

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 24th day of April, 2025.

Present: All the Justices

KIMBERLEY LARAIN SCHMIDT,
INDIVIDUALLY, ET AL.,

APPELLANTS,

against Record No. 240264
 Court of Appeals No. 0816-22-3

BOBBY AARON DEEL,

APPELLEE.

UPON AN APPEAL FROM A
JUDGMENT RENDERED BY THE
COURT OF APPEALS OF VIRGINIA.

Kimberly¹ Laraine Schmidt (“mother”) challenges the Court of Appeals’ determination that Code § 20-108.1 limits the timeframe for which she can recover a monetary obligation owed to her by Bobby Aaron Deel (“father”) pursuant to their written agreement concerning child support. Upon consideration of the record, briefs, and argument of counsel, for the reasons set forth below, the Court is of the opinion that there is reversible error in the judgment of the Court of Appeals.

Mother and father previously undertook a cohabitational relationship, during which a child was born to the parties. Irreconcilable differences led the parties to separate within two years of the child’s birth.

On December 6, 2012, the parties entered into a formal agreement delineating the terms of their separation, with a stated intent to “determine and settle their respective property rights and their rights and duties as parents.” In addition to provisions regarding the parties’ debts and personal property, the agreement included terms pertaining to the child’s custody, visitation, and support, as well as medical expenses and college education.

¹ The correct spelling as used in the record appears to be “Kimberly” despite the initial filings in this Court reading “Kimberley.”

Under the agreement, mother retained physical custody of the child, and father was allowed visitation upon mutual agreement. Mother agreed to maintain medical insurance for the child, and father agreed to be responsible for any uninsured medical expenses incurred on the child's behalf. In a paragraph addressing child support, the agreement states that

Father agrees to be responsible for the making of a support payment to the Mother for the minor child born of the relationship in an amount as would be required by [Code § 20-108.2]. Until such time as that figure is actually calculated, the Father agrees to make voluntary payments to the Mother for which he will be entitled to a credit against any amount ultimately calculated to be due and owing pursuant to the referenced support guidelines. Any arrearage which might exist upon an ultimate determination of the obligation owed pursuant to this Paragraph will be repaid within the same period of time after the establishment, as occurred for the creation of the arrearage itself.

The agreement further provided that it was a “contractual undertaking” between the parties, and that “either party may submit [the] Agreement to a [c]ourt of competent jurisdiction for confirmation, ratification and approval.” Finally, the agreement also provided that “if one party incurs any expenses in the enforcement of any of the provisions of this Agreement, the other shall be responsible for, and shall pay forthwith, any and all expenses incurred, including, but not limited to, reasonable attorney's fees.” Despite reaching an agreement concerning child support, the parties did not immediately submit the agreement to a court for judicial approval.

On August 6, 2018, roughly seven years after entering the agreement, father petitioned the Buchanan County Juvenile and Domestic Relations District Court (“JDR court”) for custody and visitation of the child. Soon thereafter, on October 10, 2018, mother petitioned the JDR court for child support. The JDR court determined custody and visitation rights, and it ordered father to pay \$545.51 per month in prospective child support and arrearages, beginning June 2019 and dating back to the filing of mother's petition. The JDR court, however, declined to rule on the validity or enforceability of the agreement itself. Mother appealed the JDR court's determinations to the Circuit Court of Buchanan County (“circuit court”) for a de novo appeal.

Separately, mother filed two complaints in the circuit court—one in her individual capacity, and the second “as next friend” of the child—seeking a “judgment” against father for the “amounts owed pursuant to the contract for both child support and uninsured medical bills” and additional interest accruing since execution of the agreement. The complaints also requested

an award of attorney's fees and costs as allowed by the agreement's provision for enforcement. Upon mother's request, the circuit court entered an order "approving, confirming, ratifying and incorporating" the parties' agreement into the proceedings.

An "Agreed Order of Custody/Visitation," albeit displaying no identifying case numbers, was entered reflecting that the parties had reached an agreement "with respect to custody and visitation of the minor child," and purported to leave "nothing further to be done with respect to the issue of custody and visitation." The order made no mention of the appealed child support matter. The circuit court thereafter granted mother's motion to consolidate the "three separate and distinct" cases pending before it: mother's individual complaint, the child's complaint through mother as next friend, and, presumably, mother's JDR appeal regarding child support.²

In response to mother's individual complaint, father filed a special plea of res judicata, collateral estoppel, and the statute of limitations, arguing that mother was barred from recovering on her complaint. In a subsequent "memorandum of law" following the child's complaint through mother as next friend of the child, father again asserted bars of res judicata, collateral estoppel, and the statute of limitations, but also asserted that Code § 20-108.1(B) limits retroactive child support to the date a petition is first filed in a court of competent jurisdiction.³

Following a hearing, the circuit court reduced its rulings to writing in an opinion letter that was incorporated into a final order. Reciting facts deemed admitted, the circuit court recounted specific terms of the agreement, noting that father "agreed to make payments for the support, education, and welfare" of the child. Specifically, father agreed to "be responsible to make child support payments as would be required by [Code § 20-108.2]," and that any payments that were either in excess of or less than the required guidelines would result in a "credit" or an "arrearage" respectively. From the execution of the agreement "through and including October 31, 2019," father made no payments toward his contractual support obligation.

The circuit court found that the agreement was valid, and it rejected father's pleas of res judicata, collateral estoppel, and the statute of limitations. Pertinently, as to the statute of

² Though the previously mentioned agreed order purported to dispose of at least the custody and visitation matters, the consolidation order inexplicably identifies all of the original JDR appeal case numbers as being consolidated.

³ Father's memorandum states that mother withdrew her JDR appeal, but as noted, that statement is unsupported by the record.

limitations, the circuit court held that its incorporation of the agreement into an order of the court merited the twenty-year statute of limitations found in Code § 8.01-251(A). The final order reflects that father was found “to have been in breach” of the agreement, and it “establishe[d] an award owed by [father] to [mother]” for unpaid medical expenses and child support, separate from and in addition to the amount of prospective support calculated in the JDR court.⁴ Based on father’s breach, the circuit court found it appropriate to award attorney’s fees incurred in pursuing enforcement of the agreement, but it included the amount of fees in the “arrearage total” to be paid directly to mother.

Father appealed the decision to the Court of Appeals, arguing that the circuit court erred by incorporating the agreement and awarding retroactive child support, as well as by rejecting his special pleas of res judicata, collateral estoppel, and the statute of limitations. In a split opinion, the Court of Appeals affirmed the incorporation of the agreement but reversed the award of child support, medical expenses, and attorney’s fees predating mother’s initial petition in JDR court. The Court of Appeals found the award of arrearages from the date of the agreement to be at odds with the “clear and controlling” language of Code § 20-108.1(B), which limits a retroactive award of child support to the date a petition is first filed.

The majority opinion declined to address any contractual claims, however, finding that the circuit court “did not rule on such claims nor did it grant any contract damages—only arrearages.” While conceding that mother “may have a possible avenue of recovery under a contract theory,” it reasoned that the lack of a hearing transcript and the absence of “any discussion in the letter opinion or final judgment order” undermined any support for a “contract theory” of recovery.

On appeal, this Court finds merit in mother’s contention that the Court of Appeals erroneously disregarded the contractual basis for the circuit court’s judgment. The Court of Appeals correctly identified the timing constraints for statutory claims of retroactive child support, but the record in this case—with or without a transcript or written statement of facts⁵—

⁴ The prospective child support is not at issue on appeal.

⁵ The agreement, the statement of admitted facts, and the circuit court’s orders provided a sufficient record from which the Court of Appeals could make an informed decision on father’s specific assignments of error. Thus, a transcript or written statement of facts were not “necessary to permit resolution of appellate issues” before the court, and mother was not prejudiced by their omission. *See* Rule 5A:8(b)(ii).

sufficiently indicates that the circuit court reached its decision based on the written agreement between the parties.

When a court is called upon to resolve the matter of a child whose support requires determination, the court is permitted to take several actions with respect to an agreement containing provisions purporting to govern child support. The “extent to which and method by which an agreement for child support is enforceable” depends upon the action taken. *See Fry v. Schwarting*, 4 Va. App. 173, 178 (1987). Generally, a “court may not disregard an agreement regarding child support.” *Shoup v. Shoup*, 37 Va. App. 240, 250 (2001) (*en banc*). An agreement that has been approved and incorporated into the court’s proceedings is given the effect of a court order. *See Fry*, 4 Va. App. at 178. Where such an agreement has been “incorporated but not merged” into a court order, the agreement also “remains enforceable under . . . contract law” and, if appropriate, may warrant an award of specific performance or monetary relief. *See Rubio v. Rubio*, 36 Va. App. 248, 253 (2001) (*en banc*); *Hering v. Hering*, 33 Va. App. 36, 373-74 (2000).

The complaints filed with the circuit court alleged a contractual obligation for monthly child support, a breach of that obligation through repeated failures to pay, and a monetary amount owed as a result—matters squarely sounding in contract. The letter opinion identified the issue to be addressed by the circuit court as whether the “[a]greement setting child support obligations caused arrearages dating back to the date the [a]greement was signed.”⁶ The circuit court expressly prefaced its analysis by finding that the parties’ agreement was valid, a preliminary finding often made when determining the enforceability of agreements regarding matters of support. The final order also states the express finding that father was “in breach” of the agreement before proceeding to order payment on the past due contractual obligations. Moreover, the amounts awarded appear to be based upon the amounts in the respective requests for judgment. Given this context, it is clear the circuit court considered and relied upon the parties’ agreement in reaching its decision.

⁶ Repeated references to an “arrearage” appear to be nothing more than the circuit court adopting incongruent terminology used by the parties as opposed to a term of art.

Further, on the record as it exists before the Court, it appears the circuit court proceeded to judgment on the child's complaint through mother as next friend as opposed to mother's complaint in her individual capacity.⁷ While the circuit court's letter opinion identified mother as the plaintiff, and the final order established an award owed and payable to mother, the award itself appears to contemplate an amount dating back to the execution of the agreement. As to mother's claim, that date clearly exceeds the limitation period for actions on contract.

In general, actions on written contracts signed by the parties to the contract must be brought within five years of the accrual of a cause of action. *See* Code § 8.01-246(2). A contract premised on monthly payments in installments is "divisible in its nature," and therefore "each default in the payment of an installment" gives rise to a separate cause of action. *See Jones v. Morris Plan Bank*, 168 Va. 284, 292 (1937) (citation omitted). In which case, the statute of limitations begins to run as to a new breach of the contract when each installment comes due and goes unpaid. Applied here, father's obligation under the agreement to make monthly payments of child support to mother was divisible, and each month he failed to pay constituted a new breach. As a result, mother could recover damages based upon father's individual breaches of the agreement that occurred up to five years prior to initiating her action for unpaid support.

Facing a partial bar to recovery, mother contends that the child's action asserting third-party beneficiary status is not so constrained. She argues that the child's legal status as a minor—for whom the running of the statute of limitations in personal actions is statutorily tolled until attaining majority—allows the child to recover the full amount of the obligation dating back to the execution of the agreement. *See* Code § 8.01-229(A)(1) ("If a person entitled to bring any action is at the time the cause of action accrues an infant, . . . such person may bring it within the prescribed limitation period after such disability is removed.").

It would be remiss not to observe that application of a third-party beneficiary theory of recovery dating back to the execution of the agreement in these circumstances indisputably raises a non-contracting third party's rights higher than those of the contracting parties in terms of a

⁷ The Court does not view this ambiguity as a potentially fatal infirmity to a valid final order because, while courts might allow both a promisee and a third-party beneficiary to bring an action against a promisor on a contract, "there can only be one satisfaction, preventing double recovery." *Thorsen v. Richmond SPCA*, 282 Va. 257, 279 (2016).

statute of limitations bar.⁸ The matter is made more complicated as it concerns monetary support for a minor child, a duty that is owed by both parents to the child regardless of contract. *See* Code § 20-61; *Kelley v. Kelley*, 248 Va. 295, 298 (1994); *Featherstone v. Brooks*, 220 Va. 443, 448 (1979). The significance of this duty of support has given rise to a carefully structured body of statutory tools designed to both facilitate and guarantee its satisfaction. Nonetheless, public policy supports the amicable resolution of child support issues by encouraging parents to voluntarily form legally binding and enforceable agreements for the support of their children. *See Morris v. Morris*, 216 Va. 457, 459 (1975); *Richardson v. Richardson*, 10 Va. App. 391, 399 (1990).

Policy is left wanting, however, when obligations to the child go unmet. Seven years passed in which father did not pay the amount of child support he contractually agreed to pay, with mother justifying delayed action on their agreement because the parties “were happy with the status quo,” a status quo wherein the duty to the child went unfulfilled. Although “[a]ctions or suits, by or [o]n behalf of a child against a parent, should not be encouraged,” *McClagherty v. McClagherty*, 180 Va. 51, 68-69 (1942), the circumstances here are such that the Court cannot ignore the probability that the circuit court proceeded to judgment on the child’s complaint by apparently calculating a monetary award, payable to mother as the child’s custodial parent, dating from the execution of the agreement. It does not appear that father specifically challenged, at any point, the child’s status as a third-party beneficiary, the tolling of the statute of limitations as to the child, or the discrepancy of the child’s contractual recovery being greater

⁸ “The essence of a third-party beneficiary’s claim is that others have agreed between themselves to bestow a benefit upon the third party but one of the parties to the agreement fails to uphold his portion of the bargain.” *Tingler v. Graystone Homes, Inc.*, 298 Va. 63, 104 (2019). As is the practice in Virginia, a “third-party beneficiary to a contract is entitled to enforce the terms of the contract,” but is also “subject to defenses arising out of the contract.” *Levine v. Selective Ins. Co. of Am.*, 250 Va. 282, 286 (1995). “In practical terms, a third-party beneficiary’s claim fails if the promisor,” being the party that made the promise sought to be enforced by the third party, “could defeat the same claim if the promisee,” being the party who received the promise to benefit the third party, “had asserted it directly against him.” *Rastek Constr. & Dev. Corp. v. General Land Commer. Real Estate Co., LLC*, 294 Va. 416, 424-25 (2017). Such is the case because the “rights of third parties are derivative.” *Id.* at 425. Thus, “[w]hile the rights of the beneficiary stem from the contract between the promisor and the promisee, the derivative nature of a third-party beneficiary’s rights implies that these rights can sink lower than but cannot rise higher than those of the promisee unless the agreement specifically provides otherwise.” *Id.* (citation omitted).

than that belonging to mother.⁹ For this reason, it was error not to consider the child's third-party beneficiary action as a basis for affirming the circuit court's judgment on appeal.

For the reasons stated, the Court of Appeals' decision declining to consider the contractual nature of the circuit court's judgment was in error. Father breached a valid installment contract that provided for monthly payments of child support, which he did not pay. The judgment of the Court of Appeals is reversed, and the matter is remanded to the Court of Appeals with instructions to further remand to the circuit court for a determination of reasonable attorney's fees incurred in enforcing the agreement and in pursuing this appeal.

This order shall be certified to the Court of Appeals and to the Circuit Court of Buchanan County.

A Copy,

Teste:


Clerk

⁹ Father contests neither the legal validity of the species of suit in which a child pursues child support as a third-party beneficiary to a contract, nor the legal validity of the apparent argument that the child has a greater limitation period due to her minority. Thus, those questions are not before the Court, and the Court expresses no opinion as to the validity of either issue.