

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 10, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

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.

No. 99-1868

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

SHERIDA L. WELKE,

PETITIONER-APPELLANT,

v.

DAVID R. WELKE,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Eau Claire County: GREGORY A. PETERSON, Judge. *Judgment affirmed in part; reversed in part and cause remanded with directions.*

Before Dykman, P.J., Eich and Deininger, JJ.

¶1 PER CURIAM. Sherida Welke appeals from the judgment divorcing her from David Welke. She received primary physical placement of the couples' two children, and David agreed to pay 25% of his gross income in child

support. The trial court denied Sherida's request to receive maintenance after she no longer received child support. The issues on appeal are whether the trial court properly computed David's gross income for child support, and whether it erred by denying Sherida's request for deferred maintenance. We conclude that the trial court undercalculated David's gross income for child support purposes, but properly denied maintenance. We therefore reverse in part and affirm in part.

FACTS

¶2 Sherida, age thirty-three, and David, age thirty-two, were divorced after eleven years of marriage. Their children were ages eight and two. David earned over \$50,000 per year as a management employee at Menards, and Sherida earned \$22,000 per year from her own business. Both parties had high school degrees and Sherida also had technical school training. David's Menards income consisted of a salary, annual bonuses, and annual profit sharing checks. The profit sharing program had recently replaced a deferred compensation plan for employees, where Menards placed money in trust to be paid out at retirement or termination of employment. While married, the parties invested part of the profit sharing money in a retirement account, and used the rest for various other purposes.

¶3 David stipulated to a child support award based on the standard 25% of gross income for two children, under the provisions of WIS. STAT. § 767.25(1j) (1997-98)¹ and WIS. ADMIN. CODE § DWD 40.03. However, the court held that David's annual profit sharing check did not meet the definition of "gross income,"

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

in WIS. ADMIN. CODE § DWD 40.02(13), because it was a form of retirement pay. The trial court addressed Sherida's maintenance request in the following manner:

Sherida Welke requested that maintenance be reserved while she is receiving child support and that it be reviewed when her support terminates. This is not an acceptable reason for reserving maintenance under WIS. STAT. § 767.26. Furthermore, this is not a long marriage (11 years), the parties are relatively young (31 and 33), in good health, and equally well educated. David Welke does earn considerably more than Sherida Welke. This is due, at least in part, because Sherida Welke is attempting to start a small business. With her employment history and technical degree, she is highly employable. For these reasons, maintenance is denied.

CHILD SUPPORT

¶4 When the trial court applies the child support percentage of income standards, the award is calculated using the payor's "gross income." WISCONSIN ADMIN. CODE § DWD 40.03. WISCONSIN ADMIN. CODE § DWD 40.02(13) defines "gross income" in relevant part as all income, employee contributions to any pension or retirement account, and all other income, whether taxable or not.

¶5 The trial court erroneously excluded David's annual profit sharing check from his "gross income." The payments were taxed as income in the year David received them, and he was free to use them as he chose. If placed in a retirement account, such investment was a voluntary "employee contribution." Under any reasonable view, the annual payments therefore qualified as "gross income" under WIS. ADMIN. CODE § DWD 40.02(13), even if they replaced a compensation plan that did not qualify as such.

MAINTENANCE

¶6 The decision to award maintenance is discretionary, and we will not reverse a maintenance determination absent an erroneous exercise of discretion. *LaRocque v. LaRocque*, 139 Wis. 2d 23, 27, 406 N.W.2d 736 (1987). An erroneous exercise of discretion occurs when “the trial court has failed to consider the proper factors, has based the award upon a factual error, or when the award itself was, under the circumstances, either excessive or inadequate.” *DeLaMatter v. DeLaMatter*, 151 Wis. 2d 576, 582-83, 445 N.W.2d 676 (1989) (citation omitted). The “court’s decision 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.’” *Trieschmann v. Trieschmann*, 178 Wis. 2d 538, 541-42, 504 N.W.2d 433 (Ct. App. 1993) (quoted source omitted).

¶7 The trial court properly exercised its discretion in denying Sherida’s maintenance request. Sherida was young, educated as well or better than David, in good health, and the parties did not have a “long” marriage for maintenance purposes. Additionally, the court found Sherida to be “highly employable” and the record supports that determination. In short, the facts reasonably supported a determination that future maintenance was not necessary for support or fairness, and the court adequately explained its reasoning on this issue.

¶8 On remand, the trial court shall enter an amended judgment providing that David’s gross income for child support purposes is to include the profit sharing checks he receives annually from Menards. No costs to either party.

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

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

