COURT OF APPEALS
DECISION
DATED AND FILED

June 26, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2651 **Cir. Ct. No. 00-PA-4**

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

IN RE THE PATERNITY OF LUKAS A.F.:

STATE OF WISCONSIN AND JULIE E.F.,

PETITIONERS-RESPONDENTS,

V.

JAMES R.K.,

RESPONDENT-APPELLANT.

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

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. James R.K. appeals from an order determining that he owes over $46,000 in past child support. He argues that because two previous paternity actions were dismissed, this action is barred by operation of WIS. STAT.

§ 805.04(1) (1999-2000).[1] He also claims that the trial court failed to consider the equities of the case in refusing to deviate from the percentage guidelines for support. We conclude that the action was not barred by the previous dismissals and that the trial court properly exercised its discretion in determining that application of the percentage guidelines was not unfair. We affirm the order.

¶2 James's son, Lukas, was born December 27, 1986, to Julie E.F. The State of Wisconsin initiated a paternity action against James in the circuit court for Rock county in February 1987. On the State's motion, that action was dismissed in April 1988. In May 1990, the State commenced a second paternity action against James in the circuit court for Rock county. That case was dismissed in October 1993 on the State's motion. This action was commenced in the circuit court for Walworth county in January 2000.

¶3 James moved for summary judgment dismissing this action as barred by operation of WIS. STAT. § 805.04(1). Section 805.04(1) provides in part:

> An action may be dismissed by the plaintiff without order of court by serving and filing a notice of dismissal at any time before service by an adverse party of responsive pleading or motion …. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is not on the merits, except that a notice of dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court an action based on or including the same claim.

¶4 The trial court found that the two previous actions had not been dismissed by mere notice of dismissal by the State but by a court order on a

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

motion brought under WIS. STAT. § 805.04(2).[2] James claims that this finding is clearly erroneous because he was never given notice of the motions to dismiss and therefore the dismissals were not by proper motion but on the State's unilateral application, just like a notice of dismissal contemplated in § 805.04(1).

¶5 On their face, the orders of dismissal emanate from a court and do not constitute a dismissal of the action "without order of court" as defined in WIS. STAT. § 805.04(1). The record does not establish whether the motions for dismissal were filed prior to the service of an adverse pleading, another precondition for the application of § 805.04(1).[3] The orders of dismissal do not operate against the mother because she was not named a party to either action. The orders give notice that the paternity actions were dismissed "without prejudice," and evince the intent of the dismissing court that dismissal is not on the merits. James could have sought relief under WIS. STAT. § 806.07 if he believed that the motions for dismissal had been handled improperly or should have been with prejudice. We conclude that the trial court's finding that the dismissals were not by mere notice under § 805.04(1) is not clearly erroneous. Dismissal of this action is not required by operation of § 805.04(1).

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[2] WISCONSIN STAT. § 805.04(2) provides:

> Except as provided in sub. (1), an action shall not be dismissed at the plaintiff's instance save upon order of court and upon such terms and conditions as the court deems proper. Unless otherwise specified in the order, a dismissal under this subsection is not on the merits.

[3] The trial court took judicial notice of the Rock county proceedings. We have not been provided a transcript of the hearing at which the motion to dismiss was argued. We are unable to determine if the trial court took notice of whether a responsive pleading was filed before the motion to dismiss in each of the prior Rock county actions. It is the appellant's duty to see that evidence material to the appeal is in the record. ***State v. Smith***, 55 Wis. 2d 451, 459, 198 N.W.2d 588 (1972).

¶6 The determination of back support in paternity cases is committed to the discretion of the trial court. ***State v. Alonzo R.***, 230 Wis. 2d 17, 21, 601 N.W.2d 328 (Ct. App. 1999). While a father is responsible for a child's support for all years following his or her birth under the presumptively applicable percentage standards, a court can deviate from the percentage standards if, after considering the factors set forth in WIS. STAT. § 767.51(5) (1997-98), it determines that use of the percentage standards is unfair to either the child or the requesting party. ***State v. Patrick G.B.***, 2001 WI App 85, ¶18, 242 Wis. 2d 550, 627 N.W.2d 898. In concluding that a deviation is warranted, a trial court need only consider those of the listed factors that are relevant. ***Id.*** at ¶17.

¶7 James argues that the trial court erroneously exercised its discretion by only considering the child's current exceptional needs and that, as stated by the court, "all the equity rests upon the child." James does not challenge the court's finding that the child has special needs. Rather, he asserts that the trial court should have considered the nearly fifteen-year delay in establishing support occasioned by the mother's early representations that she would seek the termination of James's parental rights to pave the way for an adoption and that she did not want support.[4] He also explains how the amount of past support creates a financial burden because he made financial choices on the assumption that no support was owed.

¶8 We cannot conclude that the trial court's determination was made in disregard of the special circumstances James advanced. The potential impact of

[4] Approximately eleven months after the child was born, the mother married and moved to Michigan. She acknowledged having spoken with James about the possibility of her husband adopting the child.

the mother's representations and the delay in seeking support was fully litigated before the trial court. The trial court sympathized and acknowledged James's precarious financial situation. It also found that James had done little to help the child. In the end, the trial court found that the mother's conduct did not overcome the child's right to adequate support and James's failure to provide support. There was nothing improper in putting the child's interests first.

¶9 Stated in another way, James argues that equitable estoppel should be applied to reduce his past support. The trial court's finding is equivalent to a determination that James's reliance on the mother's representations was unreasonable. James knew he had potentially fathered a child and he could have sought a judicial resolution of his obligation to support his child to protect against the significant exposure he now faces. For this reason, the trial court's refusal to reduce past support owed to the State is also affirmed.

¶10 In conclusion, the trial court's decision demonstrates a reasoned application of proper principles of law to the facts of the case. There was no reason to deviate from application of the percentage guidelines in setting past support.

By the Court.—Order affirmed.

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