

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED
April 24, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

BETTY HOLT,

Appellant,

v.

BOBBY STOKELY,

Appellee.

) C/ A NO. 03A01-9512-JV-00442
)
) COCKE JUVENILE
)
) HON. MARCUS MOONEYHAN,
) JUDGE
)
) VACATED AND
) REMANDED

WILLIAM M. LEIBROCK, Newport, for Appellant.

THOMAS V. TESTERMAN, Newport, for Appellee.

O P I N I O N

Franks. J.

Plaintiff filed this action in April of 1994, alleging she was the mother of Julie Marie Holt, born January 22, 1983, and that she and the defendant had formally legitimated the child in September 1988. She further alleged that the defendant had refused to support the child and she sought child support arrearages in an amount determined proper by the Court for the eleven years that he has refused. In defendant's answer, he stated with respect to the claims

for past due child support, the defendant would show that he is not indebted for past due child support, and further interposes the defense of 'laches'.

Subsequently, a trial was held and the Trial Judge determined the defendant was employed and was capable of paying child support, and ordered child support beginning on September 30, 1994. As to the aforementioned allegations, he ruled that the matter of child support arrearage and/or establishment of past child support shall be reserved pending further orders of the Court. Subsequently, the Court entered judgment, from which plaintiff appeals, which states in pertinent part:

The Court further finds, orders, adjudges and decrees that the plaintiff's claim for child support arrearage is not sustained by the proof offered in the case, and the Court fixes the child support arrearage at \$1,800.00 rather than the \$50,976.00 alleged by the plaintiff to be due and owing as a result of the calculations of the defendant's income from the years 1983 through September 23, 1994.

The record demonstrates that the Trial Court did not hear evidence on the issue, and we vacate his judgment and remand for a trial on the merits.

Appellant, in her statement of evidence, concedes that the statement of counsel . . . is basically all the oral evidence given in the case. In the record is a copy of the petition and order of legitimation, which simply asks the Court to legitimate the child with no request for support or medical benefits, which the statute afforded. We understand from comments of counsel before the Trial Judge that after the order of legitimation the parties married and were subsequently either divorced or the marriage was annulled, all

apparently without any provisions for support for the minor child.

State ex rel Coleman v. Clay, 805 S.W2d 752 (Tenn. 1991) is instructive on the issues before us. We hold that at the time the child was legitimated, the mother, by not including the statutory benefits personal to her, waived any right to recovery for those expenses. *Clay, Id.* 755. Tennessee Code Annotated, Section 36-2-102 states that the father of a child born out of wedlock is liable for "the necessary support and education of the child". This obligation begins at birth and continues until the child reaches majority, and actions for support may be maintained against the father at all times during the child's minority. See *Tennessee Department of Human Services v. Hinton*, 660 S.W2d 506 (Tenn. App. 1983).¹

Upon trial, the Trial Court will be guided by the statute which renders the father liable for support from and after the child's birth. The statute, however, gives the Court "discretion to order a retroactive support award back to that date," but the "amount and method of payment" is within the sound discretion of the juvenile court Judge. *Clay*, 755. We remand the case to the Juvenile Court to determine the issues after the parties have presented their evidence.

The cost of the appeal is assessed one-half to each party.

¹*Hinton* notes the defense of laches is available to the father, but as *Clay* states, this defense is only available if the father can demonstrate "actual prejudice" by reason of the delay in bringing the action.

Herschel P. Franks, J.

CONCUR:

Don T. Mc Murray, J.

Clifford E. Sanders, Sp.J.