COURT OF APPEALS
DECISION
DATED AND FILED

January 6, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-1939-FT **Cir. Ct. No. 98FA000116**

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

IN RE THE MARRIAGE OF:

GARY MARTIN KRUTKE,

PETITIONER-APPELLANT,

V.

JODI ANN KRUTKE N/K/A JODI ANN DOUGHERTY,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Jackson County: GERALD W. LAABS, Judge. *Affirmed*.

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Gary Krutke appeals a child support order. We affirm the order for the reasons discussed below.

BACKGROUND

¶2 When Krutke and Jodi Dougherty were divorced in 1999, they agreed that no child support would be paid at that time, but that Krutke would provide his 1999 financial information to Dougherty so that the issue could be reviewed in 2000. Dougherty claims that Krutke never supplied the required financial information, but she did not raise the child support issue in 2000 as contemplated by the divorce judgment.

¶3 In January of 2004, the Jackson County Child Support Agency moved for a child support order. Krutke, in turn, moved to modify placement, and the matter was set over several times to allow for attempted mediation. By the time a hearing on the child support issue was held on May 27, 2004, Krutke had been called up as a reservist and was out-of-state attending required military training in preparation for deployment to Iraq.

¶4 Krutke asked to stay the proceedings until his return from Iraq. He provided an affidavit explaining that he believed he would be prejudiced if he was not able to present testimony that he had waived maintenance and any claim to Dougherty's pension benefits in exchange for Dougherty waiving child support. The trial court refused to further delay the hearing on the child support issue by granting a stay.

¶5 There was no testimony presented at the hearing from either party. The only evidence produced was one of Krutke's pay stubs from May 12, 2004, showing his earnings prior to taking a leave of absence from his job as a police officer due to his impending military service. Both parties also filed financial disclosure statements, although Krutke's was unsigned and neither was marked as an exhibit. Krutke's attorney argued on his behalf that the terms of the divorce

judgment precluded any imposition of child support after the year 2000 and that there had been no substantial change of circumstances. He further argued that the child was not in need of additional support and that Krutke lacked the ability to pay child support. The Jackson County Child Support Agency responded that the passage of more than thirty-three months provided a sufficient change of circumstances under the statute, while Dougherty added that child support could not be permanently waived, as a matter of public policy. The trial court agreed with Dougherty and the child support agency, and imposed a child support order of $719.85 per month in accordance with the child support guidelines, based on the sole pay stub which it had before it.

DISCUSSION

¶6 We first consider whether the trial court properly denied Krutke's request for a stay. Krutke claims he was entitled to a stay under 50 App. U.S.C. § 521, which is part of the federal Servicemembers Civil Relief Act (formerly known as the Soldiers' and Sailors' Civil Relief Act). The act provides in relevant part:

> **§ 521. Protection of servicemembers against default judgments**
>
> (a) Applicability of section
>
> This section applies to any civil action or proceeding in which the defendant does not make an appearance.
>
> …
>
> (d) Stay of proceedings
>
> In an action covered by this section in which the defendant is in military service, the court shall grant a stay of proceedings for a minimum period of 90 days under this subsection upon application of counsel, or on the court's own motion, if the court determines that--

> **(1)** there may be a defense to the action and a defense cannot be presented without the presence of the defendant; or
>
> **(2)** after due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists.

Servicemembers Civil Relief Act of 1940, 50 App. U.S.C. § 521, Pub. L. No. 108-189, § 1, Stat. 2835 (amended Dec. 19, 2003).

¶7 We question in the first instance whether the act is even applicable here under sub. (a), because Krutke made an appearance by phone earlier in the action and appeared by counsel at the hearing. This does not appear to be the type of default judgment situation to which the statute applies. In any event, we are persuaded that the trial court could reasonably conclude under sub. (d)(1) that any defense Krutke might have could be presented without his actual presence at the hearing, taking into account that Krutke already had several months to gather materials and prepare for a hearing before he was called to service; he was represented by counsel; the issue was very straightforward, and relevant financial evidence could have been submitted in documentary form. Furthermore, since the testimony which Krutke claimed he wanted to present in person went primarily to the question of whether the judgment was final with respect to the nonpayment of any child support, and the trial court properly determined that the child support could not be permanently waived as a matter of law, *see* ***Ondrasek v. Tenneson***, 158 Wis. 2d 690, 695-96, 462 N.W.2d 915 (Ct. App. 1990), Krutke failed to demonstrate that his defense would be materially affected if a stay were not granted.

¶8 Krutke further complains that, even if it was proper to proceed with the hearing, the evidence Dougherty presented was insufficient to support the child

support award. What Krutke fails to acknowledge is that there were statutory presumptions in effect, and that it was his own burden to produce evidence to rebut those presumptions. First, WIS. STAT. § 767.32(1)(b) (2001-02)[1] establishes a rebuttable presumption that a substantial change in circumstances justifying a revision of child support has occurred after thirty-three months have expired since the date of the last previous child support order. It was uncontested that more than thirty-three months had passed since entry of the divorce judgment. Once it was established that a substantial change in circumstances has occurred, the court was obliged to enter an order according to the percentage standard unless the greater weight of the credible evidence showed that it would be unfair to the child or any of the parties. WIS. STAT. §§ 767.25(1j) and (1m). Since Krutke did not present any evidence at all, the trial court certainly did not err in following the percentage standard.

¶9 Nor was it improper for the trial court to apply the standard to Krutke's most recent wage information. Counsel informed the court that he had met with Krutke shortly before the hearing to fill out the financial disclosure statement, and Krutke certainly could, and should, have signed his statement and produced subpoenaed information about his current pay status in the military at that time. He cannot complain that the trial court failed to consider more recent information which he himself failed to provide.

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

By the Court.—Order affirmed.

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