

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.

No. 98-3440

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

PATRICE A. PRIGGE,

PETITIONER-APPELLANT,

v.

DENNIS J. PRIGGE,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Sheboygan County: JOHN B. MURPHY, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Patrice A. Prigge appeals from the child support and maintenance provisions of the judgment divorcing her from Dennis J. Prigge.

Because we conclude that the circuit court erroneously calculated Dennis's income for child support and maintenance purposes, we reverse and remand for further proceedings. With the exception of child support and maintenance, which depend on a calculation of Dennis's income, we affirm all other aspects of the judgment of divorce.

¶2 The Priggs were married for sixteen years before Patrice commenced an action for divorce. The circuit court divided the parties' assets equally and determined their respective incomes for child support and maintenance purposes. With regard to \$30,000 in income from Dennis's employer, Prigge's Chartered Buses, Inc., the court found that although these funds are paid to Dennis, the funds are applied by wage assignment to the purchase of Prigge's Chartered Buses stock from Dennis's father. The balance of the \$30,000 is used to pay the income taxes arising from the \$30,000 in income. Because Dennis acts as a conduit for the \$30,000 and receives no economic benefit other than to pay for the stock he is purchasing, the court excluded the \$30,000 from Dennis's income for child support and maintenance purposes and included the current value of the Prigge's stock in the parties' assets for division.

¶3 On appeal, Patrice argues that the circuit court erroneously excluded the \$30,000 from Dennis's income for child support and maintenance purposes. Patrice contends that the child support standards do not permit the court to exclude income from the calculation of the payor's income.

¶4 The circuit court determines child support payments using the percentage standards established by the Department of Health and Social Services. *See Cook v. Cook*, 208 Wis.2d 166, 176, 560 N.W.2d 246, 250 (1997). The child support award is based on the payor's "gross income," which is defined broadly by

WIS. ADM. CODE § HSS 80.02(13)(a) as “[a]ll income considered federal gross income under 26 CFR 1.61-1.”¹ “Gross income as defined in 26 C.F.R. § 1.61-1 (West 1997) means ‘all income from whatever source derived, unless excluded by law.’” *State v. Wall*, 215 Wis.2d 595, 598 n.1, 573 N.W.2d 862, 863 (Ct. App. 1997). We assume, without deciding, that Dennis’s gross income includes the \$30,000 which facilitates his stock purchase. This, however, does not end our analysis.

¶5 Section 767.25(1m)(i), STATS., permits a circuit court to consider “[a]ny other factors which the court in each case determines are relevant” on the question of whether to deviate from the percentage standards. *See Wall*, 215 Wis.2d at 600, 573 N.W.2d at 864. In *Wall*, this court upheld the circuit court’s exclusion from the payor’s gross income of the value of two trips he received from his employer, *see id.* at 603, 573 N.W.2d at 865, even though the trips fell within the WIS. ADM. CODE § 80.02(13) definition of “gross income,” *see Wall*, 215 Wis.2d at 599, 573 N.W.2d at 863. The court deviated from the percentage standards because it found that it would be unfair to include the value of the trips in the payor’s gross income because the trips “could not be readily converted to cash, traded or sold.” *Id.* at 598-99, 573 N.W.2d at 863.

¶6 As we noted in *Wall*, a court can consider whether the asset at issue generates additional cash or assets or otherwise enhances the payor’s financial ability to make child support payments. *See id.* at 600, 573 N.W.2d at 864. In this case, the court observed that the \$30,000 paid to Dennis had never been treated by the family as part of its disposable income and that the “value” of the \$30,000

¹ Chapter HSS 80 has been renumbered ch. DWD 40 (effective Aug. 1, 1999).

could more fairly be captured by including in the property division the present value of the stock being purchased. We affirm the court's exercise of discretion in treating the \$30,000 as a property division issue rather than an income issue, and in deviating from the gross income guidelines.

¶7 While we affirm the circuit court's treatment of the \$30,000, we agree with Patrice that the court erroneously excluded from Dennis's income his \$9500 contribution to his 401k account. Contributions to private pensions are included in the definition of gross income. See WIS. ADM. CODE § HSS 80.02(13)(e). The court's determination of Dennis's income is a finding of fact which will not be set aside unless it is clearly erroneous. See *DeLaMatter v. DeLaMatter*, 151 Wis.2d 576, 588, 445 N.W.2d 676, 681 (Ct. App. 1989). In this case, we conclude that the court's determination of Dennis's income is clearly erroneous.

¶8 We agree with Dennis that the circuit court expressly stated that it was only excluding the \$30,000 from Dennis's income for child support and maintenance purposes.² However, from our review of the record it is clear that the court began its income calculation from a figure which was also reduced by Dennis's \$9500 401k contribution. In paragraph 10.J. of the judgment of divorce, the court deducted \$30,000 from Dennis's 1996 gross income and arrived at an income of \$136,000. However, the W-2 form included in the record indicates that in 1996 Dennis earned \$175,499 in Medicare wages, made a \$9500 401k contribution and reported wages of \$165,999. Rounding these figures, it appears that the court took

² We reject Dennis's contention that the exclusion of the \$30,000 related only to the setting of child support. In determining maintenance, the court considered the amount of child support and the parties' incomes. Dennis's income was calculated after subtracting the \$30,000 he used to purchase Prigge stock.

\$30,000 from \$166,000, for a child support income of \$136,000. At paragraphs 10.J to 10.P., the court calculated child support and maintenance based on the \$136,000 figure. Therefore, it appears that the court set Dennis's income net of his 401k contribution, even though the court intended to exclude only the \$30,000.

¶9 In light of the discrepancy between the circuit court's stated intention to exclude only the \$30,000 from Dennis's income and its calculations, we conclude that we must reverse and remand for the court to explain why it relied upon an income figure for Dennis which was reduced by his \$9500 401k contribution or to correct the income calculation to reflect Dennis's actual income (not including the \$30,000, the exclusion of which we have affirmed). If the court calculates a new income figure for Dennis, the court may have to revisit its child support and maintenance calculations.

¶10 Patrice also challenges the \$100 monthly maintenance award as a misuse of discretion. Because we are reversing and remanding due to the error in calculating Dennis's income, the circuit court may have to revisit maintenance. Nevertheless, we will briefly comment on Patrice's complaints about the circuit court's maintenance methodology.

¶11 In awarding indefinite maintenance, the circuit court considered each party's gross income, budgetary needs and Dennis's child support payments. The court then strove to meet Patrice's budgetary needs. The court found that \$100 per month in maintenance plus child support and Patrice's earnings would yield a net income of \$4729 per month to Patrice and \$4356 to Dennis.

¶12 Patrice argues that the \$100 per month maintenance award was a misuse of discretion because the court did not consider the § 767.26, STATS., maintenance factors, the support and fairness objectives of maintenance, *see*

LaRocque v. LaRocque, 139 Wis.2d 23, 33, 406 N.W.2d 736, 740 (1987), and premised the maintenance award upon an assumption that Dennis would make child support payments of \$34,000 per year (25% of his gross income). Patrice seems to complain that Dennis's income might fall in subsequent years, resulting in a reduction of child support which would then undermine the maintenance calculation. This challenge is premature. Child support and maintenance, which are interrelated, *see Cook*, 208 Wis.2d at 183, 560 N.W.2d at 253, remain subject to modification upon a showing of a substantial change in circumstances, *see* § 767.32, STATS.

¶13 We note that the circuit court roughly equalized the parties' incomes and the maintenance award yields funds to Patrice which meet her budgetary needs, less a de minimis amount. The court's approach to maintenance satisfies the support and fairness standards of *LaRocque*. We also conclude that the court evidenced its exercise of discretion by referring to the § 767.26, STATS., maintenance factors as relevant to the case. *See Trattles v. Trattles*, 126 Wis.2d 219, 228, 376 N.W.2d 379, 384 (Ct. App. 1985). As we have noted, however, the court may need to revisit maintenance in light of our directions on remand.

¶14 No costs on appeal to either party.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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

