Appeal No. 2010AP177 **Cir. Ct. No. 2006FA1556**

WISCONSIN COURT OF APPEALS
DISTRICT IV

IN RE THE MARRIAGE OF:

SUZANNE R. MAY,

PETITIONER-RESPONDENT,

V.

MICHAEL T. MAY,

RESPONDENT-APPELLANT.

FILED

JAN 06, 2011

A. John Voelker
Acting Clerk of
Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Vergeront, P.J., Lundsten and Blanchard, JJ.

We certify this appeal to the Wisconsin Supreme Court to consider the enforceability of child support stipulations that set a child support payment amount, and then restrict the payor's right to request downward adjustments. The published case law and our own experience suggest that these stipulations are common. However, nearly all of the case law regarding this practice comes from this court, without significant consideration of the subject by the Wisconsin Supreme Court. In addition, a recent published opinion by this court appears to be in conflict with a statement by the supreme court. Because greater clarity will be

helpful to litigants, trial courts, and the family law bar, we certify this appeal under WIS. STAT. RULE 809.61 (2007-08).[1]

The present case arises from the divorce of Michael May and Suzanne May. A January 2008 post-judgment order contained a stipulation of the parties that Michael would pay child support of $1203 per month. Michael and Suzanne further stipulated that this "shall be the minimum amount due for a period of no less than thirty-three (33) months … and Michael may not file for a reduction in that amount for the full 33 month period." Seventeen months later, in June 2009, Michael moved for a reduction in the payment amount due to an alleged involuntary loss of his employment. Suzanne opposed the motion, and the court held that the thirty-three-month floor in the stipulation was not against public policy and was otherwise enforceable. Michael now appeals.

Stipulations like the one in this case set a minimum child support amount, regardless of changes in circumstances. This practice is referred to as setting a "floor" on the support amount. The issue we certify is whether, or under what circumstances, stipulations imposing a "floor" are unenforceable because they are against public policy.

We begin by clarifying what this case is *not* about. The supreme court has already held that "ceiling" stipulations are unenforceable. A "ceiling" stipulation is one that prevents a support-receiving parent from seeking an increase in payments, regardless of changed circumstances. *See* ***Frisch v. Henrichs***, 2007 WI 102, ¶¶67-76, 304 Wis. 2d 1, 736 N.W.2d 85. Ceiling stipulations are against

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

public policy because they may deprive children of a needed increase in support, and are therefore not in the best interest of children. ***Id.***

The present case instead relates only to whether parties may stipulate to a floor below which the support amount may not go. As far as we are aware, this question has not been squarely presented to the supreme court. In ***Frisch***, the supreme court briefly addressed this point in a footnote. The court wrote: "Stipulating to a minimum amount for a limited period of time does not violate public policy because it ensures that a certain amount of child support is received, which is in the best interests of the children." ***Id.***, ¶74 n.23.

In contrast to the supreme court, this court has published several opinions in which we considered a stipulation that set a floor. In 1989, we held that a stipulation setting a child support floor did not violate public policy, but we did not discuss the policy issues in great detail. ***Honore v. Honore***, 149 Wis. 2d 512, 439 N.W.2d 827 (Ct. App. 1989). In 1997, we held that a stipulation setting a floor on child support was against public policy when it contained no time limit or opportunity for review. ***Krieman v. Goldberg***, 214 Wis. 2d 163, 173-78, 571 N.W.2d 425 (Ct. App. 1997). In 2007, we held that a stipulation was against public policy when it permanently prevented the paying parent from seeking a reduction in the support amount, even though there had been a change in placement. ***Motte v. Motte***, 2007 WI App 111, ¶¶13-20, 300 Wis. 2d 621, 731 N.W.2d 294.

All of these cases preceded the supreme court's footnote in ***Frisch***. Since that footnote, we have issued one more published decision addressing this issue, ***Jalovec v. Jalovec***, 2007 WI App 206, ¶¶10-20, 305 Wis. 2d 467, 739 N.W.2d 834.

In ***Jalovec***, we held that a stipulation setting a four-year floor on child support was against public policy. We relied in part on ***Frisch***, which we described as striking down "a stipulation requiring a four-year moratorium on litigation, including a modification of child support." ***Jalovec***, 305 Wis. 2d 467, ¶19. We further relied on ***Krieman***, which we described as saying that "a provision preventing a child support review if the payor's income changed was … against public policy." ***Jalovec***, 305 Wis. 2d 467, ¶19. We concluded that the combined result of those holdings meant the Jalovecs' stipulation was against public policy because, like ***Frisch***, it was a four-year moratorium that did not allow for changes and, like ***Krieman***, it applied regardless of the payor's reduced income.

Of all of these cases, ***Jalovec*** is arguably the closest fact situation to our present case. Here, the terms of the Mays' stipulation place a thirty-three-month floor on support that cannot be modified if, as now, the payor seeks modification due to a reduction in income. The only potentially significant difference from the facts in ***Jalovec*** is that the time period of the floor is approximately one year less. We do not see an obvious reason why that difference is sufficient, by itself, to distinguish this case from the result in ***Jalovec***.

However, ***Jalovec*** appears to be inconsistent with the supreme court's footnote in ***Frisch***. In ***Frisch***, the supreme court made the blanket statement that a child support floor of limited duration is not against public policy. The supreme court explained that, unlike ceilings, a floor "ensures that a certain amount of child support is received, which is in the best interests of the children." ***Frisch***, 304 Wis. 2d 1, ¶74 n.23. In contrast, our ***Jalovec*** decision holds that a child support floor of limited duration *was* against public policy. Our ***Jalovec***

decision does not appear to take into account the distinction drawn in ***Frisch*** between floor stipulations and ceiling stipulations.

The party challenging the stipulation in this case, Michael, also does not acknowledge the ***Frisch*** footnote, but he does dispute the policy conclusion that a support floor is necessarily in the best interest of children. Michael argues that a reduction in the payor's support amount may be in the interest of the children if both parents have placement. He argues that, if circumstances change in a way that causes support payments to reduce one parent to dire financial straits, it will impede that parent's ability to provide for the children during their placement time with that parent. Because many cases now include shared placement, he argues, it is against public policy for payor parents to enter stipulations for unchangeable support levels that may turn out to be unsustainable.

An additional reason for the supreme court to provide guidance on this subject relates to the duration of such stipulations. Michael argues that the thirty-three-month period in the stipulation is improper because that durational limit is not tied to a point in time when it would be logical to reexamine support. This argument is consistent with language in at least one of our decisions, ***Wood v. Propeck***, 2007 WI App 24, 299 Wis. 2d 470, 728 N.W.2d 757.

In ***Wood***, we interpreted our own prior decisions as holding that a support payor may agree and be bound to a floor amount of child support for a limited period of time, if the term of the limitation is short, and it is tied to a point in time when it would be logical to reexamine both parents' financial circumstances. ***Id.***, ¶20. The limited time period part of the ***Wood*** holding is supported by our decision in ***Krieman***. But the part of the duration requirement that Michael relies on—that the duration be tied to a point in time when it would

be logical to reexamine both parents' financial circumstances—is more problematic.

In ***Wood***, we did not explain why the "tied to" duration requirement is needed. Instead, we appeared to believe that the requirement had already been imposed in ***Krieman*** and ***Honore***. ***Wood***, 299 Wis. 2d 470, ¶20. We now question whether ***Wood***'s "tied to" holding accurately reflects those two cases. We do not mean to suggest that the requirement is a bad idea—only that it appears to have entered our jurisprudence without careful consideration. Thus, if the supreme court takes up the propriety of such stipulations, litigants, trial courts, and the family law bar would benefit if the court also addresses this "tied to" duration issue.

In summary, we believe that the tension between ***Jalovec*** and the ***Frisch*** footnote, and the uncertain foundation of our "tied to" duration pronouncement in ***Wood***, provide an opportunity for the supreme court to directly and fully address the issue of child support "floor" stipulations.