COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2241 **Cir. Ct. No. 1992PA11A**

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

IN RE THE PATERNITY OF K.J.P.:

JEROME E. PARRISH,

PETITIONER-RESPONDENT,

V.

DIANA L. MENDOZA,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Richland County: EDWARD LEINEWEBER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Higginbotham, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Diana Mendoza appeals an order denying her motion for relief from two child support orders. Mendoza contends the trial court erroneously exercised its discretion by failing to apply the proper criteria and by basing its decision on its own experience rather than on facts of record. We agree that the trial court erred with respect to one of the child support orders and certain aspects of the other order, and therefore reverse in part and remand with directions that the trial court exercise its discretion in a manner consistent with this opinion.

BACKGROUND

¶2 The present appeal arises out of an underlying paternity action dating back to 1992, which determined Jerome Parrish to be the father of Mendoza's daughter, Kelli. In 2000, Parrish obtained primary placement of the child by stipulation. Mendoza moved to regain primary placement in August 2004, but failed to appear at a status hearing or to pay the guardian ad litem deposit. Meanwhile, Parrish moved for an unspecified amount of child support. After Mendoza failed to appear at another hearing, the trial court issued an order dated January 5, 2006, which dismissed Mendoza's motion for a change of placement due to a failure to prosecute, and also ordered her to pay $151.75 per month in child support, based on 17% of a full-time, minimum wage job. This court affirmed the January 5, 2006 default order on direct appeal.

¶3 On October 10, 2006, while her appeal was still pending, Mendoza moved to modify the child support order pursuant to WIS. STAT. § 767.32 (2003-04). The appellate record does not include a transcript from the modification hearing, and docket entries suggest that the transcript may never have been produced. However, minutes from the hearing indicate that the court admitted one exhibit which has been included in the appellate record. The exhibit was a notice

of an award from the Social Security Administration informing Mendoza that she was eligible for a monthly disability benefit from September 1, 2006, onward. The ALJ who considered Mendoza's claim rejected an assertion that her back problems met the disability criteria, but found that Mendoza's impairments due to a bipolar disorder were "severe" according to the disability criteria, and that "despite medication management and ongoing therapy, she continues to exhibit numerous symptoms, which affect her ability to perform even basic work activity." The ALJ relied upon the report of Dr. Ashraf Ahmed stating that Mendoza was "very unstable" and that her symptoms included

> appetite disturbance/weight change; illogical thinking/loosening of association; decreased energy/chronic fatigue; generalized persistent anxiety; somatization unexplained by organic disturbance; pathological dependence/passivity; difficulty thinking or concentrating; sleep disturbance; personality change; manic syndrome; recurrent panic attacks; anhedonia; hostility/irritability; mood disturbances/lability; and social withdrawal/isolation.

On November 30, 2006, the trial court issued a decision reducing the child support order to $64 per month, and set up a schedule for Mendoza to pay $1,000 in arrears by March 1, 2007, another $1,000 in arrears by September 1, 2007, and the balance of her arrears by December 11, 2007.

¶4 On April 26, 2007, Mendoza filed a motion under WIS. STAT. § 806.07 (2005-06)[1] seeking relief from both the January 5, 2006 and November 30, 2005 orders. The trial court denied the motion, concluding that there had been no substantial change in circumstances since the last order and that Mendoza had failed to establish any other basis for relief under § 806.07.

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

STANDARD OF REVIEW

¶5 WISCONSIN STAT. § 806.07(1) allows the trial court to reopen an order or judgment for various reasons, including:

> (g) It is no longer equitable that the judgment should have prospective application; or
>
> (h) Any other reasons justifying relief from the operation of the judgment.

Subsection (g) applies when there has been a change in circumstances. ***Connor v. Connor***, 2001 WI 49, ¶40, 243 Wis. 2d 279, 627 N.W.2d 182. The catchall provision in subsection (h) requires a showing of "extraordinary circumstances" taking into account:

> whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; whether the claimant received the effective assistance of counsel; whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments; whether there is a meritorious defense to the claim; and whether there are intervening circumstances making it inequitable to grant relief.

Id., ¶41 (citation omitted). We review the trial court's decision whether to reopen a judgment under the standard for discretionary decisions, considering whether the trial court reasonably considered the facts of record under the proper legal standard. ***Nelson v. Taff***, 175 Wis. 2d 178, 187, 499 N.W.2d 685 (Ct. App. 1993).

DISCUSSION

¶6 Although the parties have largely organized their briefs around the subdivisions of WIS. STAT. § 806.07 at issue, we believe it makes more sense to

organize our own analysis around each of the two orders from which Mendoza sought relief.

January 5, 2006 Order

¶7 The January 5, 2006 order denied Mendoza's motion to modify placement based on her failure to prosecute, and granted Parrish's counter-motion for child support. It went on to set support in the amount of $151.75 per month based on an application of the standard guideline amount to the minimum wage, without taking any evidence. Because this order was subsequently amended, it is no longer in effect. Therefore, WIS. STAT. § 806.07(g) dealing with prospective application is not applicable, and the only question is whether the order should have been set aside under subsection (h) based on extraordinary circumstances, thus vacating the arrearages that accumulated while the order was in effect.

¶8 The trial court did not address four of the five extraordinary circumstances factors—namely, whether Mendoza had deliberately acquiesced in the decision she was attempting to set aside; whether she had been afforded the effective assistance of counsel; whether the trial court had considered the merits of the decision before entering the order; and whether there were any subsequent circumstances which would render relief inequitable. *See* ***Connor***, 243 Wis. 2d 279, ¶41. Although the court did consider one factor—whether Mendoza in fact had a meritorious position to advance—its analysis of that factor was flawed for reasons we will discuss below and was not weighed against the other factors. Furthermore, the trial court's statement that resolution of the motion was "not about" Mendoza's lack of counsel was an error of law, since the effective assistance of counsel is one of the relevant factors. Therefore, the record does not

demonstrate that the circuit court properly exercised its discretion by applying the relevant law when denying relief from the January 5, 2006 order.

¶9 We may affirm a decision even when the trial court has relied upon the wrong rationale, if we can determine for ourselves that the facts of record provide a basis for the trial court's decision. ***State v. Gray***, 225 Wis. 2d 39, 51, 590 N.W.2d 918 (1999). However, we see no such basis here.

¶10 The first extraordinary circumstance factor favors relief because the order setting child support was entered over Mendoza's objection, not as the result of a stipulation or any other deliberate choice on her part. Nor does the record show that Mendoza's failure to appear at the child support hearing was deliberate; she called to explain that her car had broken down in Appleton on her way to the hearing from Green Bay.

¶11 The second factor favors relief because Mendoza did not have the benefit of any counsel—much less effective representation—despite her ongoing attempts to obtain an attorney. We note that the inability to afford counsel is not determinative, in and of itself. However, Mendoza's lack of counsel takes on added significance here, where Mendoza had documented mental health issues and was also unable to be present at the hearing herself, but was apparently subsequently able to obtain pro bono assistance.

¶12 The third factor also favors relief because the trial court entered an order on child support without taking any evidence on the financial circumstances of either party. Furthermore, it set child support in an amount that had not been specified in the motion, giving Mendoza no notice that she would be required to pay an amount in excess of the guideline percentage of her actual income based upon an imputed earning capacity. In other words, the merits of the child support

motion had plainly not been litigated before the trial court entered the January 5, 2006 order.

¶13 With regard to whether there was a meritorious defense to Parrish's oral request to have child support calculated based on the minimum wage, the trial court essentially stood by its original earning capacity decision, stating:

> I think that the evidence in this case does today and always has supported the finding that Ms. Mendoza is capable of seeking and maintaining some form of gainful employment. That is established in the record of Dr. Dervish [who had concluded that Mendoza's disc problems did not preclude employment involving only light lifting], it's established in her own testimony [that Mendoza was planning to seek employment because she could not pay her bills] ….
>
> Furthermore, ADHD is not a disability in and of itself on this record simply because it might exist to some extent nor is a bipolar condition. There are plenty of people who are gainfully employed who wrestle with ADHD and [have a] bipolar condition. To simply say that you have these conditions doesn't mean that you are not capable of maintaining gainful employment….

¶14 We agree with Mendoza that this discussion shows the trial court improperly substituted its own life experience for facts of record. The court had accepted the Social Security Administration's disability decision into evidence at a prior hearing, and the determination contained therein that Mendoza suffered from a severe bipolar condition that prevented her from maintaining gainful employment was uncontested by any other testimony or evidence. It is true that a court is not required to accept the credibility of even uncontested evidence. Here, however, the trial court did not cite any specific reason it had to question the credibility of the disability award or the expert opinion upon which it was based. Instead, the court simply offered its own opinion that a bipolar condition does not constitute a disability and that "plenty of people" with bipolar disorder are

gainfully employed. However, the severity of an individual's bipolar condition is a matter of expert medical opinion, not common knowledge. Similarly, the percentage of people in the general population who are able to maintain gainful employment while suffering the same degree of bipolar symptoms as Mendoza is a factual issue which cannot be determined in the absence of any evidence in the record on that subject. *See* ***State v. Sarnowski***, 2005 WI App 48, ¶¶15-16, 280 Wis. 2d 243, 694 N.W.2d 498 (court erred in using personal experience obtaining carpenter as measure for availability of carpentry work in community).

¶15 In addition, we note that the trial court reduced the child support award from $151.75 to $64 per month after taking evidence on the matter on November 7, 2006. While we do not have the transcript from that hearing, such a substantial reduction suggests in and of itself that Mendoza did in fact have some meritorious defense to the amount of child support imposed in the initial order.[2]

¶16 Finally, we do not see any facts in the record that suggest there are intervening factors which would make relief from the January 5, 2006 child support order inequitable. For instance, there is no information that Mendoza's actual income has increased or that Parrish's income has declined. The trial court did note that Mendoza testified that she was considering looking for employment. A willingness to *look* for employment, however, has no bearing on the expert

[2] Mendoza also argues that the trial court failed to consider the merits of her motion to modify placement. As we explained on the prior appeal, however, the trial court was not required to discuss the merits of that issue because it was dismissing for procedural reasons that predated the December 6, 2005 hearing.

opinion that Mendoza's bipolar disorder is severe enough to prevent her from *maintaining* gainful employment.[3]

¶17 In sum, we see no facts of record which would support denying Mendoza's motion to set aside the January 5, 2006 order under WIS. STAT. § 806.07(1)(h). Therefore, we remand with directions that the trial court grant relief from that order and vacate any arrearages which accumulated between January 5, 2006 and October 6, 2006—the effective date of the subsequent child support order.

November 30, 2006 Order

¶18 The November 30, 2006 order reduced the child support award to $64 per month. Again the trial court did not discuss the factors under subsection (h) when refusing to grant relief from that order. However, because we do not have the transcript from the hearing that preceded the November 30, 2006 order, we cannot tell how many of the "extraordinary circumstances" factors may be present. For instance, we do not know what, if any, amount of child support Mendoza may have testified that she would be able to pay, or upon what facts the trial court relied in setting the amount that it did. Since it appears from Mendoza's arguments both in the trial court and on appeal that the November 30, 2006 award may have been close to 17% of Mendoza's actual non-exempt income at that time as shown on her own exhibit, the imputed income problem discussed above would not appear to come into play, and it is not clear what other defense she may have

[3] Indeed, Mendoza's apparent inability to appear at scheduled court appearances seems entirely consistent with the expert's opinion that Mendoza would be "likely to be absent from work more than 6 times a month due to impairment related issues."

had on the merits. We therefore assume that the record supports the reduced child support award on its merits. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993) ("[W]hen an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling."). Accordingly, we affirm the trial court's refusal to grant *retroactive* relief under WIS. STAT. § 806.07(1)(h) from the November 30, 2006 order—aside from the accumulated arrears incorporated from the prior order which we have already discussed. In other words, there has been no showing on this record that Mendoza is entitled to relief from the $64 child support award in effect from October 6, 2006 (the date she moved to modify the original award) until April 26, 2007 (the date she moved for relief from both child support awards).

¶19 We next consider whether the trial court properly refused to grant *prospective* relief under WIS. STAT. § 806.07(1)(g) from the November 30, 2006 child support order. As mentioned above, that subsection applies when there has been a change of circumstances that render it no longer equitable that the order has prospective effect.

¶20 Mendoza testified at the hearing that her cognizable income had decreased from $512 to $419 a month between the November 7, 2006 and August 14, 2007 hearings. That represents an 18% drop in income. The trial court seems to have reasoned that this change in actual income was immaterial because Mendoza could still be expected to seek employment. We have already explained why that finding was contrary to the undisputed fact of record that Mendoza was receiving government disability payments because her severe bipolar disorder rendered her unable to maintain employment. Furthermore, although we cannot know the specific calculation the court used in reaching the $64 figure without the

missing transcript, the fact that the figure is well below the original minimum wage calculation the court employed suggests that the court may already have taken Mendoza's actual cognizable income into account in some fashion when setting the last child support order. If that is the case, then the significant change in Mendoza's income would indeed appear to represent a change in circumstances. We conclude that the record does not show that the trial court properly exercised its discretion in deciding whether to grant prospective relief from the November 30, 2006 order pursuant to WIS. STAT. § 806.07(1)(g). On remand, the trial court should reconsider the issue of prospective relief based upon Mendoza's actual cognizable income for child support purposes.

CONCLUSION

¶21 In sum, we affirm the trial court's refusal to grant retroactive relief from the November 30, 2006 order, but reverse its refusal to grant retroactive relief from the January 5, 2006 order and its refusal to grant prospective relief from the November 30, 2006 order. We therefore remand with directions that the court set aside any arrears that are attributable to the January 5, 2006 order and reconsider the appropriate amount of child support that should have been paid from April 26, 2007, onward, based on Mendoza's actual cognizable income.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.