STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County
In the Family Court

C. David Sawyer, Jr., Family Court Judge

Opinion No. 3716 (S.C. Court of Appeals, Filed December 15, 2003

Jane Smith — Respondent

v.

John Doe — Appellant

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

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II. Was the action for paternity and support barred by the statutes of limitation?

III. Was the award of child support within the discretion of the Family Court?

ARGUMENT

I. The decision of the Court of Appeals presents no novel question of law, nor does it conflict with the decisions of this court.

The appellant alleges that the Court of Appeals should have held this action was time barred by South Carolina's general statute of limitations, at S.C. Code Ann. Section 15-3-530 (2002 Supp.), or related provisions.

This Court has already held that the duty to support a child is a continuing one, in *South Carolina Department of Social Services v. Lowman*, 269 S.C. 41, 236 S.E.2d 194 (1977). In that case, this Court rejected the argument that the general statute of limitations should bar a paternity and support action for a child who was seven years old at the time of the suit. This Court remanded the matter for determination of paternity and an award of support if paternity was established.

The Court of Appeals, in its opinion below, limited the decision in *Lowman* to apply to actions for retroactive child support. It looked to its own recent decision in *Riggs v. Riggs*, 353 S.C. 230, 578 S.E.2d 3 (2003) for precedent on the question of whether an action could be brought for paternity and support for an adult child, after the child had reached majority age. In that case, the twenty-three year old daughter suffered from a deteriorating condition which disabled her, and which was not diagnosed until she was twenty years old. The Court of Appeals held that such an action could be brought.

This is not new law, however. This Court, in *Crenshaw v. Thompson*, 280 S.C. 203, 311 S.E.2d 742 (1984) addressed whether a parent could be required by the family court to support an adult child. There, an emancipated son, after graduating from high school, was severely injured in an automobile accident rendering him totally disabled. This Court construed what is now S.C. Code Ann. Section 20-7-420(17), 1976 as amended, regarding support for children with physical or

mental disabilities to mean that, indeed, a parent could be required to pay support for an adult disabled child.

This is actually settled law in this area, and the question before this court presents no novel legal question, nor is the decision of the Court of Appeals in conflict with the decisions of this Court.

II. The action was not barred by the statute of limitations.

The appellant argues that this action is barred by the general statute of limitations, at S.C. Code Ann. Section 15-3-530 (1989 Supp.) or in the alternative, a so-called catch-all provision barring any action after 10 years, at S.C. Code Ann. Section 15-3-600 (1989 Supp.)

The Court of Appeals correctly construed these statutes to bar retroactive support only, support obligations which may have accrued up until three years prior to the commencement of an action for paternity, and cited this court's decision in *South Carolina Department of Social Services v. Lowman*, 269 S.C. 41, 236 S.E.2d 194 (1977). "New causes of action arise over the years with each instance of a putative father's failure to support his child." *Id*, 236 S.E.2d 194, 196.

This obligation extends to adult children. In *Crenshaw v. Thompson*, 280 S.C. 203, 311 S.E.2d 782 (1984), an emancipated son, after graduating from high school, was severely injured in an automobile accident, resulting in his total disability. This court construed S.C. Code Ann. Section 14-21-810(B)(4) (1976) regarding the jurisdiction of the Family Court to award support for children with physical or mental disabilities to extend beyond a child's minority.[1] This court rejected the father's argument that the code should be narrowly construed to require a preexisting, established support obligation as a condition precedent to extending the obligation beyond the child's minority. Noting that an otherwise healthy adult child could bring an action for college support under *Risinger v. Risinger*, 273 S.C. 36, 253 S.E.2d 652 (1979), this court refused to reach what it characterized as an anomalous result in which support would be justified for a child to attend college, but not for a child who was totally disabled, requiring the necessities of life.

It is not at all unprecedented that adult disabled children have successfully sought support in the Family Courts. In *Morris v. Morris*, 335 S.C. 525, 517 S.E.2d 720 (Ct.App. 1999), a mother successfully obtained support for a 23 year old son in a divorce proceeding. While the court found

[1] This section has now been re-codified as S.C. Code Ann. Section 20-7-420(b)(4).

that his 24 year old sibling was essentially self-supporting, the court found the 23 year old severely disabled due to a mental condition, and deserving of support.[2] More recently, in *Riggs v. Riggs*, 353 S.C. 230, 578 S.E.2d 3 (2003) the Court of Appeals upheld an award of child support for a disabled child who was 23 at the time of the commencement of the action, and who was not diagnosed with the disability until she was 20 years old. In *Riggs* the court interpreted the intent of the legislature to require "a non-custodial parent [to] share the burden of supporting a child who cannot be emancipated because of a disability that arose before majority but was diagnosed only after the child turned eighteen." 578 S.E.2d 5. This rationale was relied upon by the Court of Appeals in its decision in this case below. *See*, *Smith v. Doe*, __ S.C. __, 592 S.E.2d 322, 325 (2003).

The only conceivable distinction, and it is a factual one, between this case and the foregoing is that this case involves a determination of paternity in addition to support. To begin with, the Court of Appeals correctly noted that the state statute governing paternity for actions for child support expressly provides that the term "child" is not limited to a person under the age of eighteen. *Id*, 592 S.E.2d at 326. *See* S.C. Code Ann. Section 20-7-952 (1985 Supp.). Moreover, as the Court of Appeals pointed out, the only other reference to paternity actions is found in the probate code, at S.C. Code Ann. Section 62-2-109(2)(ii) (2004 Supp.). That section provides that a person borne out of wedlock may establish paternity either before the death of the father or after his death within a prescribed period of time. It would be anomalous indeed, and not a little ironic, if an adult disabled child could only seek inheritance from a dead man, but not support from a living one.

Furthermore, there are other interests of a child which are at stake in the determination of paternity, after minority. In addition to rights of inheritance, these include medical support, workers

[2] In its statement of fact, the appellant asserts that Starla has never been declared incompetent. There is no challenge, however, to the Family Court's finding that she is disabled, either in the Court of Appeals or in this court.

compensation benefits, and other government benefits such as social security.[3] Indeed the appellant father conceded that Starla's mother initially requested that he acknowledge paternity, not to obtain support from him but to establish his paternity for social security benefits she might be entitled to (ROA p. 109, l. 17-24).

In South Carolina, it has long been the policy of this state that the father of a child born out of wedlock has a natural and moral duty resting upon him to support his offspring. *State v. Walker*, 86 S.C. 66, 68 S.E. 133 (1910), citing *Com. of Poor v. Gilbert*, 2 Strob. 152. That obligation extends to an adult disabled child and that obligation can legally be imposed by a court. *Crenshaw v. Thompson, supra.*

[3] Other states have recognized these interests. *See, Johnson v. Hunter*, 447 N.W.2d 871 (Minn. 1989); *Hall v. Lalli*, 194 Ariz. 54, 977 P.2d 776 (1999); *Clark v. Kenley*, 647 N.E.2d 76 (Ind.Ct.App. 1995).

III. The Family Court was well within its discretion when it awarded support according to the South Carolina Child Support Guidelines

An award of child support is well within the discretion of the Family Courts to fashion, and a challenge to the court's decision must demonstrate an abuse of discretion by the court. *Hopkins v. Hopkins*, 343 S.C. 301, 540 S.E.2d 454 (2000); *Campbell v. McPherson*, 268 S.C. 444, 234 S.E.2d 774 (1977); *Ziegler v. Ziegler*, 267 S.C. 9, 225 S.E.2d 849 (1976). The abuse of discretion is never presumed, and the burden of showing an abuse of discretion is on the complaining party. *Hickman v. Hickman*, 294 S.C. 486, 366 S.E.2d 21 (Ct.App. 1998).

The statute imposing an obligation on parents to support children extends the obligation beyond mere necessities to include

> ...an amount of financial assistance which, when combined with the support the member is reasonably capable of providing for himself or herself, will provide a living standard for the member substantially equal to the person owing the duty to support. It includes both usual and unusual necessities.

S.C. Code Ann. Section 20-7-90(A) (1999 Supp.). This obligation extends to children born both in and out of wedlock.

The mother responsible for the day to day upbringing of this child, without any help from the father, draws retirement of $1,458.17 from her employment at Allied Signal Corporation in Columbia. Indeed, she took early retirement from a well paying job to tend to Starla as she became more demanding. (ROA p. 75). The mother now works in housekeeping at White Knoll Public School in Columbia. (ROA p. 72). This is a significant decrease from the $40,000.00 a year salary she enjoyed at Allied; she sacrificed it to be able to pay more attention to her disabled daughter (ROA p. 73).

The mother still works afternoons and evenings and pays a sitter the modest sum of $35.00 a week to watch her daughter while she works (ROA, pp. 76-77). This sum is modest, probably because the sitter is a relative of the family. Starla herself can only stay by herself a couple of hours at a time (ROA, p. 73, ll. 7-8).

Starla essentially has a make-work job at the local Babcock Center in Columbia and does cleaning. Her hours and pay vary (ROA, p. 77). Starla is not capable of full-time employment; her relative confirms that she does not even have the requisite skills to work at McDonald's (ROA, p. 92). The clear inference of the testimony is that Starla could not earn income at all in the private sector. Her W-2's, admitted into evidence, reflect average gross monthly income of about $250.00 per month for the year 2000 and gross monthly income of about $500.00 for 2001 leading up to the date of trial.

Starla does receive supplemental security income (SSI) from the Social Security Administration in the amount of $274.93. As her mother attested, however, this will be reduced when child support payments are taken into account by the administration.

The father is 62 years old and married with four adult children (ROA, pp. 108-109). Indeed, one lives at home with him at his age 41 (ROA, p. 116, ll. 20-22). Mr. Bannister owns his own business. Despite his assertion that the business "was not worth nothing the last two years," the business had gross earnings of $1.2 million in 1999 and $1.5 million in 2000 (ROA p. 111, l. 7-8; p. 112). His corporation might be more profitable were he to find ways to cut travel costs; these amounted to $113,000 in 1999 and $101,000.00 in 2000. (ROA p. 138; p. 167) He draws $32,500.00 in salary from the corporation as an officer (ROA, p. 113). He has $70,000.00 in retirement (ROA, p. 113). He resides in a home "owned" by his wife in West Columbia which is apparently paid for. The 1800 sq. ft. home is worth about $60,000.00 (ROA, pp. 114-115).

In awarding support, the Family Court applied the South Carolina Child Support Guidelines as it was required to do under S.C. Code Ann. Section 20-7-852(A)(2000 Supp.). *See, Miller v. Miller*, 299 S.C. 307, 384 S.E.2d 715 (1989), deeming the South Carolina Child Support Guidelines an aid in determining the proper level of child support to be awarded when utilized properly. In fact, the child support guidelines are presumptive, and when the court awards support which varies significantly from the guidelines, the court must make specific findings justifying deviation. Id. The statute does require the court to consider certain factors enumerated by the statute which might justify deviation; the appellant argues that the child's significant available income here justifies deviation. S.C. Code Ann. Section 20-7-852(C)(10).

First, any income earned by the child must be characterized as significant to be considered grounds for deviation. The modest wages Starla earns can hardly be deemed significant. What little she makes she turns over to her mother for her care and support (ROA p. 95, 1.12-17). The trial court took her earnings into account when it fashioned an award of support August 28, 2001, (ROA p. 6, paragraphs 9&10; ROA, p. 3, paragraph 4.)

The court likewise considered Starla's social security benefits. *See, Id.* The trial court properly excluded these from consideration. *See, e.g., Lovett v. Lovett*, 311 S.C. 279, 428 S.E.2d 874 (1993), where the court likewise discounted social security income received by the children there due to the mother's disability. In *Lovett*, the court pointed out that the purpose of payments under those circumstances is to replace income lost because of the mother's inability to work; here, these benefits are intended to supplement the disabled person's need for support and are reduced when other sources of income or support are taken into account. *See* 20 CFR 416.1121(b) (social security benefits are calculated based on income which includes alimony or support, whether

voluntary or by court order). Thus, child support from the father will hardly be a windfall to the mother.

The child support guidelines take into account the joint incomes of the parents in fashioning an award of support, consistent with S.C. Code Ann. Section 20-7-90(A) requiring parents to support their children according to a standard of living and not necessity. This is at least as true for a disabled child as one who is not; disabled children deserve to be supported according to their parent's means and resources. *See, e.g., Peterson v. Smith*, 307 S.C. 418, 415 S.E.2d 431 (Ct. App. 1992), where the father was earning $225,000.00 per year as a physician and was required to part with 8% of it, or $1,500.00 per month to take care of his 20-year-old retarded daughter. *See also Holcombe v. Hardee*, 304 S.C. 522, 405 S.E.2d 821 (1991), requiring a mother with an income of $38,000.00 per year to assist with the education of her adult special-needs child in light of her assets and resources.

Ms. Nicholson has modest desires to improve her child's life with assistance from Mr. Bannister, who apparently chooses not to be a part of his daughter's life. She would like some additional testing for Starla and some therapy for her. She would like to take Starla on a vacation. Starla enjoys going out to eat and she would like to do that (ROA pp. 55-56).

The court has directed Mr. Bannister to pay a grand total of $391.30 per month as a contribution towards Starla's care and quality of life; a little less than half of that will be consumed by the cost of a sitter for Starla. This is a middling amount of support and is very likely less than the direct and indirect support consumed by his 41-year-old son living at home (ROA p. 116, l. 17-22).

CONCLUSION

The writ of *certiorari* should be dismissed. Otherwise, the decision of the Court of Appeals should be affirmed.

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CERTIFICATE OF COUNSEL

John D. Elliott, Attorney for Respondent, certifies that this Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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