COURT OF APPEALS
DECISION
DATED AND RELEASED

February 13, 1997

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. 96-0346

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

In re the Paternity of:
CRYSTAL M. L.:

STATE OF WISCONSIN EX REL.
CINDY L.D.,

Petitioner-Appellant,

v.

GREGORY B.L.,

Respondent-Respondent.

APPEAL from an amended order of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

Before Eich, C.J., Dykman, P.J., and Deininger, J.

PER CURIAM. The State of Wisconsin appeals from an amended order in a paternity action. The issues are whether the trial court is empowered

to: (1) reduce arrearages that accrued prior to August 1, 1987; (2) abrogate interest on the remaining arrearage; (3) delay payment of the arrearage until Crystal attains majority and then direct the arrearage to be paid in monthly installments directly to her; and (4) modify child support from a dollar amount to a percentage of gross income. We conclude that the trial court is empowered to reduce the pre-August 1, 1987, arrearage and affirm that part of the amended order. However, we reverse those parts of the amended order that abrogate interest and direct payment to Crystal. We also reverse that part of the August 3, 1993, nonfinal order that modifies child support from a dollar amount to a percentage because Cindy did not have notice of that modification until the appropriate motion was filed and decided in December of 1995.[1] We remand for proceedings consistent with this opinion.

Crystal is the nonmarital child of Cindy and the respondent, Gregory. Gregory agreed to a graduated support order on November 24, 1978, pursuant to which he was obliged to pay $179 monthly child support.[2] Gregory owed Cindy $17,622 in accrued arrearage through November 16, 1992. The trial court reduced his arrearage from $17,622 to $11,484. It also found that Gregory was "engaged in full time farm work which the court believes to be his highest potential and that after deducting a current support obligation of 17%, an additional assessment for the arrearage would place [Gregory] in the poverty level." Consequently, it concluded a justifiable basis existed to allow deferred payment of the arrearage until Crystal attained majority and then, because Gregory no longer had a child support obligation, pay the arrearage in monthly installments of $179 directly to Crystal, rather than to her mother.[3] The

[1] Although the trial court properly exercised its discretion in modifying child support from a dollar amount to a percentage of gross income, it erred in doing so in August of 1993, before a motion seeking such modification was filed. RULE 809.10(4), STATS., provides, "An appeal from a final judgment or final order brings before the court all prior nonfinal judgments, orders and rulings adverse to the appellant and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon." Consequently, we reverse that part of the August 3, 1993, nonfinal order that modifies child support to a percentage, and direct the trial court to change the effective date of the child support modification from August 3, 1993, to December 18, 1995. *See infra* at 7-8.

[2] Initially, Gregory's monthly child support obligation was $125. One year later, his monthly obligation increased to $150; one year later, on February 1, 1981, it increased to $179.

[3] The trial court ordered payment through the clerk of courts office, which was directed to forward those payments to Crystal, rather than to Cindy.

Wisconsin Department of Health and Social Services, which seeks reimbursement for monies paid on Cindy's behalf for medical assistance, appeals.

The State contends that the trial court erred in reducing the arrearage. The trial court has discretion to reduce a party's liability for child support arrearages which have accrued under a support order entered prior to August 1, 1987. *See* ***Schulz v. Ystad,*** 155 Wis.2d 574, 582-83, 456 N.W.2d 312, 314 (1990) (construing § 767.32(1m), STATS.); *see also* ***Rust v. Rust,*** 47 Wis.2d 565, 570, 177 N.W.2d 888, 891 (1970) (***Rust*** pre-dates § 767.32(1m), which precludes the retroactive revision of child support arrearages after its effective date, August 1, 1987). Because the arrearages accrued pursuant to a 1978 order, which pre-dates § 767.32(1m), the trial court has the discretion to reduce those arrearages.

The State also contends that the trial court erroneously exercised its discretion because it had no justification to reduce the arrearage. "`A discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.'" ***LaRocque v. LaRocque,*** 139 Wis.2d 23, 27, 406 N.W.2d 736, 737 (1987) (quoted source omitted). The trial court found that Gregory earned a total of $77,256 over the relevant time period. It then concluded that the monthly support agreed upon by the parties was unfair because Gregory was incapable of consistently paying $179 in monthly support. The trial court applied the appropriate level of support according to WIS. ADM. CODE § HSS 80.03(1)(a), and calculated 17% of Gregory's gross income as $13,133. After crediting Gregory for the support paid, the trial court found the "net fair and reasonable arrearage [to be] $11,484." There is evidentiary support for the trial court's determination of unfairness and we conclude that the trial court properly exercised its discretion in reducing the arrearage.

The State also contends that the trial court erred in abrogating the interest on the arrearage. The trial court found that Gregory could not afford to pay off the arrearage while paying child support, and concluded that the eventual payment of the arrearage "is at zero percent interest." However, § 767.25(6), STATS., provides, "A party ordered to pay child support under this section *shall* pay simple interest at the rate of 1.5% on any amount unpaid."

(Emphasis supplied.) "Statutory construction is a question of law that this court reviews without deference to the trial court. When the word `shall' is used in a statute, it is presumed mandatory unless a different construction is necessary to carry out the clear intent of the legislature." ***B.L.J. v. Polk County Dep't of Social Servs.,*** 153 Wis.2d 249, 253, 450 N.W.2d 499, 501 (Ct. App. 1989) (citation omitted), *aff'd,* 163 Wis.2d 90, 470 N.W.2d 914 (1991).

The use of the term "shall" and the statutory phraseology that requires payment of simple interest at a specified rate support the interpretation that payment of interest is required on unpaid child support. *See* ***Greenwood v. Greenwood,*** 129 Wis.2d 388, 393, 385 N.W.2d 213, 215 (Ct. App. 1986). Consequently, we reverse that part of the trial court's order that imposes repayment of the reduced arrearage "at zero percent interest" and direct the trial court to impose simple interest at 1.5% per month, as required by § 767.25(6).[4]

The State next contends that the trial court is not empowered to defer payment of the arrearage until after Crystal attains majority. By doing so, the trial court attempted to fashion a payment plan to allow Gregory to delay payment of the arrearage until after his child support obligation has ended. Without imposing simple interest of 1.5% monthly, as directed by § 767.25(6), STATS., this deferral is improper. Consequently, we direct the trial court to revisit the issue of deferring payment in conjunction with its calculation of interest. *See* ***Paterson v. Paterson,*** 73 Wis.2d 150, 155-56, 242 N.W.2d 907, 910 (1976).

The State also challenges the trial court's order directing payment of the arrearage to Crystal, rather than to Cindy.[5] Circumventing Cindy's assignment to the State by ordering direct payment to Crystal is precluded by

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[4] Section 767.25(6), STATS., was created by 1983 Wis. Act 27 § 1763 and became effective on July 2, 1983. The trial court is not required to impose statutory interest on any arrearage which pre-dates the effective date of § 767.25(6).

[5] The trial court conditioned its order directing payment to Crystal on Cindy's "agreement to assign her rights to Crystal" and expressly stated that if "the mother wants to contest that, I'll certainly allow her to come back into court if she contests that order on that issue since ... she didn't bother to show up." However, the trial court did not consider Cindy's existing assignment to the State.

State v. Luna, 183 Wis.2d 20, 25-26, 515 N.W.2d 480, 482 (Ct. App. 1994) (trial court erroneously exercises its discretion if it deprives the state of reimbursement for payments made because the right to past support no longer belongs to the recipient-parent once it is assigned to the state); *see generally* ***Felger v. Kozlowski,*** 25 Wis.2d 348, 350-52, 130 N.W.2d 758, 759-60 (1964).

The State also challenges the trial court's modification of Gregory's child support obligation from $179 monthly to 17% of his gross monthly income. Section 767.32(1)(b)2, STATS., creates a rebuttable presumption of a substantial change in circumstances if the child support ordered was not expressed as a percentage of parental income and thirty-three months have passed. Thus, we conclude that the trial court did not erroneously exercise its discretion by modifying the February 1, 1981, child support order from a dollar amount to 17% of Gregory's gross income. Section 767.32(1)(b)2; *see* WIS. ADM. CODE § HSS 80.03(1)(a).

We also base our conclusion on evidence demonstrating that Gregory's annual income fluctuates and the trial court's finding that the original order was "not fair to all parties under all of the circumstances [because] it required larger support contributions than [he] was capable of paying." However, until November 30, 1995, there was no pending motion to modify Gregory's support obligation, thereby depriving Cindy of the requisite notice.[6] Therefore, the trial court could not modify child support until Cindy received notice that such modification was requested. Consequently, we reverse that part of the trial court's order modifying child support from $179 monthly to 17% of Gregory's gross income from August 3, 1993, to December 18, 1995.

By the Court.—Amended order 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.

[6] The record indicates that Gregory did not move to modify child support (as opposed to the arrearage) until November 30, 1995.