COURT OF APPEALS DECISION DATED AND FILED

August 27, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-3417

Cir. Ct. No. 00FA000353

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

IN RE THE MARRIAGE OF:

RANDALL G. WEBER,

PETITIONER-APPELLANT,

V.

MARY BETH WEBER,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed*.

¶1 BROWN, J.[1] This is an appeal from a contempt finding arising from an earlier divorce judgment. Randall G. Weber raises seven issues which we can distill into three. We treat each issue in seriatim fashion and affirm.

(1) Denial of Randall's Request for Adjournment

¶2 Randall's first argument concerns his request for an adjournment so that he could get a lawyer to represent him at the contempt hearing. The request was made just prior to the start of the scheduled contempt hearing and was denied by the trial court. Randall then proceeded without a lawyer.

¶3 Randall observes that the contempt hearing date had been set two days beforehand, while at a "status hearing." At this status hearing, the trial court noted that it had some free time on its calendar two days hence and set the matter for that time. Randall concedes that, at the status hearing, he had first indicated his desire to proceed pro se, thinking that the hearing would not be that complicated. He asserts, however, that the court informed Randall that the hearing was going to be significantly more complicated than Randall believed. Randall then claims that, as a result of the court's warning, he rethought his position in the two days leading up to the contempt hearing and told the court on the day of the hearing that he wanted an attorney. He further informed the court that he had been in contact with an attorney, but she was unavailable to come on short notice. Randall now argues that the trial court arbitrarily rejected his request solely for calendaring reasons. In doing so, Randall contends that the court ignored the fact that Randall had been given only two days to get a lawyer.

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(h) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶4 Randall also cites ***Phifer v. State***, 64 Wis. 2d 24, 218 N.W.2d 354 (1974), for the proposition that the trial court had an obligation to balance his right to adequate representation against the public's interest in the prompt and efficient administration of justice. He asserts that the trial court should have considered all the factors set forth in ***Phifer*** in making its balancing assessment.[2] Had the court done so, it would have determined that Randall had made no prior requests for an adjournment, his desire for counsel was genuine and based on the court's warning to him that the proceedings were significantly more complicated than he expected, and that a delay would not have significantly harmed the other party to this case, his former wife, Mary Beth Weber. He claims that the trial court did no balancing at all and therefore erroneously exercised its discretion.

¶5 First of all, it is not accurate that the trial court warned Randall at the status hearing about how the order to show cause hearing was going to be "significantly more complicated" than Randall expected. Rather, the trial court was simply responding to Randall's belief that the hearing would not take much time. Randall thought the hearing would not take long. He informed the court that "it's pretty clean-cut. I was prepared to, to do everything today, answer all the charges that they've got. And I've got documentation supporting the charges against them." But the trial court responded that "it will not take that short a time. It'll be much longer than that and you will see that when you have the hearing." The court explained to Randall that there would be direct and cross-examination of

[2] The factors are: (1) the length of delay requested; (2) whether "lead counsel" has associates prepared to try the case in his or her absence; (3) whether other continuances had been requested and received by the party; (4) the convenience or inconvenience of the parties, the witnesses and the court; (5) whether the delay seems to be for legitimate reasons, or whether the purpose is dilatory; and (6) other relevant factors. ***Phifer v. State***, 64 Wis. 2d 24, 31, 218 N.W.2d 354 (1974).

the parties and any other witnesses and that this took time and the parties would "be lucky" if the hearing lasted less than one day. So, if Randall is asserting that the court informed him how the hearing was going to be much more legally complicated than he thought, Randall is wrong. The colloquy at the status hearing had to do with the time it would take, not the level of legal complexity.

¶6 The above quotation from the record also belies Randall's assertion that he was surprised that the matter was going to be heard such a short time after the status conference. In truth, Randall wanted the matter heard that very day. He was ready to respond to all the charges that had been made against him. Randall seemed most concerned with having to take another day off from work. This is evident from the fact that Randall's only objection about holding the hearing two days after the status conference was that he would have to take time off from work. He never intimated to the court that he needed more time to prepare for examination or cross-examination. When told by the court that he would have to take time off from work regardless of when the hearing was scheduled, Randall allowed as to how the court's response was "true." When the court said it might as well be that Friday, Randall said, "Okay." So, it was not like Randall was dragged, kicking and screaming into a hearing two days after the status conference.

¶7 Now we get to the hearing date itself. The allegation is that the court did not engage in a balancing act between the right to representation and the public's right to speedy and orderly resolution of court business. First, it was not error that the trial court did not explicitly consider each of the factors outlined in ***Phifer***. That was a criminal case. In criminal cases, loss of liberty is a very real possibility and the situation therefore demands that a defendant have the right to counsel. This is a civil case. No Wisconsin case demands strict adherence to

Phifer in civil cases. This is probably because there is either no possibility of loss of liberty or the possibility is minimal compared to a criminal case.

¶8 Having said this, we do not state that there was no duty by the trial court to balance the right to assistance of counsel with the public's right to speedy resolution. After all, this was a civil contempt hearing and one of the remedies a court has in a contempt hearing is loss of liberty of the contemnor. So, we hold that the court here did have to balance Randall's right to counsel with the public's right to orderly and speedy resolution of court business. But we also hold that the court was not duty bound to consider each factor in ***Phifer***, chapter and verse.

¶9 Here, the court considered that the order to show cause was filed on March 13, 2003. Randall had notice from that day on that he was supposed to appear in person to answer the contempt charges on July 24, more than four months later. During all that time, Randall did not get an attorney. Even on the status hearing day, Randall voiced no concern about the lack of an attorney. He was fully prepared to represent himself and told the court so. Only on the day of the actual hearing did he first state his desire for legal representation. And this was in the form of a statement by him that he had called a lawyer but that lawyer was not available. Missing from the record is any statement from that lawyer that she had been, in fact, contacted by Randall much less retained by him. Also missing is any formal motion by an attorney requesting an adjournment and the reasons for it.

¶10 Moreover, Randall did not give the court a reason why he suddenly wanted an attorney when, all this time, he made no move to get one. All he said was that he felt he was "ignorant of the laws" and was "not prepared." This seems like a hollow excuse when he knew for months what the allegations were against

him, had all the paperwork to respond to those allegations, and was ready two days before to meet those allegations.

¶11 In ***Medved v. Medved***, 27 Wis. 2d 496, 501, 135 N.W.2d 291 (1965), our supreme court dealt with a divorce case where the defendant wanted an adjournment because he was unprepared to proceed. Like here, the trial court in ***Medved*** noted that the action had been pending for quite some time and that the defendant had been notified well in advance of the date he was to appear. The supreme court wrote that proceeding with trial was not a misuse of discretion where the failure to be prepared was "wholly due to [the] defendant's own fault or deliberate choice." ***Id***. As did the supreme court in ***Medved***, we will not reverse the trial court's discretionary choice to refuse to grant an outright adjournment where it was known that Randall had participated in his prior divorce action and knew the value of having an attorney, the actions culminating in the contempt proceedings had been going on a long time, he got notice of the contempt proceedings four months in advance of the court appearance and he originally said he was prepared to respond to the allegations himself.

¶12 Finally, it was not the case that the court simply refused to grant Randall an adjournment. Rather, the court indicated that it would grant an adjournment provided that Randall paid $600 in attorney fees. This was in recognition of the fact that Mary Beth's lawyer had prepared the necessary paperwork, was ready to proceed with the hearing and had no doubt prepared for the hearing. If there was going to be a delay, the court believed that Randall should pay the attorney fees in getting ready for the hearing at that point. So, Randall was given a limited right to an adjournment.

¶13 This brings us to another of Randall's objections, that it was a misuse of discretion to condition the adjournment of the hearing upon payment by him of $600. Randall cites ***State ex rel. Collins v. American Family Mutual Insurance Company***, 153 Wis. 2d 477, 489, 451 N.W.2d 429 (1990), for the proposition that there must "be a reasonable relationship between the disruption a party's misconduct causes and the sanction to be imposed as a result." He argues that the court failed to show why his wish for an attorney should require him to pay Mary Beth's lawyer $600 as a condition of adjournment. Randall calls it a "prepayment of [an] arbitrary penalty."

¶14 If Randall is arguing that a trial court may not impose attorney fees as a condition of continuance, he is wrong. WISCONSIN STAT. § 805.03 allows a court to make "such orders in regard to the failure [to prosecute or to obey any order of the court] as are just, *including but not limited to* orders authorized under s. 804.12(2)(a) Stats." (Emphasis added.) WISCONSIN STAT. § 804.12(2)(a) suggests several sanctions a trial court might consider in the interest of justice, but also echoes the flexible approach in § 805.03:

> [T]he court in which the action is pending may make such orders in regard to the failure as are just, *and among others* the following [various options listed].

Sec. 804.12 (2)(a) (emphasis added).

Section 804.12(2)(a) thus allows a court to require a party or his or her attorney to pay attorney fees caused by the party's failed duty to try the case when ordered.

¶15 Even if Randall is arguing that while the trial court may impose attorney fees, the $600 amount was arbitrary, he is wrong again. The trial court has the expertise to evaluate the reasonableness of attorney fees. ***Standard Theatres, Inc. v. DOT***, 118 Wis. 2d 730, 747, 349 N.W.2d 661 (1984). This court

concludes that the trial court adequately explained its rationale based upon the facts of record and supplemented by its own experience and expertise. The trial court is entitled to supplement the record with its own expertise and experience in these types of cases. It has greater familiarity with customary charges in the community by attorneys who practice before it. Here, the court considered the customary rate to be somewhere in the range of $120 an hour to $250 an hour, considered the time it takes to normally prepare for an order to show cause with a multitude of issues, plus the time it took to appear in court and arrived at the figure it did. Certainly, four to six hours of time by an attorney is a reasonable amount of time to prepare. We hold that the trial court did not misuse its discretion in this regard.

(2) Whether the Court Changed Child Placement Contrary to Statute and Whether the Court Erred in Changing Child Support to Reflect the Change in Shared Placement

¶16 The Marital Settlement Agreement called for shared placement. During the school year, Randall had placement for five out of every fourteen days, and in the summer, he had placement for seven out of fourteen days. His support was based on this shared placement arrangement. But he began returning the children to his former wife on Sunday prior to dinner rather than being responsible for them and returning them on Mondays. When asked by the trial court if this was true, Randall replied that it "was a mutual agreement." When asked if he agreed that he should either have to provide three meals a day on Sunday and breakfast and lunch on Monday or increase the amount of gross income for support, his only response was that he disagreed with having to pay for lunch.

¶17 Clearly, not only did he waive any change to placement, he willingly entered into the change with his former wife without court approval. All the court

was doing was approving what the parties had agreed to do. On appeal, he now claims that the court had no jurisdiction to approve this change absent a petition notifying him that such a change was being sought pursuant to WIS. STAT. § 767.325(8) and that pursuant to statutes, there would be a referral to mediation, a custody evaluation, an appointment of a guardian ad litem, a finding that Randall repeatedly and unreasonably failed to exercise placement, consideration by the trial court of the factors enumerated in WIS. STAT. § 767.24 and compliance with local court rules.

¶18 Faced with waiver because he is obviously raising all of these claims for the first time on appeal, Randall argues that the court had no subject matter jurisdiction to entertain a change in physical placement absent all of the above. He is wrong. The family court has "jurisdiction of all actions affecting the family and authority to do all acts and things necessary and proper in such actions." WIS. STAT. § 767.01. The court's interest in divorce cases and its role in approving agreements made during and after divorce proceedings are safeguarded by treating such agreements as stipulations under WIS. STAT. § 767.10(1). Included in this statute are all stipulations regarding change of placement. The trial court had jurisdiction to approve the agreement of the parties under these statutes. Randall's claim that he had no notice of the change is specious in light of his own admission that the parties had changed placement by themselves and Mary Beth's complaint in her order to show cause that a change in support should reflect the change in placement.

¶19 Randall next claims that for his stipulation to be binding, it had to be in writing, signed and filed and then approved by the court. Again, he is wrong. In ***Polakowski v. Polakowski***, 2003 WI App 20, 259 Wis. 2d 765, 657 N.W.2d 102, *review denied*, 2003 WI 32, 260 Wis. 2d 755, 661 N.W.2d 102 (Wis. Mar.

13, 2003) (No. 02-1961-FT), we explained that all divorce stipulations are subject simply to approval by the court pursuant to WIS. STAT. § 767.10(1), and the more general language of WIS. STAT. § 807.05, requiring stipulations to be in writing, signed and filed, is not applicable.

¶20 Randall then claims that there was no stipulation because the record shows that the parties did dispute physical placement. Our reading of the record is different. Randall disputed what he should pay; he never disputed the changed physical arrangement.

¶21 Now we get to child support. First, he claims he did not get notice that Mary Beth was claiming that the child support had to be changed to reflect the shared placement change and that he should have been paying that all along. We do not know how to read the order to show cause any differently than that Randall was given exactly this notice. He knew what the issues were. Second, he claims that, for the same reasons he gave as to why the court lacked jurisdiction to change placement, it also lacked jurisdiction to change support. The answer we gave to his jurisdiction argument relative to placement applies here. The court has the power to do all things necessary and proper in aid of the children of divorce. The court exercised that power here.

¶22 Next, Randall argues that the court erred in ordering the reimbursement of variable costs to be paid retroactively. He points out that there was no written order that he pay variable costs. He points out that there was no allegation that he had failed to pay that which was in the written divorce judgment. He therefore contends that the court had no authority to order that these costs be paid retroactively because to do so would be to retroactively revise and increase support contrary to WIS. STAT. § 767.32(1m).

¶23 The argument is without merit. As Mary Beth points out, the Marital Settlement Agreement established that the amount of child support assessed was based on 20.3% of Randall's gross income, reflecting the shared-time payer agreement of the parties. It takes no amount of intellectual vigor to infer that the 20.3% was calculated by applying the appropriate multiplier in the Department of Workforce Development table located in WIS. ADMIN. CODE § DWD 40.04(2)(b) based upon his placement time. It is also an easy inference that the parties and court intended by this agreement that he be obligated to pay 39% of the children's variable costs as defined in § DWD 40.02(30). That the 39% was not in writing is of no moment. The intention was to follow the DWD table. The court merely corrected the amount of variable costs to reflect the change in shared time so that the amount payable conformed to the Marital Settlement Agreement. It was not a retroactive order for support.

(3) Contempt Power in Imposing Attorney Fees

¶24 Finally, Randall argues that the trial court erroneously exercised its discretion in awarding attorney fees for the contempt action. The court ordered that he pay half the fees. Randall contends, however, that of all the allegations for contempt set forth in the order to show cause, the court only found him in contempt for two of them. He points out that the contempt statute authorizes sanctions for injuries incurred "as a result of a contempt of the court." WIS. STAT. § 785.04(1)(a). He argues that the court sanctioned him for time spent in court on noncontempt issues, without finding the amount of attorney time spent on which issues.

¶25 We disagree. Nine contempt issues plus one remedial issue were before the court. Mary Beth prevailed on nine of the issues. While many of these

issues were stipulated to by Randall, the fact remains that Mary Beth's counsel nonetheless had to prepare to present and did present these issues to the court. Moreover, the fact that the court (and counsel) spent considerable time with what Randall refers to as "noncontempt" issues makes no difference because the issues the court heard were all related to the contempt issues before the court.

¶26 Randall next argues that the amount fixed by the court was arbitrary. The court determined that Mary Beth's attorney spent 23.3 hours on the matter. Again, Randall contends that Mary Beth prevailed on only two of the issues and what the court should have done is to find the amount of time spent on preparing and presenting those two issues and based its award on that. But as we have previously observed, Mary Beth prevailed on every issue but one. The trial court was generous to Randall when it ruled that Mary Beth had prevailed on 75% of the issues and Randall had prevailed on 25% of the issues. The court then subtracted 25% from the 75% and arrived at a figure of 50% owed for attorney fees. This was not an arbitrary and capricious exercise, but one founded on reason and an expressed rationale based upon the facts of record. Randall has not cited any authority for the proposition that a court must find the amount of actual attorney fees on each issue won by the other party before assessing fees. We uphold the rationale and methodology applied by the trial court.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.