COURT OF APPEALS
DECISION
DATED AND RELEASED

November 30, 1995

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(1), 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. 95-1664-FT

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

IN RE THE MARRIAGE OF:

DIANE L. GUSE,

Petitioner-Respondent-Cross Appellant,

v.

RONALD C. GUSE,

Respondent-Appellant-Cross Respondent.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Rock County: JAMES P. DALEY, Judge. *Reversed and cause remanded with directions.*

Before Dykman, Sundby, and Vergeront, JJ.

PER CURIAM. Ronald C. Guse appeals from a judgment divorcing him from Diane L. Guse, and a subsequent order modifying the judgment. Diane cross-appeals from the modification order. Contested issues

in the divorce included Diane's maintenance, child support and the property division. The issues on appeal are whether the trial court erroneously exercised its discretion by awarding maintenance and by granting Diane substantially more than one-half of the marital property. On Diane's cross-appeal, the issue is whether the court erroneously exercised its discretion by amending the child support order on reconsideration. We reverse on all issues.[1]

Ronald, forty-four, and Diane, thirty-eight, divorced in May 1995 after an eighteen-year marriage. Both parties worked throughout the marriage. In 1994, Ronald earned over $51,000 working for General Motors (GM), and Diane earned approximately $18,000 working thirty-two hours per week for a credit union. Ronald, however, introduced evidence that his annual salary, based on a forty-hour week, would be $39,000 and that he worked an unusual amount of overtime in 1994.

Because Diane received custody of the parties' two children, the trial court ordered Ronald to pay 25% of his gross income in child support. For maintenance purposes, the court found Ronald's earning capacity to be $40,000 per year and Diane's to be $23,375 per year. The court based the $40,000 figure on its belief that GM intended to cut back overtime by hiring 500 new employees. The court then reduced both income figures by 25% to represent each parties' child support contribution and determined that a $120 per week maintenance payment was necessary and appropriate to equalize the remaining gross income. Because the court ordered Ronald to pay only $100 per week, Diane received $52,000 worth of property out of the net marital estate of $90,000.[2]

Ronald moved for reconsideration of the maintenance award, arguing that it left him unable to meet his monthly living expenses while leaving Diane with excess income. The trial court denied his motion on the grounds that Ronald actually earned more income, through overtime, than the

---

[1] This is an expedited appeal under RULE 809.17, STATS.

[2] The parties stipulated to a property division that gave Diane property worth $24,000 more than Ronald's share. The parties then litigated the amount of the equalization payment due Ronald. The trial court's unequal award resulted from its order for a $5,000 equalization payment.

$40,000 figure used to compute the award. However, on its own motion, the court modified the child support order from 25% of that actual income, to a fixed amount of $185 per week, representing 25% of a $40,000 per year salary. The court reasoned that "I used the forty-hour work week I've always used. Twenty-five percent of the forty-hour work week to children. Because I [have] found that if, in fact, I encourage people to work longer, the funds accrue to the children through the form of gifts and so forth."

We review trial court decisions regarding child support for the proper use of discretion. ***Wallen v. Wallen***, 139 Wis.2d 217, 223, 407 N.W.2d 293, 295 (Ct. App. 1987). We will also not disturb the court's division of marital property or the maintenance award unless a party demonstrates an erroneous exercise of discretion. ***Haugan v. Haugan***, 117 Wis.2d 200, 215, 343 N.W.2d 796, 804 (1984). The court properly exercises its discretion if it articulates its reasons, bases its decision on facts of record and the correct legal standards and any monetary awards are neither excessive nor inadequate. ***Id.*** at 215-16, 343 N.W.2d at 804.

We reverse and remand for reconsideration of the maintenance award. Equally dividing the parties' total income is the starting point for determining maintenance in a long-term marriage. ***LaRocque v. LaRocque***, 139 Wis.2d 23, 39, 406 N.W.2d 736, 742 (1987). However, the trial court may not mechanistically divide income without consideration of other factors. ***Kennedy v. Kennedy***, 145 Wis.2d 219, 223, 426 N.W.2d 85, 87 (Ct. App. 1988). Here, the court failed to consider and evaluate Ronald's contention that the maintenance award actually left the parties in a grossly disproportionate financial situation. The court must consider both need and ability to pay. ***Id***. at 222, 426 N.W.2d at 86. Here, the court did neither.

Additionally, the trial court must reevaluate Ronald's income. It appears that Ronald's income for maintenance purposes was calculated, at least in part, based on anticipated events. However, no evidence was introduced as to those events. On remand, the court may take additional evidence to clarify Ronald's actual and anticipated income.

The trial court must also reconsider the unequal property division. In all cases, maintenance and division of property are closely related and

should be considered together. ***Dean v. Dean***, 87 Wis.2d 854, 878, 275 N.W.2d 902, 913 (1979). Here, the court expressly made the awards interdependent.

The trial court must reevaluate child support giving due weight to the parties' particular circumstances. Under § 767.25(1j), STATS., courts must calculate child support under the Department of Health and Social Services's percentage guidelines, based on the payor's actual gross income. A court may modify that award if it finds that using the percentage standards is unfair to the child or to any of the parties, after considering a long list of factors pertaining to the child and the parties' particular circumstances. Section 767.25(1m), STATS. Here, as a matter of general policy, the court reduced child support to a percentage of Ronald's estimated base income, as opposed to his actual income including overtime pay. As directed by § 767.25(1m), the court must use the specific facts of this case and not general policy if it wishes to modify Ronald's child support obligation. The court properly exercises its discretion only if it relies on the correct legal standards. ***Haugan***, 117 Wis.2d at 215-16, 343 N.W.2d at 804. Accordingly, we reverse. No costs to either party.

By the Court.—Judgment and order reversed and cause remanded with directions.

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