COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2327

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

IN RE THE MARRIAGE OF:

TERESA THOMPSON,

PETITIONER-RESPONDENT,

V.

TODD THOMPSON,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: JOHN H. LUSSOW, Judge. *Affirmed.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Todd Thompson appeals an order denying his motion to set aside a prior order which modified his child support obligation from a percentage of income to a fixed amount. The prior order also established a

payment plan for a significant amount of arrearages after he failed to appear at the modification hearing. He claims the trial court should have granted him relief from the order because his failure to appear was the result of excusable neglect. We conclude the record supports the trial court's refusal to grant relief from the default order, and we therefore affirm.

BACKGROUND

¶2 A judgment of divorce entered in 1989 required Thompson to pay his ex-wife Teresa Clemens 25% of his gross income for child support, and to provide the appropriate Rock County officials with copies of his tax returns each year. Thompson subsequently moved to Hawaii, where a child support enforcement order was entered pursuant to the Uniform Reciprocal Enforcement of Support Act, requiring him to pay Clemens $520 per month.

¶3 Thompson worked as a carpenter for several different contractors over the years, causing his income to fluctuate from over $60,000 in 1993 to a loss of over $5,000 in 1996, the year in which he became self-employed. From 1993 through 1997, Thompson paid Clemens $520 per month, regardless of the actual amount of his income. He began missing payments in 1998, and also failed to provide a copy of his 1997 tax return.

¶4 Clemens received AFDC benefits from the State of Wisconsin from October of 1988 to February of 1992. In October 1998, Clemens and the State moved to modify the support order to a specific amount rather than a percentage of income and to establish an arrearage amount. The State claimed entitlement to some of the arrearages to recoup its AFDC payments. Thompson contacted Clemens and, in a three-way telephone conversation with Cheryl Beyer from the Rock County Child Support Enforcement Office, the parties verbally agreed that it

would be appropriate to set Thompson's current child support obligation at $520 per month. Thompson indicated during the conversation that he wanted to appear at the hearing telephonically because he could not afford to return to Wisconsin.

¶5 Thompson did not appear at the hearing, however, either telephonically or in person. The State presented evidence of Thompson's income for the years about which it had information, and made estimates of his income for 1997 and 1998 based on projections from the information it had. It informed the trial court that Thompson had been paying $520 per month under the Hawaii order, but did not mention that there was any agreement to continue payments at that amount. The trial court proceeded to set Thompson's support obligation at $733 per month. It also established arrearages due to Clemens in the amount of $28,845 and to the State in the amount of $13,879.41, and it ordered Thompson to pay $167 per month on the past obligations.

¶6 Thompson moved to strike the arrearages. At a hearing on his motion, he testified that he had not appeared at the modification hearing because he thought there was an agreement in place regarding the amount at which his support obligation would be set, and because he believed that he would be called if he was needed at the hearing. He also presented evidence to show that his business had been struggling to stay afloat, and that he could not afford to pay the amounts set in the default order. Following the hearing, the trial court expressed concern about whether its default order had been based on accurate and reliable information. The court ultimately decided not to set the order aside however, because it concluded that Thompson had sufficient notice of the hearing, and because the verbal support agreement had been nonbinding. The trial court did reduce the amount of the arrearage owed to the State to $6,258.44, based on the

State's agreement that a reduction to that amount would be appropriate. Thompson appeals.

STANDARD OF REVIEW

¶7 The trial court has discretion whether to grant relief from a judgment or order under WIS. STAT. § 806.07 (1999-2000).[1] ***Nelson v. Taff***, 175 Wis. 2d 178, 187, 499 N.W.2d 685 (Ct. App. 1993). When reviewing discretionary determinations, we limit our inquiry to whether the trial court considered the facts of record under the proper legal standard and reasoned its way to a rational conclusion. ***Burkes v. Hales***, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991). '"Because the exercise of discretion is so essential to the trial court's functioning, we generally look for reasons to sustain discretionary decisions.'" ***Id***. at 591 (citation omitted).

ANALYSIS

¶8 A trial court may properly enter a default order against a party who has failed to appear at a scheduled hearing. WIS. STAT. § 806.02(5). WISCONSIN STAT. § 806.07 allows the trial court to grant relief from a default order if the party's failure to appear was the result of excusable neglect or misrepresentation. Section 806.07(1)(a) and (c). Excusable neglect is "that neglect which might have been the act of a reasonably prudent person under the same circumstances, and is not synonymous with neglect, carelessness or inattentiveness." ***Price v. Hart***, 166 Wis. 2d 182, 194-95, 480 N.W.2d 249 (Ct. App. 1991) (citation omitted).

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

¶9 Thompson does not dispute that he failed to appear at the support modification hearing held on November 30, 1998. Rather, he argues that his failure to appear was excusable because he believed that there was already an agreement in place regarding the figure at which support was to be fixed, and because he was led to believe that he would be contacted to appear at the hearing by telephone if it was necessary. He also claims the trial court was misled about the reason for his failure to appear.

¶10 Thompson's contentions are flawed in several respects. Although it appears there was a verbal agreement that Thompson's ongoing support obligation would be fixed at $520 per month,[2] there was no agreement as to the amount of the arrearages. Thompson had notice that the arrearage question would be addressed at the hearing, and he was informed that he was supposed to provide documentation about his income in order to establish the amount of the arrearages.[3] Therefore, his expressed belief that there was an agreement as to the amount of ongoing child support does not explain, much less excuse, his failure to appear at the hearing.

¶11 Thompson's residence in Hawaii does suggest why it was impractical for him to appear at the hearing in person. It does not, however, explain why he could not have appeared telephonically as he told Clemens and Cheryl Beyer that he wanted to do. Thompson asserts that Beyer informed him that he would be contacted by telephone if it was necessary for him to be present

[2] Thompson concedes that this verbal agreement was nonbinding.

[3] He testified that he did not receive the affidavit of income forms from the Family Court Commissioner in time to be able to return them before the hearing.

at the hearing.[4] However, Beyer's notes of their conversation indicated that she referred Thompson to a secretary in the Family Court Commissioner's office to set up the telephone contact. From the trial court's ruling, we must infer that it found Beyer's recorded recollection of the conversation to be the more accurate account.

¶12 There was therefore no basis for the trial court to conclude that Beyer had misled Thompson about his need to appear, or that the child support counsel had subsequently misled the court as to the reason for Thompson's nonappearance. As we have previously noted:

> A party failing to appear in court does so at its own peril. A party cannot choose to not appear in court by pronouncing that unless it hears from the court otherwise, it deems itself excused. [Such notification] is insufficient to excuse a party from appearing and, as this case shows, is a dangerous practice.

Buchanan v. General Cas. Co., 191 Wis. 2d 1, 11, 528 N.W.2d 457 (Ct. App. 1995).

¶13 Thompson also argues that the trial court erroneously exercised its discretion by focusing on the narrow questions of whether he had notice of the hearing and whether the verbal support agreement was actually binding, rather than on the broader issue of whether his misunderstandings about the nature of the parties' agreement and the steps necessary for him to appear telephonically constituted excusable neglect. We note, however, that Thompson did not cite either WIS. STAT. § 806.07 or the standard for excusable neglect in his motion or

[4] It appears that the hearing which Beyer and Thompson were discussing was a status hearing which was scheduled for November 6th before Court Commissioner Nancy Welch. For the sake of argument, however, we will accept Thompson's assertion that he believed their discussion applied to the ultimate hearing on November 30th as well.

letter brief to the trial court. We therefore see no basis for Thompson to complain about any lack of specificity in the trial court's decision. *See* ***State v. Rogers***, 196 Wis. 2d 817, 826, 539 N.W.2d 897 (Ct. App. 1995) ("[A] party seeking reversal may not advance arguments on appeal which were not presented to the trial court.").

¶14 In sum, we are satisfied from the record that the trial court properly considered the factors most relevant to Thompson's motion for relief from the modified support order, and that its decision was within the bounds of its discretion.

By the Court.—Order affirmed.

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