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STATE OF WISCONSIN

CIRCUIT COURT
FAMILY COURT BRANCH

WINNEBAGO COUNTY

In Re the Marriage of:

DEBRA A. VJ.+N PRICE;

P&itioner, ;,

RESPONDENT'S BRIEF IN
OPPOSITION OF MOTION TO
VACATE THE JUDGMENT

and

ROBERT A. VAN PRICE;

Case No. 81 FA 31

&&\$&dent.

ISSUES

1) Does Sec. 767.32(1m) prohibit a motion to vacate a child support order when pursued under a 806.07 motion to vacate?

INTRODUCTION

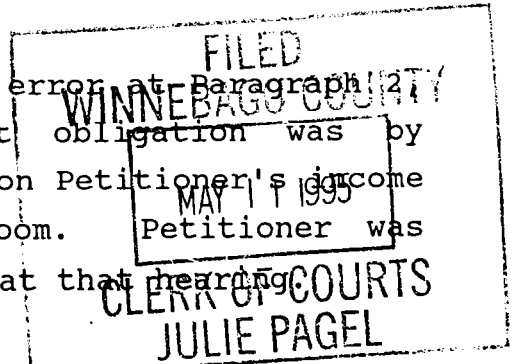
This matter comes before the court pursuant to a motion to vacate the judgment, filed by Petitioner. The motion was first brought on before the Family Court Commissioner, but referred to Circuit Court which is the correct court to hear the motion to vacate.

Petitioner's introduction states that the motion is to vacate the judgment dated July 14, 1992 regarding a set child support obligation.

In actuality the Petitioner's support obligation was set by stipulation of the parties at a hearing before the Honorable Thomas S. Williams on December 20, 1988. The Order from that hearing is dated January 10, 1989, NUNC PRO TUNC December 20, 1988.

STATEMENT OF FACTS

Petitioner's statement of facts is in error at Paragraph Page 2. The \$50.00 per week support obligation was by stipulation of the parties. It was based on Petitioner's income of \$200.00 per week from the Bamboo Room. Petitioner was represented by Attorney Richard C. Rowland at that hearing.



Petitioner's version of the facts at Paragraph 1, Page 3 states that Petitioner was unable to work as of November 1, 1991. She omits the fact that the matter was heard on an adjourned basis on July 1, 1992 and Petitioner then had employment and that her SSI Benefits were to terminate within two (2) months.

Also omitted in Petitioner's statement of facts are that an Order to Show Cause was filed by the Winnebago County Child Support Agency on April 21, 1993 and heard by the Family Court Commissioner on June 10, 1993. The findings indicate Petitioner was referred to Fox Valley Technical Institute to enroll in a secretarial clerical program by the Division of Vocational Rehabilitation and they would provide the funding. The court on this date also made a specific finding that Petitioner was able to engage in employment and pay support.

The matter was next heard October 22, 1993 by the Family Court Commissioner. The court made a finding that Petitioner had worked at three (3) separate jobs over the summer and that the Department of Vocational Rehabilitation had enrolled Petitioner in a full-time program for administrative assistant.

The matter was next heard January 11, 1994 by the Family Court Commissioner. The court made a finding that Petitioner voluntarily terminated her enrollment at Fox Valley Technical Institute mid semester and she also voluntarily terminated her employment at Electronic Assembly. The court made a specific finding that the Petitioner is able to obtain employment and that nothing in her medical history at this point indicates that she is not able to work.

In March of 1994 when the matter was again heard by the Family Court Commissioner, Petitioner was working full-time -and the Order to Show Cause was dismissed.

ARGUMENTS

PETITIONER'S MOTION IS IM\$'ROPE-Y BROUGHT LJ-1.JDER SECTION 806.07

Petitioner argues that her Sec. 806.07 motion to vacate is not a motion for retroactive modification of child support.

Petitioner's argument is rhetorical only in that the effect of her motion under Sec. 806.07 is a retroactive modification of child support which is expressly prohibited under Sec. 767.32(1m).

Wis. Stats. Sec. 801.01(2) Scope, states that Chapters 801 to 847 govern procedure and practice... except where different procedure is prescribed by statute or rule.

Wis. Stats. Chapter 767 does prescribe different procedure for modifying judgment in actions affecting the family.

If parties were allowed to bring an action to modify support pursuant to Sec. 806.07 they could avoid proving a substantial change in circumstances and all the other very specific requirements governing modifications of support orders contained in Chapter 767.

Ignoring Sec. 801.01(2) throws the whole process into chaos. Reading Sec. 806.07 in light of the scope section at 801.01(2) clearly directs the moving party to Sec. 767.32(1m) as the specific procedure to use in this instance and restricting Petitioner from using Sec. 806.07 to obtain the relief she is requesting.

IF THE COURT FINDS THAT PETITIONER'S MOTION IS PROPERLY BROUGHT UNDER 806.07, SHOULD PETITIONER'S MOTION BE GRANTED?

a) Is there a basis to grant Petitioner's motion under Sec. 806.07(1)(h)?

Petitioner requests relief under Sec. 806.07(1)(h) which grants relief for "any other reasons justifying relief from the operation of the judgment".

Relief under Sec. 806.07(1)(h) is available outside the -one year **time** frame.

The Supreme Court in State Ex Rel MLV v DGH 363 N.W.2d 419 (Wis. 1985) 426-427 held that:

On the basis of the federal cases interpreting Rule 60(b)(6) and the Wisconsin cases, we conclude that the subsections of Sec. 806.07(1) should be treated as mutually exclusive to the extent that a party should not

be allowed to circumvent the one-year time limit applicable to subsection (1) I lb) and (c) by recharacterizing her or his claim as a claim under subsection (h). Nevertheless subsection (h) permits a circuit court to grant relief, even if the fact situation may give rise to a claim under subsections (1) 3 W 01: (cl I if extraordinary circumstances justify relief.

If Petitioner relies on Sec. 806.07(1)(h) for relief of the judgment, relief can only be granted if the court finds there are extraordinary circumstances justifying relief.

The court goes on to discuss what factors the Circuit Court should consider as relevant to the competing interests of finality of judgments and relief from unjust judgments. The instant case differs from State Ex Rel MLB v DGH in that this case is a divorce and State Ex Rel MLB v DGH was a paternity, therefore not all the factors apply.

The first factor to consider is whether Petitioner had effective assistance of counsel. In the case at bar the Petitioner did have effective assistance of counsel.

Petitioner was represented by Richard C. Rowland, private, retained counsel at the December 20, 1988 hearing, when the parties stipulated to entry of the \$50.00 per week child support order. Mr. Rowland was also Petitioner's attorney in the underlying divorce proceeding.

Petitioner claims in her motion and brief that she moves to vacate a judgment dated July 14, 1992. The support order was set December 20, 1988. Petitioner is choosing a different date because the facts on that date better fit her argument for extraordinary circumstances. If Petitioner uses the date July 14, 1992 she can argue Petitioner had a Public Defender as opposed to the true facts of the case. Plainly stated, Petitioner had a private attorney when the support order was entered, and the order was entered by stipulation of the parties. I cannot create a better example of 'Ia conscious, well-informed and deliberate choice on the Petitioner's part" than a stipulation entered on advice of counsel.

The next factor to consider is whether there was judicial consideration of the merits, and if the interest of deciding the case on the merits outweighs the finality of judgments.

The support order was entered by stipulation of the parties as the order clearly states, in conformity with the percentage standard for child support. If the matter had been put before the court to decide rather than stipulated to, it is presumable the court would also have used the percentage standard and set the support at \$50.00 per week. Since there was a stipulation there is no reason to consider whether deciding on the merits outweighs the finality of the judgments, the merits were agreed on.

Another factor to consider is whether Petitioner has a meritorious defense to the claim. Any defense, or evidence regarding the amount of Petitioner's income was presented at the hearing. Petitioner does not offer new evidence now that would change the courts mind in setting support.

Again, Petitioner uses the date of July 14, 1992 to argue that Petitioner had a disability and this is a defense to the claim. The judgment was entered December 20, 1989 and Petitioner was not disabled then.

The last factor to consider is whether there are intervening circumstances making it inequitable to grant relief.

During the years since entry of the support order of \$50.00 per week, both Respondent, Robert Van Price and State of Wisconsin have expended money in support of these children. At present \$10,407.21 is due to the State and \$2,227.06 is due the Respondent.

Petitioner states that Respondent and the state have not detrimentally relied on getting that support money but gives no reason for this statement. She implies that \$5,000.00 is really not much less than \$11,000. I have no doubt that Petitioner would believe that denying her \$5,000.00 or \$6,000.00 toward repayment of expenses already incurred would be detrimental.

The State paid out \$ 28,259.00 in AFDC payments to Respondent during the period 1988 to 1993 and expected to get \$50.00 per week in support for that period.

A retro-active reduction would certainly prejudice both the State, and Respondent who rely on collecting the arrears from the Petitioner some time.

Consideration of these factors show that they do not constitute extraordinary circumstances justifying relief from the judgment under Sec. 806.07(1)(h).

Petitioner brought this motion to vacate the judgment under Wis. Stats. Sec. 806.07 to circumvent 767.32(1m) which states:

In an action under sub. (1) to revise a judgment providing for child support, maintenance payments or family support payments, the court may not revise the amount of child support, maintenance payments or family support payments due prior to the date that notice of the action is given to the respondent, except to correct previous errors in calculations.

In actions affecting the family orders, stipulations and judgments are entered. The case may be heard any number of times and not change these underlying orders, so they continue to run.

Petitioner brings her motion to vacate the judgment. She must then go back to the date judgment was entered and take the facts as she finds them. The Petitioner has no right to arbitrarily choose a date and request to vacate as of that date because she likes the facts on that date. The judgment was entered when it was entered.

Respondent under the statute has no right to a retroactive reduction of support.

B) Is there a basis to grant Petitioner's motion under Sec. 806.07(1) (a) for excusable neglect?

Sec. 806.07(2) states that motion if based on Sec. 806.07(1)(a) must be brought not more than one year after the judgment was entered or the order or stipulation was made.

The stipulation and order setting Petitioner's support obligation at \$50.00 per week was entered effective December 20,

1988. Obviously more than one year has passed since entry of this order and, therefore, there is no basis to grant Petitioner's motion based on excusable neglect.

CONCLUSION

Petitioner is prohibited from seeking a retroactive reduction in child support by Sec. 767.32(1m). Petitioner is prohibited from seeking to avoid the effects of Sec. 767.32(1m) by moving to vacate under Sec. 806.07 because of the Scope section at 801.01(2). Petitioner may not manipulate the facts of the case to fit arguments under Sec. 806.07, and as of the date judgment was entered, Petitioner has not demonstrated extraordinary circumstances justifying relief from operation of the judgment.

For the reasons stated above Respondent and the State of Wisconsin request the Court deny Petitioner's motion to vacate the Judgment.

Respectfully submitted this / day of May, 1995.


Karen L. Seifert
Child Support Attorn&

STATE OF WISCONSIN)
WINNEBAGO COUNTY) SS

AFFIDAVIT OF MAILING

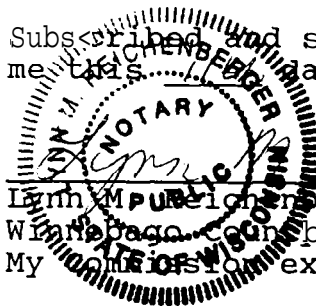
Heidi Chivington, being first duly sworn, on oath, says that she is the Case Manager in the office of the Winnebago County Child Support Agency-Paternity Unit: that on the 11th day of May, 1995, she served the attached Respondent's Brief in Opposition Of Motion to Vacate the Judo-ment for Case No. 81 FA 31, upon the following persons by depositing in a United States mail box, a true copy thereof, properly enclosed in a postpaid envelope addressed to the following persons at the following addresses:

Ms. Karen S. Roehl
Attorey at Law
404 N. Main St., Suite 702
Oshkosh, WI 54901

Mr. Robert Van Price, Jr.
831 3rd St.
Menasha, WI 54952

Heidi Chivington
Winnebago County Courthouse
Paternity Unit
P.O. Box 2808
Oshkosh, WI 54903-2808

Subscribed and sworn to before me this _____ day of May, 1995.


Lynn M. Reichenberger
Lynn M. Reichenberger, Notary Public
Winnebago County, Wisconsin
My Commission Expires: 3-1-98

FILED
WINNEBAGO COUNTY
MAY 11 1995
CLERK OF COURTS
JULIE PAGEL