IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

THERESA L. HARLAN, Plaintiff	: :	
v.	:	No. 00-20,971
RANDY A. HARLAN, Defendant	: :	

OPINION EN BANC

The issue before us is whether, in support cases where no arrearage exists, the court may make an order decreasing support effective prior to the date the petition for modification was filed. This issue was first heard by the Family Court Hearing Officer, who issued an order modifying Father's child support. The order was made effective August 2000 because Mother had failed to notify the Domestic Relations office of substantial increases in her income since that time, as she was ordered to do. The Hon. Dudley N. Anderson, hearing the matter on exceptions, found the Master erred because Father was not in arrears, and changed the effective date to August 19, 2003, the date the petition for modification was filed. Judge Anderson revisited the issue upon Father's motion for reconsideration, but reached the same conclusion. Father then filed a petition requesting an En Banc Review, which was granted by Judge Anderson. Argument was held before the undersigned judges on March 10, 2004. After serious consideration of the relevant cases and the law, we affirm Judge Anderson, for the following reasons.

Typically, modification of support is governed by Pa.R.C.P. 1910.17. That rule states an order shall be effective from the date of the filing of the complaint "unless the order specifies otherwise." The plain language of the rule permits a court to make the order effective prior to the date the petition was filed, so long as the court sets forth

reasons for the retroactivity. Unfortunately, the Superior Court has foreclosed that option, interpreting the rule to prohibit an effective date earlier than the date the petition was filed. Kelleher v. Bush, 832 a.2d 483 (Pa. Super. 2003). This interpretation was reiterated by the Superior Court in Maue v. Gilbert, 839 A.2d 430, 432 (Pa. Super. 2003), and most recently in Ewing v. Ewing, 2004 Pa. Super. 46, 2004 Pa. Super. LEXIS 160 (2004), a case from Lycoming County.

Father, however, relies on 23 Pa.C.S.A. §4352(e), entitled "Retroactive modification of arrears." That subsection clearly permits a court to make the modification effective on a date prior to the filing of the petition if the petitioner was precluded from filing due to a significant physical or mental disability, misrepresentation of another party, or another compelling reason, so long as the petitioner promptly filed when no longer precluded. The Superior Court has repeatedly emphasized, however, that §4352(e) applies only to cases involving arrears. For instance, in Holcomb v. Holcomb, 670 A.2d 1155, 1157-58 (Pa. Super. 1996), the Superior Court rejected the notion that §4352(e) could apply to cases without arrears, stating,

> It is true that the first three sentences in §4352(e) appear to apply to all petitions for modification, whether or not the obligor is in arrears. However, the entire subsection is titled 'Retroactive Modification of Arrears," therefore, by its plain meaning the subsection refers only to those cases where arrears are at issue.

The Holcomb court also noted that the last sentence of subsection (e) explicitly refers to arrears. Similarly, in Kelleher, the Superior Court cited Holcomb and stated, "the plain text indicates this subsection refers only to those cases where arrears are at issue." Kelleher, supra, at 485. And again, in Maddas v. Dehaas, 816 A.2d 234, 239 (Pa. Super. 2003), the Superior Court stated that §4352(e):

> applies only to modification of arrears and does not permit retroactive modification of the general support obligation. . . Therefore, under this section, the trial court could order a retroactive modification of Father's arrears dating back to the time Mother first misrepresented her income if

> Father promptly filed a petition for modification upon discovery of Mother's misrepresentation.

Clearly, in the case before this court, Father cannot receive relief under §4352(e) because Father is not in arrears. Instead, Father is requesting a credit for the time he overpaid child support due to Mother's failure to report her increased income.

Father distinguishes Holcomb on its facts, pointing out that Holcomb involved a father attempting to receive credit for paying child support after the child had graduated from high school. In Holcomb, the father clearly knew the child had graduated, and therefore had no excuse for his delay in filing for modification. While that factual distinction certainly exists, the father's request for credit was not denied on that basis. The Superior Court rejected retroactive modification solely on the basis that no arrears were at issue.[1] Holcomb, supra, at 1157-58.

Father's primary argument, however, is that in Maue the Superior Court permitted the modification order to be effective prior to the filing of the modification petition. Father acknowledges that the Superior Court specifically stated the case involved an arrearage of support, but Father argues the arrearage was *created* by the modification of the support order. After a close review of Maue, we cannot conclude that Father is correct. The only things clear from the factual rendition in Maue are that at some point the father was in arrears and in April 2002 the arrears were paid off. The convoluted history of the case through the trial court precludes us from determining anything more definite, and the Superior Court gives no suggestion of when or how the arrears were created. We also note that in Kelleher, making the modification effective prior to the filing of the petition would have created arrears, but the Superior Court nonetheless refused to apply §4352(e).

Moreover, even if Father is correct on this point, that is no help to him because in the case before this court retroactive modification would create a credit, rather than

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[1] The court did, however, note in response to the father's charge of unfairness that nothing had precluded him from filing the petition earlier.

an arrearage. We have considered interpreting the term "arrears" in §4352(e) to mean any imbalance in the support owed, including a credit as well as a deficit, but that would be to distort the plain language of the rule, which we decline to do.

In conclusion, we are constrained to hold that support orders cannot be made effective prior to the date the modification petition was filed unless the payor is in arrears. This result, of course, defies logic and creates an injustice because it rewards payors who fail to pay their child support and punishes payors who promptly pay their support. The problem, in our opinion, is the Superior Court's interpretation of Pa.R.C.P. 1910.17. The plain language of the rule permits courts to make the support orders effective prior to the filing date so long as the reasons for doing so are set forth on the record. Here, we find good reason for retroactive modification: Mother's failure to report substantial increases in her income. Unfortunately, the Superior Court's decision in Kelleher precludes retroactive modification. Should this matter come before the Superior Court, we would strongly urge the court to consider reversing its decision in Kelleher so that trial courts may achieve financial justice whenever individuals do not report substantial changes in their income. Or alternatively, we welcome legislative action to correct this injustice. In the meantime, we must follow the law as it has been established by the legislature and the appellate courts.[2]

[2] We note, however, that a remedy is available to individuals who have overpaid child support, or received less support, because of the opposing party's failure to report a change in income. Since the standard domestic relations support order requires payors and payees to report any material change of circumstances relevant to the level of support to the Domestic Relations Office and the opposing party, any individual who fails to do so would be in contempt of that order. The opposing party is free to file a petition for contempt and request the court to impose an appropriate financial sanction.

O R D E R

AND NOW, this _____ day of April, 2004, for the reasons stated in the foregoing opinion, the Opinion and Orders issued by the Hon. Dudley N. Anderson on January 8, 2004 and January 23, 2004 are affirmed.

BY THE COURT,

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Richard A. Gray, J.

I agree,

_____
Dudley N. Anderson, J.

I agree,

_____
Clinton W. Smith, J.

cc: Dana Jacques, Esq., Law Clerk
Hon. Richard A. Gray, J.
Hon. Dudley N. Anderson, J.
Hon. Clinton W. Smith, J.
William Miele, Esq.
Janice Yaw, Esq.
Domestic Relations (PC)
Domestic Relations (RW)
Family Court
Gary Weber, Esq.