

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 25, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 00-1428

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

CHRISTINE SIMMONS,

PETITIONER-RESPONDENT,

v.

RICHARD SIMMONS,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
ROBERT G. MAWDSLEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Richard Simmons appeals from an order of the circuit court which modified the judgment of divorce. The issues on appeal are whether the circuit court properly exercised its discretion when it modified the

child support provision of the marital settlement agreement and when it deviated from the shared-time payer formula. Because we conclude that the circuit court properly exercised its discretion, we affirm.

¶2 Richard Simmons and Christine Simmons were divorced by a judgment entered on August 1, 1997. The judgment incorporated a marital settlement agreement which provided in relevant part that both parties had custody and physical placement of the children, that Richard would pay \$13,000 per year in child support, and that Christine would pay for the children's tuition at a private school. The settlement agreement also contains a severance clause which states that if a court holds a portion of the agreement to be "invalid, illegal, unenforceable, void or voidable," the rest of the agreement shall remain in effect. In March 1998, Christine moved, among other things, to modify the placement and custody and child support obligations.

¶3 A hearing was eventually held and the court found that the child support arrangements were unworkable because of a change in circumstances. The court found that the entire \$13,000 child support payment Richard made to Christine went to paying the private school tuition for the children. The court further found that despite at times working two jobs, Christine was not able to make ends meet without any help from Richard. The court also noted that paying for private school was not financially feasible for Christine. The court consequently entered a temporary order which directed Richard to pay \$600 per month in child support, and refused to grant Richard credit towards the child support payments for a \$5000 payment he previously made to Christine. This

order stated that the court was modifying the divorce judgment pursuant to WIS. STAT. § 806.07 (1997-98).¹

¶4 Richard moved for reconsideration of this order. In the meantime, the parties entered into a stipulation to resolve their placement disputes. The motion for reconsideration was heard in March 2000.

¶5 In its oral decision, the court again found that there had been a change in circumstances both because Christine was not able to make ends meet and because Richard's income had changed. The court again ordered Richard to pay \$600 per month in child support and discontinued Christine's obligation to pay for private school. The court further provided that Richard could pay for the private school tuition if he had the financial resources and as long as he continued to pay the \$600 per month to Christine. The court found that the private school tuition could not be part of the child support agreement because it was not workable and not fair to Christine. The court also refused to credit the \$5000 payment Richard had previously made. The court found that the payment was necessary because of Christine's financial needs to support the children.

¶6 In support of its ruling, the court found that Christine paid most of the costs of raising the children, including things such as health insurance and extracurricular activities. The court further found that Richard had lost his job since the judgment of divorce and had attempted to start a business. The court noted that Richard was a professional engineer with twelve years of experience and that he had an obligation "not to make unreasonable choices with no results to

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

deprive the children of the support they are due and owing.” The court considered his earning capacity as opposed to his actual income. The court specifically rejected the shared-time payer formula for determining child support and explained its reasons for doing so. An order entered on April 14, 2000, incorporated these findings. It is from this order that Richard appeals.

¶7 The April 14 order does not identify the statute under which the court is modifying the marital settlement agreement. In its oral decision, which was incorporated by the written order, the court also did not identify the statutory provision upon which it relied.² We assume, therefore, that the court acted, as in the previous order, pursuant to WIS. STAT. § 806.07(1). The court modified the marital settlement agreement because it found that there had been a substantial change in circumstances for both parties, the agreement was unworkable, and the agreement was not fair to Christine or the children. The court modified the agreement by eliminating the requirement that Christine pay the private school tuition, and reducing the amount of child support Richard paid from \$13,000 per year to \$7,200 per year (\$600 per month for twelve months).

¶8 Although not raised by either party, the first issue which needs to be addressed is whether the circuit court properly exercised its discretion when it modified the marital settlement agreement. The circuit court modified the marital settlement agreement in two respects—by eliminating the requirement that Christine pay for the private school tuition, and by reducing the amount of child support Richard paid annually.

² The court did mention WIS. STAT. § 767.255 when it discussed the shared-time payer formula.

¶9 “An order granting a motion for relief [from judgment] under sec. 806.07, Stats., will not be reversed unless there has been a clear abuse of discretion.” *Mullen v. Coolong*, 153 Wis. 2d 401, 406, 451 N.W.2d 412 (1990) (citation omitted). Discretion “contemplates a process of reasoning which depends on facts that are in the record or reasonably derived by inference from the record and yields a conclusion based on logic and founded on proper legal standards.” *Id.* In exercising its discretion to grant relief from a divorce judgment, the family court should consider “factors relevant to the competing interests of finality of judgments and relief from unjust judgments.” *Spankowski (Zuercher) v. Spankowski*, 172 Wis. 2d 285, 291, 493 N.W.2d 737 (Ct. App. 1992).

¶10 In this case, the court did not indicate which subsection of WIS. STAT. § 806.07(1) it relied on in support of its decision. Consequently, the record must be reviewed to determine whether the decision is supported by any of the statutory factors. *Mullen*, 153 Wis. 2d at 406-07. In this case, the record supports the conclusion that relief was appropriate under § 806.07(1)(h) (a court may order relief from a judgment or order for “[a]ny ... reasons justifying relief from the operation of the judgment.”). This subsection gives the court broad discretionary power and invokes the “pure equity power of the court.” *Mullen*, 153 Wis. 2d at 407. Subsection (h) allows the court to grant relief if extraordinary circumstances exist. *State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 552, 363 N.W.2d 419 (1985).

Because subsection (h) invokes the sensibilities of the court, the court must consider a wide range of factors, and it is difficult to articulate the criteria on which the finding of extraordinary circumstances is based.... A final

judgment should not be hastily disturbed, but subsection (h) should be construed to do substantial justice.

Id.

¶11 We conclude that the circuit court’s decision to eliminate the requirement that Christine pay for the private school tuition is supported by the record. While a simple change in circumstances may not be sufficient to modify the judgment under WIS. STAT. § 806.07(1)(h), *see Spankowski*, 172 Wis. 2d at 290, the court found more than that here. The court found that the child support agreement was unworkable and left Christine unable to properly support her children. The court noted that Richard’s income had decreased because he had lost his job. The court further noted that Christine was working, at times, two jobs, while Richard chose to spend more time with the children rather than finding other employment. The court discussed the appropriate employment choices for Richard under the circumstances and noted that, despite his loss of employment, Richard was able to afford a \$20,000 improvement to his farm. Christine, meanwhile, paid the majority of the costs of raising their children. The court stated that Richard wanted credit for the “quality time” he spent with the children, while Christine struggled financially. The court found that this situation caused “financial harm” to the children.

¶12 The court found that by insisting that the children attend private school, Richard was attempting to control Christine and how she spent the money she received for the children. The court further found that this was not in the children’s best interests, or in Christine’s interest. The court then considered each party’s submitted budget and what would be an appropriate amount of support under these budgets. We conclude that the circuit court considered appropriate factors and ordered the relief from judgment in order to do substantial justice.

¶13 The circuit court did not quite as thoroughly explain its reasons for reducing the amount of child support from \$13,000 to \$7,200 per year. However, on balance, we conclude that there is sufficient evidence in the record to support this modification. First, the court did acknowledge that Richard's income, if not necessarily his earning capacity, had been reduced. Further, the court balanced the fact that Christine would no longer be making the tuition payments, and that Richard insisted that the children continue to attend the private school. Consequently, the court ruled that the tuition payment would become Richard's responsibility. As a "quid pro quo," the court reduced the amount of child support Richard paid, but required him to pay it on a monthly basis. The court did this to allow the payment to be used by Christine to pay her monthly rent. The court also considered both parties' monthly budgets and ordered an amount which the court believed Richard could afford and which would provide sufficient support to Christine. We conclude that the court did not erroneously exercise its discretion in so doing.

¶14 Since we have concluded that the circuit court properly exercised its discretion when it ordered relief from judgment, we will address Richard's argument that the court did not grant the proper relief. The first issue raised by Richard is whether the circuit court properly deviated from the shared-time payer formula guidelines in WIS. STAT. § 767.25(1j) (1999-2000). Richard argues that under *Randall v. Randall*, 2000 WI App 98, 235 Wis. 2d 1, 612 N.W.2d 737, the circuit court improperly deviated from the shared-time payer formula.

¶15 The court in *Randall* held that the determination of child support is committed to the sound discretion of the trial court. *Id.* at ¶7. The circuit court is bound to use the shared-time payer formula unless the court finds that the formula would be unfair to one of the parties. *Id.* at ¶15. When that happens, the circuit

court must follow the guidelines set out in WIS. STAT. § 767.25(1n). That section provides:

If the court finds under sub. (1m) that use of the percentage standard is unfair to the child or the requesting party, the court shall state in writing or on the record the amount of support that would be required by using the percentage standard, the amount by which the court's order deviates from that amount, its reasons for finding that use of the percentage standard is unfair to the child or the party, its reasons for the amount of the modification and the basis for the modification.

¶16 In this case, the circuit court followed the statutory guidelines for deviating from the shared-time payer formula. The court found that the shared-time payer formula would be unfair to Christine and to the children. Specifically, the court found that the shared-time payer amount would be \$51 per month based on Richard's asserted income, \$140 per month based on the income the court considered to be reasonable, or \$240 based on Richard's income at the time of the divorce. The court found that none of these amounts were sufficient to meet Christine's and the children's needs.

¶17 The court further explained that the existing child support arrangement created an arrangement where Richard had control over Christine and her resources. The court found that the evidence presented by both parties established that Christine was primarily responsible for the child care costs. Further, by insisting that the children attend private school and by requiring Christine to pay for the private school tuition while paying her only enough money to cover that tuition, Richard was attempting to "control" Christine. The court concluded that this situation was not in Christine's or the children's best interests. The record supports the circuit court's decision to deviate from the shared-time payer formula.

¶18 The second issue Richard raises is whether the court erroneously exercised its discretion when it determined that Richard would not receive credit for the \$5000 payment he had previously made to Christine. The court denied the request because it found that Christine did not have enough money to support the children without the payments she received from Richard. It was not reasonable to allow Richard a credit when Christine could not afford to pay for all of the children's expenses. The court also noted that Richard had made the payment without going through the proper procedures to receive credit against his child support payments required under the marital settlement agreement. The court concluded that Richard could not make independent payments to Christine and receive credit against court-ordered payments. This was not an erroneous exercise of discretion.

¶19 Finally, Richard objects to the award of attorney's fees made to Christine. While acknowledging that the award is reviewed on an erroneous exercise of discretion standard, Richard argues that the court did not make a finding that he had the ability to pay the amount awarded. The entire record, however, supports the conclusion that Christine had need and Richard had the ability to pay the amount awarded. We cannot conclude that the circuit court erroneously exercised its discretion when it awarded attorney's fees to Christine.

By the Court.—Order affirmed.

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

