IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED

October 20, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

KATHRYN LOWERY	)	ROANE COUNTY
	)	03A01-9703-JV-00093
Plaintiff-Appellant	)	
	)	
	)	
v.	)	HON. THOMAS A. AUSTIN,
	)	JUDGE
	)	
KENNETH L. SHELDON	)	
	)	AFFIRMED IN PART
Defendant-Appellee	)	and REMANDED

W. BRIAN STARNES OF KNOXVILLE FOR APPELLANT

J. SCOTT McCLUEN OF HARRIMAN FOR APPELLEE

OPINION

Goddard, P.J.

In this paternity action the Juvenile Judge for Roane County found that the Defendant Kenneth L. Sheldon was the father of a child born in 1991 to the Plaintiff Kathryn Lowery.

He thereupon made the following determinations:

1. Father would begin paying $250 per month as child support.

2. The mother was not entitled to retroactive child support.

3. Child support in this case under the Tennessee Child Support Guidelines is $476 per month.

4. The parties should pay their own attorney fees.

5. Costs would be adjudged one-half to each party.

The mother appeals, raising the following issues:

I. THE TRIAL JUDGE WAS INCORRECT IN FAILING TO DETERMINE THE FATHER'S OBLIGATIONS TO PROVIDE FOR MONETARY CHILD SUPPORT AND MEDICAL-RELATED INCIDENTS THEREOF PURSUANT TO THE TENNESSEE CHILD SUPPORT GUIDELINES.

II. THE TRIAL JUDGE WAS INCORRECT IN FAILING TO DETERMINE THE AMOUNT OF RETROACTIVE CHILD SUPPORT OWED BY THE FATHER AND TO AWARD SAME TO THE MOTHER.

III. THE TRIAL JUDGE WAS INCORRECT IN DENYING THE MOTHER'S REQUEST FOR A JUDGMENT AGAINST THE FATHER IN THE AMOUNT OF HER ATTORNEY'S FEES AND LITIGATION EXPENSES.

IV. THE TRIAL JUDGE WAS INCORRECT IN TAXING 1/2 OF THE COSTS OF THE MOTHER'S SUCCESSFUL PATERNITY LITIGATION TO THE MOTHER.

The father also raises issues, the first two of which contest the propriety of this appeal:

I. IS THE COURT OF APPEALS WITHOUT JURISDICTION TO HEAR THE APPEAL ON THE BASIS THAT THE JUDGMENT APPEALED FROM HAS NOT BEEN PROPERLY ENTERED PURSUANT TO RULE 58, T.R.C.P.?

II. ASSUMING WITHOUT ADMITTING THAT THE ORDER UPON HEARING WAS PROPERLY ENTERED ON JULY 2, 1996, IS THE COURT OF APPEALS WITHOUT JURISDICTION TO HEAR THE APPEAL BECAUSE LOWERY HAS FAILED TO TIMELY APPEAL THE JUDGMENT PURSUANT TO RULE 4, T.R.A.P.

III. SHOULD THE APPELLANT, LOWERY, BE DENIED RECOVERY BECAUSE SHE IS GUILTY OF LACHES PRETERMITTING ISSUES I, II, III AND IV RAISED BY THE APPELLANT?

It is appropriate in view of the nature of Mr. Sheldon's issues that they be first addressed.

His first two issues are predicated upon certain orders entered in the case which, together with pertinent motions of the parties, are as follows:

1. July 1, 1996. Original order filed, signed by the Trial Judge on July 7, recorded, which we assume was placed in the minutes, on July 19.
2. July 25, 1996. Amendment to the original order filed, directing the Clerk to make the child support payments to Ms. Lowery, signed July 25, recorded on July 29.
3. August 16, 1995. Ms. Lowery's motion for a new trial or to alter and amend judgment.
4. August 20, 1995. Mr. Sheldon's motion to alter or amend judgment.
5. December 20, 1996. Order entered overruling both parties' motions and directing that they submit proposed findings of fact relative to the Trial Court departing from Child Support Guidelines, signed January 12, 1997, recorded November 10, 1997.
6. December 31, 1996. Findings of fact filed, signed January 2, 1997, recorded January 10, 1997.
7. January 29, 1997. Notice of appeal filed.

All orders entered are signed by counsel for both parties.

As to Mr. Sheldon's first issue, Rule 58 of the Tennessee Rules of Civil Procedure, as pertinent to this appeal, provides the following:

ENTRY OF JUDGMENT

> _____Entry of a judgment or an order of final disposition is effective when a judgment containing one of the following is marked on the face by the clerk as filed for entry:
>
> (1) the signatures of the judge and all parties or counsel, or
> (2) the signatures of the judge and one party or counsel with a certificate of counsel that a copy of the proposed order has been served on all other parties or counsel, or
> (3) the signature of the judge and a certificate of the clerk that a copy has been served on all other parties or counsel.
>
> When requested by counsel or pro se parties, the clerk shall mail or deliver a copy of the entered judgment to all parties or counsel within five days after entry; notwithstanding any rule of civil or appellate procedure to the contrary, time periods for post-trial motions or a notice of appeal shall not begin to run until the date of such requested mailing or delivery. In the event the residence of a party is unknown and cannot be ascertained upon diligent inquiry, the certificate of service shall so state. Following entry of judgment, the clerk shall make appropriate docket notations and shall copy the judgment on the minutes, but failure to do so will not affect validity of the entry of judgment.

Mr. Sheldon insists that because the order was signed by the Trial Court after the date it was marked filed, it

therefore does not meet the requirements of Rule 58 and, consequently, is not a valid judgment.

It is clear that the provisions of Rule 58 are drawn for the purpose of giving counsel and the parties notice of the judgment. In this case, while Mr. Sheldon may be technically correct, in the interest of judicial economy, and because both counsel approved the order, and knew in the regular course it would be signed by the Trial Court and entered, we are disinclined to remand the case so that the identical order might be re-entered.

In his argument supporting issue number two, Mr. Sheldon contends that the notice of appeal, which was entered on January 29, 1997, was more than 30 days after the order marked filed on July 1 and signed by the Trial Judge on July 2 of the preceding year. While this argument would be valid if there were not intervening orders, it will be noted from the chronology hereinbefore set out that within 30 days of either July 1 or July 2, specifically on July 25, an amendment to the original order was filed. Subsequently, within 30 days of the amended order Ms. Lowery and Mr. Sheldon each filed a motion for new trial on August 16 and August 20, respectively. Thereafter, on December 20, an order was entered overruling both motions and directing the parties to submit proposed findings of fact relative to departure from the Child Support Guidelines. We note

parenthetically that this directive apparently was not honored as no proposed findings of fact are found in the record. Nevertheless, a finding of fact was marked filed on December 31, signed by the Trial Judge on January 2.

We believe the date the time began to run as to the notice of appeal is January 2, but even if it was December 31, the notice was filed within 30 days of either date.

As to the issue addressing laches, which is directed to the Trial Court's finding as to paternity, Mr. Sheldon contends that the long delay between the birth of the child on May 9, 1991, and the date the petition for paternity was filed on March 17, 1995, prejudiced him because of death of parties or destruction of certain written records. In this regard, his brief makes the following contentions:

> Ms. Lowery testified on cross examination that she had written to William Kite and in those letters had told him who the father was. These letters were thrown out or destroyed in a house fire in approximately 1986. Further, Ms. Lowery testified on cross examination that she told Dr. Cunningham who was treating her for her pregnancy, that she had stated to him the name of the father of the child. Ms. Lowery subsequently testified that those records were lost or destroyed. Ms. Lowery also testified that she had talked to people at Red Kap where she was formerly employed about her pregnancy and told them who the father was but due to the lapse of time could not tell us the name of those persons. Mr. Sheldon testified that had Ms. Lowery's deceased father Leonard Wright still be [sic] living he would have liked to have talked to Mr. Wright because the appellant was living with Mr. Wright when the child was conceived. Mr. Sheldon further testified that if the father of William Kite who is the man that the appellant was having a relationship with during 1980

> and 1981 were still alive, he would like to talk to them to find out what was going on between those two.

We might be disposed to give greater weight to this argument were it not for the results of the blood test conducted at the insistence of both Ms. Lowery and Mr. Sheldon, which shows that the probabilities of his being the father were 99.62 percent. The result of this test outweighs any statements Ms. Lowery might have made regarding the father of her son.

We now turn to the issues on appeal raised by Ms. Lowery.

As to the first, the proof shows that upon applying the Child Support Guidelines the father would be obligated to pay $478 per month rather than the $250 fixed by the Trial Court. T.C.A. 36-5-101(e) specifically mandates that any deviation from the presumption accorded the Guidelines must be justified in writing by the Trial Judge which, notwithstanding his order to submit proposed findings of fact, does not follow the mandates of the Statute. In light of this, we deem it appropriate to remand the case for the Trial Court to enter an order in accordance with the foregoing Code Section.

The questions raised in issues two and three are addressed in T.C.A. 36-2-108(b) and 36-2-102(4), respectively. These Code Sections provide the following:

> **36-2-108. Order of paternity and support. --**
> . . . .
>
> (b) The order of paternity and support shall specify who is to have custody of the child, and the sum to be paid monthly or otherwise, through the clerk of the court, until the child reaches the age of majority, and as otherwise provided by statute. In addition to providing for the support and education, the order shall also provide for the payment of the necessary expenses incurred by or for the mother in connection with the mother's confinement and recovery; for the funeral expenses if the child has died; for the support of the child prior to the making of the order of paternity and support; and such expenses in connection with the pregnancy of the mother as the court may deem proper. The court shall set a specific amount which is due in each month to be paid in one (1) or more payments as the court orders.

> **36-2-102. Liability of father of child born out of wedlock.** -- The father of a child born out of wedlock is liable for:
>
> . . . .
>
> (4) Such expenses, including counsel fees,[1] in connection with the mother's pregnancy as the court in its discretion may deem proper.

As to Ms. Lowery's second issue, we believe a Supreme Court opinion in State ex rel. Coleman v. Clay, 805 S.W.2d 752 (Tenn. 1991), is controlling. In that case, as in the case at bar, there was a lengthy delay--14 years--in filing the petition of paternity. The Juvenile Court held the father would not be liable for support prior to his learning that he was the father of the child.

[1] Attorney fees, as used in the context of this statute is, in our view, sufficiently broad to include those incurred in establishing paternity.

In rejecting the Juvenile Court's determination and affirming the mandates of T.C.A. 36-2-108(b), the Supreme Court stated the following (at page 755):

> We therefore affirm the holding by the Court of Appeals to the effect that upon determination of paternity, the father of a child born out of wedlock is statutorily liable for support from and after the child's birth. We further agree that the statute gives the juvenile court the discretion to order a retroactive support award back to that date, the amount and method of payment to be determined by the juvenile judge in light of the circumstances of the case and consistent with the standards which normally govern the issuance of child support orders. *See* T.C.A. § 36-2-108(d). We reject the implicit holding by the juvenile court in this case that the father's liability is retroactive only to the date on which he knew for certain that he was the child's father.

In a footnote to an earlier portion of the opinion, the Court also stated the following:

> The father's ability to pay is relevant to the amount of the retroactive order and the method of its payment in the future, but it should not be taken to extinguish his statutory liability for the child's support, unless he is able to show that he cannot afford to pay anything at all, no matter how nominal the award.

In light of the foregoing we also remand the case for the Trial Judge, after hearing additional proof, if he deems it appropriate, to first determine whether Mr. Sheldon is in a financial position to make any support payments, and, if so, upon exercising his sound discretion, to make such an award under such terms as are warranted by the proof.

Apropos of Ms. Lowery's third issue, an award of an attorney fee is discretionary with the Trial Court, and we think it more appropriate, in view of the fact that the case is remanded for further proceedings, that this question not be addressed at this time, but await action by the Trial Judge, who may reverse his original order and award attorney fees.

The fourth issue, relative to taxing of costs, likewise does not need attention until the Trial Court has acted upon remand.

For the foregoing reasons the judgment of the Trial Court as to finding of paternity is affirmed, and as to the other matters raised by Ms. Lowery remanded for proceedings not inconsistent with this opinion. Costs of appeal are adjudged against Mr. Sheldon.

_____
Houston M. Goddard, P.J.

CONCUR:

_____
Herschel P. Franks, J.

_____
Charles D. Susano, Jr., J.