COURT OF APPEALS DECISION DATED AND RELEASED

June 22, 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

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No. 94-2345

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

IN RE THE MARRIAGE OF:

ROBERT G. FISH,

Petitioner-Appellant,

v.

MARGARET W. FISH,

Defendant-Respondent.

APPEAL from orders of the circuit court for Jefferson County: JACQUELINE R. ERWIN, Judge. *Affirmed*.

Before Dykman, Sundby, and Vergeront, JJ.

VERGERONT, J. Robert Fish appeals from orders directing him to pay certain sums for uninsured medical expenses for his children, child support arrearages and interest on the arrearages. Robert disputes his obligation to pay for the medical expenses and the manner in which they were computed. He also claims that the trial court erred in not retroactively

modifying the child support arrearages, in not giving him retroactive contemporaneous credit for transferring a tax dependency exemption to his former wife, Margaret Fish, and in ordering interest on the arrearages. We reject each of these claims and affirm.

Robert and Margaret were divorced in 1979. The divorce judgment granted custody of the parties' two minor children to Margaret and ordered Robert to pay $60 per week for child support to the Clerk of Courts in Jefferson County. Robert and Margaret were each entitled to claim one of the children as a personal exemption for tax purposes. The judgment ordered each party to maintain his or her own life and medical insurance policies and to maintain the children as beneficiaries of those policies until age eighteen. It then stated "[t]hat each party shall pay one-half of any extraordinary medical, dentist and other medical expenses of the children."

Robert's income decreased in 1982 and he did not make his regular payments for child support for much of 1982 and 1983, but he then resumed making payments. Robert and Margaret agreed that, beginning in 1982 and thereafter, Margaret could take both children as personal exemptions. On December 2, 1993, Margaret filed a motion seeking an order that Robert make payments toward the arrearages, pay interest on the arrearages, and reimburse her for one-half of the children's accumulated uninsured medical expenses. By this time both children were no longer minors.

After an evidentiary hearing on the motion, the court issued a written decision and entered an order. After Robert filed a motion for reconsideration, the court entered a second order. Details of the trial court's decision and orders will be discussed below.

MEDICAL EXPENSES

The trial court determined that under the provision in the divorce judgment, Robert was required to pay fifty percent of the uninsured medical expenses of the children incurred while they were minors. Robert contends he is required to pay fifty percent of only "extraordinary medical expenses." The interpretation of a divorce judgment presents a question of law that we decide

de novo, without deference to the trial court. *See* ***Levy v. Levy***, 130 Wis.2d 523, 528-29, 388 N.W.2d 170, 172-73 (1986).

We conclude that the phrase "other medical expenses" does not mean extraordinary medical expenses, but rather includes uninsured medical expenses that are not extraordinary. Since the provision expressly requires each party to pay one-half of "extraordinary medical expenses," adopting Robert's interpretation of the provision would render the phrase "other medical expenses" meaningless. Robert offers no explanation for why "other medical expenses" does not include uninsured medical expenses, except to state that if the parties had meant uninsured medical expenses, they would have said so. We find this reasoning unpersuasive. Uninsured medical expenses are medical expenses and are therefore included in that category unless there is some indication they are excluded. There is none.

The interpretation we adopt is the only one that makes sense in the context of the other provisions on medical expenses. Each party is required to maintain medical insurance with the children as beneficiaries. It is obvious there will be some uninsured medical expenses. Under Robert's reading of the provision, unless those uninsured expenses are extraordinary, neither party has an obligation to pay them. This is not a reasonable interpretation of the divorce judgment.

The trial court found that Margaret had paid a total of $9,471.09 in uninsured medical bills. It also found that Robert had paid $186 toward uninsured medical bills and was entitled to credit for that amount and any other amounts that he could document. Subject to that credit, the trial court held that Robert was responsible for one-half of the total of $9,471.09.

Robert argues that there is no evidentiary basis for the trial court's finding on the amount of uninsured medical bills. Robert claims that the trial court excluded the bills for the medical expenses on the ground that they were hearsay. He claims a summary prepared by Margaret of the uninsured medical expenses she paid (Exhibit 5) was inadmissible hearsay.

The trial court sustained Robert's objection to testimony by Margaret as to what medical expenses were extraordinary and also sustained his objection to admission of the bills for the medical expenses on hearsay grounds. However, Robert made no objection to the admission of Exhibit 5. Indeed, Robert's counsel marked this document as an exhibit and questioned Margaret on it. Margaret testified in response to those questions that Exhibit 5 was a tabulation of uninsured medical expenses for the children that she had paid and for which Robert had not reimbursed her. This testimony was not challenged or disputed by Robert. Robert's attorney offered Exhibit 5 into evidence and it was admitted. Exhibit 5 shows the total amount of uninsured expenses paid by Margaret for each year beginning in 1980. The total is $9,471.09.

We will not set aside the trial court's findings of fact unless clearly erroneous. Section 805.17(2), STATS. The trial court's finding that the uninsured medical expenses Margaret had paid was $9,471.09 is not clearly erroneous in view of Exhibit 5 and Margaret's testimony concerning that exhibit. There is no testimony controverting that those were the amounts of uninsured medical expenses she paid. If Robert intended to have Exhibit 5 admitted for certain purposes but objected to its admissibility for other purposes, it was incumbent on him to make this objection so that Margaret could respond and the trial court could rule on it. Since Robert did not do this, he has waived the objection. *See* ***State v. Damon***, 140 Wis.2d 297, 300, 409 N.W.2d 444, 446 (Ct. App. 1987) (failure to timely object to the admissibility of evidence waives that objection); § 901.03(1)(a), STATS.

SUPPORT ARREARAGES

A trial court has the discretion to reduce child support arrearages under an order or judgment entered prior to August 1, 1987. ***Schulz v. Ystad***, 155 Wis.2d 574, 598, 456 N.W.2d 312, 321 (1990). The trial court's discretionary determination will be upheld if the court arrived at reasonable conclusions based on consideration of appropriate law and the facts of record. ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981). We will find a misuse of discretion only if the court has not exercised its discretion or has exercised its discretion on the basis of an error of law or irrelevant or impermissible factors. ***Barstad v. Frazier***, 118 Wis.2d 549, 554, 348 N.W.2d 479, 482 (1984).

Robert testified that his income in 1981 was approximately $11,000 or $12,000 for the year and that in 1982 his hourly wage was reduced by $1.30 and his piecework rate by approximately ten percent. As a result, he was bringing home $80 to $90 per week. On one occasion in 1982, Margaret lent him money for food. Robert testified that he contacted Margaret about his situation, but the parties' testimony as to what was said is in conflict. Robert testified that Margaret agreed that he need not pay support unless he was earning more than $100 per week. Margaret denied this. She testified that when he told her that his income was reduced, she helped him create a hypothetical budget and asked him to produce a real budget along with proof of his income and expenses but that this was never provided to her.

The trial court set forth its reasoning for not reducing the child support arrearages based on this record:

> Robert asks the court to find that he did not have the ability to pay any child support during that time and to expunge the arrearage. Robert does not provide a 1982-83 budget and we are left to speculate regarding his expenses for that period of time. We do not know what, if any, living expenses and non-essential expenses were deducted from Petitioner's gross. We do not know if he, like Margaret, reduced living expenses by residing with parents or others. We do not know the date in 1983 upon which Robert's income increased.
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> Therefore, Robert asks the court to engage in guesswork and to find that he was unable to pay any support to his children from January 1, 1992 through October 12, 1993 [sic], or to reduce it to an amount which has no particular basis. While it is highly likely, relying on the sketchy facts given, that the family court would have reduced Robert's child support for 1982 and 1983 if presented with full facts at that time, this court may not speculate from the record before it in 1994.

Robert argues that this was a misuse of discretion because the court should have inferred that, with take home pay of less than $100 per week, he was unable to pay $60 per week in child support. We do not agree. It was Robert's obligation to present evidence to the court from which it could find what his income and expenses were during the time Robert's income was reduced and exactly what that time period was. The fact that it is undisputed that his income was reduced does not entitle him to a reduction of support arrearages in the absence of evidence that would permit the court to make findings on what his income was, what his expenses were, and what period of time was involved.

CREDIT FOR DEPENDENCY EXEMPTION

The trial court ordered that Robert was to receive a credit of $1,556.94, which was the amount of the tax benefit to Margaret for the dependency exemption which had initially been awarded to Robert but which he permitted her to take in 1982 and thereafter. Robert claims that the trial court misused its discretion in not awarding him a credit each year, with interest, to offset the support arrearages accumulated for that year. The effect of this would be to reduce the interest he was ordered to pay on the arrearages.

At trial, Robert attempted, through expert testimony, to introduce exhibits showing the benefit to Margaret of the additional tax dependency exemption for each year, with the addition of interest at eighteen percent each year for those savings. The trial court refused to admit those exhibits into evidence because they lacked foundation. This was a discretionary determination. ***Prill v. Hampton***, 154 Wis.2d 667, 678, 453 N.W.2d 909, 913 (Ct. App. 1990). Robert does not explain how the trial court misused its discretion in refusing to allow the admission of this testimony. He appears to concede that whether to grant a credit and, if so, to what extent is within the trial court's discretion. His argument is that the trial court misused its discretion because it did not express its reasoning for the approach it adopted and for its rejection of the approach he suggested. We do not agree.

The trial court stated:

> During the years of Andrew's minority, the parties agree that the tax benefit to Margaret was $1,556.94. It is unknown

> what, if any, detriment was suffered by Robert as a result of the transfer of personal exemption. The family court is a court of equity and the court will offset from the arrearage, medical expenses and interest thereon the financial benefit to Margaret realized on transfer of the exemption. When the transfer was made, it was a practical solution in an attempt to increase income available for the children. The court believes likewise that a practical resolution is appropriate at this juncture. Robert will receive a credit of $1,556.94 against the total owed by him as of the date of this decision. There was no agreement regarding interest on this benefit nor does the statute require interest and no interest is awarded.

The trial court's decision not to grant interest on the credit for the dependency exemption is consistent with its decision not to grant interest on the amount Robert owed as his share of the uninsured medical expenses. No statute requires interest on such sums and the trial court did not misuse its discretion in not awarding interest.

INTEREST ON CHILD SUPPORT ARREARAGES

The trial court concluded that § 767.25(6), STATS., mandates simple interest at 1.5% per month on unpaid child support due after July 2, 1983, the effective date of that subsection, and that the court does not have discretion to forgive interest which accrued after that date. This is a correct statement of the law. In ***Greenwood v. Greenwood***, 129 Wis.2d 388, 385 N.W.2d 213 (Ct. App. 1986), we held that § 767.25(6) applies to support arrearages accrued as of July 2, 1983. ***Id.*** at 392-93, 385 N.W.2d at 215. In ***Greenwood***, we reversed a trial court's determination that the statute did not apply to such arrearages and remanded the matter with directions to the trial court to determine the amount of the interest on all of the arrearages, including that portion that had accrued prior to July 2, 1983. ***Id.***

Robert relies on ***Schulz*** and argues that just as a court may, under ***Schulz***, exercise its discretion in retroactively reducing support arrearages

under orders entered prior to the effective date of § 767.32(1m), STATS.,[1] so the trial court has the discretion not to impose interest on unpaid support due under a pre-July 2, 1983 decree. We are not persuaded by this argument.

In ***Schulz***, the court determined that § 767.32(1m), STATS., eliminated the well-established right of a child support obligor to petition for retroactive modification of support. ***Schulz***, 155 Wis.2d at 598, 456 N.W.2d at 321. This was a substantive change in the obligor's legal rights and obligations, the court held. Therefore, there was a presumption in favor of prospective application unless that presumption was expressly or impliedly overcome by the language or history of the new section. ***Id.*** The court found nothing in either the language or the legislative history to indicate that the legislature intended that the prohibition on retroactive reductions would affect orders or judgments entered prior to the effective date of the statute. For this reason, it concluded that the new statute applied only to judgments and orders entered after that date. ***Id.*** at 598-99, 456 N.W.2d at 321.

Although in ***Greenwood*** we did not expressly state whether § 767.25(6), STATS., was a substantive or a procedural statute, we did look to the intent of the legislature with respect to the retroactive/prospective issue. We used the analysis the ***Schulz*** court used to determine whether § 767.25(6) should apply to arrearages existing on the effective date of the statute. We noted that the preamble to the act creating that section stated that interest is to be assessed on "any child ... support payment paid on or after the effective date of this act, regardless of the date of entry of the order for payments." ***Greenwood***, 129 Wis.2d at 392, 385 N.W.2d at 215. We concluded this indicated that the legislature intended the new statute to apply to arrearages accumulated on the effective date of the new statute. ***Id.*** at 393, 385 N.W.2d at 215.

Robert does not discuss ***Greenwood*** and therefore does not explain why ***Greenwood*** is not controlling. We are bound by the published decisions of the court of appeals. ***In re Court of Appeals of Wisconsin***, 82 Wis.2d 369, 371, 263 N.W.2d 149, 149-50 (1978).

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[1] Section 767.32(1m), STATS., effective August 1, 1987, provides that the circuit court may not revise the amount of child support due under an order or a judgment for support prior to the date that notice of a petition to revise support is given to the custodial parent.

Robert also argues that under the doctrine of equitable estoppel, the trial court should not have awarded interest on the arrearages. Equitable estoppel may bar a custodial parent from claiming or collecting child support arrearages. ***Harms v. Harms***, 174 Wis.2d 780, 785, 498 N.W.2d 229, 231 (1993). Assuming, without deciding, that the doctrine of equitable estoppel may apply also to a custodial parent's claim for interest on support arrearages, we nevertheless affirm the trial court's ruling.

Before the trial court, Robert raised the issue of equitable estoppel both as a basis for reducing his support arrearages and as a basis for not charging interest. As noted above, Margaret and Robert gave conflicting testimony on the issue of whether she agreed that he did not have to pay support for a period of time. The trial court implicitly accepted Margaret's version of the events when it ruled that "[o]n equitable estoppel, Robert has not met his burden of proof." Focusing solely on equitable estoppel as it applies to interest, the question is what action or inaction of Margaret's with respect to Robert's obligation to pay interest on arrearages induced reliance by Robert to his detriment.[2]

In its decision, the trial court stated:

> The strongest testimony from [Robert] in this regard is that [Margaret] "did not tell [him] that she would want back support or interest" during their discussions of 1982. Such an absence of communication does not create a promise or contract which justifies reliance.

We agree with the trial court that Margaret's failure to tell Robert she intended to collect interest is not sufficient, as a matter of law, to support the application of equitable estoppel in this case. *Cf.* ***Harms***, 174 Wis.2d at 785, 498 N.W.2d at 231 (custodial parent barred by equitable estoppel from collecting

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[2] Equitable estoppel requires a showing of three elements: (1) action or inaction which induces, (2) reliance by another, (3) to his or her detriment. The reliance must be reasonable. *See* ***Harms v. Harms***, 174 Wis.2d 780, 785, 498 N.W.2d 229, 231 (1993).

support where she sent a certified letter to obligor telling him she no longer expected him to pay child support).[3]

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

[3] Robert points out that when he checked the records at the Clerk of Courts' office, they did not show that any interest had accrued. However this was not an action or inaction of Margaret.

No. 94-2345(CD)

SUNDBY, J. (*concurring in part; dissenting in part*). The majority has struggled to make sense out of paragraph 7(n) contained in the divorce judgment entered August 30, 1979. That section provides: "That each party shall pay one-half of any extraordinary medical, dentist and other medical expenses of the children." The majority concludes that that provision requires the parties to pay one-half of all uninsured medical expenses. I cannot join in that construction.

The provision is plainly ambiguous and we must search for its meaning from the entire judgment. I rule out the majority's construction because its effect is to require each party to pay one-half of all medical and dental expenses. Had that been the intent of the parties, paragraph 7(n) could have read: "That each party shall pay one-half of any medical or dental expenses of the children."

I believe the provision was intended to apportion the costs of "extraordinary" medical and dental costs.

Paragraph 7(o) provides: "That respondent [the wife] shall maintain health insurance for the minor children of the parties." Health insurance policies typically cover medical and dental expenses but contain exclusions for costly, extraordinary expenses. For example, if I go to the hospital for my annual check-up, the exercise EKG is a regular, usual or routine part of my examination. If, however, my exercise EKG suggests that the lower left ventricle of my heart is leaking blood and I have open-heart surgery to correct the condition, I have incurred an "extraordinary" expense which is rarely covered by medical insurance.[4]

I conclude that the intent of the parties was that the wife would maintain health insurance for the minor children which would cover the usual, routine medical and dental expenses. However, the parties had to deal with "extraordinary" medical and dental expenses and did so by requiring each party

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[4] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 807 (1976) defines "extraordinary" to mean: "going beyond what is usual, regular, common, or customary ... exceptional to a very marked extent: most unusual: far from common ...."

to pay one-half of such costs. I therefore dissent from the majority's construction of this part of the divorce judgment. I concur in all other respects.