COURT OF APPEALS
DECISION
DATED AND RELEASED

July 10, 1997

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.

NOTICE

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

No. 95-3376

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

In re the Marriage of:

PAMELA K. MISKULIN,
n/k/a PAMELA K. MCCONNELL,

Petitioner-Respondent,

v.

JAMES R. MISKULIN,

Respondent-Appellant.

APPEAL from an order of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Reversed and remanded with directions.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. James Miskulin appeals from the trial court's order opening a child support award pursuant to § 806.07(1)(h), STATS.[1] The issue is whether the trial court properly opened the award. We conclude that the trial court may open a child support award based on the fact that a child support payor deliberately misinformed the court about the availability of records to show the value of "in-kind" payments he was receiving from a corporation, but that the trial court failed to make sufficient findings that the motion to open was brought within a reasonable time as required by § 806.07(2). Accordingly, we reverse the order and remand for the trial court to make factual findings about the reasonableness of the time period within which the motion to open was brought. The trial court is directed to reconsider its decision opening the child support award in light of those findings.

James Miskulin and Pamela McConnell divorced in 1987. McConnell was awarded custody of the parties' four children and Miskulin was ordered to pay child support of thirty-one percent of his gross income from his primary job. In 1991, McConnell moved the trial court to clarify the gross income upon which Miskulin's child support would be calculated. Miskulin was a nurse anesthetist who worked for his own private service corporation, Bayport Anesthetists Services, Ltd., of which he was the sole employee. McConnell asked the trial court to determine what part of Bayport Anesthetists Services' gross income should not be directly attributable to him as the corporation's sole employee.

[1] The trial court did not characterize its order as an order opening the child support award pursuant to § 806.07(1)(h), STATS. However, after reviewing the trial court's order setting child support issued in 1991, we conclude that the order appealed from did in fact open that order. The 1991 order stated that child support should be set at thirty-one percent of Miskulin's gross income and that $15,000 annually should be attributed to Miskulin's wages for housing and other living costs that were paid by his company. The 1995 order amended the $15,000 figure to reflect the actual housing and other living costs paid by the corporation. As such, it opened and set aside the previous order.

At the motion hearing, Miskulin's testified that he received a salary, a daily reimbursement for living expenses and a housing allowance from the corporation that employed him. Miskulin testified that he had no idea how much his housing reimbursement was because the rent payments were made directly to the landlord on his behalf. Miskulin testified that he received $1,200 per month in living expenses to cover his food and automobile costs. In its order, the trial court added $15,000 to Miskulin's income to represent the amount Miskulin was receiving either in living and housing expenses from his employer and ordered that amount added to Miskulin's wages. Child support was set at $2,100 per month.

In December 1993, McConnell moved the court to clarify its formula for calculating Miskulin's income. She alleged that Miskulin was using the service corporation to hide his true income and that he received additional income from other corporations, which he did not report. She filed a second motion requesting that Miskulin pay child support arrearages based on her allegation that at the time of the 1991 hearing, Miskulin had misrepresented the amount of money he received from his employer for living expenses and housing and that she was only recently able to obtain accurate information because Miskulin had resisted the discovery necessary to obtain this information over a long period of time.

The trial court ruled that the actual figures for Miskulin's housing allowance were available to him at the time of the 1991 hearing and that he had not been forthcoming with information about his income and benefits during the hearing. The trial court amended the prior child support order to include the actual amount of the benefits Miskulin received.

Section 806.07, STATS., provides in relevant part:

> (1) On motion and upon such terms as are just, the court may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
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> (a) Mistake, inadvertence, surprise, or excusable neglect;
>
> …
>
> (c) Fraud, misrepresentation, or other misconduct of an adverse party;
>
> …
>
> (h) Any other reasons justifying relief from the operation of the judgment.
>
> (2) The motion shall be made within a reasonable time, and, if based on sub. (1)(a) or (c), not more than one year after the judgment was entered or the order or stipulation was made.

A trial court's order granting relief under § 806.07, STATS., will not be reversed on appeal unless the trial court misuses its discretion. ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis.2d 536, 541, 363 N.W.2d 419, 422 (1985). "The term 'discretion' contemplates a process of reasoning which depends on facts that are in the record or are reasonably derived by inference from the record and yields a conclusion based on logic and founded on proper legal standards." ***Id***. at 542, 363 N.W.2d at 422.

Although motions to open based on §§ 806.07(1)(a) and (c), STATS., must be brought within a year, the trial court has the authority to grant relief pursuant to § 806.07(1)(h) for claims which may arguably come within subsections (a) and (c) where "extraordinary circumstances" exist which constitute equitable reasons for relief. ***Id***. at 549-50, 363 N.W.2d at 425-26. Thus, the trial court had the authority to open the child support award under subsection (h), even though the claim sounded in part under subsection (c) and was brought outside the one-year time period for that section, as long

as extraordinary circumstances justifying relief in the interest of justice existed, and the motion was brought within a reasonable period of time. *See* § 806.07(2), STATS.

Because the trial court did not make factual findings regarding the reasonableness of the time period within which McConnell brought her motion and whether extraordinary circumstances existed which would justify her bringing the motion outside of the one-year time period, we remand to the trial court to make the appropriate factual findings and reconsider its decision in light of those findings.

By the Court.—Order reversed and remanded with directions.

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