COURT OF APPEALS
DECISION
DATED AND FILED

August 5, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2701 **Cir. Ct. No. 03FA000073**

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

IN RE THE MARRIAGE OF:

TODD W. DUMMER,

PETITIONER-APPELLANT,

V.

MARY LYNN DUMMER,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Rock County: JAMES E. WELKER, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Deininger, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM. Todd Dummer appeals an order denying his motion for a change in the placement schedule for his children and requiring him

to pay a substantial amount in child support arrearages. For the reasons discussed below, we affirm the arrearage determination but reverse and remand on the issue of placement.

Placement Schedule

¶2 At the time of the divorce, Todd lived in Sauk County and Mary lived in Rock County. After Todd moved to Rock County, he moved for a change of placement. The parties agreed that their closer proximity constituted a substantial change of circumstances. The trial court, however, refused to accept their stipulation and concluded that Todd's move did not constitute a substantial change of circumstances. The court therefore did not consider whether a change of placement would be in the best interest of the children. Both parties object.

¶3 Regardless whether it was proper for the trial court to refuse to accept the parties' agreement, we conclude that Todd's move did constitute a substantial change of circumstances as a matter of law. *See* ***Keller v. Keller***, 2002 WI App 161, ¶7, 256 Wis. 2d 401, 647 N.W.2d 426 ("Whether a 'substantial change of circumstances' has occurred is a legal question."). The original placement schedule was predicated on the parents living in different counties. Now that they live only a few miles from one another, it may be substantially easier to arrange custody transfers. We therefore remand this issue with directions that the trial court hold a hearing to determine whether a new placement schedule would be in the best interest of the children under WIS. STAT. § 767.325(1)(b) (2001-02).[1]

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

Child Support

¶4 The divorce judgment entered in 1998 stated, "Upon stipulation of the parties, the petitioner shall pay the sum of $420.00 per month or $210.00 per pay period to the respondent for the support and care of the parties two minor children." An order for income withholding at the set amount of $210 twice a month was filed July 14, 1998.

¶5 About two years after the divorce judgment was entered, Mary moved for an order requiring recalculation of Dummer's child support for 1999 based upon the child support guidelines. The trial court issued an order calculating an arrearage, stating that Todd's "support obligation for 1999 and following years, until further order of the court, shall be based upon 25% of his gross income." Apparently, neither party was ever sent a copy of the order, however, and Todd's wage assignment was not converted to a percentage. He therefore continued paying the set amount specified in the divorce judgment.

¶6 In 2003, Mary moved for a modification of child support based upon Todd's increased earnings. Her affidavit stated that Todd had been ordered to pay $420 per month. At the final hearing, however, Mary asked for arrearages based on a percentage of Todd's income. The trial court awarded the arrearages based on the 2000 order.

¶7 Todd complains that the arrearage determination represents a retroactive determination of child support prohibited by WIS. STAT. § 767.32. We disagree with his characterization of the record. The trial court was not retroactively increasing Todd's support obligation, but rather calculating the amount already due under a prior order of the court.

¶8 Although the apparent confusion surrounding the entry of the 2000 order is unfortunate, Todd was present at the hearing at 2000, and therefore should have been on notice that an order was forthcoming. It was his responsibility to obtain a copy of that order and appeal it if he felt aggrieved by the change from a fixed amount of child support to a percentage award. He did not do so. Nor has he provided this court with a transcript of the 2000 hearing. We therefore have no basis to determine that there was anything improper in the modification of the child support order at that time. Based on the 2000 order, the trial court properly determined that Todd had accumulated child support arrearages.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

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