Modifying payments accruing while modification proceedings are pending.

A court with jurisdiction over a court support order may modify an obligor's duty to pay a support payment that becomes due after notice of a petition to modify the court support order has been given to each obligee and to the obligor before a final order concerning the petition for modification is entered.

Effective Date: 03-22-2001

§ 302.70

forwarding any amounts withheld on behalf of IV-D agencies in other States to those agencies.

(6) Reimburse the administrative costs incurred by the SESA that are actual, incremental costs attributable to the process of withholding unemployment compensation for support purposes insofar as these costs have been agreed upon by the SESA and the IV-D agency.

(7) Review and document, at least annually, program operations, including case selection criteria established under paragraph (c)(3), and costs of the withholding process versus the amounts collected and, as necessary, modify procedures and renegotiate the services provided by the SESA to improve program and cost effectiveness.

[49 FR 8927, Mar. 9, 1984, as amended at 68 FR 25303, May 12, 2003]

§ 302.70 Required State laws.

(a) *Required Laws.* The State plan shall provide that, in accordance with sections 454(20) and 466 of the Act and part 303 of this chapter, the State has in effect laws providing for, and has implemented procedures to improve, program effectiveness:

(1) Procedures for carrying out a program of withholding under which new or existing support orders are subject to the State law governing withholding so that a portion of the noncustodial parent's wages may be withheld, in accordance with the requirements set forth in § 303.100 of this chapter;

(2) Expedited processes to establish paternity and to establish and enforce child support orders having the same force and effect as those established through full judicial process, in accordance with the requirements set forth in § 303.101 of this chapter;

(3) Procedures for obtaining overdue support from State income tax refunds on behalf of individuals receiving IV-D services, in accordance with the requirements set forth in § 303.102 of this chapter;

(4) Procedures for the imposition of liens against the real and personal property of noncustodial parents who owe overdue support;

(5)(i) Procedures for the establishment of paternity for any child at least to the child's 18th birthday, including

45 CFR Ch. III (10-1-06 Edition)

any child for whom paternity has not yet been established and any child for whom a paternity action was previously dismissed under a statute of limitations of less than 18 years; and

(ii) Effective November 1, 1989, procedures under which the State is required (except in cases where the individual involved has been found under section 454(29) of the Act to have good cause for refusing to cooperate or if, in accordance with § 303.5(b) of this chapter the IV-D agency has determined that it would not be in the best interest of the child to establish paternity in a case involving incest or forcible rape, or in any case in which legal proceedings for adoption are pending) to require the child and all other parties in a contested paternity case to submit to genetic tests upon the request of any such party, in accordance with § 303.5(d) and (e) of this chapter.

(iii) Procedures for a simple civil process for voluntarily acknowledging paternity under which the State must provide that, before a mother and putative father can sign a voluntary acknowledgment of paternity, the mother and the putative father must be given notice, orally or through video or audio equipment, and in writing, of the alternatives to, the legal consequences of, and the rights (including any rights, if a parent is a minor, due to minority status) and responsibilities of acknowledging paternity, and ensure that due process safeguards are afforded. Such procedures must include:

(A) A hospital-based program in accordance with § 303.5(g) for the voluntary acknowledgment of paternity during the period immediately before or after the birth of a child to an unmarried mother, and a requirement that all public and private birthing hospitals participate in the hospital-based program defined in § 303.5(g)(2); and

(B) A process for voluntary acknowledgment of paternity in hospitals, State birth record agencies, and in other entities designated by the State and participating in the State's voluntary paternity establishment program; and

(C) A requirement that the procedures governing hospital-based programs and State birth record agencies

must also apply to other entities designated by the State and participating in the State's voluntary paternity establishment program, including the use of the same notice provisions, the same materials, the same evaluation methods, and the same training for the personnel of these other entities providing voluntary paternity establishment services.

(iv) Procedures under which the voluntary acknowledgment of paternity creates a rebuttable or, at the option of the State, conclusive presumption of paternity, and under which such voluntary acknowledgment is admissible as evidence of paternity;

(v) Procedures which provide that any objection to genetic testing results must be made in writing within a specified number of days before any hearing at which such results may be introduced into evidence; and if no objection is made, a written report of the test results is admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy;

(vi) Procedures which create a rebuttable or, at the option of the State, conclusive presumption of paternity upon genetic testing results indicating a threshold probability of the alleged father being the father of the child;

(vii) Procedures under which a voluntary acknowledgment must be recognized as a basis for seeking a support order without requiring any further proceedings to establish paternity; and

(viii) Procedures requiring a default order to be entered in a paternity case upon a showing that process was served on the defendant in accordance with State law, that the defendant failed to respond to service in accordance with State procedures, and any additional showing required by State law.

(6) Procedures which require that a noncustodial parent give security, post a bond, or give some other guarantee to secure payment of support, in accordance with the procedures set forth in § 303.104 of this chapter;

(7) Procedures for making information regarding the amount of overdue support owed by a noncustodial parent available to consumer reporting agencies;

(8) Procedures under which all child support orders which are issued or modified in the State will include provision for withholding from income, in order to assure that withholding as a means of collecting child support is available if arrearages occur without the necessity of filing an application for services under § 302.33 of this part, in accordance with § 303.100(i) of this chapter;

(9) Procedures which require that any payment or installment of support under any child support order, whether ordered through the State judicial system or through the expedited processes required by paragraph (a)(2) of this section, is (on and after the date it is due):

(i) A judgment by operation of law, with the full force, effect, and attributes of a judgment of the State, including the ability to be enforced;

(ii) Entitled as a judgment to full faith and credit in such State and in any other State; and

(iii) Not subject to retroactive modification by such State or by any other State, except as provided in § 303.106(b).

(10) Procedures for the review and adjustment of child support orders:

(i) Effective on October 13, 1990 until October 12, 1993, in accordance with the requirements of § 303.8 (a) and (b) of this chapter; and

(ii) Effective October 13, 1993, or an earlier date the State may select, in accordance with the requirements of § 303.8 (a) and (c) through (f) of this chapter.

(11) Procedures under which the State must give full faith and credit to a determination of paternity made by any other State, whether established through voluntary acknowledgment or through administrative or judicial processes.

(b) A State need not apply a procedure required under paragraphs (a) (3), (4), (6) and (7) of this section in an individual case if the State determines that it is not appropriate using guidelines generally available to the public which take into account the payment record of the noncustodial parent, the availability of other remedies, and other relevant considerations. The guidelines may not determine a majority of cases in which no other remedy is being used to be inappropriate.

(c) State laws enacted under this section must give States sufficient authority to comply with the requirements of §§ 303.100 through 303.102 and § 303.104 of this chapter.

(d)(1) *Exemption.* A State may apply for an exemption from any of the requirements of section 466 of the Act by the submittal of a request for exemption to the appropriate Regional Office.

(2) *Basis for granting exemption.* The Secretary will grant a State, or political subdivision in the case of section 466(a)(2) of the Act, an exemption from any of the requirements of paragraph (a) of this section for a period not to exceed three years if the State demonstrates that compliance would not increase the effectiveness and efficiency of its Child Support Enforcement program. Demonstration of the program's efficiency and effectiveness must be shown by actual, or, if actual is not available, estimated data pertaining to caseloads, processing times, administrative costs, and average support collections or such other actual or estimated data as the Office may request. The State must demonstrate to the satisfaction of the Secretary that the program's effectiveness would not improve by using these procedures. Disapproval of a request for exemption is not subject to appeal.

(3) *Review of exemption.* The exemption is subject to continuing review by the Secretary and may be terminated upon a change in circumstances or reduced effectiveness in the State or political subdivision, if the State cannot demonstrate that the changed circumstances continue to warrant an exemption in accordance with this section.

(4) *Request for extension.* The State must request an extension of the exemption by submitting current data in accordance with paragraph (d)(2) of this section 90 days prior to the end of the exemption period granted under paragraph (d)(2) of this section.

(5) *When an exemption is revoked or an extension is denied.* If the Secretary revokes an exemption or does not grant an extension of an exemption, the State must enact the appropriate laws and procedures to implement the mandatory practice by the beginning of the fourth month after the end of the first

regular, special, budget or other session of the State's legislature which ends after the date the exemption is revoked or the extension is denied. If no State law is necessary, the State must establish and be using the procedure by the beginning of the fourth month after the date the exemption is revoked.

(Approved by the Office of Management and Budget under control number 0960-0385)

[50 FR 19649, May 9, 1985, as amended at 51 FR 37731, Oct. 24, 1986; 54 FR 15764, Apr. 19, 1989; 56 FR 8004, Feb. 26, 1991; 56 FR 22354, May 15, 1991; 57 FR 30681, July 10, 1992; 57 FR 61581, Dec. 28, 1992; 59 FR 66249, Dec. 23, 1994; 64 FR 6249, Feb. 9, 1999; 64 FR 11809, Mar. 10, 1999; 68 FR 25303, May 12, 2003; 68 FR 53052, Sept. 9, 2003]

§ 302.75 Procedures for the imposition of late payment fees on noncustodial parents who owe overdue support.

(a) Effective September 1, 1984, the State plan may provide for imposition of late payment fees on noncustodial parents who owe overdue support.

(b) If a State opts to impose late payment fees—

(1) The late payment fee must be uniformly applied in an amount not less than 3 percent nor more than 6 percent of overdue support.

(2) The fee shall accrue as arrearages accumulate and shall not be reduced upon partial payment of arrears. The fee may be collected only after the full amount of overdue support is paid and any requirements under State law for notice to the noncustodial parent have been met.

(3) The collection of the fee must not directly or indirectly reduce the amount of current or overdue support paid to the individual to whom it is owed.

(4) The late payment fee must be imposed in cases where there has been an assignment under section 408(a)(3) of the Act or section 471(a)(17) of the Act or the IV-D agency is providing services under § 302.33 of this chapter.

(5) The State may allow fees collected to be retained by the jurisdiction making the collection.

(6) The State must reduce its expenditures claimed under the Child Support

§ 303.104

(f) *Fee for certain cases.* The State IV-D agency may charge an individual who is receiving services under § 302.33(a)(1) (i) or (iii) of this chapter a reasonable fee to cover the cost of collecting past-due support using State tax refund offset. The State must inform the individual in advance of the amount of any fee charged.

(g) *Distribution of collections.* (1) The State must distribute collections received as a result of State income tax refund offset:

(i) In accordance with section 457 of the Act and §§ 302.51 and 302.52 of this chapter; and

(ii) For cases in which medical support rights have been assigned under 42 CFR 433.146, and amounts are collected which represent specific dollar amounts designated in the support order for medical purposes, under § 302.51(c) of this chapter.

(2) If the amount collected is in excess of the amounts required to be distributed under paragraph (g)(1) of this section, the IV-D agency must repay the excess to the noncustodial parent whose State income tax refund was offset within a reasonable period in accordance with State law.

(3) The State must credit amounts offset on individual payment records.

(h) *Information to the IV-D agency.* The State agency responsible for processing the State tax refund offset must notify the State IV-D agency of the noncustodial parent's home address and social security number or numbers. The State IV-D agency must provide this information to any other State involved in enforcing the support order.

(Approved by the Office of Management and Budget under control number 0960-0385)

[50 FR 19655, May 9, 1985; 50 FR 31720, Aug. 6, 1985, as amended at 51 FR 37731, Oct. 24, 1986; 54 FR 32312, Aug. 4, 1989; 56 FR 8005, Feb. 26, 1991; 64 FR 6252, Feb. 9, 1999; 68 FR 25305, May 12, 2003]

§ 303.104 **Procedures for posting security, bond or guarantee to secure payment of overdue support.**

(a) The State shall have in effect and use procedures which require that noncustodial parents post security, bond or give some other guarantee to secure payment of overdue support.

45 CFR Ch. III (10-1-06 Edition)

(b) The State must provide advance notice to the noncustodial parent regarding the delinquency of the support payment and the requirement of posting security, bond or guarantee, and inform the noncustodial parent of his or her rights and the methods available for contesting the impending action, in full compliance with the State's procedural due process requirements.

(c) The State must develop guidelines which are generally available to the public to determine whether the case is inappropriate for application of this procedure.

(Approved by the Office of Management and Budget under control number 0960-0385)

[50 FR 19656, May 9, 1985, as amended at 51 FR 37731, Oct. 24, 1986]

§ 303.106 **Procedures to prohibit retroactive modification of child support arrearages.**

(a) The State shall have in effect and use procedures which require that any payment or installment of support under any child support order is, on and after the date it is due:

(1) A judgment by operation of law, with the full force, effect, and attributes of a judgment of the State, including the ability to be enforced;

(2) Entitled as a judgment to full faith and credit in such State and in any other State; and

(3) Not subject to retroactive modification by such State or by any other State except as provided in paragraph (b) of this section.

(b) The procedures referred to in paragraph (a)(3) of this section may permit modification with respect to any period during which there is pending a petition for modification, but only from the date that notice of such petition has been given, either directly or through the appropriate agent, to the obligee or (where the obligee is the petitioner) to the obligor.

[54 FR 15764, Apr. 19, 1989]

§ 303.107 **Requirements for cooperative arrangements.**

The State must ensure that all cooperative arrangements:

(a) Contain a clear description of the specific duties, functions and responsibilities of each party.



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THE OFFICE OF CHILD SUPPORT ENFORCEMENT

*Giving Hope and Support to
America's Children*

U.S. Department of Health and Human Services
Administration for Children & Families
Office of Child Support Enforcement

PIQ-00-03

DATE: September 14, 2000
TO: State IV-D Directors
FROM: David Gray Ross
Commissioner
Office of Child Support Enforcement

SUBJECT: State IV-D Program Flexibility with Respect to Low Income Obligor -- Imputing Income; Setting Child Support Orders and Retroactive Support; Compromising Arrearages; Referral to Work-Related Programs and Other Non-traditional Approaches to Securing Support

Our goal in issuing this PIQ is to clarify for State IV-D agencies the flexibility that exists under Federal IV-D requirements in setting support obligations and securing collections from low-income obligated parents.

The HHS Office of the Inspector General (OIG) recently released the results of a study entitled The Establishment of Child Support Orders for Low Income Non-custodial Parents, OIG-05-99-00390, which can be found on OCSE's website at: </programs/cse/extinf.htm> The major findings of the study were:

- **Retroactive Support:** Most sampled States routinely charge non-custodial parents for retroactive support. The longer the period of retroactivity, the less likely it is that the parent will pay any support.
- **Income Imputation:** Most sampled States impute income when the non-custodial parent is unemployed or income is unknown. Income imputation appears ineffective in

generating payments.

- Minimum Orders: Six of the sampled States routinely establish minimum orders when the non-custodial parent has limited payment ability. Minimum order cases exhibit lower payment compliance than other cases.
- Debt Owed to the State: Most sampled States will not reduce debt owed to the State by the non-custodial parent except in rare cases. Median debt on 1996 cases was over \$3,000.
- Job Programs: Few sampled child support agencies formally link with job programs. Non-custodial parent participation in such programs is minimal.

The findings of the OIG study and the President's June 17, 2000 Memorandum to HHS and other Federal Departments requiring the development of Joint Guidance on Supporting Responsible Fatherhood, provide an important opportunity for OCSE to clarify the extent to which States can develop child support policies and practices to more effectively serve low-income fathers. We have previously issued policy guidance on the authority of States to compromise arrearages owed to the State. (See PIQ-99-03 and OCSE-AT-89-06 containing the preamble to final regulations at 45 CFR 303.106 for Procedures to Prohibit Retroactive Modification of Child Support Arrearages, which are both available on the above website.) This policy guidance provides further information about how States currently have the flexibility to substantially address all the issues identified in the OIG study.

Retroactive Modification of Arrearages vs. Compromising Arrearages Owed to the State.

States may not retroactively modify arrearages, but have discretion to compromise arrearages owed to the State.

Under section 466(a)(9) of the Social Security Act (the Act) and 45 CFR 302.70(a)(9), a child support order is a judgment on and after the date due with the full force, effect, and attributes of a judgment of the State, and it is not subject to retroactive modification. States must have laws prohibiting retroactive modification of arrearages, which prevent a court or administrative body from taking action to erase or reduce arrearages that have accrued under a court or administrative order for support, in effect, altering the obligor's obligation without the concurrence of the obligee (or the State, in the case of arrearages permanently assigned to the State). Compromising arrearages, on the other hand, involves the satisfaction of arrearages by specific agreement of both of the relevant parties in

accordance with State law or on the same grounds as exist for any other judgment in the State.

Child support arrearages that have been permanently assigned to the State under title IV-A, or assigned to the State under titles IV-E and XIX of the Act, may be compromised by an agreement between the obligor and the State (as assignee of the obligee). Any compromise of child support arrearages that have not been permanently assigned to the State would require the agreement of the obligee. State law may further require that the court or administrative authority must endorse any agreement affecting child support orders to ensure that the best interests of the child are protected.

There may be circumstances involving low-income obligors that warrant consideration of compromising arrearages in accordance with State law. For example, **Maryland** recently initiated a pilot collaborative project in Baltimore between the IV-D program and three fatherhood programs under which a portion of arrearages owed to the State could be compromised for unemployed non-custodial parents who enroll and complete a responsible fatherhood project where they go to work and complete certain activities. Additional portions of the State debt may also be compromised after the non-custodial parent has completed one year, then another year, of paying current support. The goal of the project is to relieve these fathers of what is largely an uncollectible debt owed to the State so they can focus on current support payments.

An amnesty program could be one way to address the problem of high arrearages for low-income obligors. State amnesty programs for arrearages tend to fall into one of two categories: those that compromise part of the arrearages owed to the State and those that halt or postpone an enforcement action.

- o **Compromise of Arrearages.** Some States have proposed amnesty programs that would compromise arrearages assigned to the State if the obligor keeps current on a payment plan for a specific period of time. **Iowa's** pilot program allows a percentage satisfaction of assigned support for obligors who pay full support on time for a certain period (15% satisfaction for 6 consecutive months of full payment; 35% for 12 consecutive months; 80% for 24 consecutive months). **Montana** implemented a program targeted to parties with an outstanding debt of \$5,000 or more, asking them to contact the CSE agency to work out an

agreement to settle the debt. The State was willing to reduce the AFDC or TANF debt in certain cases where a lump sum payment was made or the obligor agreed to make regular payments.

- o **Postponement of Enforcement.** **Virginia** has an ongoing amnesty program that, coupled with a round-up of unresponsive delinquent obligors, has collected over \$114.6 million from parents since 1997. If appropriate, good-faith payment plans were arranged, the non-custodial parent would receive amnesty from enforcement techniques. The case would not be referred to court and the State would recommend that the parent not go to jail. **North Carolina's** program couples a publicity campaign with mail notification to obligors who are delinquent for 60 days or longer. County offices remain open for 12 hours a day during the period of the amnesty project. Counseling is available from community colleges and jobs-related agencies to assist underemployed and unemployed parents. **Maryland, the District of Columbia and Northern Virginia** are participating in an amnesty program aimed at cases with active bench warrants. The program offers amnesty from arrest.

States also may have the authority under State law to compromise or forgive penalties or interest charges on arrearages. States may choose to compromise penalties or interest alone or in conjunction with the compromise of the principal unpaid child support obligation. **West Virginia's** new law, effective January 1, 2001, will allow obligors who pay arrearages off within a 24-month period to have the interest dropped, if all parties agree.

Many States have laws, sometimes referred to as "laws of general obligation," under which a debt to the State is established equal to the amount of assistance provided to the family for the period when there was no support order in place. States may not collect these State debts through the IV-D program, because child support obligations must be set using the State's mandatory guidelines. However, if the State were enforcing an order that included arrearages based on assistance paid to the family prior to the requirement for mandatory child support guidelines in October of 1989, the State may continue to enforce these debts through the IV-D program. See policy guidance in OCSE-AT-93-04 and 93-08. States that assess State debt in addition to child support obligations may want to consider compromising State

debt in consideration of the obligor's payment of the child support obligation.

While allowable under title IV-D of the Act, States should apply these policies carefully and only in those circumstances that warrant consideration of compromising permanently assigned arrearages. There is a danger in sending a message that obligors can ignore support obligations because of the possibility that a State may eventually accept less than the full amount owed in satisfaction of the debt. States may benefit from having uniform written policies that set forth the circumstances under which the State will compromise arrearages.

Imputing Income and Setting Child Support Awards.

States can take steps to limit the number of cases where income is imputed.

States are required to use mandatory child support guidelines in establishing support obligations. However, they have discretion to design their guidelines within the parameters of Federal requirements at 45 CFR 302.56. For example, the guidelines must take into consideration all earnings and income of the non-custodial parent. The NCSL and CLASP (page 7 herein) cite two mechanisms States use to accommodate very low income obligors in their guidelines: 1) adopting a guideline which provides a self-support reserve for a non-custodial parent with the obligation set based on income above the reserve amount; and 2) excluding certain payments - such as means-tested public assistance - from the definition of income.

States may also impute income, based on the parents' earning capacity or previous work experience. The OIG's findings, however, show that support orders based on imputed income often go unpaid. This could be the result of the non-custodial parent being unemployed or underemployed. The OIG report notes that a causal relationship between the use of income imputation and lack of payments cannot be assumed. However, it appears self-evident that child support obligations that are based upon actual income, rather than imputed income, are generally likely to be more accurate and fair to the obligor. States may want to take steps to limit the imputation of income, for example, to cases in which the non-custodial parent has apparent assets and/or ability to pay, but is uncooperative. And, most importantly, States should make the maximum use of improved methods of determining income and resources of non-custodial parents, including the State and National Directories of New Hires as well as the Financial Institution Data Match (FIDM) and Multistate

Financial Institution Data Match (MSFIDM).

Review and modification policies that seek to ensure that child support orders reflect the current ability of the non-custodial parent to pay support can help to avoid cases where large amounts of arrearages accrue. For example, some States have avoided the accumulation of large arrearages while obligors are incarcerated. **North Carolina** automatically modifies a support order once a father is incarcerated. **Colorado's** IV-D program writes newly incarcerated fathers to explain the procedures for modifying their support orders. In addition, **Puerto Rico** and the **Virgin Islands** do outreach to individuals who may be able to request downward modifications. For example, **Puerto Rico** does outreach in prisons and in industries and government offices expecting layoffs to advise people of their rights to adjustments. We encourage States to regularly publicize to obligated parents the opportunity to request review and possible adjustment of a support obligation based upon a significant change in circumstances, such as incarceration. States are required to have procedures in place which provide for modification (both upwards and downwards) at the request of either parent. (See 42 U.S.C 666(a)(10)). Appropriate State responses to these requests will ensure that support orders, once they are established, continue to be based on an obligor's current ability to pay.

Minimum Orders.

States are allowed to use minimum orders, but only if the minimum amount is rebuttable under criteria established by the State.

The OIG found that some States routinely set minimum orders, even when the obligor has limited, or no, ability to pay and that minimum order cases exhibit lower payment compliance than other cases. While States are allowed to use minimum orders, the minimum amount must be rebuttable.

Section 467(b)(2) of the Act provides:

"There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of such guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to

rebut the presumption in that case."

In response to comments, the preamble to final guidelines regulations stated that:

" . . . procedures requiring that guidelines be followed in setting all support awards without the possibility of rebuttal appear not to comply with the requirements of the new law. We advise States in this position that changes to their guidelines and accompanying procedures will be necessary to conform to the requirements of Public Law 100-485 unless Congress clarifies an intent to the contrary. (56 FR, pages 22335 and 22337, May 15, 1991)."

Setting Support for Prior Periods.

States have flexibility to determine whether or not to establish an amount representing support for periods prior to the date of the support order.

Any support awards for prior periods must be based on the State's child support guidelines. However, support for prior periods could be set as a deviation from the appropriate guidelines amount, if there is a written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case. See 45 CFR 302.56 (g). Since States have flexibility in setting support for prior periods, States may choose not to seek awards for prior periods from low-income obligors in public assistance cases.

Determining how far back to set support for prior periods may also impact upon payment of support, according to the OIG study. Some States limit the time an order can be retroactive. **Kentucky** prohibits a retroactive support order unless paternity is established within four years. **Maine** only allows six years of retroactive support.

Referral to Jobs and Welfare-to-Work Programs and Other Nontraditional Approaches.

States are encouraged to make referrals to Welfare-to-Work programs and use other nontraditional approaches to assist low-income non-custodial parents.

As the use of automated enforcement techniques increases, States can concentrate on the more difficult cases involving low income, underemployed or unemployed obligors. Some States are

using case management or nontraditional approaches to reach these obligors. Almost all States indicate that they make some referrals to job search or employment and training programs, but much more could be done in this area to increase participation rates with job programs.

States, such as **Louisiana**, have provided customer service training to caseworkers to help change attitudes to encourage outreach and referral of nonpaying obligors to appropriate and needed services. **Los Angeles County** child support workers and local service providers conduct intake at the courthouse for fathers who are behind in child support payments, providing help and appropriate referrals for needed job and other services. **Georgia** operates a similar program, the Fatherhood Initiative, using child support agencies as connection points to refer fathers to employment-based services and skill-building classes. First year results show that 80% of the 450 obligors who completed job skills training are now employed and paying child support. The program expanded Statewide into 36 technical schools in November 1998. The program has formed partnerships with the Georgia Department of Labor and the State Board of Pardons and Parole.

Other States' efforts with job-related programs include: **Delaware**, making referrals through the Parents Seek Work Project; **California**, operating a demonstration project in seven counties to determine whether providing these types of services will improve support payment, increase parent involvement or reduce public assistance to the children of these parents; **Missouri's** Parents' Fair Share program, which offers jobs and job training; **Idaho's** "career enhancement" services; and **New York's** Westchester and Ontario Counties collaboration with Welfare to Work programs. **Washington's** offices have been working directly with local resources such as private industry councils, employment security, public assistance, and tribes for 2 years to make referrals. Each office has a process to identify potential participants or judges may order participation. Outreach includes prisons for screening of inmate obligors who are close to release for welfare to work eligibility. Many of these programs involve a mixture of funding streams for maximum flexibility.

States should examine their policies for dealing with low income obligors.

In light of recent efforts to identify obstacles to compliance with support orders faced by low-income obligors, such as the OIG study, OCSE encourages States to scrutinize policies that may

contribute to nonpayment by these obligors. States should carefully examine their policy choices for setting current support and support for prior periods, particularly with respect to underemployed or unemployed obligors to avoid problems with compliance as evidenced by the OIG study. Careful policy choices up front in establishing obligations should improve the obligor's incentive and ability to support his or her children, as well as improve a State's ability to enforce its orders.

Several non-HHS publications have additional information about innovative legal and policy choices States have made to address the issue of setting support for low-income parents.

The National Conference of State Legislators has recently published "Connecting Low-Income Families and Fathers: A Guide to Practical Policies." In addition, the Center for Law and Social Policy, in February 1999, published a paper, available on the CLASP website at www.clasp.org/pubs/childrenforces/supaward.htm, which discusses State choices within the context of title IV-D requirements and highlights innovative State practices in setting current support awards and arrearages as well as compromising arrearages owed to the State. These publications are not to be considered as official policy documents of the Department of Health and Human Services or its agencies and do not necessarily reflect the views of HHS or its interpretation of federal law, but States may find useful information in the discussion of state flexibility and innovative practices. We will continue to identify and share examples of allowable State practices that may improve non-custodial parents' ability and willingness to support their children.

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3123.18 Final judgment.

If a court or child support enforcement agency made a final and enforceable determination under sections 3123.02 to 3123.071 of the Revised Code as those sections existed prior to the effective date of this section or makes a final and enforceable determination under sections 3123.01 to 3123.07 of the Revised Code that an obligor is in default under a support order, each payment or installment that was due and unpaid under the support order that is the basis for the default determination plus any arrearage amounts that accrue after the default determination and during the period of default shall be a final judgment which has the full force, effects, and attributes of a judgment entered by a court of this state for which execution may issue under Title XXIII [23] of the Revised Code.

Effective Date: 12-31-2002

FOCUS - 18 of 65 DOCUMENTS

AMANDA VIOX, Plaintiff-Appellee, - vs - M. PIERCE METCALFE,
Defendant-Appellant.

CASE NO. CA97-03-026

COURT OF APPEALS OF OHIO, TWELFTH APPELLATE DISTRICT,
CLERMONT COUNTY

1998 Ohio App. LEXIS 800

March 2, 1998, Decided

DISPOSITION: [*1] The trial court's February 24, 1997 decision denying appellant's motion to modify or vacate child support arrearage is reversed. This cause is remanded to the trial court.

CASE SUMMARY:

PROCEDURAL POSTURE: After a joint parenting agreement was terminated and appellant husband was ordered to pay support, he appealed, and the custody order was stayed. After it was affirmed, the husband sought to modify the child support order, which had not been appealed. The Clermont County Court of Common Pleas (Ohio) denied the husband's motion to modify or vacate the support order, even for the period when he had custody, and he appealed that determination.

OVERVIEW: After the husband and appellee wife were divorced, they shared custody under a shared parenting agreement. Subsequently, the wife was granted custody and the husband was ordered to pay support. He appealed the custody order, and it was stayed, but the support order was not appealed. The court held that the appellate stay did not modify the trial court's order determining custody and/or child support, and did not relieve the husband of the need to comply with orders not affected by the stay. It was held that the trial court did not err in enforcing its child support order. The court noted that the husband was procedurally neglectful in his failure to raise the issue of his child support obligation sooner, a fact possibly explained or excused by the difficulty he encountered in obtaining or retaining counsel. However, the court held that such neglect should not have denied his right to fair and equitable relief. The factual issue could not be

resolved by reviewing the pleadings, and its resolution required an evidentiary hearing. While courts typically placed finality over perfection, the court stated that justice should have prevailed over procedure, and perfection over finality.

OUTCOME: The court reversed the decision denying the husband's motion to modify or vacate the child support arrearage. The case was remanded with instructions to conduct an evidentiary hearing to determine which of the parents had actual physical custody of the children during the dispute period and to establish the amount of child support arrearage, if any, owed by the husband to the wife during that period.

LexisNexis(R) Headnotes

Civil Procedure > Judgments > Entry of Judgments > Stays of Proceedings > General Overview
Family Law > Child Support > Obligations > Modification > General Overview

[HN1] A stay of proceedings does not relieve a party of the need to comply with orders of the trial court not affected by the stay.

Family Law > Child Support > Obligations > Modification > General Overview
Family Law > Child Support > Obligations > Types > Retroactive Support
Governments > Legislation > Effect & Operation > Retrospective Operation

[HN2] *Ohio Rev. Code Ann. § 3113.21(M)(3)* states that except as provided in § 3113.21(M)(4) of the section, a court may not retroactively modify an obligor's duty to pay a delinquent support payment. The only extent to which child support payments can be retroactively modified is set forth in § 3113.21(M)(4), which states that a court with jurisdiction over a support order may modify an obligor's duty to pay a support payment that becomes due after notice of a petition to modify the support order has been given to each obligee and to the obligor before a final order concerning the petition for modification is entered.

Family Law > Child Custody > Visitation > General Overview

Family Law > Child Support > Obligations > Enforcement > General Overview

Family Law > Paternity & Surrogacy > Establishing Paternity > General Overview

[HN3] Finality requires that there be some end to every lawsuit, thus producing certainty in the law and public confidence in the system's ability to resolve disputes. Perfection requires that every case be litigated until a perfect result is achieved. For obvious reasons, courts have typically placed finality above perfection in the hierarchy of values. Finality is particularly compelling in a case involving determinations of parentage, visitation and support of a minor child.

COUNSEL: Amanda Viox, 314 Buddy Lane, Loveland, Ohio 45140, pro se.

Michael J. Finney and Rebecca Carroll, 2400 Clermont Center Drive, Suite 107, Batavia, Ohio 45103, for appellee, Clermont County Child Support Enforcement Agency.

Monnie, Waite & O'Connor, L. Joshua Davidson, 267 East Ohio Pike, Amelia, Ohio 45102, for defendant-appellant.

JUDGES: KOEHLER, J. POWELL, P.J., and WALSH, J., concur.

OPINION BY: KOEHLER

OPINION

OPINION

(Accelerated Calendar)

KOEHLER, J. Plaintiff-appellee, Amanda Viox (fka Amanda Metcalfe), and defendant-appellant, M. Pierce Metcalfe, were divorced in 1993. A shared parenting agreement filed the same year granted custody of the parties' three minor children to appellant during the school year and to appellee during the summer months, and waived all rights to child support from either party.

In a report filed on February 3, 1995 and after hearing various motions filed by both parties, a magistrate terminated the shared parenting agreement, awarded custody of the children to appellee, [*2] and ordered appellant to pay \$ 331.17 per month in child support. The order was to be effective February 6, 1995. On February 3, 1995, the Clermont County Court of Common Pleas, Domestic Relations Division, approved the report and entered judgment. Appellant then appealed that decision as regarding custody, but failed to appeal the child support order.

On July 31, 1995, while his appeal was still pending, appellant filed a "Motion for Temporary Orders" in this court, requesting a stay of the trial court's February 3, 1995 entry granting custody of the children to appellee. Specifically, appellant prayed that this court issue an order "directing that the minor children remain in the custody of appellant pending conclusion of the appeal herein *** ." Appellant did not request a stay of the trial court's child support order.

In an affidavit supporting his motion for stay, appellant stated that even though appellee was entitled to have custody of the parties' children effective February 6, 1995, appellee had continued visitation and made no attempt to obtain custody of the children until July 30, 1995, during which time the children remained with appellant. Appellant further stated that [*3] on July 30, 1995, appellee took custody of the oldest child. By entry filed September 1, 1995, this court granted the stay for the duration of the appeal.

On January 29, 1996, this court affirmed the trial court's February 3, 1995 custody award of the children to appellee. Sometime thereafter, appellee took custody of all three children.

In April 1996, appellee, the Clermont County Child Support Enforcement Agency ("CSEA"), entered the trial court proceedings, attempting to collect from appellant an

arrearage for child support in the sum of \$ 4,555.52 predicated on the trial court's February 3, 1995 order. The parties were again before a magistrate on various motions on May 8, 1996. That same day, the magistrate filed a decision which stated that the parties had agreed to a shared parenting agreement effective June 1, 1996 whereby the oldest child would reside with appellee, and the other two children would reside with appellant. The parties also agreed to waive any right to child support. The shared parenting agreement did not address the child support arrearage that had accrued up to that point. A shared parenting decree was filed on August 22, 1996.

The issues between the parties [*4] seemed to have been temporarily resolved; however, CSEA, having failed to collect the alleged child support arrearage, moved to hold appellant in contempt. CSEA claimed arrearage accumulated from February 6, 1995 to August 22, 1996.

On January 21, 1997, appellant moved to modify or vacate the child support arrearage, claiming that all or part of the arrearage accrued while the children were in his physical custody and care. It was appellant's contention that during the period from January 1995 to January 29, 1996, he had actual physical custody of all the children except for a short period when the oldest child was with appellee. Although there was conflicting testimony as to the exact period of custody exercised by appellant, there was no dispute that appellant provided for the children for a substantial period. The trial court made no finding on this factual issue.

This matter is further confused by the fact that at some time during the period in question, appellee was in receipt of aid for dependent children. This court, however, considers that fact irrelevant to the issues to be decided in this cause.

Appellant's motion to modify or vacate the child support arrearage was heard [*5] by a magistrate who rendered a decision on February 24, 1997, denying the motion as follows:

This matter came before the Court on February 21, 1997, on Defendant's Motion to Modify or Vacate Child Support Arrearage, filed January 21, 1997. Both parties were present[.] ***

Defendant testified the children resided with him while this matter was pending in the Court of Appeals from February 1995 to January 1996. On January 29,

1996, the Court of Appeals issued a decision affirming the trial court's decision, which had the effect of ordering child support, effective February 1995. Defendant now requests this Court modify [sic] the arrearage for the time the children actually resided with him.

The parties entered into an agreement for shared parenting at a hearing on May 4, 1996. The agreement is set forth in the Magistrate's Decision journalized May 8, 1996, which indicates the Shared Parenting Plan was effective June 1, 1996. The formal Shared Parenting Plan was effective June 1, 1996. The formal Shared Parenting Plan was journalized August 22, 1996. There is no mention in the Magistrate's Decision or the Shared Parenting Plan of any reduction in the child support arrearage.

[*6] *ORC § 3113.21(M)* provides child support cannot be modified retroactively without a pending motion to modify child support. There is no motion pending to modify the child support. The appropriate time to deal with the question of the arrearage was in May 1996. The Court cannot now modify the amount of the arrearage.

After objection, the decision was approved by the trial court and filed for record on February 27, 1997. This appeal followed and appellant sets forth the following three assignments of error for review:

Assignment of Error No. 1:

THE TRIAL COURT ERRED BY RETROACTIVELY ENFORCING A CHILD SUPPORT ORDER DESPITE THIS COURT'S STAY THEREOF.

Assignment of Error No. 2:

THE TRIAL COURT ERRED BY APPLYING *R.C. 3113.21(M)(3)* TO APPELLANT.

Assignment of Error No. 3:

AS A MATTER OF PUBLIC POLICY, *R.C. 3113.21(M)(3)* SHOULD NOT APPLY TO A CHILD SUPPORT ARREARAGE THAT ACCRUES WHILE THE OBLIGOR HAS ACTUAL PHYSICAL CUSTODY OF THE CHILDREN.

For purposes of this opinion, appellant's second and third assignments of error will be consolidated and addressed together, as both assignments of error deal with

the issue of the application of *R.C. 3113.21(M)(3)*.

In his first assignment [*7] of error, appellant argues that during the period of time the stay order granted by this court was in effect, appellant was not required to make child support payments. Appellant argues that the motion for a stay of custody necessarily required a stay of the child support order since this court was aware of appellant's actual physical custody and support of the children. It is further argued that this court would not have intended for the support order to be retroactively enforced after the trial court's order was affirmed.

However, the question of child support was not before this court on appellant's request for a stay. The record clearly shows that appellant's motion to stay the trial court's February 3, 1995 order was solely directed to the issue of child custody. In turn, the stay granted by this court pending the initial appeal simply ordered:

The order of the Clermont County Court of Common Pleas, Domestic Relations Division, granting custody to appellee is STAYED *** until this appeal is concluded.

The foregoing language clearly shows that our stay did not modify the trial court's order determining custody and/or child support. It is well-established that [HN1] a stay of proceedings [*8] does not relieve a party of the need to comply with orders of the trial court not affected by the stay. *Ledger v. Ohio Dept. of Rehab. & Corr.* (1992), 80 Ohio App. 3d 435, 441, 609 N.E.2d 590.

In the case at bar, once this court's January 29, 1996 decision upheld the trial court's February 3, 1996 order granting custody of the children to appellee and ordering appellant to pay child support, that order became enforceable. Having not found any authority, and appellant having cited none, for the proposition that the stay of a child custody order implicitly affects an existing child support order, we find that the trial court did not err in enforcing its child support order. Appellant's first assignment of error is overruled.

In his second and third assignments of error, appellant argues that it was error for the trial court to apply *R.C. 3113.21(M)(3)* to him when it denied his motion to modify or vacate child support arrearage. It is appellant's contention that *R.C. 3113.21(M)(3)* as applied in this case is improper, could not have been intended by the legislature to apply to a situation where a child support arrearage accrues while the obligor has actual

custody of the children, and is against [*9] public policy.

By enacting legislation such as *R.C. 3113.21*, the legislature has engaged in an admirable effort to cause more child support payments to be made. However, and not unexpectedly, circumstances may arise which cry out for exceptions.

[HN2] *R.C. 3113.21(M)(3)* states that "except as provided in division (M)(4) of this section, a court may not retroactively modify an obligor's duty to pay a delinquent support payment." The only extent to which child support payments can be retroactively modified is set forth in *R.C. 3113.21(M)(4)* which states as follows:

A court with jurisdiction over a support order may modify an obligor's duty to pay a support payment that becomes due after notice of a petition to modify the support order has been given to each obligee and to the obligor before a final order concerning the petition for modification is entered.

Nevertheless, despite the language in *R.C. 3113.21(M)(3)* and (4), several Ohio courts have found additional exceptions justifying retroactive modification of child support payments as follows.

In *Ollang v. Ollang* (1979), 64 Ohio App. 2d 17, 410 N.E.2d 789, an order was entered by agreement of the parties changing custody of the minor children [*10] from the plaintiff to the defendant. However, this order was never executed by transfer of physical custody and the children remained with the plaintiff, who subsequently filed a motion in contempt against the defendant for failing to make child support payments, and for an order reducing the arrearage to judgment. The trial court entered a judgment for child support arrearage.

The Tenth Appellate District, in reversing and remanding the trial court's decision, noted that "although no mention was made of child support, necessarily, had [the] order [changing custody of the children from plaintiff to defendant] been carried into execution, the obligation of defendant to pay plaintiff for child support *** would at least be mitigated to the extent that defendant was in fact providing such support in kind." 64 Ohio App. 2d at 19-20. There after, the court held that where there is a change of custody ordered, but such change never takes place, the trial court has jurisdiction to in effect nullify or modify the child support order. *Id.* at 20-21.

In *Flynn v. Flynn* (1984), 15 Ohio App. 3d 34, 472 N.E.2d 388, an entry signed by both parties granted temporary custody of the parties' minor child to the [*11] appellant. No mention of child support was made in the entry and no support payments were made while the child was in the custody of the appellant. After the appellee regained custody of the child, the appellant made only two child support payments. The appellee thereafter filed a motion for an order reducing child support arrearage to judgment. The trial court granted the motion.

On appeal, this court noted that the initial issue to be decided was "whether the agreed entry between the parties which granted temporary custody to appellant terminated the provision of the original separation agreement requiring appellant to pay child support when the entry changing custody is silent on the matter." *Id.* at 36. This court then held that

In the case at bar, appellant did in fact obtain custody of his son in accordance with the entry changing custody which both parties consented to. Thus, even though the entry never addressed the question of child support payments, appellant was not obligated to make such payments to his former wife, the noncustodial parent, while he had custody of their child, since appellant was in fact directly supporting the child during such time. Nevertheless, [*12] once appellee regained physical custody of the child, appellant was responsible to make the necessary support payments ***.

Id.

Finally, in *Osborne v. Osborne* (1992), 81 Ohio App. 3d 666, 611 N.E.2d 1003, the Fourth Appellate District held that fraud was a basis to permit retroactive modification of child support. *Id.* at 674. The court held that evidence that the husband had committed fraud in misrepresenting the amount of his annual income for purposes of child support calculation justified retroactive modification of child support effective from the date of the dissolution decree, rather than the filing date of the wife's motion to increase. *Id.* The court stated that to hold otherwise would allow the husband to retain the benefits of the fraud he had perpetrated upon his wife and the court, which anomalous result would not be sanctioned. *Id.*

We are mindful that against the foregoing cases is the Supreme

Court of Ohio's decision in *Strack v. Pelton* (1994), 70 Ohio St. 3d 172, 637 N.E.2d 914, which held as follows:

In *Knapp v. Knapp* (1986), 24 Ohio St. 3d 141, 144-145, 493 N.E.2d 1353 ***, this court declared, [HN3] "finality requires that there be some end to every lawsuit, thus producing certainty [*13] in the law and public confidence in the system's ability to resolve disputes. Perfection requires that every case be litigated until a perfect result is achieved. For obvious reasons, courts have typically placed finality above perfection in the hierarchy of values." Finality is particularly compelling in a case involving determinations of parentage, visitation and support of a minor child.

70 Ohio St. 3d at 175.

In the case at bar, the record unequivocally shows that effective February 6, 1995, appellee was awarded custody of the parties' children and appellant was ordered to pay child support. Yet, the parties' three children remained in appellant's physical custody and under his care until July 30, 1995, at which time appellee obtained physical custody of the oldest child. Sometime after this court's January 29, 1996 decision, appellee obtained physical custody of all three children. It is undisputed that appellant never paid child support.

The record also shows that appellant was procedurally neglectful in his failure to raise the issue of his child support obligation sooner,¹ a fact possibly explained or excused by the difficulty he encountered in obtaining or retaining counsel. [*14] However, such neglect should not deny his right to fair and equitable relief.

1 Appellant's procedural neglect is evidenced by his failure to raise the issue of his child support obligation on appeal of the trial court's February 3, 1995 order or in his motion for a stay before this court. The record shows that when he filed his motion for a stay, appellant had had physical custody of all three children for six months. Thus, appellant could have filed a motion to vacate or modify child support then, rather than one and one-half years later by filing a motion to modify child support arrearage.

At issue is the matter of appellant's child support obligation for the period from February 6, 1995 to

January 29, 1996 during which period appellant claims he was the actual physical custodian of the children. If upheld, the trial court's February 27, 1997 ruling would require appellant to pay child support to the custodial parent of record, appellee, even though appellant had actual physical custody of the children and [*15] was directly fulfilling their needs. Appellant's claim, however, directly contradicts his own affidavits filed with several of his motions, which consistently state that he had physical custody of all three children from February 6, 1995 to July 30, 1995, at which time appellee obtained physical custody of the oldest child. During a hearing on appellant's motion to modify child support arrearage held on February 21, 1997, appellee testified that until January 29, 1996, the children were "back and forth" as they had been for five years.

As already noted, the trial court made no finding on this factual issue. Because of the several contradictions heretofore mentioned, we find that this factual issue cannot be resolved by reviewing the pleadings and that resolution requires an evidentiary hearing.²

2 We further find that *Civ.R. 60(B)* is the preferable method of obtaining the relief sought in this case by appellant. No *Civ.R. 60(B)* motion for relief from judgment was filed by appellant in this case; appellant filed a motion to modify or vacate child support arrearage. However, the "unusual

circumstances of this case call for relief under the court's inherent power over its own judgment." *In re Marriage of Watson (1983)*, 13 Ohio App. 3d 344, 346, 469 N.E.2d 876.

[*16] While "courts have typically placed finality over perfection," *Strack*, 70 Ohio St. 3d at 175, we find that in the case at bar justice should prevail over procedure, and perfection over finality. Appellant's second and third assignments of error are well-taken and sustained and the trial court's February 24, 1997 decision denying appellant's motion to modify or vacate child support arrearage is reversed. This cause is remanded to the trial court with instructions to conduct an evidentiary hearing to determine which of the parties had actual physical custody of the children from February 6, 1995 to June 1, 1996,³ and to establish the amount of child support arrearage, if any, owed by appellant to appellee during the foregoing period.

3 In a decision filed May 8, 1996, the magistrate stated that the parties had agreed to a shared parenting plan effective June 1, 1996, whereby appellee would have custody of the oldest child, appellant would have custody of the other two children, and any right to child support would be waived.

[*17] POWELL, P.J., and WALSH, J., concur.

LEXSEE 1990 OHIO APP LEXIS 3880

DIANE M. LAWHORN (OLT), Plaintiff-Appellee v. NELSON D. LAWHORN,
Defendant-Appellant

Case No. 11914

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

1990 Ohio App. LEXIS 3880

September 7, 1990, Rendered

PRIOR HISTORY: [*1] Appeal from No. 78-DR-2350.

DISPOSITION: The judgment of the trial court will be reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant father challenged a judgment from the Montgomery County Common Pleas Court, Domestic Relations Division (Ohio), which approved a referee's report finding that there existed a certain amount in arrearages in child support payments and awarded a lump sum therefor to plaintiff mother. The mother had filed a motion to "reinstate support" against the father seeking a lump sum judgment.

OVERVIEW: A mother was divorced from her father pursuant to a divorce decree, under which custody of the parties' two minor children was awarded to the mother, and the father was ordered to pay child support. Then, at the mother's request, the father executed "two consents" for the children's adoption, in exchange for the mother's agreement to forgive any child support then due and owing and any future child support payments. When the youngest child reached the age of 18 years, the father was notified that there was an arrearage of a certain amount, and the mother sought to "reinstate support" and a lump sum judgment for the arrearage. The trial court approved the referee's report and awarded a lump sum judgment to the mother. On appeal, the court held that: (1) there was no consideration sufficient to support the agreement because the father merely promised to pay a sum less than that which he was already obligated to pay; (2)

hence, the agreement was unenforceable; and (3) the lump sum judgment was erroneous because, as the parties' children were over the age of 18 or emancipated at the time such judgment was sought, the judgment would inure solely to the mother's benefit.

OUTCOME: The court reversed the trial court's judgment.

LexisNexis(R) Headnotes

Contracts Law > Formation > General Overview
Family Law > Child Support > Obligations > Modification > General Overview

[HN1] As between a husband and a wife, an agreement between them, for a valuable consideration, made subsequent to and different from the order of a court, will be binding upon a wife in an action by her to recover unpaid installments of a court's child support award.

Contracts Law > Consideration > Sufficient Consideration

[HN2] Neither the promise to do a thing, nor the actual doing of it, will constitute a sufficient consideration to support a contract if it is merely a thing, which a party is already bound to do, either by law or by a subsisting contract with the other party.

COUNSEL: THOMAS M. BAGGOTT, Dayton, Ohio, Attorney for Plaintiff-Appellee.

THOMAS H. LILES, Dayton, Ohio, Attorney for Defendant-Appellant.

JUDGES: Brogan, J. Fain, J., and Grady, J., concur.

OPINION BY: BROGAN

OPINION

OPINION

Appellant, Nelson Lawhorn, appeals from the judgment of the Common Pleas Court (Domestic Relations Division) finding that there existed a child support arrearage of \$ 13,980.12 as of August 14, 1989. Appellant has appealed to this court and raised two assignments of error.

Appellee, Diane Lawhorn and Nelson Lawhorn were divorced on February 26, 1979. Mrs. Lawhorn was granted custody of the parties' two minor children, Glenda (born August 23, 1968) and Wayne (born March 16, 1971), and appellant was ordered to pay weekly child support to Mrs. Lawhorn. At the time the youngest child reached the age of eighteen, the appellant was notified that an arrearage of \$ 17,219.98 existed in the support account. Appellant's former employer was ordered to retain funds of \$ 6,830.78 in severance pay due the appellant pending [*2] a mistake of fact hearing to determine the accuracy of appellant's Support Enforcement Agency (SEA) records.

The Referee's report reflects that the appellant testified that he executed "two consents" for the adoption of his minor children on June 15, 1981 at the request of his former spouse so that Mrs. Lawhorn's new husband John Olt could obtain a step parent adoption of the Lawhorn children. The referee found that in exchange for appellant executing the necessary consents for the step parent adoption, appellee agreed she would forgive any child support then due and owing as well as future child support for their children.

The Referee found that the appellant then moved to Florida believing the adoptions would take place, but he later learned Mr. Olt had a change of heart about adopting appellant's children and this was communicated to appellant's counsel in late July, 1981. The Referee notes that the appellant had no communication with his children and no request from his former spouse for child support until 1988 when his employer was informed to withhold appellant's earnings for the child support.

The referee rejected appellant's contention that he was relieved of his obligation [*3] to pay child support by virtue of his oral agreement to permit the adoption of his children. The referee also rejected appellant's argument that appellee should be equitably estopped from now collecting the delinquent child support because the agreement was procured at the instance of the appellee or that the defense of laches should prevent recovery of the child support.

In his first assignment, appellant contends the trial court erred in granting a lump sum judgment for an arrearage without regard to the parties' 1981 "agreement." In his second assignment he argues the trial court erred in approving the referee's report when the appellant had established an equitable defense of laches.

In *Tressler v. Tressler* (1972), 32 Ohio App. 2d 79, the Defiance County Court of Appeals held that an agreement between a father and a mother (formerly husband and wife) of minor children, whereby the father, in consideration of his executing and delivering to the wife a written consent to the adoption of the children is valid as between the parties, even though the adoption never takes place and the mother is subsequently divorced from the stepfather, and the mother cannot recover from [*4] the father for her lump sum judgment for the installments of such child support award which otherwise would have been payable. Judge Guernsey explained the rationale of the court at page 80 of the court's opinion:

"* * * that, in October of 1970, there existed an oral agreement between plaintiff and defendant that the \$ 30.00 weekly support payments would cease for the three minor children of the parties upon defendant giving consent for their adoption to the then plaintiff's husband, Warren Spencer. Defendant gave such consent in writing and no further support payments were made and none requested. The Court finds the adoption has not taken place and is not now pending. The Court further finds that a divorce between the plaintiff and Warren Spencer occurred January 7, 1972 whereupon the defendant upon request resumed support payments. The Court further finds that defendant did not, pursuant to the agreement of the parties, pay the \$ 30.00 weekly support payments between July 8, 1970 and December 3, 1971, as ordered in the divorce decree."

The plaintiff, appellant herein, assigns error of the trial

court in denying her motion for a lump sum judgment.

It does not appear from [*5] the foregoing facts that the subject children were deprived of actual support for the period from July 8, 1970, to December 3, 1971, and it may be inferred that they were supported during this period by their mother or stepfather, or both. It not appearing that the motion for lump sum judgment is for and on behalf of the children we conclude that the recovery sought is personal to the mother and involves only her rights as against the natural father. See *Smith v. Smith*, 7 Ohio App. 2d 1 and *Bidinger v. Bidinger*, 89 Ohio App. 274.

It is established law in Ohio that [HN1] as between a husband and wife an agreement between them, for a valuable consideration, made subsequent to and different from the order of the court will be binding upon the wife in an action by her to recover unpaid installments of the court's child support award. *Schnierle v. Schnierle*, 33 Ohio Law Abs. 212; *Bidinger v. Bidinger*, supra; *McCabe v. McCabe*, 83 Ohio Law Abs. 19; *Blumberg v. Saylor*, 100 Ohio App. 479; and *Beiter v. Beiter*, 24 Ohio App. 2d 149.

The referee relied upon *Alves v. Scholler* (April 1, 1983), CA-L-82-362, Lucas App., unreported. In that case the parties were divorced in [*6] 1978 and the appellant was awarded custody of one of the parties' children and the appellee was ordered to pay child support. The trial court found that in May 1982, the parties had negotiated an agreement whereby the appellant gave up her right to child support in exchange for appellee's execution and delivery of a consent to adoption. Appellee ceased paying support but the adoption never took place. In September 1982 appellant filed a motion to reinstate the support and for a lump sum judgment for child support arrearages.

The trial court found that an enforceable agreement existed between the parties and relying on *Tressler v. Tressler* held that child support was suspended between May 1, 1982 and September when the motion to reinstate support was filed, thus denying appellant's motion for a lump sum judgment. The Court of Appeals reversed the judgment of the trial court on the basis a minor child is a third party beneficiary to a child support order and the parties may not modify child support to the detriment of the child. Citing, *Rhoades v. Rhoades* (1974), 40 Ohio App. 2d 559. The court held the agreement was

enforceable only until it was clear the adoption would [*7] not take place, i.e. June 21, 1982.

In *Rhoades v. Rhoades*, supra, the Hamilton County Court of Appeals held that minor children are third party beneficiaries of provisions in a divorce decree granting support payments for their benefit, and such benefits may not be modified by the parties to the detriment of the minors. In a per curiam opinion the court noted:

We believe that *Tressler*, supra, pronounces accurately the law in Ohio bearing upon the subject with which we are concerned here. Consequently, we have searched the record to determine whether there is evidence sufficient to have required the referee and the court below to find that an agreement had been made between the parties. Especially, we have searched for evidence to establish that there was consideration for any such agreement.

If, in the case at bar, the defendant gave up nothing, there could be no agreement. See *McCabe v. McCabe*, 83 Ohio Law Abs. 19.

It is elementary that [HN2] neither the promise to do a thing, nor the actual doing of it will constitute a sufficient consideration to support a contract if it is merely a thing which the party is already bound to do, either by law or a subsisting [*8] contract with the other party. 11 Ohio Jurisprudence 2d 320, Contracts, Section 82.

All that we can perceive defendant here promised to do, and for all material purposes did, was to pay a sum less than that which he was already obligated to pay to plaintiff. Hence, there was no consideration sufficient to support the purported agreement even if plaintiff's testimony that she did not recall agreeing to defendant's proposal is brushed aside.

Upon this state of the record, viewed in light of the law as we comprehend it to be, we can find no error committed below in rendering the lump sum judgment and, therefore, the first assignment is not well taken. 162

The age of the children in the *Alves v. Schaller* case is not clear, but we must assume they were still minors as the appellee sought to "reinstate support" as well as seeking a lump sum judgment. Presumably in that case a lump sum judgment would inure to the benefit of the minor children during their minority, and was not brought solely for the benefit of the spouse. Since the parties' children were over the age of eighteen or emancipated at

the time, the appellee sought her lump sum judgment, the judgment would solely inure [*9] to her benefit.

We find the reasoning of *Tressler v. Tressler* to be persuasive and the first assignment is sustained.

The appellant's second assignment is overruled

because the appellant failed to demonstrate he was materially prejudiced by the appellee's delay in pursuing a lump sum judgment. See, *Smith v. Smith (1959), 168 Ohio St. 447.*

The judgment of the trial court will be reversed.

2 of 4 DOCUMENTS

DAVID HEDRICK, Appellant v. STACY ROWE WYNO, Appellee

C.A. NO. 20380

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, SUMMIT
COUNTY

2001 Ohio App. LEXIS 3003

July 5, 2001, Decided

PRIOR HISTORY: [*1] APPEAL FROM
JUDGMENT ENTERED IN THE COURT OF
COMMON PLEAS. COUNTY OF SUMMIT, OHIO.
CASE NO. B 83-5-489.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant father sought review of an order from the Summit County Juvenile Court (Ohio) that denied his motion to approve a private settlement agreement releasing him from over \$ 20,000 in child support arrearages owed to the appellee mother in exchange for a lump sum payment and allowing his daughter to reside with him.

OVERVIEW: On appeal, the father claimed that because the parties entered into an extrajudicial contract, wherein the parties, for good consideration, agreed to modify his past due child support obligation, he was forever released from his arrearages, and the trial court had an obligation to enforce the agreement. Upon review, the appellate court affirmed the denial of the father's motion. A strict construction of the language in former *Ohio Rev. Code Ann. § 3113.21(M)(3)* clearly indicated that once it was determined that past due child support was owed, the trial court could not modify that amount, except for the time period between the motion to modify and the trial court's final order on the subject. The trial court could not modify the child support order retroactively and did not err in refusing to approve the parties' settlement agreement.

OUTCOME: The judgment was affirmed.

LexisNexis(R) Headnotes

Family Law > Child Support > Obligations > Modification > General Overview
[HN1] See former *Ohio Rev. Code Ann. § 3113.21(M)*.

Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend
Family Law > Child Support > Obligations > Computation > Arrearages
Family Law > Child Support > Obligations > Modification > General Overview

[HN2] Under former *Ohio Rev. Code Ann. § 3113.21(M)(3)*, once it is determined that past due child support is owed, a court cannot modify that amount, except for the time period between the motion to modify and the court's final order on the subject.

Family Law > Child Support > Obligations > Modification > General Overview
Family Law > Child Support > Obligations > Types > Retroactive Support
[HN3] Courts may not modify delinquent child support payments retroactively.

Civil Procedure > Settlements > Settlement Agreements > Modifications
Family Law > Child Support > Obligations > Modification > General Overview
[HN4] Past due child support is not modifiable after it becomes past due.

COUNSEL: DAVID A. LOONEY, Attorney at Law, Akron, Ohio, for Appellant.

MARTHA HOM, Attorney at Law, Akron, Ohio, for Appellee.

JUDGES: BETH WHITMORE, BATCHELDER, P.J., CARR, J., CONCUR.

OPINION BY: BETH WHITMORE

OPINION

DECISION AND JOURNAL ENTRY

Dated: July 5, 2001

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

WHITMORE, Judge.

Appellant David Lee Hedrick has appealed from an order of the Summit County Juvenile Court that denied his motion to approve a private settlement agreement releasing him from over \$ 20,000 in arrearages in exchange for a smaller lump sum payment and allowing his daughter to reside with him. This Court affirms.

I.

On May 9, 1984, the Summit County Juvenile Court declared that a father and child relationship existed between Appellant and Appellee Stacy Rowe Wyno's minor child, Diane. As a result, Appellant was ordered to pay \$ 35 weekly in child support. He was also directed to pay an additional \$ 25 weekly towards his \$ 7,329.90 debt to Appellee for Diane's [*2] past medical expenses and unpaid support for the time since her birth.

On February 7, 1996, almost twelve years later, Appellant had paid only \$ 107.36 in support, while \$ 1,232.52 had been intercepted from his income tax refunds. The trial court found him to be in contempt of court, owing at that time a balance of \$ 20,535.12. A judgment in favor of Appellee, against Appellant, was entered for the same. Notwithstanding its decision, the trial court gave Appellant a chance to purge its contempt finding and avoid a thirty day jail sentence. Appellant had ninety days in which to initiate direct support payments

to the Summit County Child Support Enforcement Agency (CSEA).

When Appellant failed to meet the trial court's deadline, CSEA moved to show cause and impose the jail sentence. Appellant failed to appear at the hearing set on the motion, and a warrant for his arrest was ultimately issued on April 9, 1997.

During October 1998, CSEA recommended that Appellant's continuing child support obligations be terminated as Diane had reached the age of majority. The trial court approved and adopted the recommendation on October 13, 1998. Following the trial court's order, Appellant and [*3] Appellee reached a private settlement agreement, in which Appellee released Appellant of his child support obligations and arrearages in exchange for Appellant's lump sum payment of \$ 3,000 and taking Diane into his home. Appellee and counsel for Appellant also prepared and signed a journal entry relieving Appellant from his child support obligations and arrearages. Appellee received the \$ 3,000 payment after signing the settlement contract and proposed journal entry, and Diane moved in with Appellant.

On March 20, 2000, having complied with the preconditions of the settlement agreement, Appellant moved the trial court to approve and adopt the prepared journal entry. The trial court held a hearing on the issue. Then, on November 15, 2000, the trial court denied Appellant's motion and refused to sign the proposed order approving the settlement. The trial court believed that it could not retroactively modify Appellant's arrearages. Appellant's \$ 3,000 payment was setoff against his total arrearages, and the warrant for his arrest, issued April 9, 1997, remained in effect. Appellant timely appealed, asserting one assignment of error.

II.

Assignment of Error

Where a [*4] party voluntarily enters into an agreement modifying past due child support, the party is bound by said agreement.

In his sole assignment of error, Appellant has argued that the trial court should have modified his arrearages pursuant to the parties' settlement agreement.

Specifically, he has claimed that because the parties entered into an extrajudicial contract, wherein the parties, for good consideration, agreed to modify Appellant's past due child support obligation, he was forever released from his arrearages, and the trial court had an obligation to enforce the agreement. This Court disagrees.

[HN1] *R.C. 3113.21(M)* provides, in pertinent part:

(3) Except as provided in division (M)(4) of this section, a court may not retroactively modify an obligor's duty to pay a delinquent support payment.

(4) A court with jurisdiction over a support order may modify an obligor's duty to pay a support payment that becomes due after notice of a petition to modify the support order has been given to each obligee and to the obligor before a final order concerning the petition for modification is entered.¹

¹ Effective March 22, 2001, the General Assembly repealed *R.C. 3113.21*. However, that measure has no bearing in this appeal, as the statute was in effect at the time the trial court entered its decision.

[*5] A strict construction of the language in *R.C. 3113.21(M)(3)* clearly indicates that [HN2] once it is determined that past due child support is owed, a court cannot modify that amount, except for the time period between the motion to modify and the court's final order on the subject. Hence, as this Court recently observed, [HN3] "courts may not modify delinquent child support payments retroactively." *Zaccardelli v. Zaccardelli*, 2000 Ohio App. LEXIS 3343 (July 26, 2000), Summit App. No.

19894, unreported, at 8, citing *R.C. 3113.21(M)(3)* and *Brightwell v. Easter* (1994), 93 Ohio App. 3d 425, 429, 638 N.E.2d 1067 [HN4] ("Past due child support *** is not modifiable after it becomes past due."). The trial court did not err in refusing to approve the parties' settlement agreement. Appellant's assignment of error is without merit.

III.

Appellant's sole assignment of error is overruled. The judgment of the trial court is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, to carry this judgment into [*6] execution. A certified copy of this journal entry shall constitute the mandate, pursuant to *App.R. 27*.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. *App.R. 22(E)*.

Costs taxed to Appellant.

Exceptions.

BETH WHITMORE

FOR THE COURT

BATCHELDER, P.J.

CARR, J.

CONCUR