COURT OF APPEALS
DECISION
DATED AND FILED

February 8, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-1077

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

IN RE THE MARRIAGE OF RICHARD P.T.
AND SHERRY A.T., N/K/A SHERRY A.D.:

STATE OF WISCONSIN,

APPELLANT,

V.

RICHARD P.T.,

RESPONDENT.

APPEAL from an order of the circuit court for Door County: JOHN D. KOEHN, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PETERSON J. The State of Wisconsin appeals an order declaring it responsible for reimbursing Richard P.T. for child support payments. The circuit court held that Richard is entitled to be reimbursed after blood tests revealed that

one of the children he was paying child support for was not his. The State argues that the equitable defenses of estoppel and laches bar Richard's recovery. Because we agree with the circuit court that the State has suffered no harm from Richard's delay in determining his paternity, the order is affirmed.

¶2 Richard and Sherry A.T. were divorced in August 1989. Three children were born from the marriage. At the time of divorce, Sherry was pregnant with a fourth child and the court, presuming the unborn child was Richard's, provided for increased support payments from the time when that child would be born. The divorce judgment also stated: "If [Richard] is found to not be the father of the unborn child he may apply for reimbursement of child support." Brad was born in November 1989.

¶3 Sherry filed a motion to modify the divorce judgment in November 1997 claiming that Richard was not Brad's father. Genetic tests eventually confirmed her claim, and Richard sought reimbursement for the child support payments he had been making for Brad.

¶4 The State opposed Richard's request for reimbursement, apparently because Sherry had been receiving AFDC assistance.[1] The State argued that Richard was equitably estopped from recovery because equity does not aid people who sleep on their rights. Rejecting that argument, the circuit court concluded that the State could seek child support from the biological father and, therefore, would

[1] It is undisputed that Sherry had been receiving AFDC assistance while Richard was making child support payments. WISCONSIN STAT. § 49.19(4)(h)1.b (1997-98) expressly assigns to the State any right to child support that an AFDC recipient has under the statute. *See also* ***State v. William W.***, 180 Wis. 2d 708, 713-14, 510 N.W.2d 718 (Ct. App. 1993).

suffer no detriment by repaying Richard. The court ordered the State to repay the amount of child support Richard erroneously paid for Brad.

¶5 Someone who pays more support than legally required is entitled to recover the amount overpaid. *See* ***Poehnelt v. Poenhelt***, 94 Wis. 2d 640, 655-56, 289 N.W.2d 296 (1980). In ***Poehnelt***, the paternal father mistakenly paid support beyond the time when he was legally required because the divorce complaint listed his children's birthdates inaccurately. *See* ***id.*** Our supreme court characterized the receipt of support paid by mistake as unjust enrichment and held that a circuit court should allow recovery in such instances. *See* ***id.***[2]

¶6 The decision whether to grant equitable relief is within the circuit court's discretion. *See* ***Zinda v. Krause***, 191 Wis. 2d 154, 175, 528 N.W.2d 55 (Ct. App. 1995). We affirm a discretionary decision if the circuit court applied the proper law to the relevant facts of record and used a rational process to arrive at a reasonable result. *See* ***Ambrose v. Continental Ins. Co.***, 208 Wis. 2d 346, 350, 560 N.W.2d 309 (Ct. App. 1997). Here, the court reasonably exercised its discretion because it determined that the State had received child support payments from the wrong person and could now collect the payments from the natural father.

¶7 On appeal, the State claims that the equitable defenses of estoppel and laches preclude Richard from recovering the child support payments. However, both equitable defenses require a showing that the party asserting the defense suffered detriment due to unreasonable delay. *See* ***Sawyer v. Midelfort***,

[2] *See also* ***Van Offeren v. Van Offeren***, 173 Wis. 2d 482, 501-02, 496 N.W.2d 660 (Ct. App. 1992) (holding that the trial court had discretion to order the manner in which reimbursement of overpaid child support would be paid).

227 Wis. 2d 124, 159 ¶74, 595 N.W.2d 423 (1999) (laches is an equitable defense based on unreasonable delay in bringing suit under circumstances in which the delay is prejudicial to the defendant); ***Lohr v. Viney***, 174 Wis. 2d 468, 475-76, 497 N.W.2d 730 (Ct. App. 1993) (estoppel may be applied against a party whose action or inaction induced reliance by another to the party's detriment).

¶8 The State completely fails to address the circuit court finding that the State suffered no detriment because nothing prevents it from now pursuing child support from the true biological father.[3] Although the State claims it relied on Richard's payments throughout the years in not pursuing other payments, it does not develop the argument or claim that it would have any difficulty pursuing payment from the biological father now. Moreover, the record contains the clerk's notes from a June 1998 hearing indicating that the biological father is known and capable of paying child support. No evidence or argument suggests otherwise. Therefore, the circuit court did not abuse its discretion in refusing to apply the equitable defenses.

¶9 The State also raises other issues attacking the trial court's exercise of discretion. To the extent they are not repetitive, however, they are incomprehensible, undeveloped and unsupported by citation to authority. Accordingly, we do not consider these arguments. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

[3] The circuit court was correct that the State is free to pursue the biological father for child support from the date of birth even if the biological father did not know he was Brad's father. *See* ***Brad Michael L. v. Lee D.***, 210 Wis. 2d 437, 564 N.W.2d 354 (Ct. App. 1997). WISCONSIN STAT. § 767.51(4) (1997-98) provides in part: "The father's liability for past support of the child shall be limited to support for the period after the birth of the child." In ***Brad Michael L.***, this court concluded that § 767.51(4) applies retroactively to a biological father and provides liability for the period after the child's birth despite the biological father's lack of knowledge that a child of his exists. *See* ***id.*** at 449.

¶10 The dissent raises two concerns. First it notes that the State was never a party to the divorce action. However, the State appeared by counsel at the motion hearing. Although the State substantively argued against the prospect of repaying Richard, it never claimed that it was not an interested party or that it had not received adequate notice.[4]

¶11 Second, the dissent asserts that the State has never waived its sovereign immunity. However, the supreme court stated in ***Lister v. Board of Regents***, 72 Wis.2d 282, 291, 240 N.W.2d 610 (1976), that the doctrine of sovereign immunity is "procedural in nature and, if properly raised, deprives the court of personal jurisdiction over the state." The court explicitly noted that "sovereign immunity is a matter of personal jurisdiction which may be waived." ***Id.*** at 296. Again, the State appeared without raising the issue of its sovereign immunity. The State also fails to make this argument on appeal and, accordingly, we deem it waived.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[4] WISCONSIN. STAT. § 767.075(1) (1997-98) provides that, under certain circumstances, the State is a real party in interest for purposes of establishing paternity, securing reimbursement of aid paid and future support. We do not consider whether the State was necessarily a real party of interest in this case because the State appeared and substantively argued against the motion without raising any issue of notice or personal jurisdiction. The State has waived that argument.

¶12 CANE, C.J. *(dissenting).* I respectfully dissent from the majority's holding that the State is required to reimburse Richard P.T. for the amount of child support he paid for the child conceived during his marriage to Sherry A.T. My main concern is how the court can order the State to pay Richard when it has never been made a party to this divorce action nor waived its sovereign immunity.

¶13 Here, Richard, in a divorce action, was ordered to pay child support for a child conceived during his marriage. The trial court gave him the opportunity to contest paternity, but for approximately nine years he did nothing to challenge paternity. In fact, only after Sherry sought to terminate his parental rights and after the genetic tests excluded him as the father, did he assert any claim for reimbursement from both Sherry and the State.[5] We must keep in mind that the State's only connection to this case arises from the mother's receipt of AFDC benefits, as an AFDC recipient's right to child support is expressly assigned to the State.

¶14 Article IV, § 27, of the Wisconsin Constitution provides that "[t]he legislature shall direct by law in what manner and in what courts suits may be brought against the state." Thus, the State, including its arms and agencies, is immune from suit except when the legislature has consented to be sued. *See* ***Lister v. Board of Regents***, 72 Wis. 2d 282, 291, 240 N.W.2d 610 (1976). Such consent must be clearly and expressly stated. *See* ***State v. P.G. Miron***

[5] One must even question whether there is a final order in this case as the trial court never specified an amount required for the State's ordered reimbursement.

Constr. Co., 181 Wis. 2d 1045, 1052-53, 512 N.W.2d 499 (1994). For purposes of this rule, an action against a state agency is an action against the State. *See* ***Bahr v. State Invest. Bd.,*** 186 Wis. 2d 379, 387-88, 521 N.W.2d 152 (Ct. App. 1994).

¶15 Under no circumstances was the State ever made a party to the divorce action nor did it ever give consent to be sued for the child support payments Richard made to the mother under the divorce order. The State is a "party in interest" only for purposes of establishing paternity, securing reimbursement of aid paid and future support. *See* WIS. STAT. § 767.075 (1997-98). It is not a party in interest for any other purpose, such as in this instance where Richard P.T. seeks reimbursement from the State for child support overpayments. *See* ***id***. We must keep in mind that this is a divorce action, not a separate lawsuit against the State.

¶16 Also, Richard paid child support to the mother. Although this child support was assigned to the State by operation of law, all the State did in this case was supplement her assistance. In other words, the effect of AFDC was that Sherry continued to receive any payments from Richard plus additional support from the State. Thus, if there is to be any reimbursement, it should be from Sherry, not the State.

¶17 Finally, in ***Poehnelt v. Poehnelt***, 94 Wis. 2d 640, 657, 289 N.W.2d 296 (1980), the court concluded that the ex-husband was entitled to an offset or credit, rather than reimbursement, for overpayment of child support. Providing a remedy in the form of an offset or credit to be applied against the father's future payments or arrearages is logically consistent with a divorce order requiring support payments to the mother.

¶18 Without deciding whether equitable estoppel or laches bars Richard's action against the State, I would conclude that Richard's claim for reimbursement from the State is barred because it was never made a party to the divorce action and it continues to have sovereign immunity. One cannot claim sovereign immunity if it is never been made a party to the action or separately sued. Therefore, I would reverse the order requiring the State to reimburse Richard P.T. for any overpayments of child support.