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DISTRICT IV

August 29, 2024

To:

Hon. Jacob B. Frost
Circuit Court Judge
Electronic Notice

Michele Perreault
Electronic Notice

Jeff Okazaki
Clerk of Circuit Court
Dane County Courthouse
Electronic Notice

Rojeanna Louise Marsh
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2023AP1477

In re the marriage of: Rojeanna Louise Marsh v. Patrick Shaun Marsh (L.C. # 2019FA1360)

Before Blanchard, Nashold, and Taylor, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Patrick Marsh appeals circuit court orders requiring him to reimburse his former spouse, Rojeanna Marsh, for health insurance expenses that Rojeanna paid to insure the parties' two minor children.¹ Based on our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).² We summarily reverse and remand to the circuit court to enter an order consistent with this opinion.

¹ Because the parties share the same surname, we refer to them by their first names for clarity.

² All references to the Wisconsin Statutes are to the 2021-22 version.

Rojeanna and Patrick were divorced pursuant to a divorce judgment granted on August 12, 2020.³ The divorce judgment incorporates the terms of the parties' Marital Settlement Agreement ("MSA"), which is attached to the divorce judgment. The MSA includes a clause relating to the children's health insurance ("the insurance provision"), which states, in pertinent part:

Patrick shall maintain and pay for the entire cost of the minor children on his comprehensive medical and hospitalization insurance policy, dental and vision insurance policy as long as it is available to him through his employer at a reasonable cost and he shall maintain the same until the child reaches the age of majority.

At the time of the divorce judgment, Patrick was employed and the children were insured through his employer.

In August 2021, Patrick filed a motion to modify the divorce judgment with respect to family support and insurance, contending that he had become unemployed and was unable to pay the \$3,400 in monthly family support or to provide insurance as required by the divorce judgment. He requested that his family support and insurance obligations be suspended until he obtained employment. Rojeanna subsequently filed a motion for contempt, alleging that Patrick had violated the terms of the divorce judgment by failing to make the required family support payments, provide insurance, or pay for the purchase of a car for the parties' son. At that time, Rojeanna had been providing insurance for the children through her employer since July 2021.

³ This document was originally titled, "Findings of Fact, Conclusions of Law, and Judgment of Legal Separation," but it was converted to a judgment of divorce by order dated March 11, 2022. For convenience, we refer to the document as the divorce judgment and to the divorce as having occurred at the time of the original document.

After hearing testimony and argument at a hearing in November 2021, the circuit court denied Patrick's motion to modify the divorce judgment and granted Rojeanna's contempt motion, finding Patrick in contempt for failing to pay family support and failing to make payments toward the son's car. The court found that Patrick had shirked maintaining his employment and unreasonably failed to gain new employment. The court imputed to Patrick the salary he had been earning at the time of divorce and ordered Patrick to pay arrearages in family support and to make the son's car payment. The court did not address the insurance issue that Rojeanna had also raised in her contempt motion. The court's November 2021 verbal orders were incorporated into a December 2021 written order which was not appealed.

Although related to the proceedings just described, the subject of this appeal concerns a second motion for contempt that Rojeanna brought in March 2023, again alleging that Patrick was in violation of the terms of the divorce judgment by not paying the children's health insurance expenses. At a hearing on Rojeanna's second motion for contempt in June 2023, the parties did not dispute that Rojeanna had been paying expenses for health insurance for the children through her employer and that Patrick had not reimbursed her for those expenses. Rojeanna sought reimbursement from Patrick for the health insurance expenses; in response, Patrick pointed to the specific language of the divorce judgment, which required Patrick to pay for health insurance only "as long as it is available to him through his employer at a reasonable cost." The parties do not dispute that during all pertinent time periods, when insurance was available to Patrick through his employer at a reasonable cost, Patrick covered those costs, and also that when Patrick did not provide insurance coverage, it was not available to him through his employer at a reasonable cost.

Patrick also pointed out at the June 2023 hearing that the parties had been before the circuit court in 2021 on Patrick's motion to modify the divorce judgment's terms of family support and insurance and that at that time the court denied his motion to modify, thereby leaving the language of the divorce judgment in effect, including the insurance provision. In response to Patrick's reference to the 2021 hearing, the court stated that it would review the transcript from the November 2021 hearing, and that if at that hearing the court had verbally referenced Patrick having to pay the health insurance costs, and if such reference was inadvertently omitted from the written order, the court would impose the verbal order over the written order and require Patrick to pay the children's health insurance costs retroactive to the verbal order.

The transcript of the November 2021 hearing does not reflect that the circuit court required Patrick to pay the insurance costs even when he was unemployed, nor did the court state that it was modifying the terms of the divorce judgment to require Patrick to pay Rojeanna now that she was the one paying for the children's health insurance through her employer. In fact, the court explicitly stated, "I'm not modifying the judgment." The court also asked the parties if they had any other issues to raise or that the court needed to address. The only additional issue raised was Rojeanna's request that Patrick make the car payment for their son, which the court ordered.

Following the June 2023 hearing on Rojeanna's contempt motion, the circuit court issued an order denying Rojeanna's motion for contempt on the basis that the court "needed to clarify and resolve this outstanding issue from [Patrick's] 2021 [m]otion." In doing so, the court ordered Patrick to pay all of the costs of the children's health insurance provided through Rojeanna's employment, retroactive to August 9, 2021, which was when Patrick filed his motion

for modification that the court denied. The court explained that in reviewing the transcript of the November 2021 hearing, the court realized that it had, at that time, “overlooked the need to directly address who was financially responsible for the children’s health insurance costs going forward in light of [Patrick] losing his job yet being imputed income as if he still worked.” The court stated that the “clear intent” of its November 2021 order and findings “was to continue requiring [Patrick] to pay for support and the expenses as set forth in the judgment. In other words, [Patrick] needed to either continue providing insurance for the children at his expense or pay for the insurance [Rojeanna] provided.” The court stated that, because it “did not make an explicit order on that issue” at the November 2021 hearing, it would “do so now.”

The circuit court denied Rojeanna’s 2023 contempt motion on the basis that the court “needed to clarify and resolve this outstanding issue from [Patrick’s] 2021 [m]otion.” Nevertheless, the court ordered Patrick to pay the insurance expenses and made the order retroactive for two reasons. First, the court explained that “this is plainly what I would have ordered after trial in November 2021,” that not doing so was an “oversight,” and that the court was “now resolv[ing] that outstanding motion on the merits.” Second, the court concluded that Patrick was “barred” from arguing that he was not responsible for these payments because “[c]onsistently since the November 2021 trial, [Patrick] has assured [Rojeanna] in writing that he knows he owes this insurance expense” and the court would not “reward the party who has unclean hands and made promises he never followed through on.” The court stated that it was “clarif[ying] the [Divorce] Judgment by ordering that [Patrick] remain 100 [percent] responsible” for the costs of the children’s insurance “even when he lost his employment [because] that was shirking” and ordered him to reimburse Rojeanna for her health insurance

payments upon her providing proof of her costs. The court issued a subsequent order outlining the amounts Patrick was ordered to pay.

Patrick appeals the 2023 orders, arguing that the circuit court was without authority to require him to reimburse Rojeanna for insurance payments she made retroactive to August 9, 2021, the date that Patrick filed his motion for modification. We agree.

As to the circuit court's first rationale, we observe that, at the time the court issued its 2023 orders, the only motion before the court was Rojeanna's 2023 contempt motion, which the court denied. To the extent that the court sought to resolve what it considered an "outstanding motion" related to Patrick's 2021 motion to modify the divorce judgment, no such motion was before the court in the 2023 proceeding: in 2021, the court explicitly denied Patrick's modification motion, and no other modifications were requested or granted. Therefore, all of the terms of the divorce judgment, including the insurance provision, remained in effect following the November 2021 order. As stated, the insurance provision requires Patrick to pay for insurance only "as long as it is available to him through his employer at a reasonable cost." It is undisputed that Patrick paid for insurance when it was "available to him through his employer at a reasonable cost" and that the court in 2021 did not modify the divorce judgment to require him to pay for insurance outside of these express terms. Thus, the court erred in requiring Patrick to make the retroactive insurance payments on the basis that there was a pending modification

motion that had not been addressed and based on what the court *intended* to do at the November 2021 hearing but did not in fact do.⁴

We likewise reject the circuit court's second basis for ordering retroactive payments, namely, that Patrick's previous assurances that he would reimburse Rojeanna for insurance expenses bars him from subsequently arguing that he is not required to do so. The MSA incorporated into the divorce judgment contains the following provision governing the parties' voluntary modification of the divorce judgment:

Any future revisions, modification, amendment, or waiver of the provisions of this Agreement shall be effective only if made in writing, dated, signed and executed with the same formality as this Agreement. Any such revision, modification, or amendment shall specifically provide that it is intended to revise, modify or amend this Agreement and the [Divorce Judgment]. No oral revisions, modifications or amendments shall be effective to revise, modify, amend, or waive any terms or conditions of this Agreement. Failure of either party to insist upon strict performance of any of the provisions of this Agreement shall not be construed as a waiver of any subsequent default of the same or similar nature. Any written revision or modification of this

⁴ Implicit in the circuit court's reasoning may be the theory that, because the court concluded in 2021 that Patrick was shirking with respect to employment, and the court imputed to Patrick the same income that he had been making while employed at the time of divorce, this necessarily means that Patrick is likewise required to pay for insurance as though he were so employed. However, we see no reason why such a conclusion necessarily follows, particularly given the clear language of the divorce judgment that requires Patrick to insure the children only "as long as it is available to him through his employer at a reasonable cost."

Separately, we note that the circuit court did not appear to base its 2023 orders on the theory that it had previously neglected to, and was now addressing, the insurance component of Rojeanna's 2021 contempt motion, namely, her allegation that Patrick was in contempt because he had failed to provide insurance for the children as required by the divorce judgment. Nor do we discern how contempt could have been found in 2021 on that basis given the explicit language of the divorce judgment's insurance provision. Consistent with this conclusion, we note that the court denied Rojeanna's 2023 contempt motion, which was based on her allegation that Patrick had violated the divorce judgment by failing to provide insurance.

Agreement shall be reduced to a Stipulated Order Amending [the Divorce Judgment].

This provision explicitly precludes oral agreements to modify or waive any term or condition of the divorce judgment. Moreover, it is undisputed that at no time did the parties ever file with the court a stipulated order amending the divorce judgment. Finally, as Patrick points out, this court has determined that, as a general matter, extrajudicial agreements to modify support do not overcome the language stated in the divorce judgment and statutes. *See Monicken v. Monicken*, 226 Wis. 2d 119, 593 N.W.2d 509 (Ct. App. 1999).⁵

Accordingly,

IT IS ORDERED that the orders of the circuit court are summarily reversed, and this matter is remanded for the court to enter an order consistent with this opinion.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals

⁵ We note that Rojeanna, who is pro se, fails to respond to any of Patrick's substantive arguments, which we may take as a concession on the issues addressed in this opinion. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). Separately, Patrick notes that Rojeanna fails to comply with various rules of appellate procedure as provided by WIS. STAT. § 809.19 and he requests summary reversal and sanctions on that basis. We decline this request.