

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2006-CA-001877-MR

DOUGLAS BAKER

APPELLANT

v.

APPEAL FROM CALLOWAY CIRCUIT COURT  
HONORABLE DENNIS R. FOUST, JUDGE  
ACTION NO. 02-CI-00206

PATRICIA BAKER

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON, VANMETER, JUDGES, KNOPF<sup>1</sup>, SENIOR JUDGE,  
CAPERTON, JUDGE: Douglas Lee Baker (Douglas) appeals from an  
order entered in the Calloway Circuit Court, which required  
Douglas to pay temporary maintenance arrearages accrued to  
Patricia Lynn Baker (Patricia) without setoff for the marital  
property division. After careful review, we affirm.

The Bakers were granted an interlocutory decree of  
dissolution of marriage in September 2002. In that order the

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<sup>1</sup> Senior Judge William L. Knopf, sitting as Special Judge by Assignment of the  
Chief Justice pursuant to Section 110 (5) (b) of the Kentucky Revised Statutes  
(KRS) 21.580

Calloway Circuit Court adopted the findings of fact and conclusions of law of the domestic relations commissioner (the DRC), and all prior temporary orders were to remain in effect until further order of the court. The final hearing was held on September 29, 2005 with a final order rendered August 10, 2006. In that final order the court set the amount of maintenance arrearages to be paid by Douglas at \$9,515.28. It is from this order that Douglas appeals.

In the recommended order of the DRC, Patricia was given exclusive use and possession of the marital home during the time the divorce action was pending. Patricia was required to pay all bills associated with the family home. In addition, Patricia was temporarily awarded maintenance in the amount of \$400.00 per month. The DRC also made it clear that no party was to dispose of marital property without the Court's prior approval. Douglas asserts that the subsequent loan foreclosure on the marital home and the filing of bankruptcy by Patricia constitute a violation of the court order, and thus Patricia should be estopped from collecting arrearages. We disagree.

Douglas cites *Loid v. Kell*, 844 S.W.2d 428 (Ky.App. 1992) and *Anderson v. City of Lexington*, 192 S.W.2d 361 (Ky. 1946) in furtherance of his estoppel claim. In *Loid*, the court held that "[e]stoppel is an equitable principle utilized to prevent one who has failed to act when he should have acted from reaping a profit to the detriment of his adversary." *Id.* at 430. In *Anderson*, the court explained that "[o]ne may be precluded

from asserting a claim that, except for his conduct, would be meritorious." *Id.* at 858-859.

Patricia alternatively asserts that the foreclosure was a result of Douglas failing to pay timely maintenance. She also claims that there is no evidence that the failure of Douglas to pay maintenance was induced by any action or inaction on her part. To support her argument, Patricia cites *S.R.D. v. T.L.B.*, 174 S.W.3d 502 (Ky.App. 2005), in which the Court sets out the equitable estoppel factors:

- (1) Conduct, including acts, language and silence, amounting to a representation or concealment of material facts;
- (2) the estopped party is aware of these facts;
- (3) these facts are unknown to the other party;
- (4) the estopped party must act with the intention or expectation his conduct will be acted upon;
- and (5) the other party in fact relied on this conduct to his detriment.

*Id.* at 506.

In maintenance awards and property division, the circuit court is afforded a wide range of discretion, which is reviewed under an abuse of discretion standard. See *Davis v. Davis*, 777 S.W.2d 230, 233 (Ky. 1989); *Platt v. Platt*, 728 S.W.2d 542, 543 (Ky.App. 1987). Upon review of the relevant case law and the record, it is apparent that equitable estoppel has no place in this case. The circuit court in its final order was well aware of the foreclosure and bankruptcy filed by both parties. There is no indication in the record of any concealment of material facts made by Patricia to Douglas. Therefore, we find no error.

The divorce proceedings were initiated by Patricia in May of 2002. The recommended order with the temporary maintenance was entered in August 2002 with the interlocutory decree entered in September 2002. The record subsequently indicates that in 2003 there were multiple motions pending before the circuit court including motions for contempt and withdrawals of both attorneys. In February 2005 there was a motion for a final hearing. The final hearing occurred in September 2005. Throughout this time Douglas continued making child support payments with only a minimal amount of arrearage. The record indicates, however, that at the time of the final hearing, Douglas was \$9,515.28 behind in maintenance payments.

Douglas asserts that the time lapse between the proceedings amounted to an abandonment of Patricia's arrearages claim. Douglas cites *Taylor v. Commonwealth*, 246 S.W.2d 981 (Ky. 1951) in support of his abandonment claim. The facts in *Taylor* involved a thirty-nine year lapse between the judgment and Taylor's motion. Abandonment was implied from the acts and omissions of a thirty-nine year lapse. *Taylor* also requires both plaintiffs and defendants to assert their claims in a timely manner. Douglas then cites *City of Hazard v. Duff*, 175 S.W.2d 146 (Ky. 1943); there the lapse of time was seven years. Here the length of time is considerably less and does not amount to abandonment.

Douglas also asserts that the doctrine of laches precludes Patricia from collecting any delinquent temporary

maintenance. Douglas refers this Court to *Barrowman Coal Co. v. Kentland Coal & Coke Co.*, 196 S.W.2d 428 (Ky. 1946). The Court in *Barrowman Coal Co.* set out the doctrine of laches:

Time is only one element in the doctrine of laches. In some cases it is the prime or controlling element, e. g., in the assertion of a long standing claim that has become stale through the passing of the years, with a loss of evidence or obscuration of the facts. In other cases, as in this one, the lapse of time may be brief, but the injurious consequences of the delay may be great. Here the parties have spent much money and created conditions so materially different that the granting of relief to the suitor would be devastating and result in gross injustice to one taken unaware[].

*Id.* at 432.

There is no evidence in the record of either evidence lost or a change in conditions so great as to merit an unjust result. As such, the doctrine of laches is not applicable to this case.

Douglas asserts that the circuit court improperly concluded that delinquent temporary maintenance was not retroactively reviewable. Our case law is clear that temporary maintenance awards are interlocutory and ordinarily not reviewable. *Lebus v. Lebus*, 382 S.W.2d 873 (Ky. 1964). However, "the amount of the arrearage became reviewable when it was incorporated in the lower Court's dissolution decree, which is final and reviewable. KRS 22A.020." *Calloway v. Calloway*, 832 S.W.2d 890, 894 (Ky.App. 1992). The circuit court in its August 2006 order incorporated the temporary maintenance arrearage and thus it became reviewable.

Temporary maintenance orders can be modified or revoked prior to the final decree. See KRS 403.160. The power to modify is within the discretion of the circuit court. See *Penrod v. Penrod*, 489 S.W.2d 524 (Ky. 1972) and *Mudd v. Mudd*, 903 S.W.2d 533 (Ky.App. 1995). The court did choose to modify the temporary award. This modification or, alternatively, the failure to modify to Douglas' liking did not amount to an abuse of discretion.

Douglas asserts that the circuit court erred in not ordering a credit for him for the portion of equity in the marital home lost through bankruptcy. KRS 403.190 requires the circuit court to award each spouse their own property and to divide the marital property in just proportions in light of a variety of factors. The circuit court in the August 2006 order considered the parties actions, including the resulting bankruptcy in its decision to deny a set off to Douglas. The court found that the amount of property already awarded to each party to be an equitable distribution. Again, this exercise of discretion did not amount to an abuse of discretion and is not reversible error.

For the foregoing reasons, we affirm the Calloway Circuit Court's order.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dennis Lortie  
Murray, Kentucky

BRIEF FOR APPELLEE:

Robert L. Prince  
Price & Brien  
Benton, Kentucky