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.

REPLY BRIEF OF PETITIONER-APPELLANT

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

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argument

**What’s this?**

I. It Is Against Public Policy for Family Support to Be Nonmodifiable.

In her brief, Mary Doe (“Mary”) cites only maintenance cases to this court to argue that family support can be nonmodifiable. In so doing, she never addresses Wis. Stat. § 767.531, which clearly recognized that family support is a substitute for maintenance ***and*** child support. Likewise, she never addresses ***Vlies v. Brookman***, 2005 WI App. 158, 285 Wis.2d 411, 701 N.W.2d 642, which requires the trial court to ensure that any family support order contain, at minimum, child support according to the percentage guideline. She also never refutes the Mac Davis tax calculations submitted to the trial court, which show that the family support order in this case was almost entirely child support. (R.27: 7 & 8; A.App. 136-137).[[1]](#footnote-1)

Instead, she relies on a June 7, 2005 letter from John Doe’s original trial counsel to Mary’s original trial counsel (R42; R.App. 154) to argue that “the family support payments were primarily intended to be a substitute for maintenance, and not child support.” (Response Brief at 7). The flaw in this argument is that this letter is just one of numerous letters between original counsel, all of which were admitted into evidence as Exhibit 5, and are item 44 in the appeal record.

Included in this Exhibit 5 is a May 17, 2005 letter from John’s then trial counsel to Mary’s then trial counsel in which he points out that Mary has announced her intent to remarry “David,” such that maintenance is not the driving force behind the family support proposed. (R.44:17; A.App. 165).1 Mary in fact married David shortly after expiration of the time limit for remarriage following this divorce. (R.36:15-17). Similarly, in his March 23, 2005 letter, John's then trial counsel emphasizes that the parties would have to “work out the specifics of making this qualify as a Section 71payment so your client receives it regardless of her marital status” (R.44:15; A.App. 163), and in his May 31, 2005 letter, makes it clear the family support proposed is not dependent on Mary’s marital status. (***Id***.:19; A.App. 167). In addition, the duration of family support is consistently tied into when the youngest child turns eighteen, with both attorneys recognizing that for the desired income tax treatment, family support cannot terminate any sooner than one year after this event. *See* ***Id*.**

These letters support John's unchallenged testimony that the family support in this case was at all times considered to be "tax deductible child support." (R.36:34; R.App. 134).

Mary argues that child support to her was addressed by the parties as the monthly state stipend she continued to receive because the parties had adopted foster children. (Response Brief at 8). This ignores that, throughout the original negotiations, and at the suggestion of Mary’s counsel, the parties treated the money from the State as earned income to Mary in all calculations. (R.44:6; A.App. 154). Therefore, it was never considered to be a substitute for child support payments from John.

Mary further argues that because John now receives the state stipend for the child now residing with him, this “cures any inequity that might otherwise exist.” (Response Brief at 9). It does not. These payments could be included in John's earned income upon any recalculation of support, just as they were included in Mary’s at the time the original support order was negotiated. Mary still receives a monthly stipend for the other child they adopted, and now receives an additional $2,000.00 per month from the state for taking on two new foster children since the date of divorce. (R.36:23; R.App. 123).

It should be noted that, in the conclusion section of her brief, Mary states that, "The payments received by [Mary] from the State were factored in, and were awarded to her, in lieu of any requirement on the part of [John] to pay additional amounts for child support." (Response Brief at 14). She offers no record citation in support of this statement, and, as set forth above, the record contradicts this statement.

Mary concludes her argument on this issue by stating that, “It would be wholly unfair to allow [John] to escape the bargain he not only negotiated, but actually proposed himself to [Mary], by permitting him to have the family support payments reduced.” Actually, because the bargain contemplated Mary having primary placement of the children until the youngest became of age, it would be wholly unfair to not allow the family support order to be modified once the youngest child’s placement changed to John, especially because Mary has exercised no periods of placement with this child since 2007. (R.36: 10-11). As set forth in John’s Initial Brief, nonmodifiability would deprive this child of support, which is contrary to public policy. For these reasons, family support must always remain modifiable regardless of whether the parties agreed otherwise.

II. The Trial Court Never Addressed Mary Doe’s Requests to Reallocate the Dependency Exemptions and Reassign Responsibility for Health Insurance and Payment of Health Expenses Despite a Substantial Change in Circumstances.

John made it clear at the motion hearing that, in addition to seeking modification of the family support order, he was seeking the dependency exemption for the child now living with him. (R.36:24; R.App. 124). Nothing in the Judgment of Divorce, including the provision for nonmodifiable family support, prohibited the trial court from reallocating the dependency exemptions. Regardless of whether the amount of family support is modified, because John now has primary placement of the youngest child, the trial court should have addressed John’s request. This was magnified, however, when the trial court failed to address this request after refusing to modify the family support order. The practical effect of this is to have John bear the expenses of a primary placement child for whom he receives no support from Mary, and also deprive him of the dependency exemption, contrary to the Internal Revenue Code.

Similarly, John asked the court to reassign responsibility for health insurance. The trial court erred in not doing so, or at least requiring Mary to contribute to its cost, after refusing to modify the family support order despite John now bearing the expense of raising the youngest of the parties' minor children.

Regarding his request that the Judgment of Divorce be amended such that each is responsible for the uninsured medical expenses of the child now living with each, John concedes that this is and was dependent on the trial court modifying his family support payments. If this court agrees that the family support order in this case is modifiable, then on remand John asks the trial court to consider this request.

CONCLUSION

**What’s this?**

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 is- sue, this court should remand the case for a 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 30th day of April, 2016.

Respectfully submitted,

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Petitioner-Appellant

CERTIFICATION AS TO FORM/LENGTH

**What’s this?**

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 1,214 words.

CERTIFICATE OF COMPLIANCE  
WITH RULE 809.19(12)

**What’s this?**

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 30th day of April, 2016.

Signed:

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Petitioner-Appellant

1. “A.App.” refers to the Appellant’s Appendix attached to John Doe’s Initial Brief. “R.App.” refers to the Respondent’s Appendix attached to Mary Doe’s Response Brief. [↑](#footnote-ref-1)