COURT OF APPEALS
DECISION
DATED AND RELEASED

October 25, 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, 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. 94-2104

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

In re the Marriage of:

KIMBERLY K. HOTZ,

Petitioner-Appellant,

v.

RUSSELL L. HOTZ,

Respondent-Respondent.

APPEAL from orders of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Kimberly K. Hotz appeals from trial court orders denying her request for maintenance and requiring her to pay child support from the date the court was moved to modify child support. We discern no misuse of the trial court's discretion and affirm.

The judgment of divorce was entered in March 1990. At that time, the parties agreed to joint custody of their three minor children with primary physical placement with Russell. At the time of their divorce, the parties stipulated that Kimberly had a child support obligation. However, Russell agreed to waive Kimberly's percentage standard child support obligation of 29% of gross income because Kimberly was earning substantially less than he was.[1] The parties agreed to hold open maintenance and review Kimberly's child support obligation only upon a change of circumstances.

On June 29, 1993, the Walworth County Child Support Enforcement Agency moved the trial court to set child support payments for Kimberly. In September 1993, Kimberly filed a motion seeking maintenance.

At the end of proceedings on December 17, 1993, the trial court applied the percentage standard and required Kimberly to pay 29% of her gross income as child support. Proceedings resumed on December 20 with testimony relating to maintenance. On January 24, 1994, the third hearing in this matter, Kimberly's counsel acknowledged that child support had been set at the December 17 hearing and that maintenance had been adjourned. Thereafter, he made the following statement:

> The other thing we have agreed to is that we will stipulate rather than tampering with the court's original ruling on child support that [Kimberly] will pay 29 percent of her gross income via an income assignment through her employer, which I believe leaves the only matter before this court then for today is the issue of maintenance which we were trying last time and had to adjourn.

The parties then verified their understanding that Kimberly would have to pay approximately $500 in child support each month. Kimberly then argued in favor of a maintenance award because this child support obligation

[1] At the time of the divorce, Kimberly was earning $1204 gross ($916 net) each month; Russell was earning $2900 gross ($2200 net) each month.

reduced her monthly disposable income to approximately $812, less than the amount she had at the time of the divorce ($916) when the parties agreed she was unable to pay child support. In a memorandum decision, the trial court denied maintenance to Kimberly.

Kimberly challenges the trial court's use of the percentage standard to establish her child support obligation at 29% of her gross income. She contends that the standard is unfair because she is left with less disposable income than at the date of divorce.

Child support may be revised if there has been a substantial change in circumstances. Section 767.32(1), STATS. If thirty-three months have expired since entry of the last child support order, there is a rebuttable presumption of a substantial change in circumstances sufficient to justify a revision of child support. Section 767.32(1)(b)2. In this case, the last child support order was the parties' March 1990 judgment of divorce. The court was asked to modify child support in June 1993. Therefore, there was a rebuttable presumption in this case that a substantial change in circumstances had occurred, warranting a revision in child support.

The trial court is required to use the percentage standards established by the Department of Health and Social Services in revising a child support order. Section 767.32(2), STATS. However, upon a party's request, the court may depart from the percentage standard if "the court finds, by the greater weight of the credible evidence, that the use of the percentage standard is unfair to the child or any of the parties." Section 767.32(2m).

Kimberly argues that the percentage standard was unfair to her. We need not reach this issue because we conclude that on January 24, 1994, Kimberly stipulated to the court's December 17 child support ruling. A party cannot maintain inconsistent positions in the trial court and on appeal. *See* ***Siegel v. Leer, Inc.,*** 156 Wis.2d 621, 628, 457 N.W.2d 533, 536 (Ct. App. 1990).

Even if we were to address Kimberly's claim that the trial court erred in not deviating from the percentage standard, we would conclude that Kimberly has not shown that application of the standard was unfair. Three

children need to be supported. Kimberly's income has increased since the date of the divorce. At the time of the divorce, her gross monthly income was $1204 ($916 net). At the time of the hearings on child support and maintenance, Kimberly's gross monthly income was $1721 ($1308 net). Under these facts, it was not unfair to apply the percentage standard.

Kimberly next argues that the trial court erred in entering the order setting her child support obligation *nunc pro tunc* to June 29, 1993. Under § 767.32(1m), STATS., the trial court may make revisions in child support effective as of the date notice of the action is given to the party against whom the revision is sought. The child support modification motion was filed on June 29, 1993. This is the best evidence of the date Kimberly received notice of the motion.[2] The trial court did not err in making her child support obligation retroactive to that date.

Finally, Kimberly protests the trial court's refusal to award her maintenance. Whether to modify maintenance is within the trial court's discretion. ***Poindexter v. Poindexter,*** 142 Wis.2d 517, 531, 419 N.W.2d 223, 229 (1988). Maintenance may be modified only upon a showing of a substantial change in the financial circumstances of the parties. ***Gerrits v. Gerrits,*** 167 Wis.2d 429, 437, 482 N.W.2d 134, 138 (Ct. App. 1992). Although the trial court did not explicitly undertake this analysis, we must uphold its discretionary decision to deny maintenance because there are facts of record which would support the trial court's decision had discretion been exercised on the basis of those facts. ***Liddle v. Liddle,*** 140 Wis.2d 132, 150-51, 410 N.W.2d 196, 203-04 (Ct. App. 1987).

The parties' hold-open agreement regarding child support and maintenance was based upon Kimberly's inability to pay child support on a monthly gross income of $1204 ($916 net). Kimberly did not pay child support for over three years. During that time, she experienced a $500 increase in her gross monthly income. The trial court balanced the equities and determined that Kimberly should dedicate that increase to supporting her children. The trial court denied Kimberly maintenance to avoid reducing the amount of parental funds available to support the parties' three children. The court

[2] Kimberly does not suggest that she received notice on any other date.

reasoned that the benefit of maintenance to Kimberly was outweighed by the necessity of supporting the parties' three children.[3] Under these circumstances, the trial court's decision to dedicate the parents' income to supporting their children, rather than each other, was a proper exercise of its discretion.

Additionally, the parties' hold-open agreement contemplated reviewing Kimberly's child support obligation upon a change of circumstances. It is undisputed that circumstances have changed for purposes of child support—in addition to the presumption of a change in circumstances under § 767.32(1)(b)2, STATS., Kimberly's monthly income has increased. However, for purposes of maintenance, Kimberly's net monthly disposable income after paying child support ($898)[4] has not changed appreciably since the date of the divorce ($916). Therefore, there was no substantial change in circumstances warranting a maintenance award.

By the Court.—Orders affirmed.

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

[3] We find support for this view in the trial court's findings that the parties are relatively young, in good health and self-supporting.

[4] In denying maintenance to Kimberly, the trial court adopted hearing exhibit A-3. The exhibit, which was submitted by Kimberly's attorney, indicates that if Kimberly pays child support of $6000 per year and claims three income tax exemptions, she will have monthly disposable income of $898.