COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3654

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

IN RE THE MARRIAGE OF:

RANDY J. RAVENSCROFT,

PETITIONER-APPELLANT,

V.

DIANE M. RAVENSCROFT,

RESPONDENT-RESPONDENT.

APPEAL from orders of the circuit court for Adams County: VIRGINIA WOLFE, Judge. *Reversed and cause remanded with directions.*

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

VERGERONT, J. Randy Ravenscroft appeals trial court orders determining his child support arrearage for the years 1993-1996.[1] He contends

[1] The court entered a separate order for each year.

that the court erred in not fully counting two direct child support payments he made in 1993 and in including 401K account distributions as "gross wage" in determining his support obligation for 1995. We conclude that the trial court erred in failing to include the full amount of the two direct payments in computing the child support Randy actually paid for 1993 and reverse the order the court entered for that year. We also conclude that further proceedings are necessary to determine the proper interpretation of "gross wage," a term contained in the parties' stipulation, which was approved by the court and incorporated unmodified into the judgment of divorce. We therefore reverse and remand the order for 1995.

BACKGROUND

Randy Ravenscroft and Diane Ravenscroft were divorced by a judgment entered on February 28, 1994, following a hearing held on November 19, 1993. The parties had three minor children. A temporary order entered on June 24, 1993, provided: "The petitioner [Randy] shall pay to the respondent for support of the minor children 29% of the petitioner's gross income (including bonuses), beginning with the paycheck to be issued by Grand Cheese [Randy's employer at the time], on June 17, 1993…. If such assignment is not in effect by June 17, 1993, the petitioner shall submit a copy of his pay stub along with a check in the amount of 29% of his gross income directly to the respondent, starting July 1, 1993."

Randy and Diane reached a final stipulation on child support and other issues which were unmodified and incorporated by reference into the judgment of divorce. With respect to child support, the stipulation provided: "Until further order of the Court, [Randy] shall pay 29% of his gross wage for child support."

Randy paid child support by income assignment to the clerk of court beginning in July 1993 and continuously through 1996. In July 1997, the Adams County Child Support Agency filed affidavits for percentage reconciliation for the years 1993-1996 pursuant to § 767.293, STATS., which governs determination of arrearage where the child support ordered is expressed as a percentage of the parent's income. These affidavits asserted the following differences between what Randy had paid to the clerk of court and 29% of his gross income: 1993—$463.17, 1994—$303.34, 1995—$5,689.51 and 1996—$246.58. Randy timely requested a hearing to contest these amounts. *See* § 767.293(2).

At the hearing, Randy testified that he paid Diane directly by check in the amounts of $520 on June 24, 1993, and $437.07 on July 10, 1993, under the temporary order, before starting to pay by income assignment to the clerk of courts. Randy contended that, rather than owing child support for 1993, he was entitled to a credit of $493.90.

With respect to the reconciliation for the years 1994-1996, Randy testified that he received the following moneys which, he contended, were not "gross wage" within the meaning of the final stipulation and judgment of divorce and, therefore, were erroneously included in computing the reconciliation amounts: 1995: $18,519 that he withdrew from his 401K plan when he left his employment at Grand Cheese and $1,100 in winnings from the IGA store; 1996: $708.31 in quarterly safety bonuses from his employer.[2] Diane did not testify.

[2] Randy also testified that in 1994 he received $1,690 from the sale of a van. The court found that amount had not been included in the county's proposed arrearage for 1994, and that is not an issue on this appeal.

The corporation counsel for Adams County argued that under § 767.32(1m) and (1r), STATS., the court did not have the authority to give Randy credit for the two payments he paid directly to Diane in 1993. He also argued that the applicable statute and regulations require a percentage payment of gross income, that the parties' stipulation could not alter that, and that the 401K withdrawal, IGA winnings and safety bonuses were all part of Randy's gross income.

The trial court found that the temporary order was in effect in June and permitted Randy to make payments directly to Diane, although, the court stated, it was not clear how the language "starting July 1, 1993" was to modify that. The court found that Randy paid the amounts indicated in the two checks directly to Diane and she received them, and thereafter Randy began paying to the clerk of court beginning on July 26, 1996. The court concluded that the payments were appropriately made to Diane pursuant to the order. The court then determined that there was no arrearage for 1993 but neither was Randy entitled to a credit.

With respect to the interpretation of the term "gross wage" in the final stipulation, the court observed that the parties could alter the statutory term "gross income," and that they had done so. The court interpreted "gross wage" to mean all payments from Randy's employer. It therefore concluded that the pension withdrawal and the safety bonuses were included in gross wage, but the IGA winnings were not, resulting in an arrearage of $5, 370.51 for 1995.

ANALYSIS

Randy does not appeal the ruling with respect to the safety bonuses. He does renew his argument before this court concerning the 1993 direct

payments, contending that the court erred in ordering no credit and no arrearage for 1993, because he was entitled to a credit of $493.90. He also renews his argument that the inclusion of the 401K withdrawal for 1995 was improper, because that is not part of his "gross wage."

The issue whether the court is precluded by statute from considering the payment made directly to Diane in computing Randy's arrearages presents a question of law, which we review de novo. *See* ***Douglas County Child Support Enforcement Unit v. Fisher***, 200 Wis.2d 807, 811, 547 N.W.2d 803 (Ct. App. 1996). There is no dispute that Randy made the two payments in question directly to Diane. The State relies on § 767.32 (1m) and (1r), STATS., which provide:

> (1m) In an action under sub. (1) to revise a judgment or order with respect to child support, maintenance payments or family support payments, the court may not revise the amount of child support, maintenance payments or family support payments due, or an amount of arrearages in child support, maintenance payments or family support payments that has accrued, prior to the date that notice of the action is given to the respondent, except to correct previous errors in calculations.

> (1r) In an action under sub. (1) to revise a judgment or order with respect to child support or family support, the court may not grant credit to the payer against support due prior to the date on which the action is commenced for payments made by the payer on behalf of the child other than payments made to the clerk of court or support collection designee under s. 767.265 or 767.29 or as otherwise ordered by the court.

We have held that these two sections "unambiguously provide that a trial court cannot grant credit for direct payments for support made in a manner other than that prescribed in the order or judgment providing for support." ***Fisher*** at 813, 547 N.W.2d at 803-04. ***Fisher*** did not address the question of whether

these sections apply in a proceeding to establish an arrearage under § 767.293, STATS., but we will assume without deciding that they do. The direct payments in this case were, as the trial court concluded and we agree, expressly authorized "if the income assignment is not in effect by June 17, 1993." The State does not argue that an income assignment was in effect when Randy made these direct payments. Rather, the State argues on appeal that Randy did not completely comply with the order because he did not submit a copy of his pay stub along with the two checks. The State asserts that "the record reflects" this. However, our review of the record shows that, with respect to the July 10 check, Randy did testify that he "sent to Diane a copy of that check stub" with the payment.

The State did not argue in the trial court that Randy did not comply with the court order because he failed to send copies of the check stubs with the checks. Randy was not asked any questions about giving Diane copies of his check stubs with the two checks and he did not volunteer information about the check stub for the June 24 check. We generally do not address issues that were not raised in the trial court, *see* ***Wengerd v. Rinehart***, 114 Wis.2d 575, 580, 338 N.W.2d 861, 865 (Ct. App. 1983), and there are good reasons not to do so in this instance. Since the corporation counsel did not raise before the trial court the issue of whether Randy submitted a copy of his pay stub to Diane with each check, Randy did not have the opportunity to present additional evidence on that issue or otherwise respond, and the trial court did not make any findings on that point. It is not an issue that Randy should reasonably have anticipated in the absence of the corporation counsel making it an issue, because the affidavits of reconciliation show that the child support agency had information on the amount of Randy's gross earnings from Grand Cheese for the period from July 1, 1993 to December 31, 1993. In any event, in the absence of a dispute over the amount of

Randy's earnings from Grand Cheese during the relevant time period, we would not be inclined to hold that he did not comply with the temporary order solely because he did not give his payroll check stub to Diane with each check.

We conclude that the temporary order did authorize Randy to make the two payments directly to Diane, and that § 767.32(1m) and (1r), STATS., do not prevent the court from counting those payments when determining whether the child support agency's proposed arrearage for 1993 was correct. The trial court reached the same conclusion. However, the trial court did not allow Randy a credit for 1993. We are unable to determine from the court's comments the basis for this conclusion, and the State does not offer any rationale for considering a portion of the direct payments but not the entire amount. We therefore conclude that Randy is entitled to have the two direct payments included in the computation to determine whether there is an underpayment or an overpayment for 1993, and to have any overpayment for that year credited against any arrearage or support owed for other years.[3]

With respect to whether the 401K proceeds were properly included, we agree with the trial court that the issue is whether they were included within the meaning of "gross wage" in the final stipulation, which was incorporated unmodified into the final judgment. When a court incorporates unmodified a stipulation between parties in a divorce action into the final judgment and a later dispute over the meaning of terms in the stipulation arises, the court must seek a construction of the stipulation that will effectuate what appears to be the intention of the parties. ***Duhame v. Duhame***, 154 Wis.2d 258, 264, 453 N.W.2d 149, 151

[3] Randy contends that the amount of the overpayment in 1993 was $493.90. On remand the court can determine whether that is the correct amount.

(Ct. App. 1989). When the language of the stipulation is reasonably susceptible to more than one meaning, it is ambiguous, ***id.*** at 266, 453 N.W.2d at 152, and the trial court then properly looks to extrinsic evidence to determine the parties' intent, such as testimony of the parties. *See* ***id***. at 265-67, 151-52. Whether a written instrument is ambiguous is a question of law, which we review de novo. *See* ***Schultz v. Schultz***, 194 Wis.2d 799, 805, 535 N.W.2d 116, 118 (Ct. App. 1995).

We conclude that the term "gross wage" is ambiguous. It could be reasonably interpreted to mean Randy's weekly gross earnings from his employment, as Randy argues. This interpretation is supported by one sentence in a later paragraph of the stipulation, also incorporated unmodified into the final judgment: "All the child support payments shall be by wage assignment from the Petitioner's payroll check." However the very next sentence, "In the event any child support payments are not collected by wage assignment, all child support payments shall be made in cash, money order, or certified check, and made payable to the Clerk of Circuit Court of Adams County," suggests there may be child support contemplated that is not collected through a wage assignment from Randy's payroll check. The trial court's interpretation of "gross wage" as any income related to Randy's employment, even though not reflected on a pay stub, is also reasonable.

Finally, the State offers yet another reasonable interpretation. The State argues that § 767.10(2)(a), STATS., provides that a court may not approve a stipulation for child support unless it provides for payment consistent with § 767.25, STATS. Subsections 767.25(1j), (1m), and (1n) require a court to determine child support payments by the percentage standard established by regulation, unless the court makes certain findings in writing or on the record

justifying a deviation from those standards. Since no such findings were made in this case, the State contends it is reasonable to interpret the stipulation as consistent with the percentage standards in the regulations. Under the regulations, the percentage is of "gross income," which is defined more broadly than Randy's proposed definition of "gross wage." *See* WIS. ADM. CODE § HHS 80.02(13). We do not agree with the State that, as a matter of law, "gross wage" must be interpreted to mean "gross income." But, in using the particular percentage established in the regulations for three children, *see* WIS. ADM. CODE § HSS 80.03(1)(c), the parties may have intended that the 29% be calculated on the same categories as those included in the definition of "gross income" under the regulations. The parties may have used the term "gross wage" because Randy's only source of income at the time was his weekly paycheck, rather than intending that he pay no more than 29% of his weekly paycheck even if he had additional income.

When Randy attempted to testify on his understanding of his support obligation under the stipulation, the court sustained an objection and explained, "That's for me to decide." If the trial court meant there was only one reasonable interpretation of the stipulation, then, as we have stated above, our de novo review of that question persuades us otherwise. If, on the other hand, the trial court meant the stipulation was ambiguous, but it was for the court to decide its meaning without extrinsic evidence, we conclude that determination was also error: in the

circumstance of this case, we do not see how the ambiguity can be resolved without testimony on the parties' intent.[4]

We therefore reverse the trial court's determination that the funds withdrawn from the 401K plan are included in Randy's "gross wage" for 1995 and remand for a hearing at which the parties may testify as to their intent in agreeing that Randy pay as child support "29% of gross wage." However, because this is a stipulation for child support, the parties' intent in entering into the stipulation may not completely resolve the issue. *See* § 767.10(2), STATS. If the court concludes that the parties intended to agree to a support obligation for Randy that is other than that provided for in § 767.25(1j), STATS., then the court must consider whether it could have properly approved that stipulation under §§ 767.10(2) and 767.25. If the court concludes that the circumstances at the time it approved the stipulation would have supported any findings required under § 767.25(1)(n), it should make those findings, and the parties' intent on the meaning of "gross wage" will then govern, having been approved by the court consistent with its statutory authority. If, however, the court concludes that the circumstances would not have supported any statutorily required findings, it should interpret the stipulation to mean "29 percent of gross income" regardless of its findings of the parties' intent, because that is the only stipulation it had the statutory authority to approve.

[4] We recognize that when a trial court makes a determination and drafts a decision, if the language the court drafted is ambiguous we defer to the trial court's interpretation of its own language because the trial court, having heard the testimony, being familiar with the record, and having drafted the decision, is in a better position than this court to resolve that ambiguity. *See* ***Schultz v. Schultz***, 194 Wis.2d 799, 808, 535 N.W.2d 116, 119 (Ct. App. 1995). However, in this case the parties drafted the stipulation, which the court approved and incorporated into the judgment unmodified. We do not understand the court to have rested its interpretation of "gross wage" on testimony it previously heard or the record with which it was familiar at the time it approved the stipulation.

We recognize that this is a somewhat unusual procedure on remand. However, we conclude it is necessary in order to take into account the parties' intent in entering into the stipulation on the one hand, and the statutory conditions placed on the court's authority to approve stipulations as to child support on the other hand. The analysis on remand will thus focus on what the parties intended at the time they entered into the stipulation, in the context of any conditions the statute imposed on the court's discretion to approve the stipulation.

In summary, we conclude that the two direct payments that Randy made to Diane in 1993 must be included in computing the amount of support he actually paid in 1993. We therefore reverse the order the court entered for 1993. We also conclude that further proceedings are necessary on the question whether the 401K withdrawal is "gross wage" within the meaning of the parties' stipulation and the divorce judgment. We therefore reverse the order entered for 1995 and remand for further proceedings as described in this opinion.

By the Court.—Orders reversed and cause remanded with directions.

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