

64521-8

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No. 64521-8-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

MARK STEVEN WYSLING, Appellant,

v.

BONNIE LEE ANDERSON fka WYSLING, Respondent

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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
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On Appeal from Snohomish County Superior Court
Honorable Kenneth L. Cowser

BRIEF OF RESPONDENT BONNIE LEE ANDERSON

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I. INTRODUCTION

This case presents an issue of statute of limitations, calling upon the court to determine the statute governing Mark Steven Wysling's unpaid child support obligations, whether 10 years from the due date of each installment applicable to orders entered before July 23, 1989 or the current rule of ten years from the child's eighteenth birthday. The support obligation at issue was originally established in a 1985 decree of dissolution of marriage. The parties modified that support obligation by an agreement embodied in a July 28, 1989 support order. That order modified Ms. Anderson's rights to seek relief in the courts in that it specified an amount the parties estimated that Mr. Wysling owed and granted him a specific means of paying that debt which would not have been available to him in the absence of the 1989 order.

Mr. Wysling did not pay the amounts specified in the 1989 order. In 2002 Ms. Anderson filed her *pro se* petition for modification of child support in which she mentioned that Mr.

Wysling owed a child support arrearage though she did not pray a judgment. Over a year later Mr. Wysling filed his response to the petition in which he denied owing a substantial arrearage, though he did not specify what he might owe or how one might compute it.

At trial Mr. Wysling acknowledged owing child support and suggested an amount he agreed that he owed. The court found a different amount owing, greater than the amount Mr. Wysling admitted, under the 1989 order.

II. RESPONSE TO ASSIGNMENT OF ERROR

1. The court correctly entered judgment against Appellant for child support arrearages which accrued under the 1989 order as the applicable statute of limitations has not expired.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1 Mr. Wysling did not assert the affirmative defense of statute of limitations as required by CR 8, thus it was not before the superior court for consideration.

2. The arrearage accrued under the July 28, 1989 order governed by RCW 4.16.020(3) and the Statute of Limitations has not expired.

3. The trial court's memorandum opinion does not affect the judgment rendered.

IV. STATEMENT OF THE CASE

This would be an entirely different case if Mr. Wysling had filed a response to Ms. Anderson's petition saying "Respondent denies that there is any accrued support debt owed, but if there is such a debt some or all of it may be barred by the applicable statute of limitations." But he did not. He simply requested a declaration that he owed nothing. (CP 285).

Bonnie Anderson (fka Wysling) and Mark Wysling were previously married. That marriage was dissolved by decree entered on December 26, 1985. (CP 277-281) The child support obligation is found within the decree itself, not in a separate document. Support is set at \$460 per month (CP 278), of which \$225 is specified to be Mr. Wysling's contribution to child care costs incurred. (CP 280).

The parties negotiated modification of their decree. Their agreement is the Stipulation and Agreed Order of July 28, 1989. (CP 271-276) Relevant topics addressed within that

document include that (1) their child would reside with Mr. Wysling for a one year period, (2) no support would be due from Mr. Wysling for a 12 month period, that thereafter support would again be due in the same amount as had previously been ordered, (3) Mr. Wysling would pay \$200 per month for a year for back due child support. The Stipulation and Agreed Order also (4) addressed Ms. Anderson's support obligation by specifying that no child support payments would be due from her while the child resided with Mr. Wysling and (5) specified that Mr. Wysling would pay \$460 monthly child support when the child returned to Ms. Anderson's physical custody. Furthermore, the parties agreed that Mr. Wysling was in arrears for various unstated months between 1984 and 1989 of child support approximating \$3400. Mr. Wysling was to pay Pacifica Preschool \$645 owed by Ms. Anderson. And the garnishment upon his wages then in effect was terminated.

Mr. Wysling testified that he paid the \$200 per month for back support (RP 68-69) and that he paid the debt to Pacifica Preschool. (RP 69). He did not mention statute of limitations.

Mr. Wysling did not pay the \$200 per month for back

support. (RP 13-14) He did not pay the \$3400 identified in the Stipulation and Agreed Order. (RP 14) He did not pay the \$645 to Pacifica Preschool. (RP 14) At trial Ms. Anderson testified without objection concerning the \$4045 established by the 1989 Stipulation and Agreed Order. (RP 14) The court posed extensive questions about the decree and the 1989 order's modification of it. (RP 61-67) The Court inquired of Mr. Wysling on similar topics. (RP 87-89)

The child discontinued residing with Mr. Wysling and returned to Ms. Anderson's care in June 1997. (RP 22)

When the child returned to his mother, Mr. Wysling commenced paying \$200 per month. (RP 22, Ex. 4) Mr. Wysling never sought to get the \$460 monthly payment amount changed. (RP 27) Mr. Wysling eventually discontinued making payments of child support at all. His last payment being in June 2000. (RP 24, 73, Ex 4)

During trial Judge Cowser asked questions of Ms. Anderson to elicit her understanding of the 1989 order (RP 36-38) and also asked similar questions to elicit her understanding of the 1985 decree. (RP 61-67) Mr. Wysling testified to his

understanding of the decree and the 1989 Stipulation and Agreed Order. (RP 72-74)

Q: [By Ms. Kenison] Now, when Robby went back to live with his mother when he was 13 and a half, what was your understanding of your financial responsibilities at that time?

A: Well, we had discussed, you know, since things had changed, changing the child support obligation to \$200 a month; but we never - - we couldn't ever seem to agree on getting the paperwork together for that.

Q: Did you feel there was an agreement, thought, that it was to be \$200?

A: Yes. I believe we had a verbal agreement.

MR. GAUL: I have a relevance objection to it. The parties can't - -

THE COURT: It may be relevant to him, but I'm not obliged by anybody's verbal agreements to change a court order. I guess that's a longhanded way of saying that the objection is sustained.

Q: [By Ms. Kenison] There was a period of time when you did not pay child support after Robby returned to live with his mother. Can you explain that.

A: I was just trying to get her to, you know, bring this into the modern time for us and for Robert and to make it all work between all of us. That was my stupidity for doing that.

Q: Do you agree that you do owe some child support?

A: Yes, I do.

Q: Would you please identify this document, Exhibit 17.

A: Computation of arrearage.

Q: Does that document accurately reflect what you believe you owe in accrued child support?

A: Yes.

Q: Would you state the amount, please.
...
Q: would you please identify the amount of child support that you believe you owe.
A: By this sheet?
Q: Yes.
A: The total on the sheet?
Q: Uh-huh.
A: I'm reading - - are we talking about - -
Q: Just the amount of child support, without consideration of interest.
A: Oh. \$2,,870.
Q: \$2,870?
A: Yes. \$2,870.
Q: And you recognize that that's what you owe in child support, what you believe you owe in child support?
A: Yes. (RP 72-74)

Mr. Wysling went on to admit that he had never offered \$2,870 or any other amount unconditionally as payment of what he believed he owed as child support. (RP 77)

Judge Cowser provided a memorandum opinion (CP 163-164) granting Ms. Anderson's petition for modification of child support to extend Mr. Wysling's support obligation through high school. The memorandum opinion also addressed a portion of the arrearage. The judgment entered addressed the \$4045 obligation established in the 1989 order.

V. ARGUMENT

1. Mr. Wysling did not assert the affirmative defense of statute of limitations as required by CR 8, thus it was not before the superior court for consideration.

Civil Rule 8 is clear:

In pleading to a preceding pleading, a party shall set forth affirmatively ... laches, ... statute of limitation ... and any other matter constituting an avoidance or affirmative defense.

Mr. Wysling brought the subject of child support arrearage before the court by his response to the petition for modification of child support where his prayer asked the court to determine that he had no accrued support obligation for his son, essentially a counterclaim for declaratory judgment. (CP 285)

A counterclaim is defined as

any claim which at the time of the serving of the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties[.]

In re Marriage of Parker, 78 Wn.App. 405, 897 P.2d 402 (1995). It is not necessary that the counterclaim be separately

denominated as such. Id.

While Ms. Anderson did mention child support debt owing in her petition, she did not seek any judgment from the court for support arrearage in her petition. Mr. Wysling did, asking essentially for a declaratory judgment. Both parties brought the subject before the court. Mr. Wysling's trial testimony abandoned the claim that he owed nothing as he suggested a debt of \$2,870 of principal only. (RP 74) His testimony does not include any assertion of a statute of limitations, as he did not mention the \$3400 figure, but did claim to have paid part of the obligation, Pacifica Preschool and \$200 per month for a year.

Mr. Wysling refers to having asserted statute of limitations in February 2008 in a reply memorandum on a motion before a commissioner. (CP 285) He does not claim to have placed this defense in a response. He did not amend his response to assert the defense after the 2008 hearing. And he never brought the statute of limitations to the trial court's attention during the testimony.

Mr. Wysling waived any statute of limitations defense he

may have had by not asserting it in his response or amending his response to add the defense. Neither did he tailor his trial testimony to include the subject.

2. The arrearages accrued under the July 28, 1989 order are governed by RCW 4.16.020(3) and the Statute of Limitations has not expired.

All support ordered after July 23, 1989 may be enforced for ten years after the youngest child named in the order turns 18. RCW 4.16.020(3). In re Marriage of Waters and Anderson, 116 Wn.App. 211, 63 P.3d 137 (2002). The statute's terms do not limit it to monthly support obligations. Rather, all support ordered is subject to this statute of limitations. While Mr. Wysling claims that \$4045 accrued prior to July 23, 1989, he does not specify when any of it actually accrued. It is support accrued under the 1989 order.

The support order in this matter was entered after July 23, 1989. A statute of limitations on an action "does not begin to run until the cause of action accrues--that is, when the plaintiff has a right to seek relief in the courts." Sabey v. Howard Johnson & Co., 101 Wash.App. 575, 592-93, 5 P.3d

730 (2000) (citing Colwell v. Eising, 118 Wash.2d 861, 868, 827 P.2d 1005 (1992)).

There is no indication when Ms. Anderson could have applied to the court for relief prior to July 28, 1989.

3. The trial court's memorandum opinion does not affect the judgment rendered.

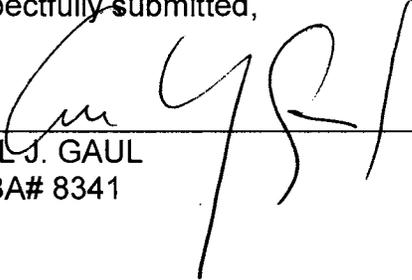
A trial court's oral or memorandum opinion is no more than an expression of its informal opinion at the time it is rendered. It has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment. State vs. Collins, 112 Wn.2d 303, 306, 771 P.2d 350 (1989). The memorandum opinion was not incorporated into the closing documents. The lack of reference to the obligations under the 1989 order does not affect the validity of the judgment entered.

VI. CONCLUSION

The trial court's judgment was correct. The statute of limitations for the 1989 order is RCW 4.16.020(3), ten years from the child's eighteenth birthday. The judgment should be affirmed.

Dated: May 10, 2010

Respectfully submitted,



CARL J. GAUL
WSBA# 8341

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on May 10, 2010, the original of the accompanying BRIEF OF RESPONDENT BONNIE LEE ANDERSON were given to ABC Legal Messengers for delivery and filing on May 10, 2010 with the Court of Appeals, Division I. I further certify that on May 10, 2010 a copy of the Motion on the Merits of Respondent Bonnie Anderson was sent out to be delivered on May 10, 2010 by ABC Legal Messengers, to the attorney for the Appellant:

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Dated: May 10, 2010



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