

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 12, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP508-FT

Cir. Ct. No. 2008FA196

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

MITZI A. WIRTZ,

PETITIONER-RESPONDENT,

V.

STEVEN P. WIRTZ,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Shawano County:
THOMAS G. GROVER, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Steven Wirtz appeals an order regarding child support. He asserts the court had no authority to sua sponte modify child support and he was not “properly put on notice” for the hearing. We affirm.

BACKGROUND

¶2 Steven and Mitzi Wirtz were divorced in 2009 and have two minor children.² The divorce judgment, which incorporated the marital settlement agreement, required Steven to satisfy a number of debts and remove Mitzi’s name from other financial obligations. Steven and Mitzi agreed to share placement of their children, with one child residing primarily with Mitzi and the other residing primarily with Steven. As for child support, the judgment provided:

The husband’s child support obligation would be \$213.12 per month. This amount represents a calculation ... based upon an equal placement schedule for both children. The wife currently is waiving any claim for child support in order to assist the husband in meeting the financial obligations as set forth herein. Wife reserves the right to request child support to be established and paid by the husband at any time.

¶3 In 2010, Mitzi filed a notice of motion and motion for contempt against Steven. Her motion was supported by an affidavit, which outlined bills Steven failed to pay and debts that continued to be listed in Mitzi’s name. In addition, Mitzi stated:

I am requesting that due to the contempt on the part of the Respondent, I am asking the Court to institute the child

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). This is also an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

² One child has since reached the age of majority.

support which could have been ordered and which should now be imposed requiring the Respondent to pay child support to me for our minor children. At the time [of] the divorce, I waived my right to claim child support to assist the Respondent in meeting the financial obligations ... that he was ordered to pay I am asking the Court to order that the Respondent pay child support to me.

¶4 In response, Steven averred, in part, that “[he has] no ability to pay child support at this time.” At the contempt hearing, in support of her request for child support, Mitzi testified that both children were living with her. Steven explained that, although he has not given up placement, his sons wanted to attend a specific school and he “supported them even though [he] wasn’t going to be able to see them as much.”

¶5 The court found Steven in contempt. It also ordered Steven to pay Mitzi child support in the amount of twenty-five percent of his unemployment compensation.

DISCUSSION

¶6 On appeal, Steven argues the court had no authority to sua sponte modify child support. He contends Mitzi needed to file a modification motion to properly put him on notice for the hearing.

¶7 Steven first asserts the circuit court sua sponte modified child support. We disagree. Mitzi requested child support in her affidavit, which was attached to and referenced in her contempt motion—there was no sua sponte modification.

¶8 Steven next argues that because Mitzi’s contempt motion did not request child support,³ it was insufficient to “properly put him on notice” for the hearing. Steven’s argument places form over substance. “We decline to place form over substance when logic commands an answer.” *See State v. Imani*, 2010 WI 66, ¶34 n.11, 326 Wis. 2d 179, 786 N.W.2d 40; *see also Sheboygan Cnty. Dept. of Health & Human Servs. v. Tanya M.B.*, 2010 WI 55, ¶48, 325 Wis. 2d 524, 785 N.W.2d 369.

¶9 Here, regardless of the form of Mitzi’s request, Steven had actual notice Mitzi was requesting child support. Her affidavit, which was attached to and referenced in her motion, contained an unequivocal request for child support. In fact, prior to the hearing, Steven responded to Mitzi’s request with his own affidavit, in which he averred, “[He has] no ability to pay child support at this time.” By his own statement, then, it is apparent Steven knew child support would be an issue at the hearing.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

³ WISCONSIN STAT. § 797.59(1c) provides a court may modify child support “on the petition, motion, or order to show cause of either of the parties.”

