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DISTRICT III/IV

March 2, 2018

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

2017AP901 In re the marriage of: Diane Poquette v. Scott Poquette (L.C. # 2011FA758)

Before Sherman, Blanchard, and Fitzpatrick, 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).

Scott Poquette appeals orders regarding child support that were entered in February and August 2017. Based upon 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 (2015-16).[1] The

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

issue is whether the circuit court improperly ordered retroactive child support modification. We conclude that it did, and accordingly reverse.

Diane Poquette filed an affidavit in support of a revision of the divorce judgment in March 2016. The affidavit did not seek a change in child support, but only in placement and restrictions on alcohol use. Diane filed a motion for modification of child support in October 2016. The court commissioner granted that motion, with the new support obligation to begin in November 2016. On de novo review, the circuit court set the modification as effective in May 2016. The circuit court denied reconsideration of that order.

Scott argues that by setting the new support obligation as effective in May 2016, even though Diane's child support modification motion was not filed until October 2016, the order violates the statutory restriction on retroactive support modification. That statute provides that the court "may not revise the amount of child support … due … prior to the date that notice of the action is given to the respondent." WIS. STAT. § 767.59(1m).

Diane responds that "the statute does not specify the level or content of the required notice. No specific language or methodology of notice is required." Relying on a dictionary definition, she argues that we should construe "notice" as meaning a warning or intimation that something may happen. And, applying that definition, she argues that here Scott had warnings that child support modification might be requested or occur because: (1) In March 2016 Diane requested a modification of placement from equal to full placement with her; (2) the court commissioner ordered Scott to bring financial information to the April 2016 hearing; and (3) after the April 2016 hearing, Scott knew he no longer had overnight placement, and that

additional court proceedings were scheduled, and therefore should have known that child support could be modified.

We reject Diane's interpretation of the term "notice." Something more is required than merely the respondent having information available that suggests a change in support is legally possible. Although we need not decide here precisely what more is required, we are satisfied that the respondent must at least have some reason to know that the legal process is somehow in motion to consider such a change. Here, none of the facts that Diane relies on, either singly or together, are sufficient to provide that kind of notice to Scott.

This conclusion is consistent with one of the likely purposes of the ban on retroactive modification, which is to allow potential payors to make decisions about budgeting and spending without concern that a retroactive modification will later occur that reaches far back into the past, after money that was earned then has already been spent. If the facts that Diane relies on were sufficient to qualify as notice, and Scott wanted to be prudent, it would be necessary for him to put aside income to pay for a support obligation that might not be imposed until years later, at such future time as Diane might choose to request it. Or, perhaps the obligation would never be imposed at all.

In addition, Diane's argument is inconsistent with the use of the word "given" in the statute. The idea that notice must be "given" implies that something active and affirmative must occur. It cannot easily be said that notice is "given" for the sole reason that facts exist from which a respondent might speculate on his or her own that child support could later be modified.

Diane also argues that the circuit court "properly exercised its equitable powers." However, her argument fails to establish that the circuit court has any equitable powers to

disregard the above statute. She relies on only the general principle that family court is a court of equity. However, even courts of equity must follow nondiscretionary statutes that limit potential outcomes.

As relief, Scott asks that we reverse the circuit court order and reinstate the court commissioner decision filed December 13, 2016. Diane has not disputed this remedy. Therefore, we direct the circuit court to take that action after remittitur.

IT IS ORDERED that the order appealed is summarily reversed under WIS. STAT. RULE 809.21, and the cause is remanded with directions.

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

Sheila T. Reiff
Clerk of Court of Appeals