

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 18, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

No. 97-1057

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

DARRELL E. BETH,

PETITIONER-APPELLANT,

V.

**MARGARET R. BETH, N/K/A NIELSEN, AND
RACINE COUNTY CHILD SUPPORT AGENCY,**

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Racine County:
CHARLES H. CONSTANTINE, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Darrell E. Beth appeals from an order requiring him to resume paying child support and declining to award him credit for

voluntary overpayments of court-ordered child support to the Racine County Child Support Agency (the Agency). We affirm.

Darrell and Margaret R. Beth (n/k/a Nielsen) were divorced in 1980. The judgment of divorce incorporated the parties' stipulation that Darrell would pay a fixed sum of child support per week and would continue to make those payments until further order of the court. Child support continued pursuant to the stipulation although occasional disputes arose regarding those payments. In January 1997, Darrell petitioned the trial court to be relieved of the stipulated child support payments for the youngest child and to receive a credit from the Agency for what he alleged were overpayments of court-ordered child support.

In her response to the motion, Margaret stated that in March 1984, she asked Darrell to increase his child support payments. Darrell did so. However, no court order was ever submitted to memorialize this agreement. Darrell paid the increased child support amount for approximately four years. In February 1988, Darrell decided to increase child support again and paid at an increased level for an additional three years without a court order. Subsequent support orders were entered, the last one in April 1993. Margaret opposed cessation of child support and Darrell's request for a refund of child support paid in excess of court orders, even though such request for a refund was directed to the Agency, not to Margaret herself. Margaret argued that Darrell voluntarily increased his child support payments without court approval and that such amounts could not be recovered.

In a written decision¹ the trial court reviewed the parties' hearing testimony and assessed their credibility in its capacity as the fact finder. The trial court rejected Darrell's claim that he made additional child support payments to build up a credit to avoid being brought back to court for contempt of the child support order. Margaret testified that she spoke to Darrell about increasing child support and that he agreed to do so and to have his attorney draft the necessary documents to put the increase in effect. Evidence of conversations in 1988 regarding increased child support did not indicate that Darrell intended his increased child support to build up a future credit.

The court found that the parties agreed upon an increased level of child support and that any overpayments of court-ordered child support were substantially due to Darrell's voluntary increase in payments. The court found that Darrell's voluntary payments were made through the court system pursuant to the parties' agreement. Having so held, the court declined to address the issue of recovery of overpayments because the court found that no overpayment existed. Additionally, the court declined to address whether the Agency had any liability for disbursing Darrell's overpayments to Margaret. The court restarted child support payments and ordered payments toward an arrearage.

The trial court found that Margaret's testimony regarding the circumstances under which Darrell increased his child support was more credible

¹ Although a hearing was held, Darrell never filed a statement on transcript. The Racine County Child Support Agency, a respondent on appeal, designated the hearing transcript to be a portion of the record pursuant to RULE 809.16(1), STATS. However, the transcript was never filed in this court. Accordingly, we rely solely on the parties' trial court briefs and memoranda and the trial court's written decision. Furthermore, to the extent that the record on appeal is incomplete, we assume that every fact essential to sustain the trial court's decision is supported by the record. See *Suburban State Bank v. Squires*, 145 Wis.2d 445, 451, 427 N.W.2d 393, 395 (Ct. App. 1988).

than Darrell's. As the finder of fact, the trial court is the sole arbiter of witness credibility. See *Micro-Managers, Inc. v. Gregory*, 147 Wis.2d 500, 512, 434 N.W.2d 97, 102 (Ct. App. 1988). We assume that the record supports the trial court's findings regarding the agreement between Margaret and Darrell which resulted in excess child support payments. For this reason, the trial court's rejection of Darrell's contention that he was merely building up a credit is not clearly erroneous. See *id.* Because the trial court found that the additional child support payments were voluntary payments rather than credits on child support, we need not address Darrell's claim that the Agency should have retained the excess child support in lieu of forwarding it to Margaret.

Darrell essentially argues on appeal that had the Agency returned the overpayments to him, he would have been alerted that he was not accruing a credit and that a court order was required to memorialize a change in child support. We disagree that Darrell may hold the Agency responsible for the fact that he was denied credit for overpaid child support. Darrell voluntarily paid excess child support in the face of a judgment of divorce which required child support to be set by court order. Because the trial court's findings regarding Darrell's and Margaret's agreement to increase child support payments are not clearly erroneous, we need not address Darrell's claim that the Agency should have alerted Darrell that he was not accumulating a credit.

By the Court.—Order affirmed.

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