COURT OF APPEALS
DECISION
DATED AND RELEASED

April 2, 1997

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.

Nos. 96-2955-FT
96-3274-FT

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

In re the Marriage of:

CYNTHIA J. HINOJOSA,

Petitioner-Appellant,

v.

JOE R. HINOJOSA,

Respondent-Respondent.

APPEALS from a judgment and an order of the circuit court for Waukesha County: CLAIR VOSS, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. In court of appeals case No. 96-2955-FT, Cynthia J.Hinojosa appeals from a divorce judgment which denied her request for maintenance, held maintenance open for four years, and denied her request that she be awarded tax exemptions

for all three of the parties' minor children. This appeal is consolidated with court of appeals case No. 96-3274-FT, in which Cynthia appeals a postjudgment trial court order which offset child support for one child physically placed with her against child support for one of two children physically placed with the respondent, Joe R. Hinojosa. The order requires Cynthia to pay 17% of her income for support of the second child physically placed with Joe.

Pursuant to this court's order of November 22, 1996, and a presubmission conference, the parties have submitted memorandum briefs. Upon review of those memoranda and the record, we affirm the judgment appealed in case No. 96-2955-FT. We reverse the order appealed in case No. 96-3274-FT and remand the matter for further proceedings.

A maintenance request is addressed to the trial court's discretion. *See* ***Hubert v. Hubert***, 159 Wis.2d 803, 818, 465 N.W.2d 252, 257 (Ct. App. 1990). Discretion is properly exercised when the court arrives at a reasoned and reasonable decision through a rational mental process by which the facts of record and the law relied upon are stated and considered together. *See* ***Wikel v. Wikel***, 168 Wis.2d 278, 282, 483 N.W.2d 292, 293 (Ct. App. 1992). Maintenance is designed to further two objectives: to support the recipient spouse according to the parties' needs and earning capacities, and to ensure a fair and equitable financial arrangement in the individual case. *See* ***id.***

In denying maintenance, the trial court directly addressed both the support and fairness objectives. It considered the respective incomes and income-producing abilities of the parties, and their standard of living and contributions during the marriage, concluding that neither party contributed to the increased education or earning capacity of the other.

While Cynthia argues that her efforts in caring for the parties' children during the marriage enabled Joe to work overtime, this contribution did not increase Joe's earning capacity within the meaning of § 767.26(9), STATS. In effect, the parties' combined efforts increased their income during the marriage. However, it did not affect Joe's future income, since Joe testified that overtime was optional for him and he no longer intended to take it. Moreover, the trial court acted within the scope of its discretion in refusing to attribute overtime income to Joe after the divorce, particularly in light of his increased child care responsibilities.[1]

Cynthia objects that the denial of maintenance is unfair because her income is reduced by her payment of child support. However, child support percentage standards are premised on an assumption that the custodial parent also shares his or her income with the children, albeit directly rather than through a child support award. *See* Preface to WIS. ADM. CODE CH. HSS 80. Consequently, Joe's income, as well as Cynthia's, is reduced by support costs.

Cynthia also argues that the trial court failed to adequately consider Joe's cohabitation with another woman and her children. However, cohabitation may be considered only to the extent it alters a spouse's economic status. *See* ***Van Gorder v. Van Gorder,*** 110 Wis.2d 188, 197, 327 N.W.2d 674, 678 (1983). Because the evidence did not establish that Joe's expenses would have been less if he had not been cohabiting and that he fashioned his cohabitation relationship and finances for the purpose of avoiding maintenance, the evidence of cohabitation provides no basis for disturbing the trial court's decision. *See* ***id.*** at 197, 327 N.W.2d at 678-79.

[1] The trial court adequately protected Cynthia's interest in any potential overtime income by keeping maintenance open for four years. It thus insured that if Joe's base income is increased by overtime, Cynthia can seek modification of maintenance pursuant to § 767.32, STATS., based upon a change in circumstances.

Cynthia, who is employed in a ten-month academic position, also argues that the trial court erroneously attributed additional earning capacity to her which was unsupported by a finding that she was intentionally shirking employment. However, Cynthia conceded at trial that she could earn approximately $2000 by working for $6 an hour for nine weeks during her summer break. The trial court did not act unreasonably in concluding that she could find such employment and attributing such income to her, particularly since her child care responsibilities were reduced by primary placement of the children with Joe. *See* ***Van Offeren v. Van Offeren***, 173 Wis.2d 482, 496, 496 N.W.2d 660, 665 (Ct. App. 1992).

Based on the parties' comparable incomes and earning capacities, as well as their respective child care and support obligations, no basis exists to conclude that the trial court erroneously exercised its discretion by denying maintenance. Similarly, no basis exists to disturb the trial court's allocation of tax exemptions. The awarding of income tax dependency exemptions is an aspect of child support and is discretionary with the trial court. *See* ***Fowler v. Fowler***, 158 Wis.2d 508, 526-27, 463 N.W.2d 370, 377 (Ct. App. 1990). Here, the trial court awarded two exemptions to Cynthia and one to Joe while there are three minor children. It further provided that when two minor children remain, each party will have one exemption, and that Cynthia will have the exemption when only one minor remains. This distribution appears fair and reasonable on its face. While Cynthia argues that the trial court failed to consider the financial implications of its award, she cites to no tax analysis or evidence in the record which demonstrates that the allocation chosen by the trial court was inherently unfair or unreasonable. The trial court's tax exemption award therefore will not be disturbed.

While we affirm the divorce judgment, we reverse the order modifying child support. In the divorce judgment, primary physical placement of the parties' three minor children was awarded to Joe, and Cynthia was ordered to pay 29% of her income

as child support. In postjudgment proceedings, one child was physically placed with Cynthia. She then moved for modification of the child support award to provide that Joe would pay 17% of his income to her for support of the child in her care, and she would pay 25% of her income to Joe for support of the two children in his care. The proposed award was consistent with WIS. ADM. CODE § HSS 80.04(3), which provides that in a split custody situation, child support may be determined by multiplying each parent's income base by the percentage appropriate to the number of children in the custody of the other parent, and subtracting the smaller obligation from the larger obligation to determine which parent should pay, and how much.

A trial court is required to use the percentage standards established by the Department of Health and Social Services in revising a child support award. *See* § 767.32(2), STATS. However, upon a party's request, the court may depart from the percentage standard if, after considering the factors listed in § 767.25(1m), STATS., it finds, by the greater weight of the credible evidence, that the use of the percentage standards is unfair to the children or any party. *See* ***Luciani v. Montemurro-Luciani***, 199 Wis.2d 280, 295, 544 N.W.2d 561, 567 (Ct. App. 1996); § 767.32(2m).

The trial court made no express finding of unfairness here, nor did it set forth any reasons for its award which demonstrate that, even implicitly, it considered whether use of the percentage standards was unfair. The record indicates simply that when Cynthia moved for modification of the child support award as set forth above, the trial court replied that if there was going to be an offset, "perhaps it should be down to 17% to save a lot of bookkeeping," meaning that Cynthia would pay 17% of her income as support for one of the children placed with Joe, and the other two children would be considered "offset." Cynthia objected that such an award would not be equitable. Moreover, while Joe consented to this suggestion, he made no claim or showing that child support pursuant to WIS. ADM. CODE § HSS 80.04(3) would be unfair.

No basis exists in the record to conclude that the trial court, even implicitly, found that application of the percentage standards was unfair to the children or one of the parties. The order modifying child support must therefore be reversed and the matter remanded for further proceedings in compliance with § 767.32(2) and (2m), STATS.

Because Cynthia prevails in her appeal of the postjudgment order, but not in her appeal from the divorce judgment, costs on appeal will be denied to both parties.

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

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