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Letter Brief
+ PETITIONERS

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Supplemental Affidavit in Support of Motion to Reopen the Judgment

August 30, 1995

The Honorable Thomas S. Williams
Circuit Court Judge, Branch III
Winnebago County Courthouse
P.O. Box 2808
Oshkosh, WI 54903-2808

FILED
AUG 30 1995

CLERK OF COURTS
JULIE PAGEL

RE: Van Price
Case No. 81-FA-31

Dear Judge Williams:

Pursuant to the schedule set out in your August 21, 1995 letter, I am submitting this letter brief and the attached '@Petitioner's Supplemental Affidavit.' When Attorney Seifert and myself discussed the possibility of stipulated facts, we did not have the same understanding of the court's desire. Attorney Seifert believed it was premature at this point to stipulate to facts based on the court's letter. For this reason, I have submitted the enclosed supplemental affidavit. I hope the supplemental affidavit and this supplemental letter brief address the Court's concerns.

INTRODUCTION

This case is before the court on the petitioner's motion to vacate an order dated July 14, 1992 regarding a set child support obligation under S806.07, Wis. Stats. At the July 26, 1995 oral argument hearing a new issue regarding the court's inherent authority arose. This memorandum will briefly address new issues raised at the July 26, 1995 oral argument hearing. The facts are outlined in the petitioner's initial memorandum and will be discussed at relevant parts of this supplemental letter brief.

There appears to be no case law directly on point. However, case law establishes that the court has broad discretionary authority to fashion an appropriate remedy under its inherent equitable authority. It is the petitioner's position that the court should use its broad authority to remedy the wrong in this case.

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THE COURT HAS INHERENT AND EQUITABLE AUTHORITY

First of all, the court possesses inherent authority, regardless of statutory authority. The court of appeals has described this power as follows:

If the circuit court is to effectively discharge its duties, it must have the inherent authority to implement it. For a power to be inherent, it must be essential to the existence of the court and necessary to the orderly and efficient exercise of the court's jurisdiction. Examples of inherent powers are the power to summon witnesses, to administer oaths, to provide counsel for the indigent, and to discipline attorneys.

In Interest of AAL, 152 Wis.2d 159, 448 N.W.2d 239, 242 (Wis.App. 1989) (citations omitted), (holding that court has power to require mother to pay for costs of father's transportation on mother's petition to terminate father's paternal rights.) See also Jacobson v. Avestruz, 81 Wis.2d 240, 260 N.W.2d 267, 269-270), and cases cited therein (courts possess inherent authority to assess costs of impaneling a jury) and In re Custody of H.S.K.-K., Wis. , 533 N.W.2d 419, 425 (1995).

The language of 767.25(1m), Wis. Stats., addressed situations where motions to modify are sought "upon request by a party". However, the circumstance where a motion to modify is requested by someone other than a party, specifically the court, is not considered. Arguably, the court, using the reasoning in Custody of H.S.K.-K., could conclude that it is not supplanted or preempted from invoking its long-standing equitable power to prevent the enforcement of the child support order as an unconscionable judgment by modifying the amount of child support upon its own motion. This argument is supported, in part, by State v Conway. There, upon an untimely motion to modify requested by a party, the court opined that although there were three statutory avenues to relief from a judgment, a fourth action in equity was available even after the running of the statutory time frames to restrain the enforcement of an unconscionable judgment. State v Conway, 162 N.W.2d 71, 75 (1968)

This inherent authority includes the court's ability to act sua snonte. See e.g. Marriage of Johnson v. Johnson, 157 Wis.2d 490, 460 N.W.2d 166, 168 (Wis.App. 1990) and cases cited therein (failure to appoint guardian ad litem sua snonte is error) and State v. Holmes, 106 Wis.2d 31, 315 N.W.2d 703, 707 (Wis. 1982)

(court has power to raise constitutionality of statute sua snonte). When the court raises an issue sua snonte, the court should provide the parties with notice and an opportunity to present legal arguments. Id. at 708. Generally, courts can grant such relief it feels a party is entitled to. Klaus v. Vander Hevden, 106 Wis.2d 353, 316 N.W.2d 664, 668 (1982).

Equitable Authority

The court also possesses inherent equitable authority. The issue of equitable authority is a variant of the inherent authority doctrine. In Interest of E.C., 130 Wis.2d 376, 387 N.W.2d 72, 77 (Wis. 1986) (the court has no authority to expunge police juvenile arrest records because no legal wrong to protect). This power permits a court to grant equitable remedies to private litigants in situations in which there is no explicit statutory authority or the legal remedy is inadequate to do complete justice. Id.

"Circuit courts have the power to apply equitable remedies as necessary to meet the needs of the case." Svrina v. Tucker, 174 Wis.2d 787, 498 N.W.2d 370, 375 (Wis. 1993) (trial court can order defendant to undergo physical examination to determine if defendant has AIDS even though could not do so under the discovery statutes because of court's equitable authority).

"Once a court of equity obtains jurisdiction over a matter, it will exercise its jurisdictions in an effort to do complete justice between the parties to the action." State v. Excel Manasement Services, 111 Wis.2d 479, 331 N.W.2d 312, 318 (Wis. 1983) (in consumer protection action brought by attorney general, court could join assignee of the contracts as essential to full relief).

The breath of equitable authority was described in one case as follows:

Equitable remedies...are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties.

White v. Ruditvs, 117 Wis.2d 130, 343 N.W.2d 421, 426 (Wis.App. 1993) (court has equitable authority to award punitive damages in injunction case).

A motion to vacate under §806.07(1)(h) "gives the trial court broad discretionary authority and invokes the pure equity power of the court." Mullen v. Coolong, 153 Wis.2d 401, 451 N.W.2d 412, (1990). Pursuant to the court's broad equitable authority in general, and especially under 5806.07(1), the petitioner requests that the court vacate on the July 14, 1992 Order. (If that portion of the July 14, 1992 Order was vacated, then the 25% of gross income provision of the Order would be effective.) In addition, petitioner points out that the court's broad equitable authority in general could have been invoked sua snonte in July of 1992, and also in February of 1994, to raise the issue of the set \$50.00 a week child support obligation even without a motion to modify being brought by one of the parties.

CONTEMPT

A specific inherent power of the court involves a court's broad contempt powers. Both 785.02, Wis. Stats., and the court's inherent power enable the court to impose a remedial or punitive sanction for contempt. In re Kading, 238 N.W.2d 63 (1975). It must be remembered that the July 14, 1992 Order and the February 14, 1994 orders were a result of the Child Support Agency's Order to Show Cause to find petitioner in contempt of court for nonpayment of child support. Since these were contempt actions, the court had very broad authority to fashion an appropriate order.

Even though the statutory language of 5785.04, Stats., does not specifically authorize a court to provide purge conditions, all courts in this state have an inherent power to hold in contempt anyone who disobeys a lawful order. "Consistent with this power is the court's authority to provide purge conditions to end the contempt. Such conditions are consistent with the purpose of remedial sanctions, which are "imposed for the purpose of terminating a continuing contempt of court." State ex rel. V.J.H. v. C.A.B., 472 N.W.2d 839, 844 (1991) (citing State ex rel. Larsen v. Larsen, 465 N.W.2d 225, 227 (Ct.App. 1990)). Purge conditions may lie outside of complying with the original court order that led to the contempt. In re Marriage of Larsen, 165 Wis.2d 679, 478 N.W.2d 18, 20 (1992). However, "the contemnor should be able to fulfill the proposed purge, and the condition should be reasonably related to the cause of the contempt." Id.

Trial courts can reduce or modify a child support obligation as part of the contempt action. See e.g. State ex rel. N.A. vs G.S., 156 Wis.2d 338, 456 N.W.2d 867, 869 (Ct.App. 1990) (court

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reduced obligation from \$30.00 a week to \$30.00 a month) and In Re Marriage of Larsen, sunra, 478 N.W.2d at 19 (W.wis. 1992) (court reduced the level of child support three times due to inability to pay). Here, it was within the court's authority to reduce the petitioner's weekly child support obligation as a part of the contempt action. The petitioner had certainly demonstrated a history warranting a decrease in the child support obligation.

CONCLUSION

Even if there is no mistake under §806.07(1)(a), the court may reopen the judgment under §806.07(1)(h), based on extraordinary circumstances.

The terms "mistake, inadvertence, surprise or excusable neglect" under §806.07(1)(a) primarily involve a determination if the conduct of the moving party was excusable under the circumstances. Hansher v. Kaishian, 79 Wis.2d 374, 255 N.W.2d 564, 573 (1977). Excusable neglect is "that neglect which might have been the act of a reasonably prudent person under the circumstances." Hansher v. Kaishian, 79 Wis.2d 374, 255 N.W.2d 564, 573 (1977) (citations omitted).

In addition, relief from judgment may be premised on an error of the court. In re Paternity of M.T.H. 140 Wis.2d 843, 412 N.W.2d 164, 166 (Wis.App. 1987).

For these reasons and for the reasons discussed in the petitioner's other memorandum, the petitioner respectfully requests that the court grant her motion to vacate. Thank you for your consideration of this matter.

Sincerely,



Karen S. Roehl
Attorney at Law
State Bar No. 1001508

KSR/blp

cc: Ms. Debra VanPrice
Ms. Karen Seifert
Winnebago County Child Support Agency
Mr. Robert VanPrice

DISK
8/30/95

STATE OF WISCONSIN

CIRCUIT COURT
FAMILY COURT BRANCH

WINNEBAGO COUNTY

In Re the Marriage of:

DEBRA A. VAN PRICE,

PETITIONER'S SUPPLEMENTAL
AFFIDAVIT IN SUPPORT
OF MOTION TO REOPEN
T&E, JUDGMENT

Petitioner,

and

ROBERT A. VAN PRICE,

Respondent.

Case No. 81-FA-31
WINNEBAGO CO.

STATE OF WISCONSIN :

:ss

COUNTY OF WINNEBAGO:

AUG 30 1995

CLERK OF COURTS

DEBRA A. VAN PRICE, states as follows:

1. I am the Petitioner in the above-referenced case.
2. As if repeated fully herein, I incorporate the statements of my previous affidavit entitled "Petitioner's Affidavit in Support of Motion to Reopen the Judgment" dated April 27, 1995, and attached to the Petitioner's Memorandum in Support of Motion to Vacate the Judgment as Exhibit F.
3. I have fully and fairly stated the case in this action to my counsel, Attorney Karen S. Roehl, and I am advised by my counsel that I have valid and substantial grounds for vacation of the orders dated July 14, 1992 and February 14, 1994, pursuant to s806.07, Wis. Stats.
4. Regarding the July 14, 1992 Order, the grounds for the motion to vacate are the following extraordinary circumstances:
 - a. I did not make a conscious, well-informed, and deliberate choice at the time of the July 14, 1992 Order.

b. At the time of the Order, I was disabled by severe depression and other health problems, such as my history of cervical cancer, all of which substantially impaired my mental capacities. In addition, at that time I was terrified that I would be sent to jail.

c. I only have a 9th grade education and limited work experience. I am currently re-taking GED tests, but I have been unable to pass the program so far.

d. I have found the child support motions to be extremely stressful, and I just want to avoid going to court again. The court process is very confusing, very intimidating, and I don't understand it.

e. Since my health problems began in 1990, I have been poor and have never had the resources to pay a retainer to hire an attorney for legal advice or representation. For this reason, I was represented by a public defender.

f. I thought my public defender in the previous motions was able to fully represent me and raise all issues, including the \$50.00 set child support obligation. However, my current counsel now informs me that in July of 1992, the focus of the case was alleged contempt so there was no decision on the merits of the underlying child support order.

g. Also, I thought the July 14, 1992 Order provided for a 25% child support obligation.

h. Because of my mental and physical disabilities, I have been a recipient of SSI since November 1, 1991. After a thorough

evaluation, the Social Security Administration found that I was disabled and unable to work.

i. Currently, my only income is supplemental security benefits. My monthly benefit is \$541.78.

j. I have not had the sustained ability to pay \$50.00 a week in child support since I became disabled, but I am willing to pay the set child support percentage, once I have employment earnings.

k. My general practitioner believes I should not be working due to knee and back problems. Currently, the professional opinion of my counselor, Cindy Peterson, is that I should not be working because of my health problems including depression. I have been referred for AODA aftercare treatment. I am also being evaluated by DVR.

l. My attorney advises me that I had a valid defense to the set child support obligation because my SSI benefits should not have been burdened with a \$50.00 a week set child support obligation according to s49.41, Wis. Stats., 42 U.S.C. §407(a), 42 U.S.C. 51383(d), federal regulations, and Lanslois v. Lanslois, 150 Wis. 2d 101, 441 N.W.2d 286 (Wis. App. 1989).

m. Although it is true that in the past I have had some work and part-time schooling, my disability status has not ended. In June of 1994, the Social Security Administration reevaluated me and determined that I am still disabled, primarily due to my depression.

n. There is no detrimental reliance by the respondent and the Child Support Agency and they would not be prejudiced by this motion to vacate.

o. I brought my motion to vacate within a reasonable time, based on my limited education, my disability status, my major depression, the intimidation of the court process, and my lack of resources to proceed on my own.

p- Also, until I was advised so by my current counsel, I did not know that my disability status could have an effect on the level of my child support obligation.

5. Regarding the February 14, 1994 Order, the grounds for the motion to vacate is mistake, inadvertence, error, and excusable neglect. The circumstances described in statement #4, supra, are excusable neglect for the continuance of this set child support obligation once I became disabled.

Dated this L&J^{i.1)} day of August, 1995.

A5LPL & Debra A. Van Price

Debra A. Van Price
Petitioner

Subscribed and sworn to before me
this ~???@3 day of f](.~--jy~q-,f, 1995.

Bonnie L. Schumacher
Notary Public, State of Wisconsin
My commission expires 8/2/98.