

10/8/95

51,138
COPY G
4p.
10/p275

STATE OF WISCONSIN IN CIRCUIT COURT
BRANCH 3

FOR WINNEBAGO COUNTY

In Re the Marriage of:

Debra A. Van Price,
Petitioner,
and
Robert A. Van Price,
Respondent.

Case # 81 FA 31
DECISION ON MOTIONS

RECEIVED

Petitioner moved the Family Court Commissioner on January 27, 1995, for revision of an unspecified child support judgment pursuant to sec. 767.32, and to vacate such judgment or order it reopened based on sec. 806.07(1)(a) and (1)(h).

The Commissioner, by order dated Feb. 21, 1995, nunc pro tunc Feb. 6, 1995, referred the issue under sec. 806.07 to the court, declined to set a child support order, ordered petitioner to work with DVR and follow their recommendations, and, as soon as petitioner was able to work, to seek work.

Petitioner then moved the court to review the Commissioner's decision on revision, and to vacate the child support judgment and to reopen the judgment effective November 1, 1991 or, alternatively, a year from the date of the filing of the motion, March 10, 1995.

I conclude that the Commissioner was correct in referring the parties to the court rather than addressing the motion to vacate or reopen the judgment under the rules of the court.

The parties have filed a stipulation, approved by the court on November 8, 1995, revising the child support order in this matter to require the petitioner to pay 25% of gross income, exclusive of SSI income, effective Jan. 27, 1995. This moots the issue of revision raised by petitioner.

The issues of vacation or reopening the prior orders have been extensively briefed, and two hearings have been held on those issues.

The parties agree that sec. 806.07 applies to orders for child support, and the court agrees as well, but the parties disagree whether petitioner has stated adequate grounds for relief from the prior orders.

The court allowed petitioner to file a supplemental brief and affidavit on the issue, which was filed on August 30, 1995.

Petitioner's most recent brief relies on sec. 806.07(1)(a), (1) (h), and the court's inherent authority to grant relief from a judgment other than as provided by statute.

807.06(1)(a)

As to sec. 806.07(1)(a), that provision is limited to one where a motion is filed within one year after the order was made. In oral argument on July 26, 1995, petitioner's counsel clarified that she was relying on mistake, that the court had the duty, on its own motion, to consider revision of the child support orders in the context of various contempt motions.

In Paternity of MTH v. AGR, 140 Wis. 2d 843, 484 (CA 1987), the court held that relief from a judgment may be premised on an error of the court. That case related to a stipulation for dismissal with prejudice, signed by the District Attorney without adequate review, and approved by the court, which subsequently found that the order did not properly state its intent that the dismissal be without prejudice.

I therefore withdraw my comments at hearing that the mistake must relate to a mistake on the part of one of the parties.

That case is clearly distinguishable from the present matter, in that it relates to a mechanical error, not to the failure to the court to proceed on its own motion to consider revision without request by a party.

Given that more than a year had elapsed between the granting of the several orders complained of and the motion, I conclude that relief is not available under sec. 806.07(1)(a).

806.08(1)(h)

Petitioner argues under sec. 806.07(1)(h) that reopener is authorized, and the one year limitation does not preclude such relief.

In State ex rel. MLB v. DGH, 122 Wis. 2d 536, 554 (1985), a case which involved a paternity agreement and the later exclusion of the alleged father by blood test, the Supreme Court held that:

"even if a claim sounds in sec. 806.07(1)(a)...it can be granted under subsection (h), if the circuit court concludes that extraordinary circumstances exist which justify relief from a prior...order...."@

Such "extraordinary circumstances" must justify relief "in the interest of justice", m, page 553, and directed the court to consider

- 1) whether the order was a result of conscientious, deliberate and well informed choice of the claimant;
- 2) whether the claimant received effective assistance of

counsel;

3) where there has been no judicial consideration of the merits;

4) whether there is a meritorious defense to the claim; and

5) whether intervening circumstances make it inequitable to grant relief.

Finally, it indicated that a final judgment should not be hastily disturbed, but subsection (h) should be construed to do substantial justice, m, p. 552.

Petitioner does not challenge the original 1989 order requiring payment of \$50/week as child support. She does challenge subsequent orders continuing that requirement after she was determined, on November 1, 1991, to be disabled for social security purposes. She does acknowledge that she has been employed for some periods thereafter, and specifically at the time of the March 16, 1994, hearing.

Her supplemental affidavit addresses some of those considerations.

1) she alleges, in conclusory form, that she did not make a conscious, well-informed and deliberate choice at the time of the July 14, 1992, hearing.

She cites as a basis her depression, her terror of being sent to jail, her 9th grade education, her desire to avoid going to court again, and that the court process was very confusing, intimidating and that she did not understand it.

2) Petitioner was represented at several hearings by a staff attorney from the Public Defender's office. She is correct in stating that the attorney was not able to represent her in bringing a civil motion to reopen. A collateral attack on the validity of the underlying order was possible, but not raised.

3) The merits of her reopener motion have not previously been addressed by the court, but the matter of her employability was addressed.

Part of the problem arises from petitioner's assumption that a finding of disability for social security purposes is the same as a finding that she was unable to contribute to the support of her children. Since, as indicated above, she was periodically employed, the issue may be further restricted to whether a flat dollar order, rather than an order requiring her to seek work and setting a percentage of income instead.

4) As a "meritorious defense", she argues that her SSI income could not be considered as income available for child support. It is true that, in considering whether she had the ability to contribute in a contempt hearing, SSI could not be

considered. The Commissioner agreed, as did this court. That, however, goes to the enforcement of the order, not to its validity.

5) She cites no "intervening circumstances"¹¹ other than the disability finding for social security purposes. Her periodic inability to maintain employment for health reasons again goes to enforcement, not validity.

The party seeking relief has the burden of proof that such relief is justified. While items #1 and, to a lesser extent, #2, might mitigate in favor of relief, the others do not.

I conclude that she has failed to sustain her burden of proof.

Equitable Powers

Many of the same considerations apply. Petitioner faces the same problem as most pro se litigants, lack of understanding of the law and discomfort in the court process.

I conclude that she has no right under sec. 806.07 to relief from the orders, and that, absent the court's failure to perform its "duty", if any exists, she is not entitled to equitable relief in the face of the direct limitation on modification prior to notice of the action being given.

Since the motion for relief is, as noted above, to be addressed to the court, I conclude that there was no error by the Family Court Commissioner in failing to so act.

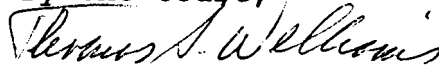
Petitioner has cited no cases which specifically discuss such a duty, but argues that since the court has the power to fashion an equitable remedy, such duty might be implied. I disagree, since the court must act impartially and cannot act in a way which makes it an advocate for one of the parties.

I further conclude that the court has no such duty, and, in fact, cannot act as an advocate.

Accordingly, the motion to vacate or reopen the various orders will be, and hereby is, denied.

Dated this 8th day of October, 1995.

By the Court,



Thomas S. Williams
Circuit Judge