COURT OF APPEALS
DECISION
DATED AND RELEASED

AUGUST 22, 1995

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. 94-3143-FT

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

In re the Paternity of
ERICA A.H.:

HILLARY A.H. and
STATE OF WISCONSIN,

Petitioners-Respondents,

v.

MICHAEL J.B.,

Respondent-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA S. CURLEY, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Michael J.B. appeals from a judgment of the circuit court awarding his minor daughter, Erica A. H., child support of seventeen percent of Michael's gross income, commencing August 31, 1994, and

setting Michael's child support arrearage at $70,715. Michael's appeal is limited to challenging the arrearage awarded by the circuit court. Pursuant to this court's order of December 21, 1994, this case was submitted to the court on the expedited appeals calendar. *See* RULE 809.17, STATS. Upon review of the briefs and the record, we affirm the circuit court's judgment.

BACKGROUND

Erica A. H. was born on September 16, 1983, to Hillary A. H. On February 2, 1993, Hillary and the State of Wisconsin commenced this paternity action against Michael. Hillary and Michael admitted to having an intimate relationship during the time that Hillary became pregnant with Erica. Hillary told the court that she informed Michael of her pregnancy with Erica as soon as she became aware of it and that Michael suggested to Hillary that she have an abortion, a suggestion Hillary rejected. Hillary testified that she telephoned Michael from the hospital to inform him of Erica's birth and to make him aware that Erica was suffering from certain serious health problems, problems that persist to the present. The record was undisputed that Erica and Hillary have resided across an alley from Michael's mother since Erica's birth.

Michael testified that he first became aware of Erica's birth when he received the petition for adjudication of paternity, approximately ten years after her birth. After the parties and Erica submitted to blood tests, however, Michael stipulated that he was the father of Erica.

The trial court ordered Michael to pay child support beginning August 31, 1994. The trial court also awarded Erica past support equal to seventeen percent of Michael's income for that period of time commencing at Erica's birth until August 31, 1994. The trial court rejected Michael's request pursuant to § 767.51(5)(j), STATS.,[1] that the court apply the doctrine of equitable

[1] Section 767.51(5), STATS., provides in pertinent part:

> (5) Upon request by a party, the court may modify the amount of child support payments determined under sub. (4m) if, after considering the following factors, the court finds by the greater weight of the credible evidence that use of the percentage standard is unfair to the child or to the requesting party:

estoppel to modify the amount of past support due. Applying the percentage standard set forth in § 767.51(4m), STATS.,[2] to Michael's past earnings, the trial court calculated the amount of arrearage to equal $70,715.

DISCUSSION

Michael's appeal raises two issues with respect to the trial court's award of arrearage: (1) whether the trial court failed "to correctly apply the factors set out in Section 767.51(5), STATS., by not considering the respondent-appellant's ability to pay an arrearage [or] the needs of the child[;]" and (2) whether the trial court erred by "not construing Section 767.51(5)(j) to permit the trial court to apply the doctrine of equitable estoppel to preclude an award of child support prior to February 11, 1993[.]"

The record discloses that Brown's objection to an arrearage award before the trial court turned solely upon his contention that Hillary's alleged ten-year period of silence regarding Erica's existence should bar an arrearage award pursuant to the doctrine of equitable estoppel under ***In re Harms,*** 174 Wis.2d 780, 498 N.W.2d 229 (1993). Accordingly, we limit our consideration of his appeal to that issue. *See* ***Wirth v. Ehly,*** 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145 (1980) (appellate court will generally not review an issue raised for the first time on appeal).

Because the facts dispositive of the single issue presented by this appeal are undisputed, the question presented for our review is one of law. *See* ***First Wisconsin Nat'l Bank v. Nicolau,*** 113 Wis.2d 524, 537, 335 N.W.2d 390, 396 (1983). Accordingly, we decide this issue independently and without

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(j) Any other factors which the court in each case determines are relevant to the best interests of the child.

[2] Section 767.51(4m), STATS., provides that "[e]xcept as provided in sub. (5), the court shall determine child support payments by using the percentage standard established by the department of health and social services under s. 46.25(9)."

deference to the decision of the trial court. ***Ball v. Dist. No. 4 Area Bd.,*** 117 Wis.2d 529, 537, 345 N.W.2d 389, 394 (1984).

We begin by summarizing the facts underlying the ***Harms*** case. Mr. and Mrs. Harms were divorced in 1979. The sole custody of the couple's two minor children was awarded to Mrs. Harms. ***Harms,*** 174 Wis.2d at 781, 498 N.W.2d at 230. The divorce judgment provided in pertinent part that Mrs. Harms was prohibited from moving the residence of the children more than fifty miles from Powers Lake, Wisconsin, without first obtaining the written consent of Mr. Harms or an order of the court. ***Id.*** at 782, 498 N.W.2d at 230. Notwithstanding the language of the judgment, Mrs. Harms moved the children to Florida in 1980. Shortly thereafter, Mr. Harms received a certified letter from Mrs. Harms informing him of the move and stating that she no longer expected him to pay child support or hospital insurance. Upon receiving the letter, Mr. Harms immediately ceased paying child support. ***Id.***

Seven years passed. In 1987, Mrs. Harms filed a motion requesting the trial court to hold Mr. Harms in contempt, alleging that he had willfully and intentionally failed to pay child support ordered by the court. ***Id.*** at 782-83, 498 N.W.2d at 230. The trial court entered a judgment holding Mr. Harms in contempt of court for his failure to pay past due child support. The judgment also held that § 767.32(1m), STATS.,[3] precluded the court from awarding any credit against the arrearage. ***Id.*** at 783, 498 N.W.2d at 230. Mr. Harms appealed. The supreme court vacated the circuit court's judgment of contempt and remanded the case for further proceedings. ***Id.*** On remand, Mr. Harms moved the circuit court to dismiss his ex-wife's contempt motion on the ground of equitable estoppel. ***Id.*** at 784, N.W.2d at 231. The trial court determined that equitable estoppel was inapplicable to bar the action for past

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[3] Section 767.32(1m), STATS., provides the following:

> In an action under sub. (1) to revise a judgment or order with respect to child support, maintenance payments or family support payments, the court may not revise the amount of child support, maintenance payments or family support payments due, or an amount of arrearages in child support, maintenance payments or family support payments that has accrued, prior to the date that notice of the action is given to the respondent, except to correct previous errors in calculations.

due child support and that Mr. Harms was liable for such support. ***Id.*** Mr. Harms again appealed. ***Id.***

The supreme court reversed the trial court, holding that the "extrajudicial agreement between Mr. Harms and Mrs. [Harms] is enforceable via the doctrine of equitable estoppel." ***Id.*** at 785, 498 N.W.2d at 231. The defense of equitable estoppel requires a showing of three elements: action or inaction, which induces reliance by another, to his or her detriment. ***Id.*** Applying these elements, the court determined that Mrs. Harms had taken two actions. The court determined that Mrs. Harms's first action was to violate the divorce judgment by moving the children to Florida and her second action was to send the certified letter to Mr. Harms informing him that she no longer expected him to pay child support. The court observed that Mr. Harms relied on these actions and discontinued his child support payments. ***Id.*** As a result of this reliance, the court further determined that Mr. Harms forfeited his right to challenge the removal of the children from the fifty-mile radius contemplated by the judgment and lost his ability to "meaningfully and regularly visit his children, who have now reached the age of majority." ***Id.*** In light of these unique facts, the supreme court concluded that equitable estoppel was available to bar Mrs. Harms's action to collect child support arrearages. ***Id***. at 781, 498 N.W.2d at 230.

The facts critical to the outcome of ***Harms*** are not present here. This case does not involve an action to enforce an extrajudicial agreement. In addition, this case does not involve the violation of a court order barring the removal of a child to another state or an attempt by a custodial parent to avoid potential enforcement of such a court order by absolving the payor from future support. *Cf.* ***Douglas County Child Support Unit v. Fisher,*** 185 Wis.2d 662, 669-670, 517 N.W.2d 700, 703 (Ct. App. 1994) (court distinguished ***Harms***, concluding that removal of children to another state pursuant to stipulation and order did not violate judgment and thus equitable estoppel not available to defeat action to collect child support).

In light of the foregoing discussion, we conclude that ***Harms*** is distinguishable from the present case and, therefore, does not furnish a basis upon which to apply the doctrine of equitable estoppel to preclude an award of child support arrearage. We further note that the doctrine of equitable estoppel applied in ***Harms*** has not been extended to paternity cases involving past child

support. In light of these circumstances, we conclude that the trial court did not err by declining to apply the doctrine of equitable estoppel to preclude Erica's claim to past child support.

By the Court.—Judgment affirmed.

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