COURT OF APPEALS
DECISION
DATED AND FILED

November 5, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3031

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

IN RE THE MARRIAGE OF:

DAVID L. NICHOLS,

PETITIONER-APPELLANT,

V.

COLLEEN R. OMANN (F/K/A NICHOLS),

RESPONDENT-RESPONDENT.

APPEAL from orders of the circuit court for Waukesha County: CLAIR VOSS, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

NETTESHEIM, J. This case concerns an ongoing postdivorce child support dispute between David L. Nichols and his former wife, Colleen R. Omann. David appeals pro se from two family court orders in which the court (1) failed to compute his support obligation pursuant to the child support

guidelines, (2) found him in contempt of court for failure to pay child support, and (3) reverted the placement of the parties' eldest daughter back to Colleen from David.

We hold that the family court erroneously computed David's support obligation in a split-custody situation under the support guidelines. We reverse this portion of the orders and remand for further proceedings. However, we reject David's further challenges to the court's contempt and placement rulings. We affirm these portions of the orders.

FACTS

The facts and procedural history underlying David's appeal are lengthy and many of these proceedings are not well documented in the appellate record. David is a lawyer and was employed by a law firm at the time of his divorce from Colleen in December 1988. The parties were awarded joint custody of their three minor children and Colleen received primary placement. The parties' briefs do not advise as to David's support obligation under the judgment. And while the judgment is in the appellate record, it does not recite the amount of the support obligation. Instead, the judgment incorporates the parties' marital settlement agreement which presumably recites David's support obligation. However, the settlement agreement is not included in the record.

In 1993, David was terminated from his employment with the law firm. As a result, he started his own private law practice, but he fell behind on his support payments. This produced a series of proceedings conducted at the instance of Colleen, the family court or the guardian ad litem seeking to compel David to pay support and to monitor David's compliance with the judgment or subsequent support orders. Besides the two latest hearings which triggered this

appeal, the earlier proceedings occurred on March 9, 1993, October 26, 1993, May 9, 1994, April 18, 1995 and March 18, 1996. Although the appellate record includes the clerk's minutes of some of these earlier proceedings, it does not include the motion papers or the transcripts relating to these proceedings. In some instances, the record also fails to include the orders which resulted from these proceedings. While these proceedings did not produce the order which David appeals, they are important to an understanding of the history of this case and to the issues which David raises on this appeal.

One of these proceedings was a motion brought by Colleen on March 11, 1994, and heard by Judge Willis J. Zick on May 9, 1994. The events leading up to this hearing are unclear. In any event, the parties reached a "global stipulation" which imputed an income level of $35,000 to David and fixed his support obligation at 29 percent, or $846 of this imputed income.[1] The purpose of the stipulation was to eliminate, or at least reduce, further litigation regarding David's support obligations as long as he continued to practice law.

Thereafter, this case was assigned to Judge Clair Voss. On March 8, 1995, Judge Voss scheduled the matter for further proceedings on April 18, 1995. Although the record is unclear, it appears that this proceeding was prompted by an Order To Show Cause issued against David by the family court commissioner. Before the matter came on for a hearing, David moved for a change in the children's placement from Colleen to himself. Judge Voss heard both motions on April 18. As a result of this hearing, Judge Voss entered three orders on different dates in June 1995. The first order appointed a guardian ad litem for the children

[1] The stipulation also increased David's imputed income by 3 percent for each successive year.

and ordered the family court services to conduct an evaluation of the placement issues. The second order reduced the parties' global stipulation before Judge Zick to a written order.[2] The third order directed David to make support payments in compliance with the global stipulation and continued the Order to Show Cause on a day-to-day basis.

The next important event was a contempt proceeding before Judge Voss on March 18, 1996. Again, we do not have a record of this proceeding, but the parties agree that at this hearing David was found in contempt for failing to pay child support, that Judge Voss imposed a sanction and a purge condition, and that David satisfied the purge condition by paying $1000 to Colleen. However, the parties dispute whether Judge Voss also continued the matter to a future date for further review. By letter of July 11, 1996, Colleen's attorney reminded David of a July 15 review date. David's letter response denied that any such review date had been scheduled. Obviously, we cannot resolve this dispute because we do not have a transcript of the March 18 hearing. However, David's response letter did state that he intended to be present in court on July 17, 1996, the date on which Judge Voss had scheduled David's pending motion for change in the placement of the children.

That brings us to the proceedings which directly inspire this appeal. At the July 17, 1996 hearing, Judge Voss addressed both David's pending placement motion and the matter of David's contempt. Judge Voss changed the physical placement of the eldest child from Colleen to David. This change prompted Judge Voss to also alter David's support obligation. Under the existing

[2] The parties do not explain why it took over one year to reduce the stipulation reached before Judge Zick to a written order.

order, David was obligated to pay 29 percent of his imputed income under the global stipulation.[3] Judge Voss modified this to 19 percent of David's imputed income which produced a monthly support obligation of $570.79. David appeals this ruling.

At this hearing, Judge Voss also found David in contempt of court for failing to make the required support payments. Judge Voss sentenced David to ninety days in the county jail, but stayed the sentence on the condition that David prove his "good faith by making payments on a regular basis whatever they are." However, the written order which resulted from this hearing stated that the purge condition was that David remain "current on the regularly schedule child payments … under the existing child support order of the court." The order also said that the court may choose to not impose the sentence if David, although not current under the existing order, has nonetheless "acted in good faith and has paid reasonable amounts for child support." David also appeals this ruling.

On August 28, 1996, the guardian ad litem brought a motion seeking an order directing David to conduct a job search in the event he did not remain current in his modified child support obligation. In his supporting affidavit, the guardian ad litem stated that David was in arrears in the approximate sum of $25,000, including interest. Judge Voss conducted the hearing on this motion on October 17, 1996.

[3] This percentage is based upon the child support guidelines established under WIS. ADM. CODE § HSS 80.03(1) which provides that a payer's child support obligation for three children shall be 29 percent of the payer's base, or imputed, income. *See* WIS. ADM. CODE § HSS 80.03(1)(c).

At this hearing, Judge Voss again found David in contempt and ordered him to serve his ninety-day sentence. The judge, however, allowed David to purge the contempt if he paid $5000 towards the arrearage. The court additionally changed the physical placement of the eldest child back to Colleen from David and reinstated the original support obligation computed at 29 percent pursuant to the child support guidelines. David also appeals these rulings.

DISCUSSION

The Child Support Guidelines

David argues that Judge Voss erroneously computed his child support obligation in a split-custody situation under the child support guidelines at the July 17, 1996 hearing. Colleen's brief does not address this argument on the merits. Instead, she contends that David waived this issue by failing to raise it before Judge Voss. We disagree.

At the July 17, 1996 hearing, the parties agreed to change the primary placement of their eldest child from Colleen to David. As a result, Judge Voss understandably saw the need to modify David's support obligation to accommodate the split-custody situation. The guardian ad litem suggested that David pay 17 percent of his income based on the following reasoning:

> My thought is that considering what his imputed income and my understanding of what [Colleen] makes that they each have the placement of one child. She's got two. If she were to pay her 17 percent of the imputed income that is kind of a wash for the child that each of them has.

Thus, the guardian ad litem concluded that one child in each party's custody would cancel each other out. Since the remaining child was placed with Colleen, the guardian ad litem urged that Judge Voss should treat the situation as if the parties had one child, resulting in a 17 percent support obligation pursuant to the

guidelines for one child. After hearing both the guardian ad litem and Colleen's attorney on the question, but without prior input from David, Judge Voss agreed and directed Colleen's attorney to prepare an order accordingly.[4]

> David responded to Judge Voss' ruling stating:
>
> [N]o one asked if I had anything to say about that. I would just point out the support guidelines which indicate 25 percent of my income for the two children. It should be 17 percent of hers. Even if you do it on the imputed income basis we don't have any income figures for her.

To this Judge Voss replied, "Now if you want to impute salary to her come up here and get elected judge and you make that decision."

Colleen argues that David's statement was simply making an observation about the court's child support calculation, not objecting to it. Colleen argues that if David had raised the guideline issue with greater specificity, she, Judge Voss and the guardian ad litem would have had the opportunity to address the issue.

We disagree with Colleen. A party must register an objection with sufficient prominence such that the court understands what it is asked to rule upon. *See* ***State v. Barthels***, 166 Wis.2d 876, 884, 480 N.W.2d 814, 818 (Ct. App. 1992), *aff'd*, 174 Wis.2d 173, 495 N.W.2d 341 (1993). Here, the exchange between Judge Voss and David must be viewed in context. Judge Voss made the support ruling without input from David. That alone cuts against Colleen's waiver argument. Nonetheless, David's rejoinder to the ruling registered three complaints: (1) the court had ruled without his input, (2) the computation was

[4] Despite the guardian ad litem's request for support at the rate of 17 percent of David's imputed income, Judge Voss ordered support at the rate of 19 percent.

wrong under the guidelines, and (3) there was no basis for an imputed income figure for Colleen. Finally, we take note of Judge Voss' reply to David's statement—a remark which clearly reveals that Judge Voss understood that David was disagreeing with his ruling. Regardless of the merits of David's objection, we conclude that he properly preserved the issue for our review.

Colleen also argues that waiver is further evident from David's statement at the later October 17, 1996 hearing that he did not "have a problem with paying the percentage that the court ordered." We have two responses. First, we fail to see how David's conduct or statements at the October hearing can cancel out his sufficient objection at the July hearing when Judge Voss announced the ruling which is appealed. Second, after David made the statement upon which Colleen relies, his very next utterance was, "I would be planning to appeal that percentage, your Honor…." As such, we reject Colleen's argument that David waived this issue at the October hearing. *See* ***Air Wisconsin, Inc. v. North Cent. Airlines, Inc***., 98 Wis.2d 301, 311, 296 N.W.2d 749, 753 (1980).

We therefore turn to the merits of David's argument. As we have already noted, Colleen does not defend Judge Voss' ruling on the merits. We think this is understandable because the law does not support the ruling.

Section 767.25, STATS., governs child support. It states, in relevant part:

> **(1)** Whenever the court … enters an order or a judgment in an action under s. 767.02(1)(f) or (j) or 767.08, the court shall do all of the following:
>
> ….
>
> **(1j)** Except as provided in sub. (1m), the court shall determine child support payments by using the percentage standard established by the department under s. 49.22(9).

Section 767.25(1) and (1j). Section 49.22(9), STATS., in turn, authorizes the department to promulgate such guidelines and to do so in recognition of the "income of each parent and the amount of physical placement with each parent …."

WISCONSIN ADM. CODE § HSS 80.04 governs the determination of child support in special circumstances. Subsection (3) recites the precise method for determining child support in a split-custody situation:

> For a split-custody payer, the child support obligation may be determined as follows:
>
> (a) Determine the payer's base in accordance with s. HSS 80.03 (1) (intro.) for calculating the amount of child support.
>
> (b) Multiply the payer's base established under par. (a) by the appropriate percentage under s. HSS 80.03 (1) for the number of children in the payee's custody to determine the payer's child support obligation in dollars.
>
> (c) Determine the payee's base in accordance with s. HSS 80.03 (1) (intro.) for calculating the amount of child support.
>
> (d) Multiply the payee's base established under par. (c) by the appropriate percentage under s. HSS 80.03 (1) for the number of children in the payer's custody to determine the payee's child support obligation.
>
> (e) Subtract the smaller child support obligation from the larger to determine the reduced amount of child support owed by the parent with the larger child support obligation.

WISCONSIN ADM. CODE § HSS 80.04(3).

The calculation methodology set out in this rule is the very method which David urged in his rejoinder to Judge Voss' ruling. That methodology is not consistent with the guardian ad litem's methodology which Judge Voss accepted.

We acknowledge that a family court may deviate from the percentage standards if the court finds that the application of the standard would be unfair. *See* § 767.25(lm) and (1n), STATS. However, we do not read Judge Voss' ruling as one made under this authority. Instead, we see the ruling as one which attempted to implement the guidelines, albeit erroneously. Moreover, even if we concluded that Judge Voss was operating outside the guidelines, we see nothing in the record which demonstrates or explains why the application of the guidelines would be unfair as required by § 767.25(1m) and (1n).

Therefore, we are compelled to reverse the computation of David's child support obligation under the July 17, 1996 ruling of Judge Voss. We remand for a correct application of the child support guidelines in this split-custody situation for the period of time during which the July 17 ruling was in effect.

This, however, does not conclude our discussion of the support issue. David additionally argues that Judge Voss' support ruling rests upon an incorrect determination of David's imputed income. Because this issue will impact on the proceedings on remand, we must address it.

We reject David's argument. David overlooks that Judge Voss' support ruling was premised upon the parties' stipulation before Judge Zick as to David's imputed income. David presented no evidence in the proceedings before Judge Voss to show why he should be relieved of this stipulation pursuant to § 806.07, STATS., or that the imputation of his income was improper or unfair on any other basis. The stipulation clearly sets forth David's imputed income through 1997 for purposes of child support as long as David is practicing law. Neither the change in placement at the July hearing nor the reversion back to the original placement at the October hearing altered David's imputed income under the

stipulation. Because David presented no basis for undoing the stipulation, we conclude that Judge Voss did not err in continuing to rely upon it.

We reverse the support modification order as made by Judge Voss at the July 17, 1996 hearing. We remand for a correct computation of David's support for the period of time covered by that order.

Contempt

Next, David argues that the trial court erred in its findings of contempt at both the July 17, 1996 and October 18, 1996 hearings because he was not given notice by formal motion that these hearings would address his possible contempt. David contends that these hearings were the result of prior hearings which had been continued on a "day-to-day" basis. He argues such a procedure is not permitted unless formal notice is given by service of a formal motion.

We reject David's argument on waiver grounds. As we have noted, David's noncompliance with the various support orders and his potential contempt for such noncompliance began back in 1993. This resulted in many hearings at which this problem was addressed. What transpired at those hearings, and the basis upon which those hearings were continued is important information bearing on David's claim of lack of notice. In order to respond to David's appellate argument, this court needs a trial court record which reflects how the numerous prior hearings were scheduled, what transpired at those hearings, and the basis upon which successive proceedings were presumably scheduled at the conclusion of those hearings.

This is especially so as to the March 18, 1996 hearing which preceded the July 17, 1996 hearing. Without this information this court is unable to determine whether the July 17, 1996 contempt proceedings arose in an

imprecise fashion or whether David had a fair understanding of the manner in which Judge Voss intended to proceed at future hearings. As the appellant, it is David's responsibility to assure that the record is complete. *See* ***Fiumefreddo v. McLean***, 174 Wis.2d 10, 26, 496 N.W.2d 226, 232 (Ct. App. 1993). David has failed to do so. We will therefore assume that the missing materials would support Judge Voss' rulings, not David's argument against those rulings. *See* ***id*** at 27, 496 N.W.2d at 232.

Even absent this important history, we conclude that David has waived this issue on a further ground. The record does include the transcripts of both the July 17, and October 17, 1996 hearings which we have reviewed. While David contended that he was not in contempt, he never complained at either hearing that he had not been provided adequate notice that contempt would be an issue. Courts generally will not consider an issue raised for the first time on appeal. *See* ***Evjen v. Evjen***, 171 Wis.2d 677, 688, 492 N.W.2d 361, 365 (Ct. App. 1992). The burden is upon the party alleging error to establish by reference to the record that the error was specifically called to the attention of the trial court. *See* ***Allen v. Allen***, 78 Wis.2d 263, 270, 254 N.W.2d 244, 248 (1977). David has not done so in this case. We therefore reject his argument.

David additionally argues that he was not in violation of the purge condition imposed by Judge Voss at the July 17, 1996 hearing and that he was in further contempt when the contempt issue was addressed at the October hearing. He bases this on Judge Voss' recitation of the purge condition at the July 17, 1996 hearing. At that hearing, Judge Voss stayed the jail sentence on the condition that David prove his "good faith by making payments on a regular basis whatever they are." David also bases his argument on the written order resulting from the July hearing which states that the court in its discretion "may not impose the sentence

ordered even if [David] is not current on the regularly scheduled child support payments due if the court believes he has acted in good faith and has paid reasonable amounts for child support." David contends that because he paid $150 and $200 in child support in the months of July and August, respectively, he was in compliance with the July 17, 1996 order.

David overlooks that the written order also says that the jail sentence is stayed "so long as [David] is current on the regularly scheduled child support payments due [Colleen] under the existing child support order of the court." Where an oral pronouncement is ambiguous, it is proper to look at the written judgment to ascertain the court's intention. *See* ***State v. Lipke***, 186 Wis.2d 358, 364, 521 N.W.2d 444, 446 (Ct. App. 1994). Here, although Judge Voss' verbal statement was less than precise, given the then existing support order pursuant to the parties' global stipulation, it is clear that the judge was requiring David to comply with the standing order of the court regarding support payments. David's argument seems to contend that Judge Voss' purge condition allowed him to pay "whatever" amount of child support he wished. That, of course, is an unreasonable and absurd interpretation.

Because the evidence at the October 18, 1996 hearing established that David was not in compliance with the purge condition and was in further and continuing noncompliance with the existing child support order, we uphold the contempt findings.

Change in Physical Placement

Finally, David challenges Judge Voss' ruling at the October 17, 1996 hearing transferring primary physical placement of the eldest child back to Colleen from David.

David argues that Judge Voss erred because the order was made without advance notice or any hearing on the matter. We disagree. David's argument overlooks the context in which Judge Voss' ruling was made. Judge Voss did not address the change in the physical placement of the eldest child until after finding David in contempt and ordered him to serve his ninety-day jail sentence. A trial court ruling on an issue properly noticed will frequently have an immediate impact on related issues which require immediate attention. This is especially true in family court cases. Indeed, at the July 17 hearing, it was the change of the same child's placement from Colleen to David which made it necessary for Judge Voss to immediately adjust David's support obligation. Notably, David raised no notice objection to that ruling.

When Judge Voss determined at the October 18, 1996 hearing that David had not complied with the purge condition, David was properly required to serve the jail sentence which the judge had previously imposed as a sanction. That ruling put the safety and well-being of the eldest child at risk because David was now under a jail sentence and was not available to provide the services required of a parent with primary placement. Under those circumstances, we hold that Judge Voss properly addressed the placement issue.[5]

CONCLUSION

We conclude that Judge Voss erroneously computed David's child support obligation in a split custody situation under the support guidelines. We

[5] We note that after the close of the October 18, 1996 hearing, David paid the monetary purge condition. But that compliance does not retroactively undo the change in placement ordered by Judge Voss at the hearing. If David believes that his avoidance of the jail sentence now renders him eligible to regain placement of the eldest child, he is free to ask the court for such relief.

reverse this portion of the order and remand with directions to recalculate David's obligations in accordance with the method proscribed by WIS. ADM. CODE § HSS 80.04(3) for the limited period of time covered by the July 17, 1996 change in placement order. We affirm the portions of the orders which found David in contempt at the July 17, 1996 and October 18, 1996 hearings. We also affirm that portion of the October order which reverted primary placement of the eldest child from David to Colleen.

By the Court.—Orders affirmed in part; reversed in part and cause remanded.

Not recommended for publication in the official reports.