COURT OF APPEALS
DECISION
DATED AND RELEASED

OCTOBER 10, 1995

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

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-3206

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

IN RE THE PATERNITY OF
DANIEL M.P. and JUSTIN M.B.:

PAMELA D.,

Petitioner-Appellant-Cross-Respondent,

STATE OF WISCONSIN,

Petitioner-Respondent-Cross-Appellant,

v.

MICHAEL P.,

Respondent-Respondent-Cross-Respondent.

APPEAL and CROSS-APPEAL from an order of the circuit court for Lincoln County: MICHAEL J. NOLAN, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. This action to modify child support arises out of a paternity determination. Pamela D. and Michael P. have two children, ages

seven and eight. The trial court ordered support to be 12.5% of Michael's income but no less than $625 per month. Pamela appeals the order, contending that the trial court erroneously determined that the WIS. ADM. CODE § HSS 80 standard of 25% would be unfair to Michael. She further contends that the amount ordered is inadequate and that the arrearage should have been calculated on 25% of Michael's gross income.

The State cross-appeals, also arguing that the child support order in effect at the time of the settlement required that the arrearage be calculated by applying 25%. For the reasons that follow, we affirm the support determination, reverse the arrearage determination and remand for proceedings consistent with this opinion.

In August 1988, Michael suffered a catastrophic head injury in a work-related accident, leaving him permanently brain damaged. Before the accident, Michael earned $6.50 per hour as a laborer. Michael is under the care of a psychiatrist due to his resulting organic personality disorder, which includes explosive outbursts, and is treated with a variety of medications. He is no longer able to work full time, but has worked in a sheltered workshop and has had limited seasonal employment at $4.50 per hour.

In November 1989, when Michael's worker's compensation benefits were $160 per week, the court ordered Michael to pay "approximately 25 percent of his gross monthly income ... This currently allots to $40 per week ...." In March 1992, Michael settled his personal injury claim arising out of his work-related accident. After paying litigation and other expenses, approximately $1.3 million dollars remained and was deposited in a guardianship account. His estimated 1993 interest income from settlement was $64,913.91. On October 1, 1992, Michael was served with the motion to revise child support.

At the hearing, Michael's parents testified that they were his guardians and that Michael requires nearly twenty-four-hour-a-day supervision. Michael lives with his parents on his farm, and his mother cares for him. She testified that Michael's income was used for his support and benefit. From his income she is paid $2,400 per month to care for Michael. Michael purchased the family's $71,000 farm from the bank that had title to it

and used nearly $29,000 to repair it. Michael also purchased vehicles and recreational items in the sum of $52,785.65. Michael receives $600 per month from the account for his personal expenses.

His children's mother, Pamela, testified that she has married and that her husband, employed as a security guard, earns approximately $1,700 per month; however, he pays 25% of his income as support for his two children of a prior marriage. Due to back surgery, Pamela was not working outside the home. Pamela and her husband have two children in addition to Justin and Daniel, who are disabled and receive social security disability of $1,054 per month. Justin and Daniel have attention deficit hyperactive disorder for which they see doctors regularly. Their medication costs $30 per month.

Pamela testified that her rent is $500 per month and includes heat. She is responsible for telephone and electric bills. She testified that she needs a newer car and that the payments are expected to be $375 per month.

The trial court concluded that the application of § HSS 80 percentage standards of 25% would be unfair and ordered that Michael pay child support in the sum of 12.5% of his gross income but not less than $625 per month. It applied this percentage retroactively to the date the settlement funds were received in order to calculate arrearage.

In its written decision, the trial court concluded that Michael's serious head injury "puts him in a different category than one who can work full time and does not have any serious and documented medical problems or future needs." The trial court stated:

> If the Court were to take a straight 25% of the assumed $60,000.00 a year in earnings that Michael has, then his child support obligation would be $15,000.00 per year. I find that this is in excess of the children's present needs and in excess of his ability to pay considering his injury, present earning capacity and the uncertainty of his future. I find it very doubtful that

> he is or will be able to supplement his income to any great degree.

The trial court ordered that Michael pay 12.5% of his income, but not less than $625 per month. It also required Michael to pay for health insurance for the children and that each parent be equally responsible for uninsured medical expenses.

Pamela argues that the trial court erroneously exercised its discretion because it determined that the application of the § HSS 80 standard of 25% would be unfair to Michael. We disagree. The issue of child support, addressed to trial court discretion, is reviewed deferentially. We must uphold the trial court's exercise of discretion if the record shows a process of reasoning dependent on facts of record and a conclusion based on a logical rationale founded upon proper legal standards. ***Abitz v. Abitz,*** 155 Wis.2d 161, 174, 455 N.W.2d 609, 615 (1990). Section 767.32(2), STATS., provides that upon revision of a child support order, the trial court shall use the percentage standards under § HSS 80, which call for 25% of gross income for two children. However, the court may deviate from the percentage standards if it finds that their use is unfair to the children or either party.[1]

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[1] A revision of child support is governed by § 767.32, STATS.:

> Revision of certain judgments. (1) (a) After a judgment or order providing for child support under this chapter ... the court may, from time to time ... revise and alter such judgment or order respecting the amount of such ... child support ... A revision, under this section, of a judgment or order with respect to an amount of child or family support may be made only upon a finding of a substantial change in circumstances.

Section 767.32(2), STATS., provides:

> Except as provided in sub. (2m) or (2r), if the court revises a judgment or order with respect to child support payments, it shall do so by using the percentage standard established by the department of health and social services under s. 46.25 (9).

Section 767.32(2m), STATS., provides:

The record supports the trial court's exercise of discretion. The record discloses that Michael, who is in his mid-twenties, suffered catastrophic injuries that resulted in permanent brain damage. His parents, both age fifty-three, testified that in all likelihood they would not be able to care for him for more than ten years. Major daily concerns for Michael include (1) judgment, (2) problem solving and (3) sequencing, all of which have an impact on his safety and require that he be closely supervised.

Michael's medical future is uncertain, but medical and economic opinion testimony showed that lifetime care could cost between 1.5 and 1.8 million dollars. Michael's personal injury attorney testified regarding his settlement: Based upon the reports of medical and economic experts, "with inflationary trends and the likely increase of future cost of care, it's necessary that in the first number of years after a settlement, that the corpus grow through accumulation of interest so that there will later be enough to last for the entire duration of the need."

The court here was faced with the difficult task of balancing the immediate needs of Michael's children with Michael's very serious future medical needs. The record supports the court's decision that Michael is not in the same category as the average salaried worker earning $60,000 per year and that because Michael's medical needs are much greater, the strict application of the percentage standards would be unfair. Although the precise cost of Michael's future medical needs are not established with mathematical precision, their existence is nonetheless well documented. And although Michael's guardians have sought and obtained court approval for Michael's purchase of the $71,000 family farm, as well as recreational vehicles for his use, there is no showing that these items amounted to waste or were not reasonably necessary for Michael's well-being. His mother testified at trial that there was a limit to the number and nature of activities Michael can do. We conclude that the trial court reasonably exercised its discretion when it concluded that the strict application of the percentage standards would be unfair.

(..continued)

Upon request by a party, the court may modify the amount of revised child support payments determined under sub. (2) if, after considering the factors listed in s. 767.25 (1m) or 767.51 (5), as appropriate, the court finds, by the greater weight of the credible evidence, that the use of the percentage standard is unfair to the child or to any of the parties.

Next, Pamela argues that the sum of 12.5% of gross income, but not less than $625 per month, is inadequate. We disagree. Pamela argues that: "The goal of child support is to provide the greatest amount of income possible to maintain the children at the standard of living they would have enjoyed had the family remained intact," citing ***Abitz v. Abitz***, 155 Wis.2d 161, 177, 455 N.W.2d 609, 616 (1990). ***Abitz*** involved a comparison of the principles underlying the Marital Property Act with principles underlying child support. ***Id***. at 176, 455 N.W.2d at 615 (quoting ***Kritzik v. Kritzik***, 21 Wis.2d 442, 448, 124 N.W.2d 581, 585 (1963)). It recognized that "children involved in divorce are always disadvantaged parties and that the law must take affirmative steps to protect their welfare." ***Id***. at 177, 455 N.W.2d at 616. With Michael's medical needs, the record falls short of establishing the standard of living the children would have enjoyed had Pamela and Michael maintained a family unit. Nonetheless, the law takes affirmative steps to protect the children of unmarried as well as of divorced parents. Section 767.51, STATS.

The standard of living the children would have enjoyed had things been different is, of course, one factor among several that the court must consider under § 767.25, STATS., the statute that governs child support in divorces. Under § 767.51(5), STATS., the analogous statute for setting child support in paternity matters, the trial court should consider the needs of the child, the health needs of the child, the standard of living of the parents, and the needs of each parent to support himself or herself, their financial means, and their earning capacities, among others.

Here, the record discloses that the trial court considered these factors and that the children's needs would be met. Other than prescription medication, which is $30 per month for each child, there was no showing of unusual costs or expenses for the children. Although Pamela submitted a budget of nearly $3,500 per month, the trial court found that the budgeted monthly expense for entertainment ($110), incidentals ($200), clothing ($250) and shoes ($250) could be reduced. On the record before us, we are satisfied that the court reasonably exercised its discretion in setting support at 12.5% of gross income but not less than $625 per month.

Next, Pamela argues, and the State cross-appeals, that the trial court erroneously modified the support order retroactively, applying 12.5% instead of the existing 25% order to calculate the arrearage that developed after the date of Michael's personal injury settlement. We agree.

Section 767.32(1m), STATS., provides: "In an action under sub. (1) to revise a judgment or order with respect to child support ... the court may not revise the amount of child support ... or an amount of arrearages ... prior to the date that notice of the action is given to the respondent, except to correct previous errors in calculations."

The record indicates that Michael received his portion of the settlement sometime in March 1992. However, the certificate of service indicates that Michael received notice of the action to revise support on October 1, 1992. Consequently, under § 767.32(1m), STATS., the reduction of support order applies not from the date Michael received his settlement, but from October 1, 1992.

Michael contends that the trial court was entitled to clarify the ambiguity created by the terminology: "approximately 25 percent of his gross monthly income ... This currently allots to $40 per week ..." We agree that the court may interpret its own order. However, here the court did not interpret its own order but entered a new order. Therefore, we reverse the new order to the extent it applies before October 1, 1992, and remand for the court to interpret its 1989 order.

By the Court. – Order affirmed in part; reversed in part, and cause remanded with directions. No costs.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.