COURT OF APPEALS
DECISION
DATED AND FILED

January 15, 2002

Cornelia G. Clark
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 00-3196 **Cir. Ct. No. 96-FA-144**

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

IN RE THE MARRIAGE OF:

MARY JO GRAY,

PETITIONER-APPELLANT,

V.

MARK GERARD GRAY,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Mary Jo Gray appeals an order granting Mark Gray's motion to reduce his child support obligation, setting his arrearage at $4,000, and denying Mary Jo's motion to find Mark in contempt. She argues that

the trial court incorrectly computed Mark's base monthly income and should not have subtracted legal fees, that Mark's testimony was incredible and he did not initially overpay child support, that Mark's employment change constituted shirking, that he should have been held in contempt for his failure to share the children's pretrial medical expenses and that he should be compelled to contribute toward her attorney fees in this matter. We reject those arguments and affirm the judgment.

¶2 The initial divorce judgment reflected a stipulation reached after two days of negotiation. It required Mark to pay child support of $1,075 per month or 25% of his net Schedule C income plus depreciation, whichever was greater. The children's uninsured health care expenses were equally divided, but each party was made responsible for debts incurred by that party pending the divorce judgment.

¶3 After the divorce, Mark lost his truck driving job and secured other employment that pays approximately 75% of his previous salary. The trial court found that Mark had overpaid his child support obligation from the time of the divorce until April 1999. In November 1999, the court reduced Mark's support obligation to $650 per month subject to further retroactive modification. The court later modified the obligation to $650 per month from May 1999 to July 2000 and, commencing in August 2000, $650 or 25% of his gross income. The court set the arrearage at $4,000, denied Mary Jo's motion for contempt based on Mark's refusal to pay the children's pre-divorce medical expenses and denied Mary Jo's request for contribution toward her attorney fees.

¶4 Child support can be modified upon a showing of a substantial change of circumstances. *See* WIS. STAT. § 767.32.[1] Whether there has been a substantial change of circumstances is a mixed question of law and fact. Findings of fact will not be disturbed unless they are clearly erroneous. Whether changes are substantial is a question of law that we decide without deference to the trial court. *See* ***Rosplock v. Rosplock***, 217 Wis. 2d 22, 32-33, 577 N.W.2d 32 (Ct. App. 1998). We review the circuit court's use of its contempt powers under the erroneous exercise of discretion standard. *See* ***State ex rel. N.A. v. G.S.***, 156 Wis. 2d 338, 341, 256 N.W.2d 867 (Ct. App. 1990).

¶5 Mary Jo's argument that the trial court improperly considered Mark's base monthly income under WIS. ADMIN. CODE § HSS 80 ignores the fact that the stipulated judgment required Mark to pay 25% of his Schedule C income, not his gross income. The company withheld $1,200 per month from May 1998 through January 1999, and an additional $1,200 in December 1998. Based on the $1,075 per month flat support level rather than a percentage, Mark overpaid his child support by $2,325 through January 1999. Mary Jo's argument that 25% of Mark's income exceeds the $1,075 minimum is not supported by the record. Mark's Schedule C income plus depreciation was $40,027. Twenty-five percent of that figure is less than $1,075 per month.

¶6 From January to April 1999, the court also used the $1,075 per month figure to calculate the arrearage. Mary Jo argues that there is no evidence of Mark's income for those months, so his 1998 income should be used. Mark

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

testified regarding his income during that time. As the arbiter of the witnesses' credibility, the trial court had the right to accept Mark's testimony. *See* ***Johnson v. Mertz***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). During the trial, the court questioned Mark's veracity and noted that he gave evasive and incomplete answers. From these comments, Mary Jo argues that Mark's testimony regarding his health, visitation problems, income and assets should not be accepted. The trial court ultimately found Mark's testimony credible, and accepted his uncontradicted explanation of his income, retirement account and temporary ownership of vehicles. The court's comments do not constitute its decision. This court must give deference to the trial court's ultimate findings, and they are not clearly erroneous. *See* WIS. STAT. § 805.17(2).

¶7 Mary Jo argues that Mark should not have been allowed to deduct legal fees in 1998 and $12,931 should be added back to his income for support purposes. Mark presented evidence from a certified public accountant that the deduction was proper. Mary Jo offered no contrary evidence. Therefore, the trial court properly accepted Mark's expert witness's testimony. *See* ***Siker v. Siker***, 225 Wis. 2d 522, 528, 593 N.W.2d 830 (Ct. App. 1999).

¶8 The record does not support Mary Jo's argument that Mark was shirking his child support obligations when he changed jobs. Mark's over-the-road truck driving job was involuntarily terminated. His truck was not roadworthy and required $5,000 to $8,000 to repair. Health problems and his desire to be closer to his children caused him to change jobs. Nothing in the record suggests that he deliberately reduced his income in disregard of his child support responsibilities. The 25% decrease in Mark's wages constituted a substantial change of circumstances.

¶9 The trial court properly exercised its discretion when it refused to hold Mark in contempt for refusing to contribute to the uninsured health care costs of the children incurred before the final divorce. The divorce judgment required the parties to equally split the children's uninsured health care expenses, but required each of the parties to pay the individual debts incurred while the divorce was pending. The judgment does not unambiguously compel Mark to share the children's uninsured health care expenses incurred before the final hearing. The trial court concluded that the judgment was based on a "global settlement" that had been reached after two days of intensive negotiation and the bills were considered at the time of the final hearing to be Mary Jo's obligation. That is a reasonable construction of the stipulation and divorce judgment.

¶10 Finally, the trial court reasonably refused to compel Mark to contribute to Mary Jo's attorney fees. Mary Jo had previously been found in contempt and was not ordered to pay Mark's attorney fees. At the time Mark filed his motion to amend child support, he was ahead in his child support payments. The court reasonably exercised its discretion when it concluded that each party should pay his or her own attorney fees for these hearings. *See* ***Ondrasek v. Ondrasek***, 126 Wis. 2d 469, 484, 377 N.W.2d 190 (Ct. App. 1985).

By the Court.—Order affirmed.

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