COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-1341

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

IN RE THE MARRIAGE OF:

SUSAN VANDERHOOF,

PETITIONER-RESPONDENT,

V.

PETER J. VANDERHOOF,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: WALTER J. SWIETLIK, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Peter J. Vanderhoof appeals from a judgment of divorce from Susan Vanderhoof. He challenges the award of family support which equalizes the parties' incomes, the requirement that he contribute $2500 to

Susan's attorney's fees, and the unequal division of the guardian ad litem's fees. We affirm the award of family support, reverse the judgment as to the attorney and guardian ad litem fees, and remand to the circuit court.

¶2 The Vanderhoofs were married for ten years. They have three children, ages 10, 6 and 5 on the day of the divorce trial. The parties stipulated to the division of property. The circuit court ordered Peter to pay family support in an amount which equalizes the parties' disposable income.[1]

¶3 The amount of family support is within the circuit court's discretion and our review is limited to whether the circuit court properly exercised its discretion. *See* ***Ondrasek v. Ondrasek***, 126 Wis. 2d 469, 481, 377 N.W.2d 190 (Ct. App. 1985).

> A discretionary determination, to be sustained, must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law.… [M]ost importantly, a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.

Hartung v. Hartung, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

¶4 Peter argues that the circuit court's findings are inadequate to support its exercise of discretion. A reviewing court is obliged to uphold a discretionary determination if it can independently conclude that the facts of

[1] The circuit court did not set a dollar amount for family support but directed the parties to run income figures through a computer program being utilized by Peter's attorney to determine the amount of support. The court indicated that if the parties could not reach an agreement on the amount, the court would review the figures.

record applied to the proper legal standard support the circuit court's decision. *See* ***Andrew J. N. v. Wendy L. D.***, 174 Wis. 2d 745, 767, 498 N.W.2d 235 (1993).

¶5 We first observe that the facts as to the parties' financial circumstances were not contested. There was no escaping the fact that Peter had been the principal wage earner throughout the marriage, that Susan had a few jobs at minimum wage, that she had not yet earned her GED diploma, and that she was unemployed at the time of the trial. Peter acknowledged that a short period of maintenance was appropriate. The circuit court found Peter's income to be $50,000 per year and imputed $15,000 yearly income to Susan. These were the income figures Peter advanced when proposing $800 a month family support. The parties agreed to nearly equal periods of physical placement of the children. Their monthly expenses in maintaining separate households for the children were within $200 of each other.

¶6 While the circuit court's articulation of its rationale is somewhat abbreviated,[2] the court indicated what it thought to be the most important factor—providing for the children. The circuit court's decision also reflects consideration of the length of the marriage and income of the parties. Implicit in the disparity in income is Susan's need for family support and Peter's ability to pay. The circuit court's decision reflects that an equalization of the parties' income is the best way

[2] The circuit court stated:

> [T]he court finds that this is a marriage of approximately 10 years; it's now over 11 years, actually. But at the time the action was started the marriage was approximately ten years. These parties brought three young children into the marriage and the court finds that under the circumstances each party shall have an equal amount of disposable income based on the income figures as found by the court.

to accommodate the children's long-term needs. The appropriate factors were considered.

¶7 We note that Peter asked for a family support order as opposed to child support and maintenance, presumably to gain the advantage of being able to take a tax deduction for family support payments. He cannot now be heard to complain that the circuit court should have applied the shared-time payer regulations applicable to an award of pure child support. While Peter also complains that the amount of support ignores the parties' agreement that he would be responsible for uninsured health care costs, he offered no evidence that such costs would have a significant impact on his budget.

¶8 Finally, we reject the suggestion that the circuit court made its decision prior to hearing the parties' testimony. After hearing the parties' settlement on property division and description of the issues remaining for trial, the circuit court questioned whether it could, absent a stipulation of the parties, order family support. Upon being assured that it could, the circuit court commented:

> [I]t seems to me that family support would be appropriate here and family support to at least equalize the incomes of the parties at a minimum…. So you've got a fifty thousand income on one and say fifteen on the other, it doesn't take a rocket scientist to determine what it would take in family support to equalize income.

The comment was directed more to determining whether the matter could be settled without a trial and did not demonstrate an irretractable position on the outcome of the case.

¶9 While we conclude that the circuit court's stated rationale for the amount of family support is minimally sufficient to sustain the exercise of

discretion with respect to family support, we cannot reach the same conclusion with respect to the required contribution to Susan's attorney's fees and the decision to split equally the remaining guardian ad litem's fees. A three-part test applies for awarding a contribution to attorney fees: "(1) the spouse receiving the award needs the contribution; (2) the spouse ordered to pay has the ability to do so; and (3) the total fee is reasonable." ***Ably v. Ably***, 155 Wis. 2d 286, 293, 455 N.W.2d 632 (Ct. App. 1990). The circuit court failed to make findings that any of the three tests were satisfied.[3]

¶10 Susan suggests that the circuit court was not required to make explicit findings on need and ability to pay because the concept of "overtrial" supports the contribution. *See* ***Ondrasek***, 126 Wis. 2d at 484. Susan testified that the parties had, at Peter's instigation, litigated the shared custody issue numerous times in front of the family court commissioner. She indicated that her attorney's fees were $9000. This testimony, without a circuit court finding that Peter engaged in unnecessary litigious actions, is not sufficient to sustain the contribution award. Moreover, "[w]ithout a determination of the actual fees incurred and whether they were reasonable, this court cannot review the reasonableness of the contribution, whether it be a conventional contribution order or one based on overtrial." ***Johnson v. Johnson***, 199 Wis. 2d 367, 378, 545 N.W.2d 239 (Ct. App. 1996).

¶11 The payment of guardian ad litem fees is also a discretionary determination which must be based on a showing of need by one party and the

[3] The circuit court's ruling was: "[W]ith respect to the matter of attorney fees, the court will order that the respondent contribute the sum of $2,5000.00 towards the petitioner's attorney fees within 60 days of the date hereof."

other's ability to pay. *See* ***Doerr v. Doerr***, 189 Wis. 2d 112, 125, 525 N.W.2d 745 (Ct. App. 1994). By splitting the fees outstanding at the time of trial ($1500), Peter ended up paying almost $1400 more of the fees than Susan.[4] The circuit court acknowledged Peter's greater contribution but did not explain why it was appropriate. The failure to do so was an erroneous exercise of discretion.

¶12 We reverse the award of a $2500 contribution to Susan's attorney's fees and the equal division of the outstanding guardian ad litem's fees as an erroneous exercise of discretion. On remand, the circuit court should make the appropriate findings in determining whether a contribution to Susan's attorney's fees is appropriate and how the guardian ad litem's fees should be divided.

¶13 No costs to either party.

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

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

[4] A pretrial order required Peter to pay an initial $1000 deposit towards the guardian ad litem's fees and each party was required to make monthly payments of $50 toward the fees. The order provided that "ultimate responsibility for Guardian ad Litem fees is reserved for court determination by future order."