COURT OF APPEALS
DECISION
DATED AND FILED

June 4, 2009

David R. Schanker
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP1359 **Cir. Ct. No. 1997FA73**

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

IN RE THE ATTORNEY FEES AND DISBURSEMENTS IN RE THE MARRIAGE OF CHRIS ELINCHEV V. MARJORIE S. ALEXANDER:

MARJORIE S. ALEXANDER,

APPELLANT,

V.

KOPP, MCKICHAN, GEYER, SKEMP & STOMBAUGH, A WISCONSIN LIMITED LIABILITY PARTNERSHIP, AND CHRIS ELINCHEV,

RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Judgment affirmed; order reversed and cause remanded with directions.*

Before Higginbotham, P.J., Vergeront and Bridge, JJ.

¶1 PER CURIAM. Marjorie Alexander appeals an order modifying child support and denying her motion for contribution of attorney fees, and a separate judgment awarding attorney fees to her former counsel. She challenges the court's calculation of child support arrearages and the date from which interest should have accrued; a modification to the parties' stipulation to share their child's medical expenses during four years of college; the denial of her request for a contribution to attorney fees; and the award of attorney fees owed to her former counsel. For the reasons discussed below, we affirm the award of attorney fees, but reverse and remand regarding Alexander's request for a contribution to those fees, as well as each of the support issues raised on appeal.

BACKGROUND

¶2 Alexander and Chris Elinchev were divorced in 1997. The court awarded Alexander primary physical placement of the parties' minor child and ordered Elinchev to pay 17% of his income in child support.

¶3 Elinchev moved to modify child support in 2005, seeking a lower rate as a result of his substantially increased income and the fact that he had two additional children. He also moved to suspend the accrual of interest. Alexander filed a number of cross-motions seeking, among other things, child support arrears and a contribution to her attorney fees. By the time the motions were decided, the parties' child was an adult and had graduated from high school.

¶4 The circuit court determined that Elinchev was entitled to the benefit of high-payor status from September 2005 through February 2006. It further determined that Elinchev had accumulated $10,317 in arrears from 2002 through 2006. The court directed that the interest on the arrears would accrue from the date of its decision. It declined to grant attorney fee contributions to either party.

¶5 Meanwhile, Alexander's attorney filed a motion seeking to withdraw and obtain a separate judgment for attorney fees. At a hearing on the motion, the court initially indicated that it would grant Alexander's request to file a written response by fax. However, upon counsel's objection and request for an immediate decision, the Court asked Alexander whether she had anything else to say, and she replied, "no." The court then directed counsel to prepare an order for judgment for the requested amount of $17,327.33, which it signed.

DISCUSSION

¶6 We begin by noting that Elinchev has not filed a response brief, despite being sent a delinquency notice warning that the failure to do so could result in the summary reversal of the judgment which is the subject of the appeal. An argument to which no response is made may be deemed conceded for purposes of appeal. ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994). We therefore take the following issues raised by Alexander to be conceded:

> (1) The trial court's calculation of the child support arrears included a typographical error. The correct amount of the arrears from 2003 was $32,887, not $32,087.
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> (2) The trial court misapplied the child support guideline for high income payers. Under the guideline, Elinchev should have been ordered to pay 17% of his monthly income up to $7,000; 14% of his monthly income from $7,000 to $12,000; and 10% of his monthly income in excess of $12,500, rather than applying the 10% rate to his entire monthly income. *See* WIS. ADMIN. CODE § DCF 150.04(5). Therefore, the correct monthly amount of support should have been $3,306, not $2,596; and the amount of arrears for 2005 was $48,532.
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> (3) The trial court erroneously terminated the child support order as of February 2006, when the child turned 18, rather than in June, when the child graduated from high school. *See* WIS. STAT. § 767.511(4). Taking into account the

> additional months, as well as the $3,306 figure described above, the amount of arrears for 2006 was $6,246. After adjusting for credits granted by the trial court, the total amount of arrears from 2002 through June of 2006 was $27,801, not $10,317.
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> (4) The trial court had no authority to suspend the accrual of interest on the arrears, which is mandated by statute. *See* WIS. STAT. § 767.511(6); ***Douglas County Child Support Enforcement Unit v. Fisher***, 200 Wis. 2d 807, 815, 547 N.W.2d 801 (Ct. App. 1996). Therefore, the trial court's direction that interest begin accruing as of the date of its decision must be reversed, and the matter remanded for a calculation of the interest required by statute.
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> (5) The trial court erroneously denied Alexander's motion for a contribution to attorney fees as having been based upon a theory of overtrial, rather than upon an allegation of need by Alexander combined with an ability to pay by Elinchev. Therefore, the trial court's denial of a contribution to Alexander's fees must be reversed and the matter remanded for further consideration consistent with factors such as those set forth in ***Franke v. Franke***, 2004 WI 8, ¶84, 268 Wis. 2d 360, 674 N.W.2d 832.
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> (6) The trial court lacked authority to modify the parties' agreement regarding the sharing of non-emergency medical expenses for their adult child through four years of college. *See* ***Rintleman v. Rintleman***, 118 Wis. 2d 587, 348 N.W.2d 498 (1984). Therefore, the challenged portion of the court's decision barring Alexander from seeking reimbursement of non-emergency medical expenses unless the care was discussed and the decision was unanimous must be reversed.

Accordingly, we reverse and remand the circuit court's order with directions that the court recalculate the arrears and interest in a manner consistent with this opinion and also reconsider Alexander's request for a contribution to attorney fees, taking into consideration the parties' respective abilities to pay, as well as the other relevant factors.

¶7 We turn then to the separate judgment awarding attorney fees. Under WIS. STAT. § 767.264(2)(a), upon allowing an attorney to withdraw in an

action affecting the family, the court shall "grant separate judgment in favor of an attorney who has appeared for the party to the action … to which the attorney … is, in the court's judgment, entitled and against the party responsible for the fees." Alexander challenges the judgment of attorney fees on two grounds. First, she claims she was denied due process because the matter was not noticed for hearing and she was unprepared as a pro se litigant to address it at the status conference. Second, she complains that counsel did not present the court with an itemized fee statement and the court never made any findings regarding the reasonableness of the fees.

¶8 With respect to the due process claim, counsel has provided a copy of the notice for the status conference, which does mention that counsel's motion to withdraw was also to be heard at that time. Alexander points out that the notice was not included in the appellate record. We agree that it would have been the better practice to supplement the appellate record, rather than merely including the document in the Respondent's appendix. However, the court also stated on the record that the hearing had been on notice with regard to counsel's withdrawal motion, and there is nothing else in the appellate record to dispute that statement by the court. Therefore, we are not persuaded that there is a factual basis for Alexander's claim that she was denied due process by lack of notice.

¶9 Alexander also claims that the trial court should have taken extra measures to ensure that she had a fair opportunity to be heard, given her pro se status and the unusual statute providing for a separate attorney fee judgment in family actions. She provides no legal authority to impose any additional obligations upon the court based upon either factor and we are not persuaded that due process so requires.

¶10 With respect to the reasonableness of the attorney fees, counsel provided an affidavit stating the total amount of fees due, and then updated that figure at the hearing while explaining that he had not been paid for a year. Alexander argues that the lack of an itemized statement prevented the court from fulfilling its obligation to consider the reasonableness of the fees. It is true the fees awarded under WIS. STAT. § 767.264(2)(a) must be those "to which the attorney … is, in the court's judgment, entitled" and this necessarily implies that the court views the fees as reasonable. However, we do not agree that the court has an obligation to consider factors or decide matters not contested by the parties. *See generally* ***Maynard Steel Casting, Co. v. Sheedy***, 2008 WI App 27, ¶¶5, 19, 307 Wis. 2d 653, 746 N.W.2d 816. Here, Alexander told the court she had nothing further to say when counsel asked for an immediate ruling on his motion to withdraw and have the court enter a judgment on fees. She did not object to the amount of the fees. To the contrary, in her subsequent motion for reconsideration of her request for a contribution to the attorney fees, she implied that the amount of the fees was reasonable given counsel's skill level. In sum, we are satisfied that the trial court could properly conclude that $17,327.33 was a reasonable fee for a year of work in the absence of any objection to that amount. We therefore affirm the judgment for attorney fees.

By the Court.—Judgment affirmed; order reversed and cause remanded with directions.

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