STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

DANNY S.,
Respondent Below, Petitioner

vs. No. 17-0157 (Mercer County No. 93-CP-909)

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,
BUREAU FOR CHILD SUPPORT ENFORCEMENT,
Petitioner Below, Respondent,
and
MOLLY K.,
Respondent Below, Respondent

FILED
April 9, 2018
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

The petitioner (respondent below), Danny S.,[1] appeals the order of the Circuit Court of Mercer County entered on January 18, 2017, that affirmed the order of the Family Court of Mercer County entered on January 11, 2016. Through the family court's order, judgment was awarded in favor of the respondent (petitioner below), the West Virginia Department of Health and Human Resources, Bureau for Child Support Enforcement ("BCSE"), and the respondent (respondent below), Molly K. (formerly Molly S.)[2] (collectively the "respondents"), and against Danny S. for unpaid child support in the amount of $13,633.39. Relying upon West Virginia Code § 38-3-18(a) (1923),[3] Mr. S. asserts that the BCSE did not

[1]Consistent with our practice in cases involving sensitive matters, we use the first name and last initial of the adult parties and the initials of their child. *See* W.Va. R. App. P. 40(e)(1).

[2]The record reflects that for part of these proceedings, the parents shared the same last name; however, they have no familial relationship and were never married.

[3]West Virginia Code § 38-3-18 was amended in 2008 to include a provision that pertains specifically to child support orders entered after the effective date of the amendment. (continued...)

obtain a writ of execution until February 23, 2009, rendering uncollectible any installments of child support that became due ten or more years before the writ's April 27, 2009, return date.[4]

Upon review of the parties' arguments, we affirm the circuit court's order denying Mr. S.'s appeal of the family court's decision and awarding judgment in favor of the respondents. Inasmuch as this case does not present a new or significant question of law, and having considered the applicable standard of review and the record presented, this matter is properly disposed of through this memorandum decision in accordance with Rule 21(c) of the Rules of Appellate Procedure.

I. Factual and Procedural Background

Mr. S. and Ms. K. are the parents of B.S., who was born in 1992. In March of 1992, the BCSE began providing services to Ms. K. and, in 1993, filed a civil action in the Circuit Court of Mercer County to establish both paternity and child support. By order entered on November 16, 1993, the circuit court found Mr. S. to be B.S.'s father and established monthly child support in the amount of $199.80 commencing November 1, 1993. Mr. S. did not appeal this order.

Mr. S. fell into arrears on his payment of child support and, on June 6, 2000, the BCSE filed a petition for contempt against him in the circuit court. On August 10, 2000, the circuit court entered an order declining to find Mr. S. in contempt due to the totality of his circumstances but awarding a decretal judgment in favor of Ms. K. in the amount of $2,943.62 for unpaid child support that had accrued between November 1, 1993, and February 29, 2000, and in favor of the State in the amount of $1,328 for unpaid child support for the same time period. Because the circuit court learned in the contempt proceeding that

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[3](...continued)
Because the support orders at issue in the case at bar were entered prior to 2008, we apply the pre-2008 version of West Virginia Code § 38-3-18, which provides, in part, as follows:

> On a judgment, execution may be issued within ten years after the date thereof. Where execution issues within ten years as aforesaid, other executions may be issued on such judgment within ten years from the return day of the last execution issued thereon, on which there is no return by an officer, or which has been returned unsatisfied.

[4]The parties are represented by counsel: Colin M. Cline for the petitioner and Dee-Ann B. Burdette for the respondents.

B.S. was living with her grandmother to whom the BCSE had redirected child support,[5] the lower court ordered the BCSE to file a petition for modification to substitute the grandmother as the party in interest and to recalculate the child support amount. Thereafter, the BCSE filed a complaint for modification. In its order entered on December 21, 2000, the circuit court found that the child had been residing with her grandmother; recalculated child support at $50 per month; redirected child support to the grandmother effective November 1, 2000; and reaffirmed that any arrearage owed by Mr. S. prior to November 1, 2000, was owed to either Ms. K. or the State as her assignee. Mr. S. did not appeal either the August 10, 2000, or the December 21, 2000, orders.[6]

It appears from the appendix record and the BCSE's appellate brief that as of March 3, 2004, B.S. had returned to live with her mother. At that same time, the BCSE redirected child support to Ms. K.[7]

In an effort to collect the child support arrearage, the BCSE filed an abstract of order and an affidavit of accrued support with the Mercer County Circuit Court Clerk on February 23, 2009, for unpaid child support totaling $17,062.08, including interest.[8] A writ of

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[5]*See* W.Va. Code § 48-18-114 (2001) ("(a) Where physical custody of the child has been transferred . . . to another person, the Bureau for Child Support Enforcement may redirect disbursement of support payments to such other person, on behalf of the child . . . .").

[6]In 2003, the BCSE filed another petition for contempt against Mr. S. for unpaid child support. By order entered on September 17, 2003, the family court declined to find Mr. S. in contempt, noting that he had four children by his wife at that time and that his driver's license had been suspended in both West Virginia and Virginia for unpaid tickets.

[7]*See supra* note 5.

[8]West Virginia Code § 48-14-201 (2001) is permissive, providing as follows:

> When an obligor is in arrears in the payment of support which is required to be paid by the terms of an order for support of a child, an obligee or the Bureau for Child Support Enforcement *may* file an abstract of the order giving rise to the support obligation and an "affidavit of accrued support," setting forth the particulars of such arrearage and requesting a writ of execution, suggestion or suggestee execution. The filing of the abstract and affidavit shall give rise, by operation of law, to a lien against personal property

(continued...)

execution issued that same day, which was returnable on April 27, 2009. On June 9, 2010, the BCSE filed another abstract of order and an affidavit of accrued support for arrears totaling $17,892.09, including interest, and a writ of execution issued that same day. The BCSE represents that Mr. S., who was served with notices of these filings,[9] did not assert any objection to the arrearage set forth in either of the affidavits.[10] Mr. S. has not disputed this representation.

On October 4, 2016, the BCSE filed a motion for decretal judgment in the family court that alleged accrued, unpaid child support in the amount of $13,740.91, including interest. Mr. S. filed a response to the BCSE's motion, as well as a counter-motion for summary judgment in which he asserted that the August 10, 2000, order did not preserve any unpaid child support that became due more than ten years prior to the April 27, 2009, return date for the writ of execution that issued on February 23, 2009; therefore, such amounts are uncollectible and must be excluded from the calculation of child support arrearage.

The BCSE filed a response in opposition to Mr. S.'s motion. It relied upon the November 16, 1993, child support order; the decretal order entered against Mr. S. less than ten years later on August 10, 2000, which awarded the child support arrears that had accrued between November 1, 1993, and February 29, 2000; and the abstract of order and affidavit of accrued child support that the BCSE filed on February 23, 2009, which was within ten

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[8](...continued)
of an obligor who resides within this state or who owns property within this state for overdue support.

Id. (emphasis added). Once the affidavit is filed, the issuance of a writ of execution is mandatory. *See* W.Va. Code § 48-14-204 (2001), in part ("(a) Upon receipt of the affidavit, the clerk *shall issue* a writ of execution, suggestion or suggestee execution and shall mail a copy of the affidavit and a notice of the filing of the affidavit to the obligor at his or her last known address.") (emphasis added).

[9]The circuit court's docket sheet contained in the appendix record reflects that a notice of these filings was mailed to Mr. S. on February 23, 2009, and on June 9, 2010.

[10]As discussed *infra*, Mr. S. had fourteen days to dispute the amount of the arrearage or challenge the writ of execution as being improper due to mistakes of fact under West Virginia Code § 48-14-204 (2001).

years of the August 10, 2000, decretal judgment, and the writ of execution that issued that same day without any objection being asserted by Mr. S.[11]

On December 19, 2016, the family court held a hearing on the BCSE's motion for decretal judgment and Mr. S.'s counter-motion for summary judgment. Rejecting Mr. S.'s arguments, the family court entered an order on January 11, 2017, finding that all arrears had been properly secured following entry of the initial support order on November 16, 1993, through the new judgment entered on August 10, 2000, and the affidavit of accrued support that was filed, and the related writ of execution that issued less than ten years later, on February 23, 2009. The family court entered judgment against Mr. S. in the amount of $13,633.39, including interest, for the child support arrearage that accrued between November 1, 1993, and October 31, 2016.

Mr. S. appealed the family court's order to the circuit court. By order entered January 18, 2017, the circuit court affirmed the family court's decision, finding that the law "expressly permits the execution of a judgment within ten years of the date of the judgment." The circuit court further found that the BCSE's affidavit of accrued support filed in February 2009, and the corresponding writ of execution that issued at that same time, were both well within the ten-year time frame under West Virginia Code § 38-3-18 for the decretal judgment entered on August 10, 2000, all of which applied equally to the affidavit of accrued support filed and the writ of execution secured by the BCSE in June 2010. The circuit court further found that the "issuance of these executions preserves the judgment and essentially re-sets the ten-year statute of limitations." Accordingly, the circuit court ruled that the family court had "correctly determined that as of January 11, 2017, the statute of limitations had not expired on the August 10, 2000, decretal judgment."[12] This appeal followed.

II. Standard of Review

Mr. S. appeals the circuit court's order that upheld the family court's order granting a decretal judgment in favor of Ms. K. and the BCSE for all unpaid child support. Our standard of review is as follows:

> In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review

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[11]*See supra* note 10.

[12]The appendix record contains a writ of execution that issued against Mr. S. on February 20, 2017, for unpaid child support totaling $13,633.39, the amount awarded in the circuit court's order entered on January 18, 2017.

> the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*.

Syllabus, *Carr v. Hancock*, 216 W.Va. 474, 607 S.E.2d 803 (2004). Bearing this standard in mind, we proceed to determine whether there was error in the rulings below.

III. Discussion

In seeking a reversal of the circuit court's order, Mr. S. assigns a single error: that "the circuit court erred in concluding that the August 10, 2000, decretal judgment effectively tolled the running of the statute of limitations." He reasons that the circuit court's order entered on August 10, 2000, did not toll the running of the limitations period under West Virginia Code § 38-3-18 and was of no effect because it did nothing more than the decretal child support judgment that was entered against him on November 16, 1993.[13] Mr. S. contends that the "exclusive procedure" for tolling the running of the statute of limitations for child support orders is found in West Virginia Code §§ 48-14-201 and -204, which provide for the filing of an affidavit of accrued support and the issuance of a writ of execution in the amount set forth in the affidavit.[14] Inasmuch as the decretal judgment establishing child support was entered on November 16, 1993, he argues that any unpaid child support installments that became due ten or more years before the April 27, 2009, return date on the writ of execution that issued on February 23, 2009, are uncollectible. Because the circuit court's order on appeal awarded an amount for unpaid child support that includes unpaid child support that accrued prior to April 27, 1999, Mr. S. seeks a reversal of the same.

Conversely, the BCSE asserts that it has multiple avenues for enforcing child support orders and that the affidavit of accrued support filed in February 2009, and the concomitant writ of execution, were well within ten years of the decretal order entered on August 10, 2000. Accordingly, the BCSE maintains that *all* child support arrears were preserved. We agree.

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[13]*See* Syl. Pt. 1, *Goff v. Goff*, 177 W.Va. 742, 356 S.E.2d 496 (1987) ("Matured installments provided for in a decree, which orders the payment of monthly sums for alimony or child support, stand as 'decretal judgments' against the party charged with the payments.").

[14]*See supra* note 8.

There is no dispute concerning the applicability of West Virginia Code § 38-3-18 to child support orders. As we previously held, "[t]he ten-year statute of limitations in *W.Va. Code*, 38-3-18 [1923] . . . applies when enforcing a decretal judgment which orders the payment of monthly sums for . . . child support." Syl. Pt. 6, *Robinson v. McKinney*, 189 W.Va. 459, 432 S.E.2d 543 (1993). Further, "[t]he limitation provided in Code, 38-3-18, applied to a decretal judgment payable in installments, commences to run when each installment becomes due, as to the part of said judgment then payable." Syl. Pt. 3, *Korczyk v. Solonka*, 130 W.Va. 211, 42 S.E.2d 814 (1947). Importantly, if the ten-year period is allowed to lapse without a writ of execution issuing on a judgment, then "the judgment dies a statutory death, incapable of revival." *Zanke v. Zanke*, 185 W.Va. 1, 4, 404 S.E.2d 92, 95 (1991).

In the case at bar, a decretal judgment establishing child support was entered against Mr. S. on November 16, 1993. Less than seven years later, on June 6, 2000, the BCSE filed a petition for contempt against Mr. S., resulting in the new decretal order entered on August 10, 2000. As explained herein, Mr. S. incorrectly argues that West Virginia Code §§ 48-14-201 and -204 provide the exclusive means for the enforcement of child support orders.

First, there is no language in West Virginia Code §§ 48-14-201 and -204 to indicate that it is the sole means by which child support orders may be enforced. To the contrary, it is but one way to enforce support orders.[15] Not only does West Virginia Code § 48-14-201 contain permissive, rather than mandatory, language, another avenue for the enforcement of support orders is set forth in West Virginia Code § 48A-5-5 (1998).[16] This statute provides for contempt proceedings seeking to enforce support orders, such as that instituted against Mr. S. by the BCSE on June 6, 2000, as follows:

> (a) *In addition to or in lieu of the other remedies provided by this article* for the enforcement of support orders, the child support enforcement division may commence a civil or criminal contempt proceeding . . . against an obligor who is alleged to have willfully failed or refused to comply with the order of a court of competent jurisdiction requiring the payment of support. Such proceeding shall be instituted by filing with the circuit court a petition for an order to show cause why the obligor should not be held in contempt.

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[15]*See supra* note 8.

[16]Following the Legislature's re-codification of statutes related to domestic relations in 2001, the contempt provision set forth in West Virginia Code § 48A-5-5 is now found in West Virginia Code § 48-14-501 (2001). We cite West Virginia Code § 48A-5-5 because that was the statute in effect at the time the contempt proceeding was instituted in 2000.

Id. (emphasis added); *see also Shaffer v. Stanley*, 215 W.Va. 58, 64, 593 S.E.2d 629, 635 (2003) (recognizing contempt proceeding as means of enforcing child support order for purposes of ten-year limitations period under West Virginia Code § 38-3-18 and "because Nada Stanley filed her Petition for Contempt of Court in October 1993, and more than ten years had passed since she last attempted through court action to collect child support arrearages from Mr. Stanley, the amount collectable under W.Va. Code § 38-3-18 is that portion of the arrearages that accrued during the previous ten years."). Here, the BCSE's contempt proceeding instituted against Mr. S. in June of 2000 was well within ten years of the November 16, 1993, decretal order and led to the entry of the August 10, 2000, and December 21, 2000, orders.

Second, judicial modifications of decretal judgments can constitute new judgments for purposes of calculating the limitations period under West Virginia Code § 38-3-18. In *State ex rel. West Virginia Department of Health & Human Resources, Child Support Enforcement Division v. Varney*, 221 W.Va. 517, 655 S.E.2d 539 (2007), this Court addressed issues involving a judgment for alimony arrearages. A writ of execution had issued on March 20, 2002, which was more than ten years after a January 27, 1992, decretal judgment was entered, but less than ten years after entry of a March 23, 1992, order following a contempt proceeding. Mr. Varney argued that the March order did not create a judgment because it merely modified the original decretal judgment entered in January and, under West Virginia Code § 38-3-18, the January order was no longer enforceable because the writ of execution issued more than ten years after that order was entered. The circuit court agreed and barred enforcement of the January 27, 1992, order. On appeal, we reversed.

Among other things, we determined in *Varney* that the decretal order entered on January 27, 1992, had been materially changed in the March 23, 1992, order, "such that [the March 23, 1992 order] was tantamount to a new judgment." *Varney*, 221 W.Va. at 525, 655 S.E.2d at 547. In reaching that conclusion, we observed that the circuit court ruled in the March order that Mr. Varney was not in contempt for failing to make alimony payments; that the BCSE's "motion to have unpaid alimony automatically withdrawn from [his] business account" was denied; and that judgment was granted in favor of Mrs. Varney for the unpaid alimony that had accrued. *Id.* at 525-26, 655 S.E.2d at 547-48. We specifically noted that through the March 23, 1992, order, the circuit court awarded Mrs. Varney "a precisely-calculated judgment based upon evidence it considered and findings it made *after* the January 27, 1992 order was entered." *Id.* at 526, 655 S.E.2d at 548 (emphasis in original). We concluded that the writ of execution that issued on March 20, 2002, was within ten years of the March 23, 1992, order, which preserved the enforceabilty of the judgment. *Id.*

Likewise, in *Collins v. Collins*, 209 W.Va. 115, 543 S.E.2d 672 (2000), the parties were divorced by order entered October 31, 1978, which established the child support to be

paid by Mr. Collins. Thereafter, he failed to meet that obligation and, less than ten years later, in 1987, the former Mrs. Collins sought and obtained a judgment against Mr. Collins for a child support arrearage in the amount of $8,919.75. Within ten years of the 1987 order, writs of execution were obtained, which preserved the enforceability of the 1987 judgment order.

Importantly, in both *Collins* and *Varney*, this Court recognized that decretal support orders can be enforced through many means, including writs of execution, contempt proceedings, and motions for decretal judgments. In fact, we expressly stated in both cases that future collection efforts could include another "writ of execution or by instituting a civil action[.]" *Collins*, 209 W.Va. at 124, 543 S.E.2d at 681; *Varney*, 221 W.Va. at 526, 655 S.E.2d at 548.[17]

Similarly, in the case at bar, the BCSE brought a contempt proceeding[18] in June of 2000, which was less than seven years after entry of the November 1993 decretal judgment. This contempt proceeding led to the entry of two orders: the August 10, 2000, decretal order that awarded the amount of unpaid child support that had accrued since the 1993 order, and the December 21, 2000, order that established a modified child support obligation due to material changes in circumstances. Then, less than ten years after the entry of those orders, the BCSE filed an affidavit of accrued support and obtained a writ of execution in February 2009.[19] Less than seven years later, in October of 2016, the BCSE filed a motion for a decretal judgment seeking a judgment in the amount of all child support arrearages. Based on this procedural history and the authority discussed above, we conclude that the BCSE's actions in this matter were all within the ten-year limitations period set forth in West Virginia Code § 38-3-18.

We find further support for our decision in the fact that when the BCSE filed its abstract of judgment and affidavit of accrued support in February 2009, notice was sent to Mr. S., who had fourteen days thereafter to challenge the amount of the arrearage or to assert that the writ was improper due to a mistake of fact. *See* West Virginia Code § 48-14-204(b),

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[17]*See also Crisp v. Crisp*, No. 13-0122, 2013 WL 5967014 (W.Va. Nov. 8, 2013) (memorandum decision) (rejecting timeliness challenge to family court's decretal judgment order for unpaid child support; finding all support payments at issue were due and owing fewer than ten years from date on which BSCE filed motions to collect those payments; and determining claims were timely as they were brought within ten-year limitations period).

[18]W.Va. Code § 48A-5-5 (1998).

[19]W.Va. Code §§ 48-14-201 and -204.

in part ("The notice . . . must inform the obligor that if he or she desires to contest the affidavit on the grounds that the amount claimed to be in arrears is incorrect or that a writ of execution, suggestion or suggestee execution is not proper because of mistakes of fact, he or she must, within fourteen days of the date of the notice: (1) Inform the Bureau for Child Support Enforcement in writing of the reasons why the affidavit is contested . . . or (2) where a court of this state has jurisdiction over the parties, obtain a date for a hearing before the court and mail written notice of such hearing to the obligee and to the Bureau for Child Support Enforcement . . . ."). The BCSE represents that Mr. S. never contested the affidavits of accrued support that it filed in February of 2009 and June of 2010, and Mr. S. has not disputed this representation. In short, Mr. S. had the opportunity to protest the amount of the child support arrearages set forth in these affidavits of accrued support. Critically, he did not.

The actions of the BCSE have preserved all child support arrearages that have accrued in this matter. Accordingly, we find no error in the circuit court's order entered on January 18, 2017.

IV. Conclusion

For the reasons stated above, the circuit court's January 18, 2017, order upholding the family court's January 11, 2017, decretal judgment is affirmed.

Affirmed

ISSUED: April 9, 2018

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Menis E. Ketchum
Justice Allen H. Loughry II
Justice Elizabeth D. Walker