COURT OF APPEALS
DECISION
DATED AND RELEASED

July 30, 1996

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. 95-1229

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

IN RE THE MARRIAGE OF:

TIMOTHY J. GROSS,

Petitioner-Appellant,

v.

GAIL M. GROSS
(n/k/a GAIL M. HICKEY),

Respondent-Respondent.

APPEAL from an order of the circuit court for Milwaukee County: DOMINIC S. AMATO, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Timothy J. Gross appeals from an order modifying the child support provisions of his divorce judgment. He argues in his *pro se* brief that the trial court erred in: (1) its application of the serial family payer rule

to his ex-wife, Gail M. Gross; (2) its calculation of the amount of support; (3) its order that Gail pay into an emergency/education fund for the children; (4) its failure to make the order retroactive; and (5) its allocation of the children's income tax dependency designation. We affirm the lower court's order with respect to issues two, three, and four. We reverse on issues one and five and remand for further proceedings.

I. BACKGROUND.

Timothy and Gail Gross were married on June 8, 1985, and divorced on October 27, 1988. They had two children. At the time of the divorce, Timothy worked with the United States Air Force/Wisconsin Air National Guard and had a gross monthly income of $1,830. Gail was a cosmetologist earning $800 per month. She had moved to Florida at the time of the divorce. During the divorce proceedings, the parties entered into a written stipulation covering several issues including child support. The stipulation stated that both parties were fit and proper persons for the children's custody and that joint custody be awarded with primary physical placement of both children to Timothy. These provisions were incorporated into the divorce decree. The court held support open for one year because of Gail's limited income and the significant travel expenses involved in visiting her children.

After a year, Timothy petitioned the court to order Gail to begin paying support. By this time, Gail had returned to Milwaukee. While her visitation costs were no longer significant, the court did not grant support because Gail was pregnant, had minimal income, and was attending school. The court stated that it would rehear the matter in ten months. When the court addressed the issue again in October of 1990, Timothy earned $2,139 per month, and his new wife earned $1,500 per month. Gail earned $645 per month as an in-home babysitter. She had also remarried, and her husband earned $2,000 per month. The court ordered Gail to pay $100 per month support payments.

Upon a subsequent review of Gail's income, a Family Court Commissioner increased the support payments to $331 per month support beginning May 6, 1994. Timothy filed a motion to review this order and requested that support be set at 25% of Gail's gross income. Upon review, the trial court found that Gail was earning $31,200 per year and receiving an

additional $3,240 per year in support payments for her third child from her second marriage. Based on Gail's responsibilities toward her third child, the court made a serial family payer adjustment of 17%, reducing the base amount to $25,900. The court then applied the WIS. ADM. CODE § HSS 80.03(1)(b) percentage standard required by § 767.25(1j), STATS., and determined that Gail pay $531 per month.[1] The court ordered that Gail continue to pay Timothy $331 per month and that she pay $200 per month into a joint savings account to serve as an emergency/education fund for the children. It also ordered that Gail could claim one of the children as a dependent for federal and state income tax purposes. Timothy appeals from this order and raises five issues. We deal with each issue seriatim.

II. ANALYSIS.

A. Serial Family Payer Rule.

We first address whether the court applied the serial family payer rule appropriately. The rule is found in WIS. ADM. CODE § HSS 80.04(1) and whether to apply it turns on the interpretation of the administrative provisions relating to its application. ***Sommerfield v. Sommerfield***, 154 Wis.2d 840, 846, 454 N.W.2d 55, 58 (Ct. App. 1990). It is a question of law that we review *de novo*. ***Id.*** at 846-47, 454 N.W.2d at 58. Under WIS. ADM. CODE § HSS 80.02(21), a "serial family payer" is "a payer with an existing child support obligation who incurs an additional child support obligation in a subsequent family or as a result of a paternity judgment." In determining the applicability of the serial family payer rule, § HSS 80.04(1) provides:

> (1) DETERMINING THE CHILD SUPPORT OBLIGATION OF A SERIAL FAMILY PAYER. For a serial family payer the child support obligation may be determined as follows:
>
> (a) Determine the payer's base in accordance with s. HSS 80.03(1) (intro.);

[1] We apply the version of WIS. ADM. CODE § HSS 80 in effect at the time of the decision.

(b) Determine the payer's adjusted base by applying one of the following methods, as appropriate:

1. When the payer is subject to an existing support order, subtract the amount of the court-ordered support, if it is being paid, from the base to get the adjusted base; or

2. When the payer has other children legally under his or her care who are not subject to a court order, multiply the appropriate percentage for the number of children legally under the payer's care by the base as determined on the worksheet. Subtract this amount from the base to determine the adjusted base; and

(c) Multiply the appropriate percentage for the number of children subject to the new order by the adjusted base determined in either par. (b) 1 or 2 to determine the child support obligation.

Underlying this provision is the idea that "the parent who brings children into the world knowing the existing prior obligation should not be entitled to an automatic reduction of child support." ***Brown v. Brown***, 177 Wis.2d 512, 521, 503 N.W.2d 280, 283 (Ct. App. 1993).

In her brief, Gail accurately describes the court's reasoning in determining the support amount:

> The judge took [Gail's] annual income of $31,200 and subtracted the Wis. Admin. Code HSS 80.04 figure of 17% for one of [Gail's] children (the child from the later marriage) and arrived at a rounded figure of $25,900. He used this amount as the adjusted basis for support of the two children before the court. He then took the two-child support figure of 25% from the $25,900 and arrived at the rounded result of $6,475. Dividing that amount by twelve the court arrived at

> a rounded monthly support figure of $540 for the children of [Gail] and [Timothy].

Gail concedes that the court misapplied the serial family payer rule when it made the 17% adjustment. We agree. The serial family payer rule can only be used to adjust support payments for the later born children of subsequent relationships. ***Id***. at 522, 503 N.W.2d at 284. It cannot be used to reduce the support payments for the earlier born children because "a parent's voluntary reduction of the ability to support a family by having more children should not automatically penalize the earlier born children." ***Id***. at 521, 503 N.W.2d at 283. While § 767.25(lm), STATS., allows the court to deviate from the percentage standards if appropriate, the deviation in this case did not rely on this statute. It was the result of the inappropriate application of the serial family payer rule. We remand this issue to the trial court for redetermination.

B. Calculation of Support Liability.

Aside from the misapplication of the serial family payer rule, Timothy argues that the court made other errors in calculating Gail's support obligation. He claims that the court erred in failing to require Gail to produce financial statements. He also objects to the court's decision to set the support amount as a fixed figure rather than as a percentage of Gail's income.

The trial court's determination of child support will not be reversed on appeal unless the trial court erroneously exercises its discretion. ***Drier v. Drier***, 119 Wis.2d 312, 318, 351 N.W.2d 745, 748 (Ct. App. 1984). Here, the trial court did not require Gail to produce her financial records, but instead relied on Gail's in-court admissions of gross income. Timothy fails to provide this court with an authority on why this was an erroneous exercise of discretion.

Further, the trial court did not erroneously exercise its discretion when it set a fixed amount of support rather than an amount in terms of a percentage of income. It is clear from the record that the trial court calculated the support amount using the percentage standard as required by § 767.25(1j), STATS. The statute does not require that support be expressed as a percentage,

and we see no reason why establishing a fixed amount is a misuse of discretion. We affirm the court's calculation as it relates to these issues.

C. Unconventional Means of Support Payment.

Timothy contends that the trial court's order to establish a savings account benefitting the children is a deviation from conventional means of support. He claims that its failure to state reasons for such a deviation was a violation of Chapter 767, STATS. We disagree. Section 767.25(2), STATS.,[2] empowers the trial court to create such a fund, and this court has approved the practice. *See* ***Hubert v. Hubert***, 159 Wis.2d 803, 817, 465 N.W.2d 252, 257 (Ct. App. 1990). We see no erroneous exercise of discretion, but the trial court may wish to reconsider the matter upon its recalculation of support. We have noted that when a trial court establishes a separate fund, the trial court should make findings on the need for the fund to promote and protect the interests of the children during minority; specify the type of fund and how it will be accessed; and require the party holding the passbook to render to the other party a periodic accounting for any monies expended.

[2] Section 767.25(2), STATS., provides:

> The court may protect and promote the best interests of the minor children by setting aside a portion of the child support which either party is ordered to pay in a separate fund or trust for the support, education and welfare of such children.

D. Retroactivity of Order.

Timothy argues that the order increasing support entered February 3, 1995, should be made retroactive to October 14, 1993. We reject this argument because the trial court had no authority to make such an order retroactive. The supreme court has stated that "[a] trial court in Wisconsin has no authority to make an order directing the retroactive increase of support payments." ***Strawser v. Strawser***, 126 Wis.2d 485, 489, 377 N.W.2d 196, 198 (Ct. App. 1985). The trial court did not err in failing to make the order retroactive.

E. Use of Children as Dependents for Tax Purposes.

Timothy argues and Gail concedes that his due process rights were violated when the trial court awarded Gail a federal and state income tax dependency exemption for one of the children. Gail's former attorney apparently included the provision when it prepared the support order that the trial court adopted on February 3, 1995. The tax dependency exemption was approved without motion, notice, or hearing on the issue.

Section 767.25(1)(b), STATS., provides that if the parties do not agree, the court is to determine the tax exemption status of each child in accordance with state and federal tax laws. In making the decision, the statute requires the court to consider who is responsible for the health care needs of the child, whether the child is covered by insurance, and other related matters. The record does not indicate that any such consideration was done; thus, there was a violation of due process. *See* ***Mullane v. Central Hanover Trust***, 339 U.S. 306, 313 (1950) (holding that due process requires an opportunity to be heard). We direct the trial court to vacate that part of its order. Of course, the parties are free to pursue the matter by agreement or motion and notice if they desire.

III. SUMMARY.

In sum, we remand the support matter for recalculation without a serial family payer adjustment. The trial court may deviate from the percentage standard if it finds it appropriate to do so under § 767.25(lm), STATS. We affirm

the creation of a fund as part of the support award with the suggestion that, if the parties cannot agree, the trial court make findings concerning the nature and the control of the fund. Finally, that portion of the order awarding Gail a one-child dependency exemption is vacated.[3]

[3] As an aside, we commend Gail's appellate attorney, Mario M. Martinez, for acknowledging those errors made by the trial court that Timothy's *pro se* brief raised in a cursory and undeveloped fashion.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

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