

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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KENNETH F. LARITZ,

Plaintiff-Appellee,

v

KATHLEEN M. LARITZ,

Defendant-Appellant.

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UNPUBLISHED

May 9, 2000

No. 210850

Macomb Circuit Court

Family Division

LC No. 84-000333-DM

Before: Gribbs, P.J., and Hoekstra, and Markey, JJ.

PER CURIAM.

Defendant appeals by leave granted from orders denying her motion for production of plaintiff's tax returns and calculation of child support arrearages, and dismissing her petition for establishment of an arrearage on the basis of defendant's own calculations. Defendant also challenges the trial court's award to plaintiff of \$450 in attorney fees. We reverse and remand for further proceedings.

On appeal, defendant first argues that the family court erroneously characterized her enforcement action as a petition for retroactive modification of the support order. We agree. MCL 552.603(2); MSA 25.164(3)(2) provides that "a support order that is part of a judgment or is an order in a domestic relations matter . . . is a judgment on and after the date each support payment is due . . . , and is not, on and after the date it is due, subject to retroactive modification." MCL 600.5809(4); MSA 27A.5809(4) establishes that the statute of limitations to enforce a support order is ten years.

In this case, the support order required plaintiff to pay defendant "Five Hundred (\$500.00) Dollars or 50% of the Plaintiff's net weekly income, whichever is higher . . ." By the plain language of this order, plaintiff was obliged to pay half of his net weekly income from the moment that figure exceeded \$500. To the extent that plaintiff paid only \$500 when that amount was less than half of his net weekly income, plaintiff was in arrears, and defendant's petition to ascertain and collect the arrearage does not constitute a request for retroactive modification. The trial court's conclusion that defendant's petition constituted a request for retroactive modification, and the order that followed, relieved plaintiff of any obligations under the half-of-net provision in the support order, effectively rendering that provision a nullity. Defendant characterizes the court's action as itself effecting a

retroactive modification, and we must agree. We hold that defendant was seeking enforcement of an existing support order, not a retroactive modification.

Next, defendant questions the prejudice to plaintiff if he is required to pay arrearages, but she brings this issue to this Court prematurely. Plaintiff raised the defense of laches,<sup>1</sup> but the family court did not decide the case on that basis. Although the court expressed concern that granting the relief that defendant requested would unduly burden plaintiff, the court made no specific finding in this regard and developed no factual record in respect to the laches defense. The court in fact decided that no arrearages existed, not that defendant had waived her right to collect existing arrearages.

This Court cannot decide the applicability of laches until it has detailed factual findings from the family court, concerning such matters as the extent to which defendant led plaintiff reasonably to believe that she was waiving her rights under the alternative provision of the support agreement, the extent to which plaintiff may have improperly induced defendant to decline to act sooner, and the extent to which any of plaintiff's voluntary contributions to the support of the children in excess of \$500 per week should be considered support payments offsetting any arrearage stemming from times when the \$500 paid was less than half of plaintiff's net weekly income. These issues, and any other matters regarding the applicability of laches are for the trial court to entertain on remand.

Finally, defendant argues that the family court abused its discretion in awarding plaintiff \$450 in attorney fees. We agree. An abuse of discretion exists if "an unprejudiced person, considering the facts upon which the trial court acted, would say there was no justification or excuse for the ruling." *Auto Club Ins Ass'n v State Farm Ins Cos*, 221 Mich App 154, 167; 561 NW2d 445 (1997). "A trial court's finding with regard to whether a claim or defense was frivolous will not be disturbed on appeal unless the finding is clearly erroneous." *State Farm Fire & Casualty Co v Johnson*, 187 Mich App 264, 268-269; 466 NW2d 287 (1991).

In this case, the trial court's decision to award attorney fees as sanctions stemmed from its conclusion that defendant's new petition was "the exact same motion" defendant had brought before. The two differed only in that the later one alleged fraud for the first time, asserted defendant's right to calculate arrearages without assistance from the friend of the court, and put forward approximately \$94,000 as the amount in arrears. We conclude that the trial court was properly unmoved by defendant's sudden allegation of fraud because defendant had expressly disclaimed any such allegation in the earlier proceedings. However, concerning defendant's calculation of arrearages, we conclude that the trial court's finding that the new petition was frivolous was clearly erroneous. At one point in the proceedings, the trial court indicated that no arrearages had yet been calculated, thereby suggesting that the lack of such a calculation affected defendant's ability to proceed. After reviewing the record, we conclude that defendant could not reasonably have anticipated the court's tack at the hearing so that the amount of the arrearage issue raised in the second motion would have been discussed in the first. Thus, the trial court's statement provided justification for defendant's second petition that calculated the arrearages, which was filed after the judge ruled against defendant's first motion. Because, defendant's second petition was not frivolous, the award of \$450.00 in sanctions was an abuse of discretion. *State Farm, supra*.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Roman S. Gibbs

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

<sup>1</sup> The defense of laches is appropriate in response to “[a] failure to do something which should be done or to claim or enforce a right at a proper time.” Black’s Law Dictionary (6<sup>th</sup> ed, 1990), p 875. An element of the doctrine is that the party’s “alleged change of position for the worse must have been induced by or resulted from the conduct, misrepresentation, or silence” of the other party. *Id.*; see, also, *Michigan Educational Employees Mutual Ins Co v Morris Auto-Owners Ins Co*, 460 Mich 180, 200; 596 NW2d 142 (1999) (the doctrine of laches generally bars a claim entirely because of unreasonable delay).