**[Cite as *Weedon v. Weedon*, 2003-Ohio-432.]**

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 81260

| | | |
|---|---|---|
| RENEE WEEDON (nka FIDERIUS) | : | |
| | : | ACCELERATED DOCKET |
| Plaintiff-Appellant | : | |
| | : | JOURNAL ENTRY |
| vs. | : | and |
| | : | OPINION |
| LIONEL DAVID WEEDON | : | |
| | : | |
| Defendant-Appellee | : | |

DATE OF ANNOUNCEMENT
OF DECISION: January 30, 2003

CHARACTER OF PROCEEDING: Civil appeal from
Court of Common Pleas
Domestic Relations Division
Case No. D-173285

JUDGMENT: AFFIRMED

DATE OF JOURNALIZATION: _____

APPEARANCES:

For Plaintiff-Appellant: JOHN D. ZOLLER
Zoller & Scholl
812 Huron Road
Cleveland, Ohio 44115

For Defendant-Appellee: NEIL W. SIEGEL
MITCHELL L. ALPERIN
Mondello & Levey
23220 Chagrin Boulevard
Suite 360
Beachwood, Ohio 44122

COLLEEN CONWAY COONEY, J.:

**{¶1}** This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the record from the lower court, the briefs, and the oral argument of counsel.

**{¶2}** Plaintiff-appellant Renee Weedon, nka Renee Fiderius (mother), appeals the trial court's finding that it did not have jurisdiction to determine her motion for child support and for support arrearage. We find no merit to the appeal and affirm.

**{¶3}** The parties were married on September 25, 1984, and they had one child, born on March 13, 1986. The mother filed for divorce on October 6, 1986. The father failed to answer.

**{¶4}** On January 22, 1987, the trial court entered a divorce decree stating:

**{¶5}** "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that due to Defendant's failure to appear, that no provisions for child support or visitation can be made, however, the Defendant is to report to the Bureau of Support, his employment status and his earnings."

**{¶6}** The father failed to abide by this order and did not "report" his employment status or earnings to the Bureau of Support.

**{¶7}** On April 12, 1999, the Cuyahoga County Support Enforcement Agency (CSEA) intervened and requested that the court find the father in contempt for failing to comply with the trial court's order to report. Service was obtained on the father at an address located in Michigan, and the trial court issued an order, requiring the father to appear and to bring relevant financial documents.

**{¶8}** On November 23, 1999, the trial court approved an agreed judgment entry of the parties, which established support from April 12, 1999 forward "in the amount of $423 monthly plus processing charge and $50.00 monthly fee on arrears of $3,024.00 as of 11/17/99 thru CSEA." The arrearage of $3,024 represented the amount that had accrued pending CSEA's contempt motion. This order did not include the past support from the date of filing of the divorce complaint to the date of filing CSEA's motion, but did state, "[t]he Court finds that the parties have resolved their differences by agreement * * *."

**{¶9}** On August 13, 2001, the mother filed a motion to establish support and determine the arrearage commencing from the date of the divorce filing on October 6, 1986, and ending with the April 1999 support order. The parties submitted briefs regarding the issue, but the court denied the mother's motion finding that it lacked jurisdiction over the matter.

**{¶10}** The mother raises two assignments of error on appeal.

Lack of Jurisdiction to Determine Arrearage

**{¶11}** In her first assignment of error, the mother argues that the trial court erred in finding that it lacked jurisdiction to establish the support and determine the arrearage for the years prior to the 1999 settlement agreement.

**{¶12}** Although the mother had requested child support in her complaint filed in 1987, no support order was issued at that time and the trial court did not expressly reserve jurisdiction over the matter. Therefore, the trial court had no jurisdiction to determine the child support and resulting arrearage for that time period because it cannot retroactively impose child support.

**{¶13}** As the Ohio Supreme Court held in *Meyer v. Meyer* (1985), 17 Ohio St.3d 222, 223-224:

**{¶14}** "It is true that we have in the past ruled that child support orders are subject to modification. See, e.g., *Colizoli v. Colizoli* (1984), 15 Ohio St.3d 333, 474 N.E.2d 280; *Peters v. Peters* (1968), 14 Ohio St.2d 268 [43 O.O.2d 441, 237 N.E.2d 902]. However, these rulings apply to the support orders in *prospective* fashion only, and solely to *existing* support orders. In such cases, the supporting spouse has ample notice on which to prepare his or her finances. This would not be true in the case of a *retroactive* order that *establishes* a support obligation." (Emphasis in original.)

**{¶15}** Furthermore, the father's arrearage was determined when the parties entered into the settlement agreement. It was at that time that the arrearage for the preceding twelve years should have also been discussed. The court's entry contained a finding that the parties had "resolved their differences by agreement." Waiting for nearly two years after the settlement agreement was entered before seeking the arrearage that accumulated since the date the divorce complaint was filed is prohibited by res judicata. See *Austin v. Payne* (Feb. 11, 1998), 9th Dist. No. 97CA006777.

**{¶16}** We also find that the mother should have sought reimbursement for extraordinary medical expenses at the time the arrearage and support payments were being determined. Even if CSEA had no authority to obtain these expenses, the mother could have done so on her own because the expenses related to the child support issue. CSEA was simply the third-party defendant in the action in 1999 and not the plaintiff.

**{¶17}** The mother's first assignment of error is overruled.

Violation of Constitutional Rights

**{¶18}** The mother contends in her second assignment of error that the trial court's refusal to hear the matter violated her constitutional rights of due process and equal protection.

**{¶19}** Although we agree that finding the father not responsible for the prior years of child support simply because he absented himself seems inequitable, the mother was given adequate opportunity to present her claim for past child support when the parties entered into the settlement agreement in 1999. The fact that the mother failed to do so, or to retain counsel at that time to represent her, was the mother's choice and she cannot now complain.

**{¶20}** The mother's second assignment of error is overruled.

Judgment affirmed.

TIMOTHY E. McMONAGLE, A.J. CONCURS IN JUDGMENT ONLY IN SEPARATE CONCURRING OPINION;

KENNETH A. ROCCO, J. CONCURS IN JUDGMENT ONLY IN SEPARATE CONCURRING OPINION

JUDGE
COLLEEN CONWAY COONEY

TIMOTHY E. MCMONAGLE, A.J., CONCURRING IN JUDGMENT ONLY:

**{¶21}** To the extent the majority relies on *Meyer v. Meyer* (1985), 17 Ohio St.3d 222, to support its finding that the trial court was without jurisdiction to determine appellant-mother's motion to establish child support, I respectfully disagree.

**{¶22}** *Meyer* is distinguishable from the instant case. The residential parent in *Meyer* sought child support reimbursement from the non-residential parent despite the former's failure to request child support at the time of instituting proceedings for divorce. While not barring an action to receive or modify *future* child support, the *Meyer* court found that the residential parent was not entitled to reimbursement from the non-residential parent where no support order was entered or requested at the time residential parent status was determined. The court reasoned that a non-residential, supporting parent was entitled to ample notice to arrange his or her finances in order to

accommodate such an obligation. Although the *Meyer* court conceded that this was not the majority view, it was its belief that "the importance of finality outweigh[ed] any inequities caused by the failure of the custodial spouse to act at the time custody is granted." Id. at 225.

**{¶23}** That is not the case here. Appellant-mother requested child support in her complaint for divorce. When appellee-father failed to appear, the court did not issue an order for child support but instead ordered the father to contact the Bureau of Support, as it was then known, to report his employment status and earnings. Apparently this never happened and the case languished for twelve years until appellant eventually contacted CSEA who, in turn, filed motions to intervene, show cause and establish support in April 1999. Appellant did not have independent legal counsel and, in fact, expressly declined such counsel and acknowledged that CSEA was represented by an assistant prosecuting attorney. A child support order was eventually obtained, albeit from the time of the filing of the original motions by CSEA. There was no independent request for past child support until the motion for such relief was filed in August 2001 by subsequently retained counsel.

**{¶24}** In my opinion, *Meyer* would not bar appellant's request for past child support had she requested such relief at the time she sought CSEA intervention. To allow a parent who fails to appear or otherwise respond to a complaint for divorce to escape any child support obligation when such relief is requested is absurd. Equally absurd, however, is a parent who allows an order of a domestic relations court to go unheeded to the detriment of a young child, especially when that parent seeks the intervention of CSEA for the purpose of securing a child support order. Under the facts of this case, I find that appellant waived any rights she had to past child support. As such, I reluctantly agree with the majority's ultimate conclusion to affirm the decision of the trial court and, therefore, concur in judgment only.

KENNETH A. ROCCO, A.J., CONCURRING IN JUDGMENT ONLY:

**{¶25}** Although the majority opinion's disposition is proper based upon existing precedent, thus compelling my concurrence in the result, I write separately to express my personal opinion: I believe the trial court in this case committed plain error in issuing its initial judgment entry.

**{¶26}** Public policy dictates that a parent has a duty to provide monetary support for his child. *Allen v. Allen* (1988), 59 Ohio App.3d 54. A parent, therefore, should not be totally excused from this duty without any showing of a good faith effort to make some type of payment. Id. It follows that the record in the first instance should demonstrate appellant's knowledgeable and voluntary waiver of the child's right to parental support from appellee.

**{¶27}** In this case, the trial court in its decision to grant appellant's petition for divorce had the authority pursuant to R.C. 3113.215(A)(5) to impute income to appellee based upon his area of expertise and its consideration of several other factors. *English v. Rubino* (Apr. 4, 1996), Cuyahoga App. No. 68901. Since the trial court had the obligation to safeguard the best interest of the child, its failure to issue any support order to appellee, in my view, remains inexcusable.