**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**April 17, 2003**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 02-3332-FT** **Cir. Ct. No. 00-FA-478**

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

---

**IN RE THE MARRIAGE OF:**

**MELISSA ERTZ ROGGE,**

**PETITIONER-RESPONDENT,**

**V.**

**PAUL AARON ROGGE,**

**RESPONDENT-APPELLANT.**

---

APPEAL from an order of the circuit court for La Crosse County: DALE T. PASELL, Judge. *Reversed and cause remanded*.

Before Dykman, Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Paul Rogge appeals a post-divorce order requiring him to pay one-half of his son Barrett's daycare expenses. Paul claims the trial court lacked jurisdiction to consider the question of daycare expenses while the

record was in this court on appeal of another issue; the court lacked authority to order the parties to split variable expenses absent any agreement that they do so; and, even if the trial court had such authority, it could not properly have exercised its discretion without having the record with the financial data before it. We do not address the jurisdictional question because we conclude Melissa Rogge's motion for "clarification" should have been treated as a motion to revise or modify the judgment. That is, the trial court improperly decided an issue which had not been addressed in the original judgment without reference to the usual standards for revising a divorce judgment. Accordingly, we reverse the post-divorce order and remand the matter for reconsideration of the daycare expenses issue in a manner consistent with this opinion.

## BACKGROUND

¶2 A proposed parenting plan signed by both parties in July of 2001 stated that Paul and Melissa agreed to "[e]ach pay 1/2 of daycare because we both work full time." Paul did not object to the admission of the plan into evidence at the divorce hearing, although he now claims he had previously complained to the family court commissioner that Melissa had made some unilateral changes to the plan, including the daycare expense provision, after he had already signed it. A subsequent partial marital settlement agreement signed by the parties and incorporated into the divorce judgment was silent on the question of daycare expenses.

¶3 At the divorce hearing, Melissa agreed to abide by the parenting plan, except as modified by the partial marital settlement agreement. Paul acknowledged that he had signed the parenting agreement, but requested only that the court incorporate the terms of the partial marital settlement agreement into the

divorce. Melissa further testified that the parties were splitting daycare costs, which Paul concedes was true under the terms of the temporary order, and the trial court appeared to believe that a division of daycare costs would continue when it was discussing who should be allowed to claim Barrett as a dependent for tax purposes. The court did not, however, adopt or incorporate the shared daycare cost provision from the parenting plan into the final written divorce judgment.

¶4 Paul stopped paying half of the daycare expenses shortly after the divorce judgment was entered. Melissa filed a motion seeking to either have Paul held in contempt or have the divorce judgment "clarified" to require that he pay half the expenses. The trial court declined to hold Paul in contempt because the divorce judgment had not explicitly required that he pay half the daycare costs. The trial court did, however, amend the judgment to "state" that Paul would be responsible for half of the daycare costs in the future.

## DISCUSSION

¶5 WISCONSIN STAT. § 767.01(1) (2001-02)[1] allows the trial court to effectuate a divorce judgment by construing, or clarifying, an ambiguous provision. ***Washington v. Washington***, 2000 WI 47, ¶25, 234 Wis. 2d 689, 611 N.W.2d 261. In certain instances, silence may create an ambiguity. ***Id.*** at ¶27. Here, however, while the divorce judgment did not mention daycare expenses, the partial marital settlement agreement which it adopted specified that each party would be responsible for any debts incurred by him or her after the commencement of the action. Therefore, a provision directing the parties to divide

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

expenses incurred by Melissa when she enrolled the child in daycare would represent a modification, rather than a clarification of the divorce judgment.[2]

¶6 There are two distinct provisions which allow modification of a divorce judgment. Under WIS. STAT. § 767.32(1), the court may revise child support or "make any judgment or order respecting any of the matters that such court might have made in the original action [other than a waiver of maintenance or a property division]" upon a showing of a substantial change in circumstances. Under WIS. STAT. § 806.07(1)(a) and (h), the court may revise a judgment if it was based on a mistake, or for any other reason justifying relief from the operation of the judgment. Because Melissa is not claiming that there has been any change in circumstances since the imposition of the divorce judgment, § 806.07 is the applicable provision here, and the trial court should have analyzed her request for a division of daycare costs under that statute. We will therefore remand this matter to allow the trial court to consider the motion under the proper legal standard.

¶7 Because the issue is likely to recur on remand, we further address Paul's claim that the trial court lacked authority to divide daycare costs equally among the parties absent their express consent. While that may be an accurate reading of the language in ***Zawistowski v. Zawistowski***, 2002 WI App 86, ¶¶16-17, 253 Wis. 2d 630, 644 N.W.2d 252, it is not a fair characterization of the issue before the trial court. The issue here is not a legal question as to whether the court

[2] We do not accept Melissa's assertion that the trial court had already ruled that the daycare provisions should be divided equally, and that the omission of this provision in the final judgment was merely an oversight. At most, the record shows that the trial court believed that the parties had reached an agreement to divide the expenses, not that it had ruled that they should do so.

could divide the daycare costs without the parties' consent, but rather a factual dispute as to whether the parties had in fact reached an agreement to divide the costs, which Paul subsequently denied after the trial court ruled that Melissa would be allowed to claim Barrett as a dependent for tax purposes. In deciding this factual dispute, the trial court may consider such facts as that Paul and Melissa had both signed a proposed parenting plan stating that the daycare expenses would be divided equally, that Melissa testified at the divorce hearing that the parties were splitting daycare expenses and that she planned to abide by the proposed parenting plan, that the partial marital settlement did not include any provisions for daycare costs, and that Paul had complained to the family court commissioner that Melissa inserted the daycare provision after he signed the plan, but that he did not object to the admission of the plan or other references to splitting daycare costs at the divorce hearing.

¶8 If the trial court finds that there was an agreement on daycare provisions at the time of the divorce hearing, it may properly consider that as a basis for granting relief and revising the judgment under WIS. STAT. § 806.07. If the court finds that the parties had not reached any such agreement, but that the court itself was under the mistaken impression that they had, it may consider whether that affects its determination on child support or the tax exemption.

*By the Court.*—Order reversed and cause remanded.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.