COURT OF APPEALS
DECISION
DATED AND RELEASED

January 11, 1996

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

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No. 95-0779

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

IN RE THE MARRIAGE OF:

MARJORIE (GRIMES) MOUNT,

Petitioner-Respondent,

DODGE COUNTY CHILD SUPPORT AGENCY,

Respondent,

v.

DENNIS GRIMES,

Respondent-Appellant.

APPEAL from an order of the circuit court for Dodge County: ANDREW P. BISSONNETTE, Judge. *Affirmed*.

Before Gartzke, P.J., Dykman and Vergeront, JJ.

VERGERONT, J. Dennis Grimes appeals from an order entered on March 3, 1995, confirming an order entered on December 13, 1993, which determined child support arrearages owed by Grimes and ordered a monthly payment of $200 per month to pay the arrearages, plus interest on the arrearages. Grimes contends that the trial court erred in various ways with respect to the December 13, 1993 order. We conclude we do not have jurisdiction to review that order. Grimes also contends that the trial court erred in confirming the December 13, 1993 order instead of vacating it or modifying it based on his objections to the December 13, 1993 order. We conclude the trial court did not erroneously exercise its discretion in entering the March 3, 1995 order and we therefore affirm.

Marjorie Mount and Dennis Grimes were divorced by judgment entered April 29, 1980. At that time, there were two minor children: Christopher, born May 22, 1972, and David, born October 14, 1974. Grimes was ordered to pay $400 toward the support of the minor children, effective February 19, 1980, and, beginning July 1, 1980, was to pay $100 per month so long as he remained a full-time student, but not later than July 1, 1982.

The 1980 judgment remained in effect until January 15, 1987, when the parties entered into a stipulation to amend the 1980 judgment. This stipulation increased Grimes' support obligation, but deferred payment of a portion and deferred interest until certain dates, which were based on Grimes' completion of advanced educational degrees.

On August 7, 1992, the Dodge County Child Support Agency moved for issuance of an order terminating Grimes' support obligation as of April 16, 1992,[1] determining the arrearages owed by Grimes, and ordering him to make regular payments on the arrearages. A hearing on the motion was held on March 15, 1993. At the hearing, Grimes appeared with counsel, Mount appeared without counsel, and the Dodge County Child Support Agency appeared through counsel. All the parties stipulated that, as of May 1990, after crediting Grimes with two payments totaling $10,189.28--one made in May

[1] The parties' youngest child, David, died on April 12, 1992. While the Dodge County Child Support Agency's motion refers to April 16, 1992, we believe it intended to refer to April 12, 1992.

1991, and the other in June 1992--there was an arrearage of $3,410.72. The parties agreed that the issue to be decided at the hearing was the amount of arrearages from June 1, 1990 through April 12, 1992.

After hearing testimony, the court orally ordered that income be imputed to Grimes at the minimum wage from June 1990 through April 12, 1992, and his support obligation for that period was of that imputed income. The court ordered interest at the statutory rate of one and one-half percent per month on this arrearage. The court also ordered that interest on the arrearages existing before June 1, 1990, be at eighteen percent per year. The court required payment of $200 per month toward the arrearages beginning April 15, 1993, but stated that interest would continue to accrue. The court did not compute the actual sums owed, but directed counsel for the Dodge County Child Support Agency (corporation counsel) to calculate that and submit a proposed written order to Grimes' counsel so he could check the math.

Testimony by corporation counsel and correspondence submitted by Grimes show that between the March 15 hearing and December 1993, Grimes' counsel and corporation counsel had communications about the computations for the proposed written order, and Grimes' counsel was attempting to settle the matter by payment of a reduced lump sum. In early December 1993, corporation counsel filed with the court a proposed written order embodying the terms of the March 15, 1993 oral order. Grimes' counsel filed a letter with the court objecting to the proposed written order on three grounds and asking that a hearing be scheduled "unless a mutually satisfactory settlement of this matter can be reached." The objections were that: (1) interest since July 1990 should not have been applied to the amount of unpaid arrearages because during that time period Grimes was not provided with information he requested through counsel about amounts owed; (2) because of delays by corporation counsel in responding to requests for information and responses to objections to the proposed order, interest on unpaid arrearages from July 1992 through the present should be deducted from the amount owed; and (3) because of Grimes' good faith efforts in making payments since April 1992 and his financial condition, a reduction in the amount of interest owed was warranted.

The court received Grimes' counsel's letter on December 13, 1993, after signing the proposed order earlier that day. The December 13, 1993 order

contains a stamp indicating that it was filed with the clerk of court on December 13, 1993. Although the order was signed and filed on December 13, 1993, the court wrote to Grimes' counsel and corporation counsel on December 15, 1993, referring to the "proposed order" submitted by corporation counsel, the letter from Grimes' counsel, and Grimes' request for a hearing. The court asked both counsel to communicate with each other and then write the court to clarify what the issues were and whether there was a need for a hearing. The court's letter made no mention of the fact that the proposed order had been signed and filed with the clerk of court.

The record contains the notice for a telephone status conference scheduled for January 20, 1994, but there is no transcript or minute sheet from that conference.

The next filed document is the motion filed on November 22, 1994, by corporation counsel requesting that the court's signature on the December 13, 1993 order be "confirmed." This motion asserts that the order was signed on December 13, 1993, and that the child support agency filed the order with the clerk of court on December 13, 1993. Testimony of corporation counsel and correspondence submitted by Grimes show that between the status conference and the filing of this motion, Grimes' counsel and corporation counsel had communications discussing the possibility of settling for a reduced lump sum.

A hearing on the motion was held on February 20, 1995. Grimes and Mount appeared without counsel, and corporation counsel appeared. Grimes objected to the December 13, 1993 order. He disputed how his arrearages had been computed in years prior to the March 1993 hearing. He also argued that the total child support and interest he was being required to pay between 1987 and 1992 was 117% of his actual earnings for that time period. He did not specifically refer to the requests for reduction of interest made in his counsel's letter of December 13, 1993, but he did refer to the letter. He did generally refer to errors and misrepresentations concerning the amount of support he owed. He expressed his understanding, based on what his attorney had told him, that everything was still under consideration and claimed that "things were stalled" by corporation counsel.

The trial court treated the December 13, 1993 order as being in effect, and concluded that Grimes should have brought a motion earlier to reconsider or vacate that order. The court decided that Grimes was guilty of laches, having waited more than a year to bring a motion for relief from the order under § 806.07, STATS. The court stated that it did not want, at this date, to reconsider a decision it had made in March 1993. A written order confirming the December 13, 1993 order was entered on March 3, 1995. Grimes filed a notice of appeal from the March 3, 1995 order with the trial court on March 14, 1995.

Grimes' arguments on appeal challenge both the December 13, 1993 order and the court's March 3, 1995 order confirming that order. We first decide whether we have jurisdiction to review the December 13, 1993 order.

If notice of entry of judgment is not given, a notice of appeal must be filed within ninety days of the entry of the order appealed from. Section 808.04(1), STATS. Entry of an order occurs when it is filed in the office of the clerk of court. Sections 808.03(1) and 806.06(1)(b), STATS. Grimes argues in the context of other issues he raises that he did not know the December 13, 1993 order was signed and entered.[2] However, we have held that even when there is no notice of entry of judgment and a party does not learn of the entry of judgment within the time allowed for an appeal, the appeal time runs from the date of entry of judgment. ***A.C.L.U. v. Thompson***, 155 Wis.2d 442, 455 N.W.2d 268 (Ct. App. 1990). The result in ***A.C.L.U.*** was based on the plain language of § 808.04(1), STATS., which requires that an appeal be initiated "within 90 days of entry if notice [of entry of judgment] is not given." We stated in ***A.C.L.U.*** that

[2] The record does not show how or when Grimes or his counsel first learned the December 13, 1993 order had been signed and entered. The trial court's letter to counsel, two days after the order was signed and entered, described it as "proposed." The court at the February 20, 1995 hearing appeared to assume that Grimes' counsel knew of the entry of the order soon after it was entered, but the issue was not squarely raised or addressed at that hearing. There are conflicting affidavits of Grimes' attorney and of corporation counsel, prepared and submitted after the appeal was filed, as to whether and how Grimes' counsel learned the December 13 order had been signed and entered. Even if these affidavits were properly part of the record on appeal, as an appellate court we do not make findings of fact if the facts are contested. ***Wurtz v. Fleischman***, 97 Wis.2d 100, 107 n.3, 293 N.W.2d 155, 159 (1980). As we explain in the opinion, none of the issues we address requires us to decide when Grimes or his attorney first learned of the entry of the December 13, 1993 order.

the reason why the party did not have notice of the entry of judgment was irrelevant to that appeal. ***Id.*** at 445 n.5, 455 N.W.2d at 270.

We need not decide whether there are any circumstances that would permit running the time to appeal from a date later than the entry of an order or judgment. Even if we accept, for purposes of argument, Grimes' implicit assumption that the appeal time on the December 13, 1993 order did not begin to run until he or his attorney had actual notice of entry, we are satisfied that actual notice occurred on or shortly after November 22, 1994, when corporation counsel filed its motion to confirm the December 13, 1993 order, stating in the motion that the order was signed and filed on December 13, 1993. The notice of appeal filed on March 14, 1995, was clearly untimely as to the December 13, 1993 order under any view of the law.

Although we do not have jurisdiction to review the December 13, 1993 order, we do have jurisdiction to review the March 3, 1995 order insofar as Grimes presented new issues at the February 20, 1995 hearing that the court had not decided on March 15, 1993. ***Ver Hagen v. Gibbons***, 55 Wis.2d 21, 26, 197 N.W.2d 752, 755 (1972). We accept the trial court's characterization of Grimes' objection to the December 13, 1993 order, made at the February 20, 1995 hearing, as a request for relief under § 806.07, STATS.[3] Grimes was arguing that

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[3] Section 806.07, STATS., provides in relevant part:

> (1) On motion and upon such terms as are just, the court may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
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> (a) Mistake, inadvertence, surprise, or excusable neglect;
>
> ....
>
> (g) It is no longer equitable that the judgment should have prospective application; or
>
> (h) Any other reasons justifying relief from the operation of the judgment.
>
> (2) The motion shall be made within a reasonable time, and, if based on sub. (1)(a) or (c), not more than one year after the judgment was entered or the order or stipulation was made.

there were errors in the arrearage calculations that had not been brought to the court's attention. This might be grounds for relief from the order under § 806.07(1)(a)--"[m]istake, inadvertence, surprise, or excusable neglect." To the extent Grimes also intended to be raising the objections stated in his attorney's December 1993 letter, those objections are also possible grounds under either §§ 806.07(1)(a) or 806.07(1)(g)--"It is no longer equitable that the [order] should have prospective application." Also, perhaps some of Grimes' or his counsel's objections could be considered "[a]ny other reasons justifying relief from the operation of the judgment." Section 806.07(1)(h).

Motions under § 806.07(1), STATS., "shall be made within a reasonable time, and, if based on sub. (1)(a) or (c), not more than one year after the judgment was entered or the order or stipulation was made." Section 806.07(2). A decision whether to grant relief under § 806.07 is within the trial court's discretion and we will affirm the decision if the court, in fact, exercised discretion and there is a reasonable basis for the trial court's determination. ***Rhodes v. Terry***, 91 Wis.2d 165, 176, 280 N.W.2d 248, 253 (1979).

Grimes argues that the court erred in finding him guilty of laches. He contends that because he and his attorney did not know that the proposed written order had been signed and entered on December 13, 1993, they did not unreasonably delay in bringing a motion for relief from the order. Phrased in the context of § 806.07, STATS., Grimes' argument is that his failure to bring a motion for relief from the December 13, 1993 order earlier was not unreasonable; the court should have entertained his objections to that order at the February 20, 1995 hearing and should have declined to "confirm" the December 13, 1993 order based on his objections.

We assume for purposes of discussion that neither Grimes nor his attorney knew that the December 13, 1993 order had been entered until receipt

(..continued)

> A motion based on sub. (1)(b) shall be made within the time provided in s. 805.16. A motion under this section does not affect the finality of a judgment or suspend its operation. This section does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or proceeding, or to set aside a judgment for fraud on the court.

of the November 22, 1994 motion. We nevertheless conclude that there is a reasonable basis for the trial court's decision.

Under § 806.07(2), STATS., a party seeking relief from an order must bring a motion within a reasonable time after "the order ... was made." For a motion under § 806.07(1)(a), the paragraph under which most of Grimes' objections fall, the maximum time allowed is one year after "the order ... was made." The use of the term "made" in connection with the order is significant. When relief is sought from a judgment, the relevant time is when the judgment is "entered." A judgment is entered when it is filed in the office of the clerk of court. Section 806.06(1)(b). An order is also entered when it is filed with the clerk of court. Sections 808.03(1), 806.06(1)(b) and 806.06(3), STATS. The use of the word "made" in connection with the word "order" in § 806.07(2) must therefore mean something different from "entered." *See* ***Armes v. Kenosha County***, 81 Wis.2d 309, 318, 260 N.W.2d 515, 519 (1977) (where legislature uses similar but different terms in a statute, particularly within the same section, there is a presumption it intended the terms to have different meanings).[4] We construe the date an order was "made" to mean the date the order was orally made in court.

The trial court orally made an order in court on March 15, 1993, determining the arrearages that Grimes owed on particular dates--the amount owed as of the end of May 1990 was determined by stipulation, and the amount owed between then and April 12, 1992, was determined by the court's imputing earnings at the minimum wage to Grimes for that time period. The court also ordered interest at prescribed percentages on the arrearages and a payment schedule.

The objections in Grimes' counsel's December 1993 letter and the objections Grimes presented at the February 20, 1995 hearing were not objections to the accuracy of the December 13, 1993 order as a reflection of the court's oral order made on March 15, 1993. Nor were they objections to corporation counsel's computations. They were objections to the substance of

[4] Although the Wisconsin Supreme Court, not the legislature, created § 806.07, STATS., we apply the same rules of statutory construction. ***Brandt v. LIRC***, 160 Wis.2d 353, 362 n.2, 466 N.W.2d 673, 676 (Ct. App. 1991), *aff'd*, 166 Wis.2d 623, 480 N.W.2d 494 (1992).

the March 15, 1993 order. In order to seek relief from that order, Grimes had to act within a reasonable time from March 15, 1993, the date on which the order was made. The date on which the proposed written order was signed and entered is not determinative of the date after which Grimes had an obligation to seek relief from the oral order of March 15, 1993.

The trial court apparently considered that all of the objections Grimes was raising had to be brought within a year of December 13, 1993, and were therefore untimely. We conclude that all the objections Grimes and his attorney raised had to be brought within a reasonable time after March 15, 1993, and that those involving "mistake, inadvertence, surprise, or excusable neglect" had to be brought by March 15, 1994. However, we are not required to reverse a discretionary decision if we can conclude *ab initio* that there are facts in the record that would support the trial court's decision had discretion been exercised on the basis of those facts under the correct legal standard. ***State v. Johnson***, 118 Wis.2d 472, 481, 348 N.W.2d 196, 201 (Ct. App. 1984).

We conclude that the record supports a determination that the objections Grimes made at the February 20, 1995 hearing relating to mistake, inadvertence, surprise or excusable neglect were not brought by March 15, 1994. As for any objections that can be characterized as based on § 806.07(1)(g) or (h), STATS., we conclude the record supports a determination those objections were not made within a reasonable time after March 15, 1993.

We consider separately the objections that Grimes' attorney made in his December 1993 letter to the court. Grimes argues that he should have been granted a hearing on those objections. In the context of § 806.07, STATS., we construe this to be his argument: That letter was, in effect, a request for relief from the March 15, 1993 order; was made within a reasonable time after March 15, 1993; and Grimes was never given the hearing he requested. Therefore, the argument continues, the court should, at the least, have found that the objections made in that letter were timely. In discussing this contention, we will assume that Grimes did raise the objections in this letter at the February 20, 1995 hearing, although that is not clear from the transcript of the hearing.

In response to Grimes' counsel's letter, the court wrote that a hearing would be held, if necessary, after the parties clarified the issues resulting from the objections. It is not clear who requested the status conference scheduled for January 20, 1994, and there is no transcript or minutes from that conference. But at the hearing on February 20, 1995, corporation counsel read from his notes of the status conference to the effect that Grimes' attorney discussed a compromise figure and brought up issues regarding "arrearage calculations ... that basically went to the original decision in March the previous year." According to corporation counsel's notes, the court stated at the status conference that "if things weren't settled in thirty days, we should act to have it scheduled for hearing." The court accepted this account of the status conference. Nothing in the record disputes it. Nothing in the record indicates that Grimes did request a hearing after the status conference.[5]

There is evidence in the record, some of it supplied by Grimes, that at and after the status conference, Grimes' counsel continued to attempt to get corporation counsel to agree to accept less than the court ordered Grimes to pay on March 15, 1993, as he had attempted before the proposed written order was submitted to the court. Grimes was the party that objected to the March 15, 1993 order. When, thirty days after the status conference, there was no agreement to modify that order, it was Grimes' responsibility--not the responsibility of corporation counsel or the court--to initiate a hearing on his request for relief from the March 15, 1993 order. It was unreasonable for Grimes and his counsel to take no action to have the court rule on the request until February 20, 1995, at the hearing on corporation counsel's motion to confirm the December 13, 1993 order. For these reasons, we conclude the record supports a conclusion that the objections made in the December 1993 letter were not timely raised, whether they are characterized as grounds for relief under § 806.07(1)(a), (g) or (h), STATS.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[5] Grimes claims that his attorney requested a hearing on January 10 and January 20, 1994, but does not cite to the record. We find no evidence of those requests in the record.

GARTZKE, P.J. (*concurring*). I concur in the result but not all of the reasoning.

The lead opinion construes the one-year limit in § 806.07(2), STATS., to mean that a party seeking relief from an order must bring the motion within one year from the date the order was rendered orally. I do not agree. The only reasonable construction of § 806.07(2) is that the one year runs from the date of entry of the order. Because the dispositive order was entered December 13, 1993, an § 806.07 motion could not be made at the February 20, 1995 hearing. Whether Grimes had actual notice that the order had been entered on December 13, 1993 is immaterial.[6]

The one year in § 806.07(2), STATS., runs from entry of the order, not its oral pronouncement. The Wisconsin Supreme Court created § 806.07. *See* 67 Wis.2d 585, 726 (1975). We apply the traditional principles of statutory construction to the supreme court's rules. ***Brandt v. LIRC***, 160 Wis.2d 353, 362 n.2, 466 N.W.2d 673, 676 (Ct. App. 1991). One such principle is that we employ a common sense reading to avoid an unreasonable or absurd result. ***State v. Moore***, 167 Wis.2d 491, 496, 481 N.W.2d 633, 635 (1992). Moreover, because § 806.07 is a judicially created rule, and separation of powers considerations are absent, we should have more flexibility in its construction than if it were a statute.

It makes sense that the one year in § 806.07(2), STATS., should run from the time a stipulation "was made." Unlike judgments and orders, stipulations are not entered by the clerk of court, and the parties are necessarily privy to them. And it makes sense that in case of a judgment, the one year should run from entry of judgment. That is consistent with when the time to appeal starts to run. Section 808.03(1), STATS.

It makes no sense to distinguish between a judgment and an order for purposes of starting the one year. Section 806.07, STATS. motions for relief from orders are as frequent as motions for relief from judgments, and usually involve orders or judgments as to which the appeal time has expired. Absent

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[6] The fact is he had such notice by virtue of the "notice of motion and motion to confirm order" mailed to him on November 22, 1994.

an explanation why the one year in § 806.07(2) should run from entry in the case of a judgment but from oral pronouncement of an order, when the time to appeal runs from entry in both cases, we ought not readily hold that the one year in § 806.07(2) runs from the time the order was orally announced.

We should look to the Judicial Council Committee's Note to § 806.07, STATS., for guidance regarding the supreme court's intent when adopting the rule. According to that note, "This section is substantially equivalent to Federal Rule 60(b) ...." Federal Rule 60(b) provides in relevant part, "The motion [for relief] shall be made within a reasonable time, and for reasons (1), (2) and (3), not more than one year after the judgment, order, or proceeding was entered or taken." Rule 60(b) is the federal counterpart to § 806.07(2), but there is a difference.

Section 806.07(2), STATS., covers stipulations and Federal Rule 60 does not. I infer that the Wisconsin Supreme Court's intent that § 806.07(2) cover stipulations as well as orders and judgments led the court to refer to "one year after the judgment was entered or the order or stipulation was made." Inadvertence is the only rational explanation for the difference when the one year begins to run on the time to seek relief as between judgments and orders. We should implement the supreme court's original intent by reading § 806.07(2) to mean that the one year starts "after the judgment or order was entered or stipulation was made."

Because the order was entered December 13, 1993, and the § 806.07, STATS. motion was not made until February 1995, more than one year expired, and the motion was untimely. The appeal time runs from the date of entry of judgment even if a party does not learn of the entry of judgment. ***A.C.L.U. v. Thompson***, 155 Wis.2d 442, 445 n.2, 455 N.W.2d 268, 269 (Ct. App. 1990). I would hold that the same principle applies to the motion for relief

under § 806.07(2). I would so hold, notwithstanding the unusual correspondence from the court referring to the order as "proposed," even though the order had already been signed and entered.

The order confirming the December 13, 1993 order is a nullity. The December order was not appealed, and it is beyond § 806.07(2), STATS., relief. To "confirm" it is as meaningless as would be an order "disaffirming" it. In neither event can the December order be affected.