

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 27, 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(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. 95-1953-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

MARK A. DURKEE,

Petitioner-Appellant,

v.

NANCY L. DURKEE,

Respondent-Respondent.

APPEAL from an order of the circuit court for Oneida County: JAMES P. JANSEN, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

MYSE, J. Mark A. Durkee appeals an order that requires him to pay child support in the amount of 25% of his total monthly entitlements including his military allowances.¹ The order further provides that Mark pay Nancy L. Durkee \$200 for a rifle that Nancy was to receive as part of their divorce judgment or replace the rifle with a similar model. Mark contends that the trial court erred: (1) when it increased his child support obligation without

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

him receiving sufficient notice of a request for child support modification; (2) by including his military allowances in gross income for the purpose of calculating child support prior to the law's amendment, effective March 1, 1995; and (3) when it ordered him to pay for the rifle although the debt had been discharged in bankruptcy. This court concludes that: (1) Mark received sufficient notice; (2) the trial court erred when it included Mark's military allowances in his gross income for child support purposes prior to March 1, 1995; and (3) the trial court did not err when it ordered him to pay for the rifle. Therefore, this court affirms in part, reverses in part and remands to the trial court to modify the order to include Mark's military allowances in his gross income only as of March 1, 1995.

Mark and Nancy were divorced on April 22, 1988. The divorce judgment required Mark to "pay twenty-five percent (25%) of his gross income (\$453.00) per month" for child support. Both parties waived maintenance, and the property division was made in consideration of the agreement and waivers made regarding maintenance. As part of the property division, Mark was required to turn over a certain rifle or its cash equivalent and pay \$200 toward Nancy's attorney fees. Mark subsequently filed bankruptcy and was discharged of his debts.

Nancy later sought to hold Mark in contempt for failing to pay more than \$453 per month in child support after increases in his pay, failing to turn over the rifle or its cash equivalent, and failing to pay the \$200 for attorney fees.

After a hearing, the trial court ordered that the child support be recalculated retroactive to September 1993, that Mark's military allowances be included in his gross income for child support purposes, and that Mark pay 25% of his total monthly entitlements as child support. The court also ordered Mark to pay Nancy a sum equivalent to the cash value of the rifle or to replace the rifle with a similar model, but determined that the attorney fees were discharged in bankruptcy. Mark appeals.

First, Mark contends that the trial court erred when it retroactively increased his child support obligation without him receiving sufficient notice of a request for modification of child support. Mark argues that he was denied due process because of the alleged insufficient notice. Because this issue

requires application of constitutional principles, this court is presented with a question of law that is reviewed without deference to the trial court. See *State v. Woods*, 117 Wis.2d 701, 710, 345 N.W.2d 457, 462 (1984).

Due process requires that the notice reasonably convey information about the hearing so the respondent can prepare a defense and make objections. *Schramek v. Bohren*, 145 Wis.2d 695, 704, 429 N.W.2d 501, 504 (Ct. App. 1988). Nancy filed an order to show cause and a motion to hold Mark in contempt for failure to continue to pay 25% of his gross income as his income increased. Nancy contended that the divorce judgment which required Mark to "pay twenty-five percent (25%) of his gross income (\$453.00) per month" for child support required Mark to pay 25% of his gross income, not just \$453. Mark was given notice of the motion and order to show cause and of the date set for the hearing. The motion conveyed sufficient information for Mark to prepare his defense to having his child support increased above \$453 and setting it at 25% of his total income. Because the motion was sufficient to advise him of the nature of the issues to be heard, this court concludes that the notice was sufficient. See *id.*

Next, Mark contends that the trial court erred when it included his military allowances in his gross income for the purpose of calculating child support payments prior to the change in the law effective March 1, 1995.² Because this issue requires interpretation of WIS. ADMIN. CODE § HSS 80.02(12) (August 1987), this court is presented with a question of law that is reviewed without deference to the trial court. See *Gohde v. Gohde*, 181 Wis.2d 770, 774, 512 N.W.2d 199, 201 (Ct. App. 1993).

² The new definition of gross income, effective March 1, 1995, is contained in WIS. ADMIN. CODE § HSS 80.02(13) (June 1995) and provides in relevant part:

"Gross income" means:

- (a) All income considered federal gross income under 26 CFR 1.61-1;
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- (f) *Military allowances and veterans benefits*;
- (h) ... and
- (i) All other income, whether taxable or not, except that gross income does not include public assistance or child support received from previous marriages or from paternity adjudications. (Emphasis added.)

The Department of Health and Social Services is required to adopt and publish standards for courts to use in determining child support obligations. Section 46.25(9)(a), STATS. The department defined gross income for the purpose of calculating child support in WIS. ADMIN. CODE § HSS 80.02(12) (August 1987), which provides:

"Gross income" means all income as defined under 26 C.F.R. 1.61-1 that is derived from any source and realized in any form, whether money, property or services, and whether reported as total income on the payer's federal tax return or exempt from being taxed under federal law.

This court concludes that § 80.02(12) is unambiguous in defining "gross income" for child support purposes, and thus this court need only trace the language of the relevant statutes and regulations. Under the definition established by § HSS 80.02(12), this court must examine the definition of gross income contained in 26 C.F.R. § 1.61-1 (1995). That regulation defines gross income as: "all income from whatever source derived unless excluded by law." 26 C.F.R. § 1.61-1 is the definition of the Department of Treasury, which defines gross income for internal revenue purposes. This court therefore looks at the Internal Revenue Code to determine whether Mark's military allowances are "gross income." If there is no exclusion from gross income in the Internal Revenue Code, the military allowances fit the definition of gross income established by § HSS 80.02(12). However, if the military allowances are excluded from gross income by the Internal Revenue Code, they do not fit the definition of gross income established by § HSS 80.02(12).

Internal Revenue Code § 134(a), (West Supp. 1995), states: "Gross income shall not include any qualified military benefit." Qualified military benefit is defined in I.R.C. § 134(b) as:

- (1) ... any allowance or in-kind benefit ... which—
 - (A) is received by any member or former member of the uniformed services of the United States ... and
 - (B) was excludable from gross income on September 9, 1986, under any provision of law, regulation, or administrative

practice which was in effect on such date (other than a provision of this title).

This court examines 26 C.F.R. 1.61-2(b) (1986) to determine whether Mark's military allowances were excluded from gross income under the regulations as of September 9, 1986. That regulation provides: "[s]ubsistence and uniform allowances granted commissioned officers, chief warrant officers, warrant officers, and enlisted personnel of the Armed Forces ... and amounts received by them as commutation of quarters, are to be excluded from gross income."

Mark's military allowances are basic allowance for quarters (BAQ), basic allowance for subsistence (BAS), and variable housing allowance (VHA). Because these allowances are for subsistence or quarters, they fall under the regulation and are excluded from gross income under I.R.C. § 134. Accordingly, these allowances are excluded under the definition of gross income in C.F.R. 1.61-1. This court therefore concludes that Mark's military allowances are not included as gross income for the purpose of calculating child support under § HSS 80.02(12). See *Grohmann v. Grohmann*, 189 Wis.2d 532, 538, 525 N.W.2d 261, 263 (1995) ("it would be illogical to conclude that the department intended gross income to have different meanings under HSS 80.02(12) and sec. 1.61-1.").

The definition of gross income for child support purposes was modified on March 1, 1995. The new definition of gross income is contained in WIS. ADMIN. CODE § 80.02(13) (June 1995) which provides in relevant part:

"Gross income" means:

(a) All income considered federal gross income under 26 CFR 1.61-1;

....

(f) *Military allowances and veterans benefits;*

... and

(i) All other income, whether taxable or not, except that gross income does not include public assistance or child support received from previous marriages or from paternity adjudications. (Emphasis added.)

Because military allowances are now specifically included in the definition of gross income, the trial court could properly include these benefits in Mark's gross income beginning March 1, 1995. Therefore, this court directs that the order be modified to include the military allowances in Mark's gross income for child support purposes only as of March 1, 1995.

Mark next contends that the trial court erred when it ordered him to pay for the rifle although the debt had been discharged in bankruptcy. Nancy argues that the rifle was nondischargeable in bankruptcy because it was awarded to her in lieu of maintenance.

The bankruptcy court order provides in relevant part:

1. The debtor is released from all personal liability for debts existing on the date of commencement of this case, or deemed to have existed on such date pursuant to Section 348(d) of the Bankruptcy Code (Title 11, United States Code)[.]
2. Any existing judgment or any judgment which may be obtained in any court with respect to debts described in paragraph 1 is null and void as a determination of personal liability of the debtor, except:
....
(b) Debts which are nondischargeable pursuant to Section 523[(a)](1), (3), (5), (7), (8), and (9) of the Bankruptcy Code.

Under 11 U.S.C. § 523(a)(5), the bankruptcy court is without authority to discharge a party's maintenance obligation. Further, "[e]ven if the agreement which was incorporated into the divorce decree is characterized as a division of marital property, '[p]roperty division may be nondischargeable when it is a substitute for alimony.'" *In re White*, 26 B.R. 572, 575 (Bankr. D.R.I. 1983) (quoting *In re Singer*, 18 B.R. 782, 787 (Bankr. S.D.Ohio 1982)). In ordering Mark to pay for the gun or replace it, the trial court made an implicit finding that the gun was a substitute for maintenance and that the bankruptcy court could not discharge the debt. There is sufficient evidence to support this finding. At the time of the divorce judgment, Nancy waived maintenance despite the fact that the parties had a long-term marriage and Nancy earned substantially less

income than Mark. Further, the marital agreement, which was incorporated into the divorce judgment, provided that the property division was made in consideration of the agreement and waivers made regarding maintenance. Therefore, this court concludes that the trial court's finding that the awarding of the gun was in lieu of maintenance is fully supported by the record.

However, Mark argues that the time to challenge the dischargeability of the debt as being in lieu of maintenance was in the bankruptcy court and that the circuit court has neither jurisdiction nor power to determine the dischargeability of debts in bankruptcy. This court disagrees. The circuit court and the bankruptcy court have concurrent jurisdiction to decide whether a debt is nondischargeable under 11 U.S.C. § 523(a)(5). See *Lyman v. Lyman*, 184 Wis.2d 124, 128 n.3, 516 N.W.2d 767, 769 n.3 (Ct. App. 1994); *In re Reak*, 92 B.R. 804, 807 (Bankr. E.D.Wis. 1988). Thus, the circuit court had jurisdiction to decide whether the debt was dischargeable.

In sum, this court concludes that Mark received sufficient notice, that the trial court erred when it included Mark's military allowances in his gross income for determining his child support obligation prior to March 1, 1995, and that the trial court did not err when it ordered Mark to pay for the rifle. Therefore, this court affirms in part, reverses in part and remands to the trial court to modify the order to include Mark's military allowances in his gross income for child support purposes only as of March 1, 1995.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions. No costs to either party.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.