STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 0000AP0000

In re the Marriage of:

JOHN DOE,

Petitioner-Appellant,

v.

Mary Doe,

Respondent-Respondent.

BRIEF OF PETITIONER-APPELLANT

JOHN DOE

On Appeal from a Memorandum Order/Decision of the Sheboygan County Circuit Court, Case No. 0000FA0000,

The Honorable Joseph Smith, Presiding

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Petitioner-Appellant

**TABLE OF CONTENTS**

Page

ISSUEs PRESENTED 1

Statement on oral Argument 1

Statement on Publication 1

statement of case and facts 2

argument 6

I. The Trial Court Erred When it Estopped John from Seeking Modification of Family Support. 6

II. The Trial Court Erred When it Failed to Reallocate the Dependency Exemptions and Reassign Responsibility for Health Insurance and Payment of Health Expenses Despite a Substantial Change in Circumstances. 11

Conclusion 13

CERTIFICATION AS TO FORM/LENGTH 14

CERTIFICATE OF COMPLIANCE WITH RULE……14

809.19(12)

**TABLE OF AUTHORITIES**

Cases

***Fowler v. Fowler***,  
158 Wis. 2d 508,  
463 N.W.2d 370 (Ct. App. 1990). 11, 12

***Frisch v. Heinrichs***,  
2007 WI 102,  
304 Wis. 2d 1, 736 N.W.2d 85, 102 8

***Jalovec v. Jalovec***,  
2007 WI App. 206,  
305 Wis. 2d 467, 739 N.W.2d 834 6, 10, 12

***Krieman v. Goldberg***,  
214 Wis. 2d 163,  
571 N.W.2d 425 (Ct. App. 1997) 9

***Motte v. Motte***,  
207 WI App. 111,  
300 Wis. 2d 621, 731 N.W.2d 294 10

***Nichols v. Nichols***,  
162 Wis. 2d 96, 469 N.W.2d 619 (1991) 6

***Ondrasek v. Tenneson,***158 Wis. 2d 690,  
462 N.W.2d 910 (Ct. App. 1990) 9

***Rintelman v. Rintelman***,  
 118 Wis. 2d 587, 348 N.W.2d 498 (1984) 11

***Vlies v. Brookman***,  
2005 WI App. 158,  
285 Wis. 2d 411, 701 N.W.2d 642 7, 8

***Whitford v. Whitford***,  
 232 Wis. 2d 38,  
 606 N.W.2d 563 (Ct. App. 1999) 5, 6

Wisconsin Statutes

§767.25 7

§767.25(1j), (1n) 7

§767.26 7

§767.511 7

§767.511(5) to (7). 7

§767.513 7

§767.56 7

§767.725(4m)(b) 11

Other Authorities

WIS. ADM. Code DCF § 150.04(3) 8

WIS. ADM. CODE § DWD ch. 40 (Dec. 2003) 7

ISSUEs PRESENTED

1. Did the trial court err when it estopped Appellant John Doe from seeking modification of family support?

Answered by the trial court: No.

1. Did the trial court err when it failed to reallocate the dependency exemptions and reassign responsibility for health insurance and health care expenses despite a substantial change in circumstances?

Answered by the trial court: No.

Statement on oral Argument

Appellant John Doe requests oral argument because it would assist the court in deciding this case of first impression regarding whether estoppel should be applied in family support cases.

Statement on Publication

The opinion in the case should be published in the official reports. It will enunciate, for the first time in Wisconsin, a rule of law on whether a party may be estopped from seeking modification of family support where the parties agreed it would not be modifiable. Not only is this an issue of first impression in the official reports, but it is also one of substantial statewide public interest.

statement of case and facts

Petitioner-appellant John Doe (“John”) and Mary Doe (“Mary”) were divorced in 2005 after a seventeen year marriage. (R.20: 1-2; A.App. 101-102). At the time of the divorce, they had three minor children, aged seventeen, eleven, and eight years old. (*Id*. at 2; A.App. 102).

Mary was awarded primary placement of the children, with John granted periods of temporary physical placement at reasonable times upon reasonable notice. (*Id*. at 10; A.App. 110.

At the final hearing, both parties waived maintenance. (R.35:12, 21 & 26). Instead of child support, the parties agreed to, and the court ordered, family support, using the following language set forth in the Marital Settlement Agreement:

That the Petitioner, John Doe, shall pay to the Respondent, Mary Doe as and for ***family support*** the sum of FOUR THOUSAND ($4,000.00) DOLLARS per month payable on the 25th of each month commencing August 25, 2005 and on the 25th of each month thereafter for a period of ***Sixty (60) consecutive monthly payments***, a period of five (5) years at which time the family support payment shall be reduced to THREE THOUSAND ($3,000) DOLLARS a month payable under the same terms as set forth above and continuing until January 3, 2016 at which time all obligations between the Petitioner and Respondent shall be terminate.

The parties understand and intend that these payments are to be considered and treated as income to the Respondent, Mary Doe, and to be taken as a deduction on the tax returns of Petitioner, John Doe. The Parties further intend that these family support payments are non-modifiable until the final payment is made under the terms of this agreement.

(R.20: 16; A.App. 116)(emphasis in original). At the final hearing, the court approved this provision without comment on the language that it was non-modifiable, and without any calculation or finding as to what amount of the family support was child support and what amount was maintenance. (R.35:26).

The Marital Settlement Agreement incorporated in the Judgment of Divorce contained the following provision as to health insurance coverage for the minor children:

Health insurance coverage for the minor children shall be provided by the Petitioner, who agrees that he will maintain in effect a policy of health insurance similar to the quality of the policy presently in effect. The Petitioner shall continue to maintain the health insurance until the youngest has attained the age of majority but in the event a child has attained the age of majority while in high school the insurance shall continue until graduation but in no event beyond a child’s 19th birthday. He shall furnish the Respondent with a current subscriber card.

In the event that both parties in the future provide medical coverage, based on their birthdays, the Respondent would be providing the primary coverage and Petitioner the secondary coverage on said minor children.

(R.20: 17; A.App. 117). It contained the following provision as to their health care expenses:

To the extent not covered by the insurance, the minor children’s medical, dental and all other health care related expenses are the responsibility of the Respondent, Mary Doe. This obligation shall continue upon each child attaining the age of majority, but no longer than the ninetieth (19th) birthday of said minor child in the event the child is pursuing an accredited court of instruction leading to the acquisition of a high school diploma or its equivalent.

(***Id***. at 17-18; A.App. 117-118). Further, it contained the following provision as to tax dependency exemptions:

The Respondent shall be entitled to claim the children as an exemption for income tax purposes. The parties realize that the issues of dependency exemptions are always subject to modification or adjustment depending on the individual facts and circumstances of the case. The parties further agree that it is their intention to maximize the income tax benefits from the dependency exemptions and further agree that they will work together to obtain the most favorable mutual benefit they can obtain. Under the present facts with the Respondent receiving “Family Support” which is taxable income to her and deductible from the gross income of the Petitioner, the Respondent can best benefit from being awarded all exemptions which is the intent of the parties.

(***Id***. at 21; A.App. 121).

Again, the court approved the provisions of the Marital Settlement Agreement and incorporated them into its Judgment of Divorce. (R.35: 25-26).

On January 4, 2008, the court entered an order, pursuant to stipulation, changing primary physical placement of the youngest child, Michael, from Mary to John. (R.25; A.App. 124-125). On January 16, 2008, John filed a Motion for Revision of Judgment, seeking a revision of family support, reallocation of dependency exemptions, and reassignment of responsibility for health insurance and payment of uninsured medical expenses. (R.26; A.App. 126).

On April 15, 2008, John filed Petitioner’s Legal Memorandum, in which he again asked the court to modify the family support order, reallocate the dependency exemptions, and reassign responsibility for health insurance and payment of uninsured medical expenses. (R.27; A.App. 130-137).

The trial held an evidentiary hearing on John’s motion on July 7, 2008, at which Mary did not appear or produce any witnesses. (R.36: 2-4). Mary filed Respondent’s Legal Memorandum that same day. (R.30).

On July 23, 2008, John filed Petitioner’s Reply to Respondent’s Legal Memorandum. In addition to seeking modification of the family support order, John again asked the court to readdress the dependency exemptions and responsibility for uninsured medical expenses. (R.31; A.App. 138-146).

On October 10, 2008, the court rendered a Memorandum Decision/Order, which was entered on October 13, 2008. (R.32;A.App. 14 7-148). In it, the trial court held the John was estopped from seeking modification of the family support provision, and concluded that this did not contravene public policy, citing ***Whitford v. Whitford***, 232 Wis. 2d 38, 606 N.W.2d 563 (Ct. App. 1999), a maintenance case. It denied John’s motion, never addressing his request for reallocation of the dependency exemptions or reassignment of responsibility for health insurance and health care expenses (***Id***.) John appeals this Order.

argument

I. The Trial Court Erred When it Estopped John from Seeking Modification of Family Support.

Because application of the estoppel doctrine to an undisputed set of facts is a question of law, this court reviews the issue independently without deference to the trial court’s decision. ***Nichols v. Nichols***, 162 Wis. 2d 96, 103, 469 N.W.2d 619, 622 (1991).

The question of whether a party may be estopped from seeking modification of family support where the parties agreed it would not be modifiable is one of first impression in Wisconsin. Estoppel has been applied to prevent modification of maintenance awards. *See, e.g.,* ***Nichols v. Nichols****, supra*, and ***Whitford v. Whitford****, supra.* Conversely, a marital settlement provision that precludes the parties from seeking to modify child support violates public policy, and estoppel does not lie. See, e.g., ***Jalovec v. Jalovec***, 2007 WI App. 206, 305 Wis. 2d 467, 739 N.W.2d 834. There are no published decisions addressing whether estoppel can be applied to prevent modification of a family support provision that stated it is non-modifiable. Because family support has a child support component, and because to estop medication when places changes deprives a child of support, this court should reverse the trial court and allow modification of the family support provision in this case.

Section 767.531, Stats., authorizes a court to make a family support order “as a substitute for child support orders under s. 767.511 and maintenance payment orders under s. 767.57.” In ***Vlies v. Brookman***, 2005 WI App. 158, ¶18, 285 Wis. 2d 411, 422, 701 N.W.2d 642, 647, this court indicated that, in calculating family support, the circuit court must separately calculate child support and maintenance “as a condition precedent,” and further stated as follows:

A circuit court should use the factors presented in WIS. STAT. §767.25[[1]](#footnote-1) (child support) and the support percentage guidelines provided in WIS. ADMIN. CODE § DWD ch. 40 (Dec. 2003)[[2]](#footnote-2) together with WIS. STAT. §767.26 (maintenance)[[3]](#footnote-3), when ordering family support. More specifically, a court must calculate child support according to the percentage guidelines or provide a rationale for deviating from the guideline. *See* §767.25(1j), (1n).[[4]](#footnote-4)

Because family support consists of a child support component and a maintenance component, this court should hold that it is against public policy for family support, or, at a minimum, the child support component of family support, to be non-modifiable.

Analysis of the family support order in this case shows that a major component, if not all, of it was child support. At the time of trial, John’s income was $10,333 per month and Mary’s was $1682.00 (R.20: 1-2; A.App. 101-102). Using 29% of his gross income because there were three minor children, his child support obligation would have been 2996.0 per month. Although the family support order was $4,000 per month, it, unlike child support, has significant tax implications because it is deductible to the payer and taxable recipient. ***Vlies v. Brookman***, 2005 WI App. 158, ¶10, 285 Wis. 2d at 420, 701 N.W.2d at 646. John submitted to the trial court two calculations made using Judge J. Mac Davis’s tax calculation program which illustrate that the family support order in this case was almost entirely child support. (R.27:7&8; A.App. 136-137). They demonstrate that if Mary had received child support of $2996.00 per month she would have net monthly income of $4,177.00, compared to $4,238.00 with $4,000 in family support. This $61.00 difference is *de minimus* and, using the methodology set forth in ***Vlies v. Brookman****, supra,* the family support in the case is primarily child support.

Further evidence that the family support award in this case was primarily child support is the undisputed testimony that, when the family support was negotiated, the parties and counsel discussed their expectation that Mary, who had been married twice before her marriage to John, would remarry again quickly. In fact, two weeks after the parties separated she began a serious relationship with a man, and married him shortly after expiration of the time limit for remarriage following this divorce. (R.36: 15-17). Because of that, it would be against public policy in this case to enforce the non-modifiable language of the family support provision of the Marital Settlement Agreement.

This is especially true here because the request for modification was triggered by John receiving primary placement of the youngest child of the parties. Now, John is in the position of seeking child support from Mary. *See* Wis. Adm. Code DCF § 150.04(3) In ***Frisch v. Heinrichs***, 2007 WI 102, ¶73, 304 Wis. 2d 1, 36, 736 N.W.2d 85, 102, our supreme court noted with approval the following language in ***Ondrasek v. Tenneson,*** 158 Wis. 2d 690, 696, 462 N.W.2d 910 (Ct. App. 1990): “The statutory goal of providing for the best interest of the child would be defeated if a party is precluded from seeking child support necessary for the best interest of the child” The trial court’s ruling in this case prevents John from seeking child support for the child now primarily placed with him, which clearly is not in that child’s best interest. He instead is paying Mary child support for two children even though one of them is placed with him.

In a case far less drastic than a change of placement, this court refused to prohibit a payer from seeking modification of child support because of a change of circumstances, even though the parties had stipulated to a non-modifiable amount of support. ***Krieman v. Goldberg***, 214 Wis. 2d 163, 571 N.W.2d 425 (Ct. App. 1997). In that decision, this court stated as follows:

A stipulation that purports to make child support nonmodifiable and is unlimited as to time could impoverish the payor parent and place him or her in financial jeopardy. A court must consider the vagaries of life and the reality that a specific circumstance may require an adjustment of an agreed-upon level of support, even where the parties have entered into a stipulation agreement. To hold otherwise and subject a payor parent’s financial future, may have detrimental effects on the parent/ child relationship and in this way would ultimately not serve the best interests of the child. This case presents a compelling change in a payor parent's ability to pay child support. We conclude that the absolute stipulation agreement, with no time limitation or opportunity for review, is against public policy. Goldberg is not estopped by the stipulation from seeking a modification of his support obligations due to a material change in circumstances.

***Id***. at 178, 571 N.W.2d at 432.

In this case, preventing John from seeking a reduction in his family support while he takes on the expense of primary placement of one of the parties' children deprives him of consideration of Mary’s child support obligation toward him, and does not ultimately serve the best interests of that child. It is beyond dispute that a substantial change in circumstances occurred which would allow revision of the family support order absent application of estoppel. In this case, the parties never contemplated that one of the children would be living with John. Further, Mary has exercised no placement since 2007 with the child now placed with John. (R.36: 10-11). That made the change of placement of one of the children a substantial change of circumstances in ***Jalovec v. Jalovec,*** 2007 WI App. 2006, ¶3. Indeed, in ***Motte v. Motte***, 207 WI App. 111, 300 Wis. 2d 621, 731 N.W.2d 294 (rev. denied), this court found that even where a former husband had stipulated that a change in placement would not diminish his support obligation, this provision was unenforceable in the context of a child support credit when a child came to live with him.

To invoke estoppel, Mary must show the following:

[T]hat both parties entered into the stipulation freely and knowingly, that the overall settlement is fair and equitable and not illegal or against public policy, and that one party subsequently seeks to be released from [its] terms ... on the grounds that the court could not have entered the order it did-Without the parties' agreement.

***Rintelman v. Rintelman***, 118 Wis. 2d 587, 596, 348 N.W.2d 498 (1984).

In the present case, the analysis turns on whether it is against public policy for family support to be nonmodifiable. At minimum, the child support component of the family support award must be modifiable for the policy reasons set forth above. In this case, where, after tax considerations, virtually all of the family support is child support, the entire amount of family support should be modifiable.

II. The Trial Court Erred When it Failed to Reallocate the Dependency Exemptions and Reassign Responsibility for Health Insurance and Payment of Health Expenses Despite a Substantial Change in Circumstances.

When John moved for modification of his family support payments, he also sought reallocation of the dependency exemptions for the children, and reassignment of responsibility for health insurance and uninsured medical expenses. (R.26; A.App.126). He renewed these requests in a brief filed before the evidentiary motion hearing (R.27; A.App. 130-137), and in a reply brief filed after the hearing. (R.31; A.App. 138-146). Nonetheless, the trial court failed to address either request in its order, simply stating "petitioner's motion is denied," after addressing only John's motion to modify the family support order. (R.32). Because there has been a material change in circumstances, and the parties did not agree to non-modifiability of health care/insurance expenses and dependency exemptions,[[5]](#footnote-5) the trial court's failure to address these portions of the Judgment of Divorce constitutes an erroneous exercise of discretion. This court should remand this case to the trial court with instructions that its rule on these additional requests by John.

Both of these items are in the nature of child support, as set forth in footnote 5, *supra*, so the trial court's decision on these items is within its discretion and will not be overturned on appeal absent an erroneous exercise of discretion. ***Fowler v. Fowler***, 158 Wis. 2d 508, 526, 463 N.W.2d 370 (Ct. App. 1990). Failure to make a decision is a complete absence of exercise of discretion.

Change of placement of a child is a substantial change in circumstances***, Jalovec v. Jalovec****, supra*, so it was error for the trial court to fail to address reallocation of the dependency exemptions and reassignment of health insurance and health care expenses. This court should remand with instructions that the trial court address these aspects of John's motion.

Conclusion

This court should render a decision that non-modifiable family support provisions are contrary to public policy. In the alternative, it should rule that non-modifiability of the child support component of a family support order is contrary to public policy. Regardless of its ruling on the family support modification issue, this court should remand the case for determination on modification of tax dependency exemption allocation and assignment of health care expenses because the change of placement is a substantial change in circumstances.

Dated this 31st day of March, 2016.

Respectfully submitted,

john doe

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Petitioner-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,151 words.

CERTIFICATE OF COMPLIANCE  
WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 31st day of March, 2016.

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Petitioner-Appellant

**A P P E N D I X**

**I N D E X**

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**A P P E N D I X**

Page

Memorandum Decision and Order, Oct. 10, 2008 1

Transcript of hearing, July 7, 2008 9

Order on primary physical placement, Jan. 4, 2008 42

**CERTIFICATION OF APPENDIX**

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 31st day of March, 2016.

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Petitioner-Appellant

1. 2005 Act 443 renumbered and amended the section title and subsecs. (1) to(4) as §767.511 (title), (1) to (4); renumbered and amended subsec. (4m) as §767.513; and renumbered and amended subsecs. (5) to (7) as §767.511(5) to (7). [↑](#footnote-ref-1)
2. Chapter DWD 40 was renumbered to chapter DCF 150 under s. 13.92(4)(b)1., Stats., Register November 2008 No. 635. [↑](#footnote-ref-2)
3. 2005 Act 443 renumbered and amended the section as §767.56. [↑](#footnote-ref-3)
4. *See* footnote 1, above. [↑](#footnote-ref-4)
5. John does not concede that modification of these items can be estopped even if he had agreed to non-modifiability, because they are in the nature of child support. *See*, ***Fowler v. Fowler***, 158 Wis. 2d 508, 526-27, 453 N.W.2d 374 (Ct. App. 1990) (a provision in a divorce judgment awarding the income tax dependency exemption for a minor child is an aspect of child support), and Wis. Stat. §767.725(4m)(b): "In addition to ordering child support for a child under sub. (1), the court shall specifically assign responsibility for and direct the manner of payment of the child's health care expenses.” [↑](#footnote-ref-5)