

NO. 64521-8-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

MARK STEVEN WYSLING, Appellant,

v.

BONNIE LEE ANDERSON fka WYSLING, Respondent.

On Appeal from Snohomish County Superior Court
Honorable Kenneth L. Cowser

BRIEF OF APPELLANT MARK STEVEN WYSLING

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I. INTRODUCTION

The parties were divorced in 1985. The Appellant husband was ordered to pay child support to the Respondent wife, who was designated as the primary custodian of their four-year old child. In 1989 they agreed to the entry of an order calling for the child to live with the father for a year, during which neither would pay child support to the other. The order stated that the father was \$3,400 behind in his child support payments but did not grant a judgment in favor of the mother.

Thirteen years later the mother filed a petition for modification of child support, but did not request a judgment for the 1984-1989 child support arrearages. Trial on the mother's petition did not occur until 2009, at which time the trial court granted her a judgment for the 1984-1989 child support arrearages, among other relief. The judgment was erroneous and must be reversed.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in awarding the Respondent a judgment against the Appellant for child support arrearages that accrued between 1984 and 1989, as the statute of limitations to collect those sums had run.

III. STATEMENT OF THE CASE

The marriage of Appellant Mark Wysling ("Mark") and Respondent Bonnie Wysling, now Bonnie Anderson ("Bonnie"), was dissolved by decree entered on December 26, 1985. (CP 277-281) The decree designated Bonnie as the primary custodian of their four-year old

child Robert and required Mark to pay Bonnie \$460 per month for child support and 50% of Robert's uninsured medical costs. (CP 278; RP 11)

On July 28, 1989 the parties entered into an agreed order which called for Robert to live with Mark for a year, beginning in May 1989. (CP 271-276) It stated, among other things, that "[i]n that child support due to Bonnie L. Anderson from Mark S. Wysling is in arrears in the amount of approximately \$3,400 for various months for the period of 1984 through 1989, Bonnie L. Anderson shall not pay Mark S. Wysling child support during the period of time that Robert L. Anderson-Wysling resides with Mark S. Wysling." (CP 274) The order called for Mark to pay Bonnie \$200 per month for back due child support payments, but did not grant her a judgment against him. (CP 274)

By agreement of the parties, Robert lived with Mark for the next eight years, not returning to Bonnie until June 1997. (CP 199)

In October 2002, Bonnie filed a Petition for Modification for Child Support, requesting that Mark's child support obligation extend beyond Robert's 18th birthday until he completed high school and was no longer dependent, and that post-secondary educational support be ordered. (CP 266-270) The Petition alleged that Bonnie had incurred more than \$8,000 in legal and medical expenses, and there was a "substantial" (although unspecified) child support arrearage, but it did not seek a judgment for such arrearages. (CP 266-270)

In his Response Mr. Wysling asked the court to, among other things, "determine that the Respondent has no accrued support obligation

for the parties' son". (CP 285)

In October 2003 a default Order of Child of Support was entered, ordering Mark to continue paying child support beyond Robert's 18th birthday, reserving the issue of post-secondary education, and granting Bonnie a judgment against Mark for \$8,000 for "unreimbursed special expenses for the benefit of the child. . . . The judgment is in addition to amounts which may be owing for regular monthly child support arrearages". (CP 264)

An order vacating the default child support order was granted on March 22, 2004. It stated that "all financial issues including but not limited to: whether Robert Wysling is dependent, whether the Respondent should be responsible for any day care and expenses assessed against him since Robert Wysling began living with his mother in June 1997, whether the Respondent should be responsible for any child support since Robert Wysling graduated from high school, and attorney fees, should be decided through the arbitration process." (CP 257-259)

In February 2008 Mark filed a motion to dismiss a lien Bonnie had recorded in 2003 against real property he owned in Yakima County. (CP 256) In her memorandum opposing Mark's motion, Bonnie included the 1984-1989 arrearages as part of the back support Mark allegedly owed her. (CP 232-238)

In Mark's reply brief, he argued that her response memorandum was the first time Bonnie claimed she was owed the 1984-1989 arrearages and contended the claim was barred by the statute of limitations and

laches. (CP 211-212)

Mark's motion to vacate the lien was denied, the court ruling that "the correct amount owing is to be determined through arbitration . . ." (CP 208)

The arbitration hearing was held on July 22, 2008. (CP 287) In the prehearing statement of proof she submitted for the arbitration, Bonnie's attorney stated, "Ms. Anderson has never asserted the arrearage accruing before July 28, 1989 in this litigation: She seeks recovery only for support arrearages and medical expense reimbursement since June 1997." (CP 84)

On September 10, 2008 the arbitrator's award ordered that "Child Support arrearages plus interest and expense shall be as computed by Mr. Gaul/Ms. Kenison since there was no disagreement." (CP 287) This calculation did not include the 1984-1989 arrearages: the only child support arrearages (\$2,870 principal and \$4,736.80 interest) were from June 1997 forward. (CP 287-292) Bonnie filed a notice for trial de novo. (CP 204)

During the March 27, 2009 trial, the court asked Bonnie what she thought the 1989 Order meant. He began by asking her to read paragraph five of the Order out loud:

THE WITNESS: In that child support due to Bonnie Anderson from Mark Wysling is in arrears in the amount of approximately \$3,400 for various months for the period of 1984 through 1989. Bonnie Anderson shall not pay Mark Wysling support during the period of time that Robert resides with Mark.

...

THE COURT: So what did you think that meant, or what do you think that means?

THE WITNESS: Well, I – that I wasn't going to pay him, because he owed me.

THE COURT. Right. So what happens to what he owes you: does it just still stay there, or do you think maybe that was a way for the two of you to get back more even?

THE WITNESS: Right.

THE COURT: But the problem I have, and I'm sure counsel is already aware, how was it going to get even? If he hadn't owed you, what do you think – do you think there would have been an order that said you had to pay him if he hadn't owed you the \$3,400, or do you have any idea?

THE WITNESS: Say that again. There's so many issues to - -

THE COURT: It looks like what this order says, or it looks like to me, is because he owes you \$3,400, they're not going to make you pay him.

THE WITNESS: Correct.

THE COURT: But does that mean, for the months that Rob is with him, his \$3,400 he owes you is going to go down by some amount?

THE WITNESS: Yes.

THE COURT: By how much a month?

THE WITNESS: I was assuming by the amount owed per month.

THE COURT: How much – okay. Like, he owes you child support and daycare when Rob is with you?

THE WITNESS: Right.

THE COURT: So Rob goes with him, and then the amount you should have been paying him would be, what, the child support or the child support and daycare, or what?

THE WITNESS: We didn't discuss it.

THE COURT: Yeah, I know. I know.

THE WITNESS: We were trying, I guess, at the time, to make it fair, that because he owed me, that he would take Rob until this debt was paid down.

THE COURT: So if things had worked out like you had

planned, Rob had been with him for a year, how much would that have reduced the \$3,400 that he owed you?

THE WITNESS: I didn't calculate it. I couldn't tell you.

THE COURT: Okay. (RP 36-38)

A month later the trial court issued a Memorandum Opinion, in which he granted Bonnie a judgment against Mark for child support arrearages only from Robert's return (June 1997) through his graduation from high school. (CP 163) The trial court also ruled it would award Bonnie judgments for 50% of uninsured medical costs for Robert that she incurred, and \$2,500 for attorneys' fees. (CP 163-164)

The parties' attorneys exchanged multiple briefs and proposed Findings of Fact and Conclusions of Law following the issuance of the Memorandum Opinion, much of which addressed Bonnie's request that she also be awarded a judgment for the 1984-1989 arrearages, even though the trial judge had not included such an award in his memorandum opinion and was barely discussed during the trial. Memoranda submitted by Bonnie's counsel noted that the arrearages were not before the court nor awarded in the Memorandum Opinion (CP 128; CP 121); and that the statute of limitations had run on the claim (CP 121-123).

Nevertheless, without hearing or explanation the trial judge entered Bonnie's proposed Findings of Fact and Conclusions of Law (CP 88-90; CP 95-98) and three judgments, one of which was for the 1984-1989 arrearages (CP 92). Finding of Fact 3 stated in part "The finding of [Mark's] obligations in the 1989 order has not been incorporated into a written judgment. Those amounts have not been paid and are still owed, bearing interest from July 28, 1989. . . The Order of July 28, 1989 is a

child support order.” (CP 89)

Mark filed a Motion for Reconsideration of the judgment for the 1984-1989 arrearages. (CP 79-87) The Motion was denied, without hearing or explanation, and a judgment for an additional \$1,000 in attorneys’ fees was awarded to Bonnie. (CP 14) This appeal followed.

IV. STANDARD OF REVIEW

This case involves a straightforward issue of law: did the statute of limitations run from the date of each child support payment Mark did not make between 1984 and 1989, or did the 1989 order somehow create a new starting point for the running of the statute of limitations? The Court of Appeals’ review of the trial court’s (unexplained) ruling is therefore *de novo*. Lobdell v. Sugar ‘N Spice, Inc., 33 Wn. App. 881, 658 P.2d 1267 (1983).

V. ARGUMENT

1. The 1985 Decree of Dissolution, Not the 1989 Order, is the Order From Which the 1984-1989 Arrearages Accrued, RCW 4.16.020 (3) Does Not Apply, and the Statute of Limitations Has Therefore Run.

The parties do not dispute that:

- Each installment of unpaid child support becomes a separate judgment from the date it is due. Koon v. Koon, 50 Wn.2d 577, 579, 313 P.2d 369 (1957).
- The relevant statute of limitations is RCW 4.16.020, which provides that the period prescribed for commencement of actions shall be as follows:

Within ten years:

(2) For an action upon a judgment or decree of any court of the United States, or of any state or territory within the United States, . . .

(3) Of the eighteenth birthday of the youngest child named in the order for whom the support is ordered for an action to collect past due child support that has accrued under an order after July 23, 1989, by any of the above named courts . . .

- Any arrearage not collected within the statutory limitation period is barred. *Roberts v. Roberts*, 69 Wash. 2d 863, 866, 420 P.2d 864 (1966). *In Re Macarone*, 54 Wash. App. 502, 504, 774 P.2d 53 (1989). *See also In Re Marriage of Ulm*, 39 Wash. App. 342, 343-344, 693 P.2d 181 (1984).

- Bonnie did not initiate an action to collect any of the unpaid child supports payments between 1984 and 1989 until far more than 10 years after they became due.

- The 1989 order was not a judgment for back support.
- Bonnie believed that the order meant that she did not have to pay support to Mark while he was caring for Robert because he owed her \$3,400, and during that time the amount he owed her was going down by some amount. (RP 36–38)

The trial court characterized the 1989 order as follows: “The parties agreed that no child support payment would be due from the Mother to the Father for this ‘extended visitation’, which was to be a

period of one year, because the Father was in arrears in the approximate amount of \$3400 for the period of 1984-1989.” (CP 163) Beginning in June 1990 when Mr. Wysling was to return the child to Ms. Anderson, “child support payments shall be paid by [him to her] in the amount of \$460 per month, *this being the original amount of child support previously ordered.*” (CP 163) (italics added)

Subsection (3) of RCW 4.16.020 was added in 1989. It only applies to an action to collect past due child support “that has accrued under an order entered after July 23, 1989”. The 1989 order was serendipitously entered on July 28, 1989. However, that order merely established how much was owed as of that date due to Mr. Wysling’s earlier failure to make support payments. The 1984-1989 arrearages accrued from the 1985 decree of dissolution, not the 1989 order, so Bonnie’s petition for modification was filed more than ten years too late.

The controlling case on this issue is Valley v. Selfridge, 30 Wn. App. 908, 639 P.2d 225 (1982), where in 1969 the father was ordered to pay child support, in 1973 the mother obtained a judgment for \$6,100 in arrearages, and she later attempted to recover those funds within six years (the then-applicable statute of limitations period) after the entry of the 1973 judgment, but more than six years after the arrearages themselves. The trial court rejected that attempt, and the Court of Appeals at page 914 upheld on what was then a case of first impression:

Although a series of past-due support installments may be reduced to a judgment, it does not follow that this

judgment is in lieu of the original judgment that vested on the date the support was due. Rather, the lump-sum judgment is an ancillary proceeding to clarify the amount where there is a question as to the amount of arrearage. . . . Since the monthly support becomes a judgment when due and is susceptible to the 6-year judgment-life statute (now 10 years), the life of the monthly judgment is not extended by being formally incorporated into an aggregate judgment reflecting all sums due within the preceding six years.

This ruling was later adopted and applied in In Re MacDonald, 41 B.R. 716, 718 (Bk. Hawaii, 1984).

The 1989 order did not even establish a judgment: like the 1973 judgment in Valley, it merely “aggregated previously unpaid installments” established in the 1985 decree. The reference in the Order to the arrearages was so inconsequential that at trial Bonnie testified she did not know how much the debt would be reduced as a result of Robert living with Mark for one year, let alone eight. As a matter of law, Subsection (3) does not apply to this case.

In her response to Mark’s Motion for Reconsideration, Bonnie alleged that she had sought recovery of the 1984–1989 arrearages in her Petition for Modification of Child Support in 2002, and Mark waived his right to assert the statute of limitations affirmative defense under CR 8 when he waited until after trial was over to assert it for the first time. (CP 22-28)

As stated *supra*, however, this assertion is lacks merit because (1) in

her Petition and almost every document she presented through the next seven years of litigation Bonnie did not ask for a judgment for the 1984-1989 arrearages; and (2) Mark had nevertheless raised the statute of limitations in 2008 when Bonnie alluded to it for the first time:

- Although in her Petition for Modification Bonnie mentioned that “there is a substantial child support arrearage due to Mark’s failure to pay the amount ordered”, she did not specify the period of time during which the arrearages accrued, and she did not ask the court to order Mark to pay them in her request for relief. Accordingly, there was no need for Mark to assert any affirmative defense to that issue.

- The October 2003 default order of child support included a judgment of \$8,000 only for unreimbursed special expenses for the benefit of Robert.

- When Bonnie filed her opposition to Mark’s motion to vacate the lien in February 2008, stating for the first time that she was claiming the 1984-1989 arrearages, Mark’s reply memorandum expressly asserted the affirmative defenses of the running of the statute of limitations and laches.

- In her prehearing statement of proof to the arbitrator, Bonnie stated that she had “never asserted the arrearage accruing before July 28, 1989 in this litigation: She seeks recovery only for support arrearages and medical expense reimbursement since June 1997.” (CP 80)

- The arbitrator used Bonnie’s own calculation of arrearages in his award: those arrearages began in June 1997.

- The trial judge did not award Bonnie any money for the 1984-1989 arrearages in his Memorandum Opinion.
- When Bonnie nevertheless proposed such an award in her proposed Findings of Fact and Conclusions of Law, Mark vigorously asserted the statute of limitations defense in opposition to it.

VI. SUMMARY

The only way Bonnie would be entitled to a judgment against Mark for the 1984-1989 arrearages is if the 1989 order was of the type contemplated in RCW 4.16.020(3). The Court of Appeals ruling in Valley v. Selfridge, *supra*, establishes as a matter of law that it does not. The trial court's ruling with respect to the 1984-1989 arrearages should be reversed and the judgment vacated.

DATED this 18th day of February, 2010.

THE HUNSINGER LAW FIRM
Attorneys for Appellants

By: _____



MICHAEL D. HUNSINGER
WSBA NO. 7662

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on February 18, 2010, the original and one copy of the accompanying Brief of Appellant Mark Steven Wysling were given to ABC Legal Messengers for delivery and filing on or before February 19, 2010, with the Court of Appeals, Division I. I further certify that on February 18, 2010, a copy of the Brief of Appellant Mark Steven Wysling was sent out to be delivered on February 19, 2010, by ABC Legal Messengers, to the attorney for the Respondent:

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DATED this 18th day of February, 2010.

THE HUNSINGER LAW FIRM
Attorneys for Appellant

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Legal Assistant

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