

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 29, 2000

Cornelia G. Clark
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. 00-0316

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

XUE MOUA,

PETITIONER-APPELLANT,

v.

CHAO MOUA,

RESPONDENT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Xue Moua appeals a judgment divorcing him from Chao Moua and an order in large part denying reconsideration of that decision. He contends that the trial court erroneously exercised its discretion when it

awarded Chao more than fifty percent of the marital assets, and when it ordered Xue to pay what he contends is excessive family support. We affirm.

¶2 The parties were married in 1982 and immigrated to the United States in 1985. They have six children, ages 8 to 15 at the time of the divorce. The judgment provided for joint legal custody of the children. Chao received primary physical placement of four children and Xue received primary placement of the other two.

¶3 Xue earns \$2,700 per month, including overtime. Chao earns \$1,469 per month from her employment. The court determined that Chao should receive fifty-five percent of the combined gross income of \$4,169, which required Xue to pay her \$824 per month in family support. Pursuant to internal revenue service rules, this amount was deductible from Xue's income and taxable to Chao. The trial court also awarded Chao \$17,370 in marital assets, while Xue received assets worth \$11,770, based primarily on a finding that Xue removed at least \$10,000 worth of marital assets and failed to account for them. The court also considered Xue's higher earning capacity and greater family resources, together with Chao's greater need for the parties' automobile, which comprised their most valuable asset.

¶4 On appeal Xue challenges both the property division and family support awards. He contends that the evidence shows that he accounted for all but \$3,600 of the assets he removed, and that the trial court failed to consider at least \$5,000 in cash that Chao failed to account for. He also contends that the family support award was erroneous because the court failed to make findings concerning Chao's needs and his ability to pay, erroneously relied on his overtime earnings to

compute his income, and should have relied on the child support percentage standards to determine his support obligation.

¶5 A trial court exercises discretion when it divides marital property. *See Long v. Long*, 196 Wis. 2d 691, 695, 539 N.W.2d 462 (Ct. App. 1995). We affirm discretionary decisions if the trial court demonstrates a reasoned application of the correct legal standards to the facts of record to reach a reasonable result. *See id.* Determining family support is also within the trial court's discretion and is also reviewed for a proper exercise of that discretion. *See Ondrasek v. Ondrasek*, 126 Wis. 2d 469, 481, 377 N.W.2d 190 (Ct. App. 1985). The trial court may award family support as a substitute for child support and maintenance. WIS. STAT. § 767.261 (1997-98).¹

¶6 We conclude that the trial court reasonably divided the marital assets. The trial court must presume an equal division of the assets, but may alter that distribution if certain factors are present. *See* WIS. STAT. § 767.255(3). Among the factors the trial court may consider are whether a party has squandered or depleted marital assets. *See Anstutz v. Anstutz*, 112 Wis. 2d 10, 12, 331 N.W.2d 844 (Ct. App. 1983). Based on Chao's testimony, this is precisely what Xue did, at least with regard to several thousand dollars in assets. Although he testified to the contrary, and instead blamed Chao for wasting assets, the trial court's determination to believe Chao is a credibility determination which we will not disturb. *See Village of Big Bend v. Anderson*, 103 Wis. 2d 403, 410, 308 N.W.2d 887 (Ct. App. 1981). The trial court also noted other reasons for

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

awarding Chao a larger share of the assets which further establish a reasonable basis for the unequal award.

¶7 We also conclude that the trial court did not err when it ordered Xue to pay \$824 per month in family support. He first argues that the trial court made no specific findings of Chao's need or his ability to pay. We may consider such findings as implied if they are not expressly made. *See Tralmer Sales & Serv., Inc. v. Erickson*, 186 Wis. 2d 549, 564, 521 N.W.2d 182 (Ct. App. 1994). Furthermore, the implied findings that Chao needed the support and Xue could pay it were not clearly erroneous. Xue earned \$2,700 per month and cared for two children and could reasonably be expected to afford a deductible expense of \$824. Under any reasonable view, Chao needed substantial support to care for four children on earnings of \$1,469 per month.

¶8 Xue also contends that the trial court erred by considering his overtime wages in computing his gross income. However, the trial court may properly consider such earnings and base an award on overtime income if it is earned on a regular basis. *See DeLaMatter v. DeLaMatter*, 151 Wis. 2d 576, 589, 445 N.W.2d 676 (Ct. App. 1989). Such was the case here, according to testimony.

¶9 Xue also contends that the trial court should have ordered support on a percentage basis, rather than a set sum. However, a percentage award is warranted only when very unusual circumstances justify one. *See Hefty v. Hefty*, 172 Wis. 2d 124, 132, 493 N.W.2d 33 (1992). None existed here, however, because the testimony indicated that Xue's overtime earnings were a predictable and constant portion of his income.

¶10 Finally, Xue contends that the trial court should have used the child support guidelines for shared placement and split custody circumstances. The trial

court concluded that the guidelines “do not fit and are not fair to the parties.” Xue has not shown otherwise. Nor has he demonstrated that a family support award necessarily aggrieves him, because it provides him with a substantial tax deduction that he would not otherwise have.

By the Court.—Judgment and order affirmed.

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

