

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

SHARON L. (DEMING) WEBER,

Appellant,

v.

JOHN D. DEMING,

Respondent.

DOCKET NUMBER WD69538

Date: September 29, 2009

Appeal from:
Jackson County Circuit Court
The Honorable Kelly Jean Moorhouse, Judge

Appellate Judges:
Division One: James E. Welsh, Presiding Judge, Victor C. Howard and Alok Ahuja,
Judges

Attorneys:
James W. Kelley IV, Esq., Springfield, MO, for appellant.
Christina E. Gondring, Esq., Kansas City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

COURT OF APPEALS -- WESTERN DISTRICT

SHARON L. (DEMING) WEBER

Appellant,

v.

JOHN D. DEMING,

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WD69538

JACKSON COUNTY

Before Division One Judges: James E. Welsh, Presiding Judge, Victor C. Howard and Alok Ahuja, Judges

Appellant Sharon (Deming) Weber ("Mother") was divorced from Respondent John Deming ("Father") in September 1991. Mother was awarded custody of the parties' two minor children ("Son" and "Daughter"); as of a modification of the dissolution decree in October 2000, Father was obligated to pay \$700.00 per month in child support to mother.

Mother entered a treatment center for alcohol abuse in June 2004. Ultimately, Daughter resumed living with Mother on a permanent basis in November or December 2005, while Son lived with Father continuously from November 2004 at least until his graduation from high school in May 2006. During a majority of the intervening period, the children resided with third parties in some sort of foster arrangement.

Father stopped paying child support in July 2004, and received notices from the Division of Child Support Enforcement and the Department of Social Services in 2004 suggesting that his obligation to pay child support had terminated. In March 2007, however, the Division of Child Support Enforcement issued an "Order/Notice to Withhold Income for Child Support" to Father's employer, which indicated that Father's employer was to deduct from Father's wages \$700.00 per month for current child support, and \$350.00 per month for past-due support.

Father filed a Motion in May 2007 seeking to terminate his child support obligation and clarify whether he owed any arrearage post-July 2004. Mother responded and cross-moved for a modification of Father's child support obligation as to Daughter alone.

The circuit court's Judgment abated Father's child support obligation as to Son from June 1, 2004, through October 31, 2004, and terminated that obligation as of November 1, 2004. The trial court ordered Father's child support obligation for Daughter to be abated from June 1, 2004, through December 31, 2005; modified and reduced it to \$350.00 per month from January 1, 2006, through June 30, 2007; and modified it to \$661.00 per month beginning on July 1, 2007. Mother appeals.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.

Division One holds:

Ordinarily, the parent who is obligated to pay child support must strictly comply with the dissolution decree, or must seek a court-ordered modification if changed circumstances occur. *Ballard v. Hendricks*, 877 S.W.2d 232 (Mo. App. W.D. 1994), and *Linford v. State, Department of Social Services*, 987 S.W.2d 507, 510 (Mo. App. E.D. 1999), recognized a limited exception to this general principle where children reside with third parties rather than with the custodial parent. Both decisions, however, recognized that this equitable exception applied only in the specific, "unique circumstances" presented in those cases.

Here, Father failed to substantiate his claim for abatement under the equitable doctrine recognized in *Ballard* and *Linford* with evidence. As the movant requesting the abatement of child support otherwise due pursuant to a valid and binding judicial decree, Father had the burden to establish his entitlement to relief from the existing judgment. But the issues were resolved in the trial court based on a limited stipulation as to certain basic facts, limited exhibits, and arguments of counsel. No testimony was presented. Father acknowledged that there is no evidence in the record to establish such issues as the identity of the foster parents; whether the foster arrangement was "official"; the nature of the care provided to the children during the periods they were not living with Mother and how that care was paid for; or whether the foster parents expected any remuneration during the time the children were in their care. The parties also disputed whether, and when,

Mother actually made demand on Father for payment of child support for the period in question.

The resolution of disputed factual issues must be based on evidence, and the arguments of counsel (particularly where disputed) are not evidence. It was Father's burden to establish his entitlement to abatement with competent evidence, including establishing any facts relevant to the issue. He failed to do so, and the trial court's complete abatement of Father's child support for the periods in question must accordingly be reversed.

Mother also argues that the trial court erred in failing to use Form 14 to calculate Father's child support arrearage for Daughter alone from January 2006 (when the court determined that Mother's right to child support for Daughter resumed) through June 30, 2007 (the month preceding Mother's most recent motion to modify). However, in the trial court Mother's counsel affirmatively argued that Father's back child support obligation for Daughter alone should be \$350.00 per month, the amount ordered by the trial court, and this invited error cannot justify reversal. Further, Mother failed to file her own Form 14 covering this retrospective time period, and therefore waived her right to object to the trial court's determination of the amount of Father's child support obligation.

Opinion by: Alok Ahuja, Judge

September 29, 2009

THIS SUMMARY IS UNOFFICIAL AND SHOULD NOT BE QUOTED OR CITED.