COURT OF APPEALS
DECISION
DATED AND FILED

May 20, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP839 **Cir. Ct. No. 1996FA966467**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN RE THE MARRIAGE OF:

LORI JACOBSON,
P/K/A LORI GONION,

PETITIONER-RESPONDENT,

V.

DALE R. JACOBSON,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Reversed and cause remanded with directions.*

Before Curley, P.J., Wedemeyer and Kessler, JJ.

¶1 CURLEY, P.J. Dale R. Jacobson appeals the post-judgment contempt order requiring him to pay his former wife, Lori Jacobson, p/k/a Lori

Gonion, $875 per month for 120 months to satisfy a $50,000 loan from his former wife, together with accrued interest on that amount. The $50,000 loan was memorialized in the marital settlement agreement and in a signed promissory note. Neither the agreement nor the note, however, contain repayment terms or a date by which the debt had to be paid. Jacobson argues that the trial court misconstrued the language in the marital settlement agreement and related promissory note "when it created a currently due, noncontingent obligation …." Additionally, Jacobson argues that the trial court erred in finding him in contempt for failing to make payments on the loan that had no due date and that was rewritten to add terms concerning repayment as was done by the family court commissioner. Because the trial court failed to conduct a *de novo* hearing as required, pursuant to WIS. STAT. §§ 767.17 and 757.69(8) (2005-06),[1] we reverse the order of the trial court and we remand this matter to the trial court with the directive that a new hearing be conducted at which both parties testify and be allowed to present their recollections as to the repayment terms, the calculation of the interest due, and any legal defenses to the payment of the loan.

I. BACKGROUND.

¶2 Jacobson and Gonion were married on August 19, 1995.[2] Gonion filed for divorce in October 1996. The parties were divorced on October 23, 1997. A marital settlement agreement signed by both parties months earlier was approved and incorporated into the judgment of divorce. The marital settlement

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] The *pro se* divorce petition filed by Gonion reflects a marriage date of August 19, 1996. The judgment of divorce states that the parties were married on August 19, 1995.

agreement contained a clause which required Jacobson to pay back a loan from Gonion for $50,000.

Creditor	Responsible Party	Approx. Balance
….		
Lori Jacobson, f/k/a Gonion	Respondent	$50,000.00

> If Respondent pays the $50,000.00 loan he received from Petitioner to her within the three years of the signing of this agreement, there shall be no interest applied to the payment. If any portion of the $50,000.00 remains unpaid after three years, interest shall accrue on the unpaid amount at the prime rate of interest in effect at that time. Petitioner shall sign a promissory note reflecting the terms of the loan within thirty days of the signing of this Agreement.

(Formatting altered slightly from original.) Pursuant to the requirement in the marital settlement agreement, Jacobson also signed a promissory note, which reads:

> **For Value Received**, after November 19, 1999, I, Dale R. Jacobson, promise to pay Lori Gonion, at 3127 W. McKinley Blvd., Milwaukee, WI 53208, fifty thousand dollars and 00/100[] cents, with interest at the prime rate in effect on November 19, 1999.
>
> If I pay the fifty thousand dollars and 00/100 cents to Lori Gonion before November 19, 1999, no interest shall accrue. If not paid in full on or before November 19, 1999, interest shall be paid for November 19, 1996, and for every day thereafter until paid on any unpaid amount.

As can be seen, the marital settlement agreement and the note have no repayment terms and no date by which the money must be paid.

¶3 In June 2006, almost ten years after the divorce petition was filed, Gonion filed an order to show cause requesting that Jacobson be found in contempt for paying only $200 of the $50,000 loan plus interest.[3] The assistant family court commissioner calculated that the loan plus accrued interest totaled $104,915. The assistant family court commissioner found that Jacobson had the ability to pay $1000 per month, ordered that Jacobson pay $1000 per month towards the debt, and adjourned the matter for seven months to determine whether Jacobson had made the payments. No transcript of this hearing exists, only the handwritten findings of the assistant family court commissioner. Shortly thereafter, Jacobson filed a *pro se* motion requesting review of the ruling of the family court commissioner, and in the moving papers he suggested that he could only pay $50 per month.

¶4 The trial court held an abbreviated hearing at which Gonion never testified. Instead, her attorney argued her position and explained the history of the case and Gonion's version of the facts. Jacobson testified, but his testimony was brief, as the trial court prevented him from explaining his version of the circumstances surrounding the creation of the loan obligation and its insertion into the marital settlement agreement and the promissory note. When Jacobson suggested that the loan was no longer enforceable, the trial court stated that it could not act as his attorney. At the hearing's conclusion, the trial court, among its many findings, found:

[3] Jacobson denies paying $200 towards the note and claims he gave the money for different financial deals that he and his former wife had.

> I'm going to stay any finding of contempt and instead give you the following purges. You are to pay this debt as ordered pursuant to the findings of fact and conclusions of law and the judgment of divorce, which is now grown to $104,915 over the next 120 months at the rate of $875 a month. Should you fail to make three consecutive payments of $875 each, not only will that amount be subject to interest at the interest of prime rate, but it will be the basis for me to lift the stay and impose the sanction of six months in the House of Correction, straight time, no Huber release.

¶5 Despite the trial court's specifically stating on the record that it was "stay[ing] any finding of contempt," the order signed by the court stated that Jacobson "has not paid the monthly amount as ordered by the Family Court Commissioner, and based upon his ability to pay, he is in contempt of court." This appeal follows.

II. ANALYSIS.

¶6 The statutory scheme for a review when a family court dispute is initially heard by a family court commissioner is found in WIS. STAT. § 767.17.[4] It permits the decision to be reviewed under the provisions set out in WIS. STAT. § 757.69(8), which directs that:

> **Powers and duties of circuit court commissioners.**
>
> ….
>
> **(8)** Any decision of a circuit court commissioner shall be reviewed by the judge of the branch of court to which the case has been assigned, upon motion of any party. Any determination, order, or ruling by a circuit court

[4] WISCONSIN STAT. § 767.17 provides:

> **Review of circuit court commissioner decisions.** A decision of a circuit court commissioner under this chapter is reviewable under s. 757.69 (8).

> commissioner may be certified to the branch of court to which the case has been assigned, upon a motion of any party for a **hearing *de novo***.

(Bolding and italics added.)

¶7 The commonly accepted meaning of a *de novo* hearing is "[a] new hearing of a matter, conducted as if the original hearing had not taken place." BLACK'S LAW DICTIONARY 738 (8th ed. 2004). Thus, a *de novo* hearing requires the taking of testimony unless the parties enter into stipulations as to what the testimony would be. *See* ***Long v. Wasielewski***, 147 Wis. 2d 57, 61, 432 N.W.2d 615 (Ct. App. 1988) (holding that a trial court must hold an evidentiary hearing when a request is made for a *de novo* review of a family court commissioner's decision, unless the parties stipulate on all relevant items). "The trial court cannot rely exclusively on the proceedings before the assistant family court commissioner, as no record is made of that proceeding." ***Id.*** Further, Gonion's attorney's statements to the court explaining Gonion's version of the underlying facts and her reasons for waiting ten years to seek repayment are not a substitute for Gonion's testimony. An attorney's argument is not evidence. ***State v. Eugenio***, 210 Wis. 2d 347, 358, 565 N.W.2d 798 (Ct. App. 1997).

¶8 Finally, we observe that WIS. STAT. RULE 809.19(1)(d) and (e) require citations to the record, both in the "statement of facts relevant to the issues presented," and in support of the argument. We will not consider arguments that are not supported by appropriate references to the record. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994), *cert. denied*, 514 U.S. 1030 (1995). Here, there is no record of Gonion's testimony and only a very abbreviated record of Jacobson's testimony due to the court's prohibiting Jacobson from explaining his version of the facts and dismissing his attempt at setting forth

his legal argument regarding the enforceability of the note. The current state of this record makes it impossible for this court to address the issues raised in this appeal. Consequently, this court reverses the trial court's order entered following the hearing.

¶9 On remand, the trial court shall conduct a *de novo* hearing according to the requirements set forth in this opinion.

By the Court.—Order reversed and cause remanded with directions.

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