COURT OF APPEALS DECISION DATED AND RELEASED

May 21, 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

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No. 96-1785

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

IN RE THE PATERNITY OF STEPHANIE A.L.:

DEBRA J.S.,

PETITIONER,

STATE OF WISCONSIN,

APPELLANT,

V.

THOMAS L.,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Winnebago County: ROBERT A. HAASE, Judge. *Affirmed.*

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

NETTESHEIM, J. This is a paternity case. The State of Wisconsin appeals from an order declaring the tax intercept statute, § 46.255(1),

STATS., 1993-94,[1] unconstitutional as applied and voiding an interception of Thomas L.'s income tax refund to pay birth expenses. We deem the issue moot. The State also challenges the trial court's award of costs to Thomas. We deem this issue waived. We affirm the order.

FACTS AND LEGISLATIVE HISTORY

On November 21, 1991, the State commenced this paternity action against Thomas L. On February 12, 1992, the State and Thomas entered into a stipulation resolving all issues. Thomas stipulated to paternity and the State agreed to hold child support in abeyance since Thomas was not then employed. In addition, the parties stipulated that Thomas was responsible for the birth medical expenses in the amount of $3301.02 which Thomas was to pay at the rate of $5 per week. However, in light of Thomas's unemployment, the stipulation also held this obligation in abeyance until Thomas obtained work. The judgment was entered on February 20, 1992, and it incorporated all provisions of the stipulation. Thereafter, Thomas obtained work and he began making the required payments on the obligation for the birth expenses. He has remained current on that obligation ever since.

At the time of the judgment, the tax intercept statute, § 46.255(1), STATS., 1991-92, provided:

> If a person obligated to provide child support or maintenance is delinquent in making court-ordered payments the clerk of court, upon application of the county designee under s. 59.07(97) or the department, shall certify the delinquent payment to the department.

[1] Section 46.255, STATS., was renumbered § 49.855, STATS., by 1995 Wis. Act 404, §§ 50 to 59, effective July 1, 1996. Section 49.855(1) differs only with respect to the agencies that make the certification or receive the certification. *See* 1995 Wis. Act 404, § 59.

Ultimately the certification becomes a lien against an obligor's state income tax refund. *See* § 46.255(3), STATS., 1991-92. At the time the judgment was entered in this case, the statute did not apply to Thomas's birth expenses obligation because the statute covered only delinquent child support or maintenance payments.

Later, the tax intercept statute was amended to its current form. As amended, the statute now reads:

> If a person obligated to provide child support or maintenance is delinquent in making court-ordered payments, *or owes an outstanding amount that has been ordered by the court for past support, medical expenses or birth expenses*, the clerk of circuit court, upon application of the county designee under s. 59.07(97) or the department, shall certify the delinquent payment or outstanding amount to the department.

Section 46.255(1), STATS., 1993-94 (emphasis added). This statute became effective June 11, 1994, and applied to outstanding amounts existing on this date regardless of when the judgment was entered. *See* 1993 Wis. Act 481, § 9326(8q).

The effect of this amendment was to broaden the reach of the former statute. The amendment retained the former statute's intercept scenario where the obligor was delinquent in child support or maintenance payments. However, the amendment created a further intercept scenario where the obligor owed an outstanding amount for past support, medical or birth expenses.

The statute further provides that any outstanding indebtedness and delinquency must be reported by the designated authorities to the department of revenue. *See* § 46.255(2), (2m) and (3), STATS., 1993-94. In late 1995, Thomas's outstanding indebtedness for the birth expenses in this case was reported to the department of revenue. Pursuant to the statute, the department notified Thomas of

the intercept and his right to a hearing before the court that issued the order. *See* ***id.*** Thomas requested and received a hearing before the circuit court.

At the hearing, Thomas argued that the debt was not outstanding because he was current on the installment payments. The State conceded this, but argued that the debt was nonetheless outstanding. Noting that the statute envisioned two intercept scenarios—delinquency or outstanding indebtedness—the State argued that if delinquency under the installment payment was required, then the outstanding indebtedness provision of the statute was rendered meaningless. The circuit court ruled in Thomas's favor, reasoning that the State could not be heard to renege on the stipulation which it had made with Thomas. The court's ruling went further, however. Although Thomas had not argued this point, the court held that the application of the statute would be an unconstitutional deprivation of due process. The court also assessed $50 costs against the Winnebago County Child Support Agency. The State appeals both the trial court's substantive ruling regarding the statute and the court's imposition of costs.

However, the issue concerning the tax intercept statute is moot because the State did not seek a stay of the circuit court's order and, as a result, Thomas has since been paid the intercepted refund. Sometimes we will address a moot issue if the issue is one of substantial importance and is likely to recur in future cases. *See* ***State v. Lipke***, 186 Wis.2d 358, 365-66, 521 N.W.2d 444, 447 (Ct. App. 1994). We acknowledge that the issue of whether the intercept statute applies where the obligor is in compliance with a stipulation calling for installment payment is one of first impression which might recur in future cases. Nonetheless, we conclude that this is not the appropriate case to address the issue. We do so for the following reasons.

First, there is a threshold question in this case as to whether the statute even applies to this case. As noted, the provisions of the current intercept statute which the State seeks to apply against Thomas's tax refund were not in existence when the judgment was entered. We recognize that the legislature stated that the amendment was to apply to outstanding amounts existing on the effective date of the amendment *regardless of when judgment was entered*. *See* 1993 Wis. Act 481, § 9326(8q). However, this attempt at retroactivity might itself be constitutionally challenged. "A statute dealing with substantive rights cannot affect rights vested on its effective date." ***State ex rel. Briggs & Stratton Corp. v. Noll***, 100 Wis.2d 650, 655, 302 N.W.2d 487, 491 (1981). Neither party addressed this threshold issue in the trial court, nor is it addressed on appeal.

Second, even if we tackled the retroactivity question, we are not satisfied that many paternity cases exist which present this unique situation—whether a pre-1994 judgment debt covered by an installment stipulation is retroactively governed by the current statute. We overlook mootness if the issue is one that "will surely recur." ***Lipke***, 186 Wis.2d at 366, 521 N.W.2d at 447.

Third, the trial court's bench decision and written findings of fact and conclusions of law do not specify the due process violation present in this case. Nor do they indicate whether the due process violation was procedural or substantive. This is perhaps understandable since Thomas did not argue that the statute, or its application, was unconstitutional. But the fact remains that we have precious little to review on this issue.

For these collective reasons we choose to not address the substantive issue regarding the interpretation of the statute or the constitutionality of its application.

That leaves the question of whether the trial court properly assessed costs against the county child support agency. The court did not specify the authority under which it assessed costs. However, § 814.245, STATS., permits an award of costs to a prevailing party against a state agency "*unless* the court finds that the state agency was substantially justified in taking its position or that special circumstances exist that would make the award unjust." The State argues that the court made no such finding in this case. In addition, the State argues that all of its duties under the tax intercept statute are mandatory and thus it was justified in "taking its position" in the trial court proceedings.

While the State is correct that the trial court did not make any finding that the State was not justified in taking its position, the State also failed to challenge the trial court's award of costs. Since the statute authorizes the trial court to award costs against a state agency and then attaches a qualifier ("unless") which revokes that authority under certain circumstances, we conclude that the State was duty bound to raise this issue with the trial court and demonstrate that it was justified in taking its position in favor of the intercept. It did not. We deem the issue waived. *See* ***State v. Hartman,*** 145 Wis.2d 1, 9-10, 426 N.W.2d 320, 323 (1988).

By the Court.—Order affirmed.

Not recommended for publication in the official reports.