

IN THE SUPREME COURT OF OHIO

Christina Lynn Byrd nka Reeder, :
 :
 Appellee, : On Appeal From the Clermont County
 : Court of Appeals, Twelfth Appellate
 : District
 :
 V. : Supreme Court Case No: 07-1913
 :
 Brian Kelly Knuckles, : Court of Appeals Case No: 2006-CA-11-095

AMICUS CURIAE BRIEF OF THE BUTLER COUNTY OHIO CSEA

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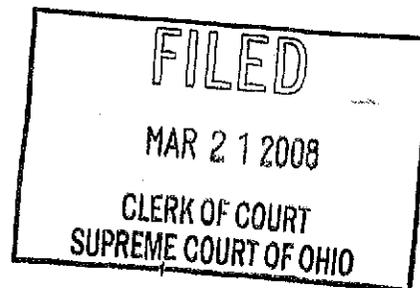


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STATEMENT OF BASIS FOR AMICUS FILING

The Butler County CSEA submits this amicus brief as a means of presenting an alternate viewpoint hinted at but not specifically address in the original Memorandum in Support of Jurisdiction filed by Appellant. The Butler County CSEA joins in the general sentiment of Appellant's Memorandum and in those to be presented by our fellow Agencies and the Ohio CSEA Directors' Association (OCDA), but we believe that Appellant's arguments are too narrow given the fundamental liberty interests in question.

The Butler County CSEA and its legal counsel and staff have been presented with many requests to do what in our parlance is termed a forgive and forget. In its most typical form, a child support obligee approaches the Agency with a request to waive all or a portion of the arrears owed. This is recommended administratively and presented to the Court for approval. This process worked smoothly and reliably until the Twelfth District's decision in this matter.

Mirroring the dissonance in interpretations of this Section in the various appellate districts, within Butler County itself there is a difference of opinion between the Juvenile and Domestic Relations Courts as to what the Twelfth District's holding means in regard to the request of willing parties to waive arrears. At this time, similarly situated parties are not being treated equally. The Domestic Relations Court has determined that the Twelfth District's holding is a bar against waivers of arrears except under extraordinary circumstances. The line between an acceptable agreement of the parties and one that will be rejected is not clear, but it has been a high bar in practice, and many parties wishing to waive arrears have not been able to do so. On the other hand, the Juvenile Court continues to readily acknowledge the wishes of the parties and honors them except in instances of coercion or apparent lack of competency.

We and the other CSEA's stand in the unusual situation of advising parties that even though administrative procedures have been long-established to issue administrative arrears forgiveness recommendations that lead to eventual court approval of parties' agreements, that we can no longer assist some of them. As it stands today, parties in identical circumstances obtain different results depending on which Court their case is assigned to. There is guidance however in the case law of the Ohio and U.S. Supreme Courts as well as in the principles of statutory interpretation which may preserve the constitutionality of ORC §3119.83. The Butler County CSEA respectfully submits these to this Honorable Court for review and consideration.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law I.

Parties who have not been declared unfit have sole discretion in arranging the financial affairs of their family, whether or not the family is intact.

A) Equity is Not at Issue

The Appellant has addressed two propositions of law that would reach a proper result in most circumstances, but which are insufficient to wholly correct the situation that has arisen since the issuance of the Twelfth District's decision in this matter. The first is that good and valuable consideration is all that is required for a trial Court to approve a forgiveness of child support arrearage. The second is that it is within the discretion of the trial court to either adopt the agreement or not, but that this discretion is limited and in the case at bar has been abused. The CSEA proposes that it is not a matter of discretion, that consideration is not required, and that a trial court must adopt an agreement of the parties which is freely entered into so long as the parties have capacity to do so and have not been declared unfit.

The distinction that has been made by the Twelfth District and the Clermont County trial court in this matter is that monetary issues differ in some way from other issues facing families, and that due to this distinction between money and personal issues, somehow the courts have gained discretion to direct families' financial affairs when the parties are in full agreement as to how their affairs should be managed. The statute which has been applied states in its entirety:

ORC §3119.83 Modifying duty to pay delinquent support retroactively.

Except as provided in section 3119.84 of the Revised Code, a court or child support enforcement agency may not retroactively modify an obligor's duty to pay a delinquent support payment.

There is no reference to discretion contained in this statute. The Twelfth District's decision in the instant matter furthers the perpetuation of the discretion myth at paragraph 15 where it states, "[I]t was within the juvenile court's discretion to determine whether the facts of this case justify equitable relief, and we find that the juvenile court did not abuse its discretion." Again, the statute does not indicate that there is discretion allowed, only that a court or CSEA "may not" retroactively modify support obligations. This does not necessarily mean that forgiveness of child support arrears is prohibited by statute, only that the trial court lacks discretion to override the statute. Since equity does not trump statutory authority (equity follows the law), the definition of retroactive modification and whether it applies to the voluntary forgive and forget process is the key to this problem.

B) Plain Meaning Should Prevail

If it is determined that a forgive and forget which is freely entered into by competent parties is in fact a retroactive modification of child support, then the statute in question is unconstitutional for the reasons to follow shortly. With that said, one does not need to go that far. It is necessary to divine the plain meaning of "retroactively modify[ing]" child support arrears, and investigate whether there is any indication that there was an intent of the legislature for it to have a particular meaning. As has been stated in the past by this Honorable Court, "A court shall apply an unambiguous statute in a manner consistent with the plain meaning of the statutory language and may not add or delete words." *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, at paragraph 52. To be retroactive, the event being changed must have implications on the arrangements, orders and situations existing in the past. To be a modification, there are

implications of some external force (ie: the Court) being applied rather than that of the parties. Otherwise it would be termed an agreement, not a modification. The statute says that it is a “court” or “child support enforcement agency” which is prohibited from doing the act in question.

The archetypical situation in the child support context is that presented in *Bonenfant v. Bonenfant*, 2005-Ohio-6037, 12th District. The trial court in *Bonenfant* was presented with a situation in which equity demanded retroactive modification of support arrears, as the child had lived with the non-custodial parent (the obligor) for nearly a year and half. During this time, his child support arrears continued to accrue. The trial court issued an order retroactively modifying the child support arrears. It was determined upon appeal that even though logic and equity supported the trial court’s decision to reduce the child support arrears of the obligor for the period during which he had physical but not legal custody of the children, it was an abuse of discretion and a violation of ORC §3119.83 to do so. That case dealt with an adversarial proceeding rather than a freely negotiated agreement, and is inapplicable here other than an illustration of what an impermissible retroactive modification would be. In that case both elements of the statute were met. The change was retroactive, as it dealt with a prior period of time and sought to make right that which had previously gone wrong. It was essentially an allowance of appellee/obligor to file a motion to reduce current support significantly out of time. That is the clear meaning of the retroactive modification which is prevented by the statute. The second element of the statute was also met. The order was a true modification, as it was issued by the court as part of adversarial proceedings.

The CSEA would propose that a current agreement of the parties, as opposed to a

determination of the Court of what should have happened in the past, is not in essence retroactive. It is a prospective arrangement between the parties, that from the time of the agreement forward the support arrears shall be a particular amount as fixed by them and as memorialized by the Court. The fact that the arrears had been something else prior to the agreement being entered on the record does not make the change itself retroactive. It deals with what the parties intend at that particular moment, regardless of the past, as sort of accord and satisfaction. Since child support is a judgment as it comes due, parties should be free to compromise it. The true essence of retroactive modification is in cases where the Court discovers that equity demands arrears reduction, either by way of disability, living arrangements (i.e.: with the children but without legal custody), or some other reason and the obligee does not agree with such reduction. It is the Court's involvement as decision maker in an adversarial context that gives rise to the "retroactive" aspect of the modification. The statute's plain meaning can be interpreted in such a way as to avoid constitutional concerns.

It is axiomatic that when at all possible, a statute shall be interpreted in such a manner as to uphold its constitutionality. It has been the consistent holding of this Honorable Court that statutes bear a presumption of constitutionality, and if they can be interpreted to be either constitutional or unconstitutional, the constitutional interpretation shall prevail. *State v. Sinito* (1975), 43 Ohio St.2d 98 at 101; and *Wilson v. Kennedy* (1949), 151 Ohio St. 485 at 492; and *Eastman v. State* (1936), 131 Ohio St. 1 at paragraph four of the syllabus. This has also been the holding of the U.S. Supreme Court.

This principle was recited, albeit not in a child support context, in the case of *United States v. Harriss* (1954) 347 U.S. 612 at page 618:

[I]f the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise. *United States v. Petrillo*, 332 U.S. 1, 7 . Cf. *Jordan v. De George*, 341 U.S. 223, 231 . And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction. This was the course adopted in *Screws v. United States*, 325 U.S. 91, upholding the definiteness of the Civil Rights Act.

If the language of the statute can be given a reasonable meaning which is not inconsistent with the otherwise plain meaning, it shall be interpreted in such a manner as to maintain constitutionality. As discussed above, the statute can be interpreted in a manner consistent with constitutional principles. An agreement of the parties as to support arrears may be entered into and memorialized in court without being considered retroactive, as it deals with how the parties conduct their business from that point onward. This would serve to preserve the constitutionality of ORC §3119.83. It must also bears repeating that it is the courts and CSEA's per the statute who are prohibited from making such modifications, not the parties themselves.

C) Divining Legislative intent

"A court's preeminent concern in construing a statute is the legislative intent in enacting a statute." *State ex rel. Van Dyke v. Public Emps. Retirement Bd.*, 99 Ohio St.3d 430, at paragraph 27. The code section in question, like any other, does not exist entirely in a vacuum. The process of forgiving arrears with the assistance of CSEA's and as presented by the parties in Court existed for some many years prior to the enactment of ORC §3119.83. Such forgiveness of arrears has occurred many thousands of times, and individual instances are not being recited here

for that reason as such would be an exhaustive and exhausting list. If the law were to be interpreted to preclude agreements of the parties, one would expect a legislature aware of this long-standing practice to account for it in the statutory language if such long-standing practice was intended to be terminated by the statute.

The drafters could easily have indicated that modification may not be made notwithstanding an agreement of the parties. Instead, it was written that a **court** cannot retroactively modify support. It says that a **child support agency** also may not retroactively modify support. The legislature did not forget that the parties might also wish to reach amicable settlement and agreement between themselves. The legislature simply left the parties out of the statute as they were not the ones upon whom these limitations were to apply. Custodial parents were intended to continue to be able to modify support as they agreed with the non-custodial parents. The proscription was against those outside the family, courts and administrative bodies, from deciding what was best for the parties. The parties themselves were to remain free to do as they deem appropriate.

D) Unconstitutionality of Statute

In the event that it is determined that no reasonable interpretation of ORC §3119.83 can be applied to allow the forgive and forget process under ordinary circumstances, then constitutional issues do arise. The interests at stake when the government interferes with a family are of grave and manifest importance and not to be entered into lightly. This is stated in succinct clarity in the syllabus of the U.S. Supreme Court in *Troxel et vir. v. Granville* (2000) 530 U.S. 57, in which the Court stated, citing prior decisions:

The Fourteenth Amendment's Due Process Clause has a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests," *Washington v. Glucksberg*, 521 U.S. 702, 720, including parents' fundamental right to make decisions concerning the care, custody, and control of their children, see, e.g., *Stanley v. Illinois*, 405 U.S. 645, 651. Pp. 5—8.

The government is barred from interfering in certain affairs, such as those involving the presumptively sound judgment of presumptively fit parents regarding the affairs of their children, except in extraordinary circumstances. A child support arrearage is a form of debt, owed either to the custodial parent (or caretaker) or the child depending upon whose interpretation is used. Regardless, since it is ultimately money owed and to be paid to the child support obligee, there must be some overwhelming reason to preclude said obligee (and presumptively fit custodian) from waiving said arrears. There must be some markedly compelling reason to interfere. In this situation, there simply is no such a reason at the offset, and certainly not in every instance. To deem otherwise is to give money greater weight than all other matters of child rearing.

A custodian of a child may freely determine: the child's religious upbringing or lack thereof, choice of home/public/private schooling, medical care, grandparent visitation as per the *Troxel* decision, dietary practices (from baby formula to pizza toppings), extracurricular activities, and everything else be it weekly allowance, ordinary (non-abusive) punishments, associations and dating choices, down to the smallest details of the child's room color and decorations. Enforcing these decisions might be difficult with the child but should not be similarly difficult with the Court. To determine that in all other aspects of a child's life and upbringing a custodian is the decision maker, but when it comes to money it is up to the Court (or is entirely statutorily barred), is an impermissible encroachment on individual liberties. Citing

a number of cases, the United States Supreme Court in *Stanley v. Illinois* (1972) 405 U.S. 645 stated the following:

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), "basic civil rights of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and "[r]ights far more precious . . . than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska*, *supra*, at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma*, *supra*, at 541, and the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

What is clear is that there is a long line of cases on these issues, dating back at least eighty-five years and likely more, as this is not a complete list of every case in which family has been determined to be important. The holdings have consistently been that there is nothing more important than a parent's ability to parent without interference from the government. In *Prince*, quoted above, the parental interest is an "obligation[] the state can neither supply nor hinder."

What is it for a Court to decide based upon discretionary powers, or a statute to outright determine without hearing, consideration or recourse, that agreements between the parties may not be honored than a hindrance to fundamental and most basic civil rights? What is it but an unreasonable and unconstitutional hindrance to parents' essential liberty interests?

There are many compelling reasons why a child support arrearage could be forgiven and be in the best interests of the children. With that said, there is a presumption (but not a requirement) that parties act in the best interests of their children. Short of abuse, neglect and dependency situations, parties are free to make their own choices, as the case law shows. There

are significant public policy reasons for parties to have such freedom and for that freedom to include waiver of support arrears. Some of the more persuasive reasons for allowing voluntary waiver of support arrears are: to facilitate a step-parent adoption, to encourage a non-custodial parent to begin visitation and relieve the shame of the unpaid debt and remove that barrier to a parent-child relationship, to give a fresh start to a non-custodial parent who has been to prison and who can't get back on his/her feet while bearing the burden of a child support arrearage, to account for the "non-custodial" parent's long-term physical custody of the children that was not promptly reflected in a motion for and change of legal custody, to credit directly paid child support and not doubly burden an obligor with multiple payment under a single support order, or to relieve a disabled obligor who did not timely request an adjustment of the current support order. There are many good reasons and many situations in which waiver of support arrears is appropriate. It is not for the government to determine whether the reason a parent has for doing so is good enough.

E) Conclusion

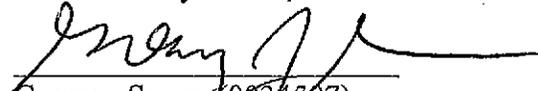
There are two approaches which this Court could use in reaching a result that would resolve the current disparity between, and even within, the various districts. The Court could determine the statute to be constitutional and interpret it to mean something other than what the Twelfth District's decision in this matter has set forth. Alternatively, the Court could deem the statute itself unconstitutional. The CSEA believes that the most prudent approach is that of constitutional interpretation rather than making a finding of outright unconstitutionality.

The most reasonable interpretation of the statute is that the legislature was actually aware

of the ongoing and long-standing practice of allowing forgiveness of child support arrears. Since the statute does not specifically reference and preclude parties from entering agreements to waive support, the true intent of the legislature and therefore the meaning of the statute is that Courts and CSEA's may not modify parties' child support arrears but parents and legal custodians can. If this is not a valid interpretation, and the statute is determined to mean that parties themselves may not agree to modify support arrears, then the statute itself encroaches on fundamental personal liberty interests without a compelling reason to do so and should be deemed unconstitutional. Parties who have not been declared unfit have sole discretion in arranging the financial affairs of their family, whether or not the family is intact.

Respectfully submitted,

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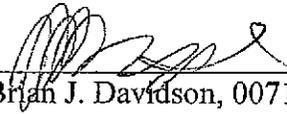
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Proof of Service

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