COURT OF APPEALS
DECISION
DATED AND FILED

January 27, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2853 **Cir. Ct. No. 2001FA1597**

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

IN RE THE MARRIAGE OF:

THOMAS W. MOORE,

PETITIONER-APPELLANT,

V.

KATHLEEN M. KERLEE, P/K/A KATHLEEN M. BALL (MOORE),

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: DONALD J. HASSIN JR., Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Snyder, J.

¶1 PER CURIAM. Thomas W. Moore challenges the circuit court's determination that he accumulated a child support arrearage to his former spouse,

Kathleen M. Kerlee. Moore argues that the parties' April 2005 stipulation eliminated his child support obligation. We conclude that the stipulation was ambiguous, and we agree with the circuit court that the parties did not intend to eliminate Moore's monthly child support obligation. We affirm the circuit court order.

¶2 At the time of the parties' 2002 divorce, the circuit court ordered Moore to pay $900 per month in child support to Kerlee via wage assignment. In April 2005, the parties filed a pre-printed form captioned "Stipulation and Order to Amend Judgment for Support/Maintenance/Custody/Placement." In the stipulation, the parties acknowledged Moore's bi-weekly child support obligation. Paragraph 1.b. of the stipulation stated: "Child support shall be changed as follows: Thomas W. Moore shall pay $0; Thomas Moore will pay [Kerlee] directly as soon as this is amended." In paragraph 1.c.2., the stipulation stated: "Thomas W. Moore will pay me directly. Both parties go above and beyond for the children and its never been a forced issue for Thomas W. Moore to pay child support." Paragraph 2, family support, stated: "Thomas W. Moore shall pay $0, paying [Kerlee] directly." The circuit court approved the parties' stipulation without a hearing.

¶3 In September 2007, Kerlee moved the circuit court to modify child support to an amount based upon the percentage guidelines and to obtain payment of a child support arrearage. As grounds, Kerlee alleged that Moore's income had increased substantially, but he ceased paying the $900 in monthly child support based on his view that Kerlee had to repay him sums he provided to her for a house downpayment.

¶4 Kerlee testified that the original child support order was for $900 per month. When she was purchasing a house, Moore offered to provide $25,000 toward the downpayment. In exchange, Moore wanted to end his wage assignment for child support, and Kerlee agreed. However, Kerlee did not agree with Moore's determination to reduce his child support payments to $600 per month to repay the $25,000, but she acquiesced because she believed that Moore would seek to modify placement if she did not accept the reduced payments, and she could not afford to litigate such a motion. Thereafter, Moore also paid Kerlee's credit card debt and reduced his child support payment to $300 per month. In 2006, Moore made a $900 mortgage payment for Kerlee after she injured herself and could not work. Moore and Kerlee did not have any agreement to treat the various payments from Moore as loans or as a basis to reduce child support. Kerlee would not have taken the funds from Moore had she known he expected repayment. Kerlee believed the payments were gifts.

¶5 Moore testified that that he provided Kerlee with $25,000 for a downpayment on a house and $6850 to cover her credit card debt. Having provided these sums, Moore reduced his $900 monthly child support payment to $600 to recoup the funds. According to Moore, in exchange for the $25,000, Kerlee agreed to terminate the wage assignment for child support. Moore later agreed to pay off Kerlee's credit card debt, and Kerlee agreed to a further reduction in child support to $300 per month. In June 2006, Moore made a $904 mortgage payment for Kerlee. In late 2006, Moore resumed paying $600 in child support per month. Moore denied threatening that he would move to modify placement if Kerlee did not repay him.

¶6 The circuit court found that the parties agreed in 2005 to terminate the wage assignment. However, child support was the entitlement of the children,

and was not reducible to repay Moore. The court found that the downpayment, the credit card debt payment and the mortgage payment were gifts, not legal offsets against Moore's child support obligation. The court criticized Moore's use of his child support obligation as a debt collection device. The court found that Moore was $16,500 in arrears in child support and ordered him to pay $250 per month toward the arrearage. In addition, Moore would pay future support of $1100 per month.

¶7 Moore sought reconsideration arguing that the circuit court had overlooked the true meaning of the 2005 stipulation which, in Moore's view, eliminated not only the wage assignment, but his entire child support obligation. The court found that the 2005 stipulation was inconsistent: the stipulation states that Moore would pay Kerlee directly, but also expresses that amount as "$0." In the court's view, the only reasonable interpretation of the stipulation was that the $900 monthly child support payments were to be paid directly to Kerlee rather than paid via wage assignment. Both parties testified that they had agreed to terminate the wage assignment at the time they executed the stipulation. The court denied Moore's reconsideration request.

¶8 On appeal, Moore argues that the 2005 stipulation unambiguously relieved him of his $900 per month child support obligation. The construction of a stipulation presents a question of law, which we decide independently of the circuit court. ***Duhame v. Duhame***, 154 Wis. 2d 258, 262, 453 N.W.2d 149 (Ct. App. 1989). Whether the stipulation is ambiguous is also a question of law. *See* ***Rosplock v. Rosplock***, 217 Wis. 2d 22, 30, 577 N.W.2d 32 (Ct. App. 1998). Language is ambiguous if it is reasonably susceptible of more than one meaning. *See* ***Duhame***, 154 Wis. 2d at 266. Where the language of the stipulation is

ambiguous, the trial court may consider extrinsic evidence to ascertain the parties' intent. *See* ***id.***

¶9 We agree with the circuit court that the 2005 stipulation is ambiguous. The stipulation is internally inconsistent: the stipulation states that Moore shall pay Kerlee $0, but also states that Moore shall pay Kerlee directly. Because the stipulation is reasonably susceptible of more than one meaning relating to the child support obligation and/or the cessation of the wage assignment, the parties' intent was relevant.[1]

¶10 After hearing testimony, the circuit court found that Moore's miscellaneous payments were not made for the benefit of the children, and Moore's attempt to recover these amounts by reducing child support was in the nature of debt collection, an inappropriate treatment of the child support obligation. More importantly, the court found that the payments were gifts, as Kerlee testified, and that the parties had agreed to terminate the wage assignment, nothing more. These findings are not clearly erroneous, and they were based upon a credibility determination which was the circuit court's to make as the fact finder. *See* ***Wallen v. Wallen***, 139 Wis. 2d 217, 224, 407 N.W.2d 293 (Ct. App. 1987).

¶11 The findings regarding the parties' intent inform the construction of the stipulation, and the findings dovetail with the principles governing child support. Parents must support their children. ***Rottscheit v. Dumler***, 2003 WI 62, ¶31, 262 Wis. 2d 292, 664 N.W.2d 525. "[C]hild support is paid to benefit the child, not the custodial parent. The custodial parent receives support payments in trust to

[1] Moore asks us to remand to the circuit court for factfinding regarding the parties' intent. We need not do so. The court's findings are sufficient to establish the parties' intent.

be used for the child's welfare." ***J.J.G. v. L.H.***, 149 Wis. 2d 349, 358, 441 N.W.2d 273 (Ct. App. 1989). Moore's payments were gifts, and the stipulation relieved him of the wage assignment but not the child support obligation.

¶12 Moore seems to suggest that Judge Hassin, who presided over Kerlee's child support modification and arrearage motion, was bound by the 2005 stipulation approved by Judge Mawdsley. We disagree. Judge Hassin had the authority to construe the 2005 stipulation. *Cf.* ***Starke v. Village of Pewaukee***, 85 Wis. 2d 272, 283, 270 N.W.2d 219 (1978) (successor judge may modify or reverse predecessor's rulings); ***Dietrich v. Elliott***, 190 Wis. 2d 816 823-24, 528 N.W.2d 17 (Ct. App. 1995). "[T]he power to modify a judicial ruling belongs to the court, not to any individual judge." ***Dietrich***, 190 Wis. 2d at 822. The circuit court docket entries do not indicate that Judge Mawdsley held a hearing or otherwise took evidence before approving the 2005 stipulation. Therefore, Judge Hassin properly construed the stipulation as part of the subsequent child support proceedings. *See* ***Starke***, 85 Wis. 2d at 283.

¶13 Kerlee contends that this appeal is frivolous. We do not agree. The issues on appeal are not the types of issues that Moore knew or should have known were "without any reasonable basis in law or equity…." WIS. STAT. RULE 809.25(3)(c)2. (2007-08).[2]

¶14 The appellant's brief contains the required certification by counsel, Kate Neugent, that the appendix contains "portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions

[2] All subsequent references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

showing the trial court's reasoning regarding those issues." WIS. STAT. RULE 809.19(2)(b). Attorney Neugent contested whether Moore had a child support obligation after the 2005 stipulation and whether the circuit court erred in construing the 2005 stipulation. Attorney Neugent, however, did not include in the appendix copies of the relevant portion of the transcripts of the motion hearings at which these issues were addressed. These transcripts were essential to understand the issues Attorney Neugent raised, and it is self-evident that the appendix, at minimum, should have included the relevant portions of these transcripts. Consequently, we conclude that Attorney Neugent filed a false certification.

¶15 The purpose of an appendix certification is to foster increased compliance with WIS. STAT. RULE 809.19(2)(a) and thereby improve the quality of appendices filed with appellate courts. *See* ***State v. Bons,*** 2007 WI App 124, ¶21, 301 Wis. 2d 227, 731 N.W.2d 367. There, we held that "[f]iling a false certification with this court is a serious infraction not only of the rule, but it also violates SCR 20:3:3(a) (2006). This rule provides, 'A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal.'" ***Bons***, 301 Wis. 2d 227, ¶24. By attesting that counsel complied with the appendix rules when counsel did not, counsel made such a false statement. This omission places an unwarranted burden on the court and "'is grounds for imposition of a penalty or costs on a party or counsel, or other action as the court considers appropriate. WIS. STAT. § 809.83(2) (2005-06).'" ***Bons***, 301 Wis. 2d 227, ¶25. Accordingly, we sanction Attorney Neugent and direct that she pay $150 to the clerk of this court within thirty days of the release of this opinion.

By the Court.—Order affirmed.

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