COURT OF APPEALS
DECISION
DATED AND FILED

October 9, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2875 **Cir. Ct. No. 00-FA-337**

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

IN RE THE MARRIAGE OF: BRYAN J. ADDIE V. CHRISTINE E. ADDIE N/K/A CHRISTINE E. FRYATT:

JEFFERSON COUNTY CHILD SUPPORT AGENCY,

APPELLANT,

V.

BRYAN J. ADDIE,

RESPONDENT.

APPEAL from an order of the circuit court for Jefferson County: JACQUELINE R. ERWIN, Judge. *Reversed and cause remanded with directions.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 DYKMAN, J. The Jefferson County Child Support Agency appeals from an order reducing Bryan J. Addie's child support obligation. Jefferson County claims that the trial court erred by concluding that equitable estoppel was

not available in child support cases. We conclude that it is, and remand for further proceedings.

FACTS

¶2 Christine Fryatt and Bryan Addie divorced on March 1, 2001. The parties share custody and placement of the two children of the marriage. The court incorporated into the divorce decree the parties' stipulation regarding maintenance and child support. The stipulation reads:

> 1. Commencing March 5, 2001, Bryan shall pay Christine the weekly sum of $310 as child support until further order of the Court. This amount equals 25% of Bryan's gross monthly income; and, notwithstanding the placement sharing schedule, is fair as child support because:
>
> (a) Christine is not employed, expects to work part-time and be a student for approximately two to three years; and,
>
> (b) Christine is permanently waiving jurisdiction for spousal maintenance.

¶3 Shortly after the divorce, Addie, who was in the business of selling used cars, was adjudged an involuntary bankrupt. He had been in the used-car business with his brother-in-law for fourteen years prior to the divorce. Because the business failed, Addie's income dropped significantly. He filed two motions to reduce his child support obligations. After a hearing, the court found that Addie had earned $5,375 in gross income per month at the time of the divorce. The court found that Addie's current earning capacity was $2,800. Addie submitted a financial statement that showed he currently earns $900 a month caring for horses.

¶4 Contrary to his agreement with Fryatt, Addie requested that the court modify the child support by applying the shared-time formula found in WIS.

ADMIN. CODE ch. DWD 40.04(2). Jefferson County argued that equitable estoppel prevented Addie from rejecting his stipulation. The trial court reasoned:

> No case relied on by the Respondent involves current child support; rather, the Petitions were for extensions or cessation of spousal maintenance or for college subsidy. Petitioner's authorities involve litigation on current child support. Because of public policy and continuing jurisdiction over children, equitable estoppel is inapplicable to current child support cases.
>
> But even if equitable estoppel was available here, the Respondent's analysis fails on the third case law requirement—by her own argument. Respondent argues that Petitioner might have grounds for modification when she enters her new profession of nursing. But what if Petitioner became disabled or unemployed due to industry recession? Or, on the other hand, could Respondent claim the agreement is illusory if Petitioner stopped taking placement of the children? Equitable estoppel does not lie.

Thus, the trial court modified the child support order by applying the shared-time formula. Jefferson County appeals.

DISCUSSION

¶5 Jefferson County asserts that the trial court erred by rejecting the use of equitable estoppel in child support proceedings. Whether equitable estoppel is available in child support cases is a question of law. ***A.M.N. v. A.J.N.***, 141 Wis. 2d 99, 105, 414 N.W.2d 68 (Ct. App. 1987). We review questions of law de novo. ***Levy v. Levy***, 130 Wis. 2d 523, 528, 388 N.W.2d 170 (1986).

¶6 Equitable estoppel may be a viable defense in child support proceedings. ***Krieman v. Goldberg***, 214 Wis. 2d 163, 178, 571 N.W.2d 425 (Ct. App. 1997). Equitable estoppel lies if (1) the parties entered into the stipulation freely and knowingly; (2) the overall settlement is fair and equitable; (3) it is not illegal or against public policy; (4) and one party subsequently seeks to be released

from the terms of the court order on grounds that the court could not have entered the order it did without the parties' agreement. ***Ondrasek v. Tenneson***, 158 Wis. 2d 690, 694-95, 462 N.W.2d 915 (Ct. App. 1990), *citing* ***Rintelman v. Rintelman***, 118 Wis. 2d 587, 596, 348 N.W.2d 498 (1984).

¶7 The trial court concluded that if it could use equitable estoppel in child support proceedings, the parties' settlement was illegal or against public policy. To support its alternate ruling, the trial court listed hypothetical circumstances that could arise under the terms of the stipulation and cause harm to the children. Under the trial court's analysis, however, any stipulation for child support would violate public policy; all stipulations are subject to such hypotheticals.

¶8 We conclude that ***Krieman*** provides the proper analysis for considering whether applying equitable estoppel would violate public policy. ***Krieman***, 214 Wis. 2d at 176-78. In ***Krieman***, we considered three factors to evaluate how the stipulation affects a child's best interest. We held that an "absolute stipulation agreement, with no time limitation or opportunity for review, is against public policy." ***Id.*** at 178. The parties in that case stipulated to set child support at a certain amount, regardless of financial changes and without a time limitation. ***Id.*** at 166. When the payor's income dropped from about $100,000 to $13,000, he moved to modify the child support order. ***Id.*** at 167-68. One of the ***Krieman*** factors, therefore, is to assess how the stipulation provides for judicial review.

¶9 ***Krieman*** also considered it against the best interest of the child if child support obligations could "impoverish the payor parent and place him or her in financial jeopardy." ***Id.*** at 178. Importantly, we refused to ignore "the reality

that a specific circumstance may require an adjustment of an agreed-upon level of support, even where the parties have entered into a stipulation agreement." ***Id.*** We did not consider the earning capacity of the payor when evaluating whether the ***Krieman*** stipulation violated public policy. Earning capacity is an appropriate way to determine the proper level of support a payor should provide under certain circumstances. However, the public policy analysis for invoking equitable estoppel in child support cases should protect the parties and their children by considering the reality of the payor's financial circumstances. ***Id.***

¶10 Finally, we concluded that the ***Krieman*** arrangement violated public policy because it "may have detrimental effects on the parent/child relationship and in this way would ultimately not serve the best interests of the child." ***Id.*** In light of these three considerations, we concluded that equitable estoppel did not lie because the stipulation violated public policy. ***Id.***

¶11 The stipulation in this case has no time limitation or opportunity for review, though it terminates when Fryatt finishes nursing school. This distinction does not render ***Krieman*** inapplicable to this case. If a case "presents a compelling change in a payor parent's ability to pay child support," then the court may not rely on equitable estoppel to suspend review of the child support order until the stipulation agreement expires. ***Id.*** A court cannot ignore a child's best interest for the sake of enforcing a bargain between the child's parents.

¶12 Jefferson County argues that when the court analyzes the public policy prong it should focus on the circumstances that existed at the time the parties entered into the stipulation. We disagree. ***Krieman*** shows that the court better serves the child's best interest by examining the reality of the current circumstances. ***Id.*** The public policy analysis would be useless if the court only

considered the circumstances that existed when the parties created the agreement; we presume that a trial court would not incorporate a stipulation into a divorce judgment if the stipulation violated public policy at the time of divorce.

¶13 We conclude that the record does not show that the trial court considered the ***Krieman*** factors. "If the trial court bases its decision upon a mistaken view of the law, it is beyond the limits of the court's discretion." ***Honore v. Honore***, 149 Wis. 2d 512, 514-15, 439 N.W.2d 827 (Ct. App. 1989) *citing* ***Schmidt v. Olsen***, 111 Wis. 2d 228, 237, 330 N.W.2d 547 (1983). Because trial courts find facts and exercise discretion, we will remand for findings and an exercise of discretion. ***See State v. Pepin***, 110 Wis. 2d 431, 435-36, 328 N.W.2d 898 (Ct. App. 1982). We do not conclude that Jefferson County is or is not entitled to an order equitably estopping Addie from repudiating his stipulation. We conclude only that the trial court erred by concluding that equitable estoppel could not be used in child support proceedings and by not considering the ***Krieman*** factors. We reverse and remand with directions to apply the policy considerations found in ***Krieman***, including the effect of any child support order on the best interests of the children.

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

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