

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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. 99-0668-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

DEBRA SCHULTZ, N/K/A DEBRA FREY,

PETITIONER-RESPONDENT,

V.

DANIEL P. SCHULTZ,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for St. Croix County:
C. A. RICHARDS, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Gordon Myse, Reserve Judge

PER CURIAM. Daniel Schultz appeals an order requiring him to pay Debra Frey \$150 per month child support for their two children.¹ He argues

¹ This is an expedited appeal under RULE 809.17, STATS.

that the record does not support the trial court's finding that he has that earning capacity in light of his physical disabilities. He also argues that the court did not consider Frey's income and the children's needs and that the court failed to make findings as to why the percentage standards should not apply. We reject these arguments and affirm the order.

At the time of their 1995 divorce, Frey agreed that she would not seek child support for two years. After that time passed, she brought a motion to compel Schultz to pay child support. The trial court concluded that he should pay approximately half of the cost of the children's daycare and medical insurance.

Schultz argues that he is unable to work based on medical conditions. He had no income for approximately thirteen years at the time of the hearing. He argues that he would have to live off the sale of personal property assets received in the divorce in order to pay child support.

The trial court's finding that Schultz has an earning capacity sufficient to pay \$150 per month is not clearly erroneous. *See* § 805.17(2), STATS. While a doctor's report concluded that Schultz would not be able to hold long-term "meaningful employment," a term not defined, the medical records and testimony do not establish such inability to work that Schultz would not be able to make the modest child support payments required by this order. The court noted that Schultz was denied social security disability benefits based on his back pain, a broken ankle, arthritis, heart problems and color blindness. Since that time, Schultz has had spinal fusion surgery and did not reapply for social security disability benefits. Schultz was capable of driving for a two hour round trip to pick up his children for visitation purposes; he occasionally drives a bobcat stored on his property to move snow, and the court was skeptical about Schultz's

credibility based on the fact that he owned ten hunting guns and four motorcycles.² The record supports the trial court's finding that Schultz is not totally incapable of working.

The award of \$150 per month child support constitutes a proper exercise of the trial court's discretion.³ Discretion is properly exercised when the record reflects the trial court considered the needs of the custodial parent and children and the ability of the noncustodial parent to pay. See *Edwards v. Edwards*, 97 Wis.2d 111, 116, 293 N.W.2d 160, 163 (1980). The court considered the children's daycare and medical insurance costs, and awarded only half of the amount Frey requested. The trial court's finding that Schultz is capable of earning a sufficient amount to afford such a modest level of support is not clearly erroneous. The court reasonably considered Schultz's earning capacity rather than his actual earnings based on his unreasonable refusal to work even though he has the capacity. See *Smith v. Smith*, 177 Wis.2d 128, 135-37, 501 N.W.2d 850, 854-55 (Ct. App. 1993). The suggestion that the court should have to use the percentage standard or explain its refusal to do so is untenable since Schultz has zero income. Using the percentage standards would reward him for his refusal to diligently pursue his best employment opportunities.

² If Schultz chooses not to work, he can satisfy his child support obligation by selling these assets. A person too disabled to work should have little need for motorcycles and hunting rifles. The law does not prohibit consideration of a party's assets when determining his ability to pay child support. See *Cook v. Cook*, 208 Wis.2d 166, 180-81, 560 N.W.2d 246, 252 (1997); *Anderson v. Anderson*, 72 Wis.2d 631, 643, 242 N.W.2d 165, 171 (1976).

³ The amount awarded is subject to modification if Schultz secures employment and can establish that the trial court's findings as to his earning capacity are no longer true.

By the Court.—Order affirmed.

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

