

STATE OF MICHIGAN
IN THE SUPREME COURT

EDWARD M. HANNAFORD,

Plaintiff/Appellee,

vs.

CHRISTINE L. MORRISON,

Defendant/Appellant.

Supreme Court No. 138219

3.6.09
Decided

Court of Appeals No. 289977

Trial Court Case No. 95-4609-DM
Hon. Tracey A. Yokich

Deborah F. O'Brien, P35261
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APPLICATION FOR LEAVE TO APPEAL

BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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support, imputation of income was not appropriate. *Ghidotti v Barber, supra; Sword v Sword*, 399 Mich 367, 249 NW2d 88 (1976) rev'd in part on other grounds by *Mead v Batchlor*, 435 Mich 480, 460 NW2d 493 (1990); 2004 MCSF 2.10 (F).

Wherefore, defendant-appellant Morrison prays that this honorable Court will find that the trial court committed reversible error in not conducting an evidentiary hearing before imputing income to the defendant/appellant, and in reversing the trial court will tax to the plaintiff/appellee defendant/appellant's costs incurred in having to appeal this issue.

II: The trial court committed reversible error when it applied the retroactivity of imputed income and child support owing to the defendant prior to the date on which plaintiff first filed his petition for increase in child support, e.g., filed November 16, 2007.

The court reviews questions of statutory construction de novo, *Perry v Golling Chrysler Plymouth Jeep, Inc., supra* at 65. At issue is MCL 552.603(2) which provides in pertinent part that "retroactive modification of a support payment due under a support order is permissible with respect to a period during which there is pending a petition for modification, but only from the date that notice of the petition was given to the payor or recipient of support." Interpretation of this portion of the statute is at the heart of the *Malone v Malone, supra*, appellate decision. The court in *Malone v Malone, supra*, ratified the prior decision of *Waple v Waple*, 179 Mich App 673,675-677; 446 NW2 536 (1989), wherein it stated "[b]y the critical terms of this statute, retroactive modification of support for periods prior to the [November 16, 2007], date of notice of the petition is prohibited," *Waple v Waple, supra* at 676. [Date inserted].

Malone v Malone, supra, is the Michigan Court of Appeals' clear and definitive statement on the statutory construction of the retroactivity of a petition for change in

Filed	Action	Operator	Fine/Cost	Due
12/11/07	HEARD BY FOC REFEREE ON MTN DAY, PROPOSED RECOMMENDED ORDER & OBJECTIONS TO RECOMMENDED ORDER The following event: HRG ON MTN TO ENFORCE ORDER scheduled for 12/03/2007 at 9:00 am has been resulted as follows: Result: HEARD BY FOC REFEREE, PROPOSED RECOMMND ORD & OBJ Judge: YOKICH, TRACEY A Location: COURTROOM A - 2ND FLOOR Result Staff: Staff: COURT REPORTER: VIDEO Certification Number:	LHINTZ	0.00	0.00
12/03/07	DEPT'S ANS AND OBJTNS TO PLTF'S MTN TO ENFORCE 11-29-01 ORD AND OBJTN TO REFERRAL TO FOC W/EXBTS A-B	SLUND	0.00	0.00
11/16/07	PROOF OF SERVICE	DCOSTA	0.00	0.00
11/16/07	MOTION TO ENFORCE 11/29/01 ORD AND FOR REFERRAL TO THE FOC FOR PROPER CALCULATION OF CHILD SUPPORT AND ARREARAGES	DCOSTA	0.00	0.00
11/16/07	HEARING; MTN TO ENFORCE ORDER SCHEDULED Event: HRG ON MTN TO ENFORCE ORDER Date: 12/03/2007 Time: 9:00 am Judge: YOKICH, TRACEY A Location: COURTROOM A - 2ND FLOOR OBRIEN Result: HEARD BY FOC REFEREE, PROPOSED RECOMMND ORD & OBJ	MEVANO	0.00	0.00
11/16/07	\$40 FOC JGMT & ORDER ENTRY FEE-SUPPORT Receipt: 143235 Date: 11/19/2007	LHINTZ	40.00	0.00
11/16/07	MOTION FEE Receipt: 143235 Date: 11/19/2007	LHINTZ	20.00	0.00
08/30/07	APPEARANCE (LITIGANT'S PRIMARY ATTORNEY) Attorney: O'BRIEN, DEBORAH F. (35261) EDWARD MICHAEL HANNAFORD (PLAINTIFF);	AJOKIN	0.00	0.00
11/30/04	FRIEND OF COURT RECOMMENDATION	BBEATH	0.00	0.00
11/30/04	PROOF OF SERVICE	BBEATH	0.00	0.00
11/09/04	HEARD BY FOC REFEREE ON MTN DAY, RECOMMENDED ORDER SGD The following event: MISCELLANEOUS MOTION HEARING scheduled for 11/01/2004 at 8:30 am has been resulted as follows: Result: HEAR BY FOC REFEREE, RECOMMENDED ORDER SGD	MBERTO	0.00	0.00
/09/04	MISC ORD -SGD	MBERTO	0.00	0.00
11/01/04	PROOF OF SERVICE	BGOLDE	0.00	0.00

Date of filing

child support; that Court was clear in its holding that "MCL 552.603(2) allows for the retroactive modification of child support from the date that notice was given to the recipient of the support payments of the petition to modify support," *Malone v Malone*, *supra* at 289.

The facts in the instant case are identical to those of *Malone v Malone*, *supra*, decision and plaintiff/appellee Hannaford should be limited in his retroactive modification of child support to the date of the filing of his motion for modification of support on November 16, 2007. To allow the trial court to carry back its construction of child support against defendant/appellant Morrison to January 1, 2005, a date pre-dating plaintiff/appellee Hannaford's first filing of his petition on November 16, 2007, by some 35 1/2 months violates the statutory construction that the Michigan Court of Appeals recently gave to MCL 552.603(2) in the decision of *Malone v Malone*, *supra* at 289. MCL 552.603b does not warrant a different statutory construction than MCL 552.603(2) does, because MCL 552.603(2) "was directed to reflect of public policy of ensuring the enforceability of support orders for the protection of children." *Malone v Malone*, *supra* at 288-289.

Here, defendant/appellant seeks application of the provisions of MCL 552.603(2) be made applicable to her situation, e.g. that her child support arrearage not commence until November 16, 2007 and continue until the date of emancipation of the minor child, e.g., her graduation from high school on May 28, 2008, at which time she had already turned 19 years of age. Instead, the trial court made her child support arrearage retroactive to January 1, 2005, an arbitrary date, which predates petition date of the plaintiff/appellee by some 35 1/2 months, all this done by the trial court without granting

defendant/appellant an evidentiary hearing, as mandated by the statute. Allowing a retroactive construction to MCL 552.603b beyond the first date, of plaintiff/appellee's petition for increase in child support does harm to the statutory construction of MCL 552.603(2), as mandated in the *Malone v Malone, supra*, appellate decision," when the language of the statute is unambiguous, judicial construction is neither necessary nor permitted," *Malone v Malone, supra* at 285.

Wherefore, defendant/appellant prays that this honorable Court will reverse the trial court's finding regarding the retroactivity for child support order cutting off a 35 1/2 months that the trial court extended her arrearage behind the November 16, 2007 filing date of plaintiff/appellee's first filing of the same and will further hold MCL 552.603(2) as controlling in this case.

III: The trial Court committed error when it did not apply the equitable parent doctrine to the facts in this case.

The Divorce Judgment which granted sole physical custody to the plaintiff of the minor child did not provide him with the unilateral right to remove the minor child from the state of Michigan to the state of Hawaii, as he did, without court order allowing the same, in September, 2005; plaintiff made his move to Hawaii in June of 2004, while the minor child remained in Michigan and resided full-time with her maternal aunt, Linda Morrison, in Fraser, Michigan. The minor child of the parties lived with her maternal aunt, Linda Morrison, from June of 2004 to September of 2005 continuously, without receiving an ounce of financial support from her father during that period. No child support should be owing to plaintiff for the period of time when the minor child resided with her aunt, for plaintiff contributed nothing towards the support of his daughter during these 15 months. The principles of equitable parent doctrine should apply to this

custodial time when the minor child lived with her maternal aunt for 15 months continuously from June 2004 to September 2005. *York v Morofsky*, 225 Mich App 333, 571 NW2d 524 (1997); *Soumis v Soumis*, 218 Mich App 27, 553 NW2d 619 (1996).

Wherefore, defendant/appellant prays that this Court will apply the equitable parent doctrine and will grant her a moratorium from incurring child support for the nine months preceding September, 2005, a period of time when the minor child resided with her maternal aunt, Linda Morrison, without receiving a scintilla financial support from her father.

IV. The trial court committed reversible error by awarding plaintiff/appellee attorney fees of \$11,385.00 on November 18, 2008, \$350.00 on January 6, 2009 and \$350.00 on January 14, 2009 all against defendant/appellant.

The trial court committed reversible error when it awarded plaintiff/Appellee his attorney fees of \$11,385.00 on November 18, 2008, \$350.00 on January 6, 2009 and \$350.00 on January 14, 2009. Attorney fees are not recoverable at common law, but may be recoverable where statute specifically provides for the same. *Marass v Amoco Oil Co*, 424 Mich 675; 385 NW2d 586 (1986). Plaintiff/Appellee sought taxation of attorney fees as the prevailing party pursuant to MCR 2.625. Prevailing party in an action may recover only those costs that are statutorily authorized for a prevailing party. *Beach v State Farm Mut Auto Ins Co*, 276 Mich App 612; 550 NW2d 560 (1996). Attorney fees are not generally recoverable as elements of costs or items of damages unless expressly authorized by the Court Rules; no Court Rule was cited by plaintiff/Appellee for the taxation of the same except MCR 2.625. *Dewald v Isola*, 188 Mich App 697; 470 NW2d 535 (1991). Plaintiff/Appellee raises for the first time, in response to defendant/appellant's original Application for Leave to Appeal the grounds that he

sought taxable attorney fees pursuant to MCR 2.313. Issues not raised in the trial court are waived for appellate purposes. *Arndt v Ball*, 335 Mich 595, 600; 56 NW2d 394 (1953).

Wherefore, defendant/appellant prays that this honorable Court will deny plaintiff/appellee his taxation of attorney fees which were errantly granted by the trial court.

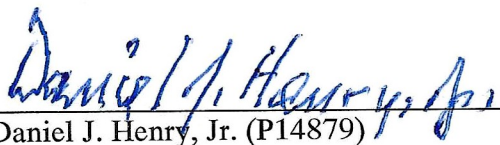
RELIEF REQUESTED

Defendant/Appellant prays that this honorable Court will grant her the relief sought above as to each issue raised by her in this Application for Leave to Appeal, or in the alternative will Order the Michigan Court of Appeals to reissue its Stay of Proceedings Order and will Order that Court to grant defendant/appellant's Application for Leave to Appeal.

Respectfully submitted,

Dated: February 9, 2009

By:


Daniel J. Henry, Jr. (P14879)
Attorney for Defendant/Appellant