COURT OF APPEALS
DECISION
DATED AND FILED

July 7, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0089

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

IN RE THE MARRIAGE OF:

COLLEEN M. GRAY,

PETITIONER-RESPONDENT,

v.

EARL P. GRAY,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Earl Gray appeals the portions of a divorce judgment awarding maintenance and child support. The maintenance provision required a specific monthly payment calculated as a declining percentage of Earl's average annual income and further required additional payments, calculated at the

same declining percentage, of any income exceeding Earl's average annual income. Earl contends the trial court erroneously exercised its discretion by making the maintenance award because the unusual circumstances required to support such a payment structure did not exist here. Earl also contends the trial court erroneously exercised its discretion when it awarded child support by requiring a monthly payment based on a percentage of Earl's annual income, but not less than $2,800 per month, and requiring an additional payment, based on the same percentage, of any earnings exceeding Earl's annual income, with any amounts in excess of $2,400 per month to be placed in an educational trust for the minor children. Because the law authorizes the court to utilize the payment structures ordered here, we conclude that the trial court had the power to exercise its discretion in awarding maintenance and child support. We affirm the judgment as a reasonable exercise of the trial court's discretion. We decline to award costs against Earl for a frivolous appeal.

BACKGROUND

Earl and Colleen Gray were married for approximately twelve years before filing for divorce. The Grays had one thirteen year old and three-year-old twins at the time of divorce. Earl, an attorney, had an average yearly income of approximately $167,600 over the course of the last three years of the marriage. Prior to the last three years of marriage, Earl had years both of extraordinarily high income and of moderate income. During the marriage, he provided the sole financial support for the family. Colleen was not employed outside the home; her primary responsibility was caring for the children.

The trial court ordered Earl to pay Colleen limited term maintenance for eight years, with the amount of the monthly maintenance payment gradually

decreasing. For the first three years, the court ordered maintenance in the amount of fourteen percent of Earl's income, but not less than $1,950 per month. This figure was based on an average annual income of $167,600. Should Earl's income exceed the average annual income during the first three years, the maintenance award requires him to pay fourteen percent of the excess above $167,600. For the next three years, the court reduced the maintenance award to nine percent of Earl's average annual income, but not less than $1,250 per month. Should Earl's income exceed the average annual income in those years, he is required to pay nine percent of the excess above $167,600. For the last two years, the court reduced maintenance to six percent of Earl's average annual income, but not less than $800 per month. Should Earl's income exceed the average annual income in those two years, he is required to pay six percent of the excess above $167,600. After eight years, the maintenance obligation ends.

In setting child support, the court required Earl to pay $2,800 per month, which represents twenty percent of his average annual income ($167,600). In addition, he was required to pay twenty percent of any income in excess of his average annual income, to child support. All amounts of child support beyond $2,400 per month were to be placed in an educational trust for the benefit of his children. Earl contests the maintenance and child support awards.

ANALYSIS

1. MAINTENANCE AWARD

The determination of the amount and duration of a maintenance award is entrusted to the trial court's discretion and we will not disturb that determination unless the court has erroneously exercised its discretion. ***LaRocque v. LaRocque***, 139 Wis.2d 23, 27, 406 N.W.2d 736, 737 (1987). We will affirm if

the trial court made a reasoned decision after properly applying the law to the record's facts. ***Id***. We review the trial court's decision in the context of the statutory factors established in § 767.26, STATS., and the fairness and support objectives articulated in ***LaRocque***. *See* ***id***. at 33, 406 N.W.2d at 740.

Earl first argues that the trial court erroneously exercised its discretion by utilizing a formula requiring that he pay both a monthly stipend based on a declining percentage of his income and an additional corresponding percentage amount predicated on any increase in earnings he may realize during the next eight years. Earl suggests that such an approach is unfair because it isolates Colleen from any risks associated with a reduction in his income while providing her with a windfall if his income dramatically increases. Earl further argues that the court is without authority to order a percentage of income in addition to a specified monthly maintenance payment unless unusual circumstances exist, relying on ***Poindexter v. Poindexter***, 142 Wis.2d 517, 419 N.W.2d 223 (1988).

In ***Poindexter***, the Wisconsin Supreme Court stated:

> [U]nder very unusual circumstances such as those presented here, where a party has an ability to effect significant changes in assets and income available for maintenance and has done so on several occasions over a period of time, a percentage maintenance award is within a circuit court's discretion.

Id. at 523, 419 N.W.2d at 225. Earl reasons that this limitation restricts the trial court to awarding a percentage of income as maintenance only under the circumstances identified in ***Poindexter***. Earl argues that he has not manipulated his income at any time in the past and has not demonstrated a propensity to do so; accordingly the ***Poindexter*** prerequisites have not been met.

Earl's interpretation of the ***Poindexter*** test is too narrow. While the unusual factual circumstances present in ***Poindexter*** involved the husband's ability to manipulate his assets and income available for maintenance, the court's precise holding was that "a percentage maintenance award is, under very unusual circumstances, within a circuit court's discretion," ***Id***. at 529-30, 419 N.W.2d at 228, and should only be considered when such an award is responsive to the factors enumerated in § 767.26, STATS. ***Id***. at 531, 419 N.W.2d at 229.

Our court has more recently approved the use of a percentage award under another type of unusual circumstance. In ***Hefty v. Hefty***, 172 Wis.2d 124, 493 N.W.2d 33 (1992), our supreme court recognized that the ***Poindexter*** "unusual circumstances" test was satisfied whenever the payer will receive an unpredictable, albeit reasonably anticipated, amount of income, such as bonus income. ***Hefty***, 172 Wis.2d at 132-33, 493 N.W.2d at 36-37. This specific approval of a percentage maintenance award leads us to conclude that ***Poindexter*** is but one illustration of the type of unusual circumstance when a percentage maintenance award is appropriate. ***Poindexter*** does not constrain the use of percentage awards under other circumstances, as is evidenced by the court's specific approval in ***Hefty***.

Here, the trial court considered the evidence in light of the statutory factors enumerated in § 767.26, STATS., and considered the unusual circumstances of this case. The court found that because Earl's income was subject to fluctuations and varied year to year, it needed to calculate an average income for the last three years in order to determine maintenance. The evidence demonstrated that prior to the last three years, Earl had several extraordinarily high income years from personal injury work in addition to his criminal practice, and that he recently had secured another potentially significant personal injury case. Under these

circumstances, the trial court considered the facts and applicable law and determined that because Earl's income, as in ***Hefty***, was subject to reasonably anticipated but unpredictable increases, a limited term maintenance award structured as a declining percentage of Earl's average annual income was more responsive to the statutory factors enumerated in § 767.26, STATS. This is a proper exercise of the trial court's discretion.

Earl next argues that the limited term maintenance award violates the ***LaRocque*** fairness objective of ensuring an equitable financial arrangement between the parties. ***Id***. at 33, 406 N.W.2d at 740. Earl contends that Colleen received a substantial property settlement and made no direct contribution to Earl's professional status or to the development of his law practice, but that because his past income has on occasion significantly exceeded the average annual income that the court calculated, Colleen could receive a windfall in addition to the monthly percentage stipend.

The maintenance award, however, is limited to eight years and is structured to require Earl to pay a declining percentage of his average annual income over the course of the term. Earl has the ability to make the court-ordered payments. Colleen needs the payments in order to maintain the lifestyle that existed during the marriage. The limited term and the declining percentage operate to encourage and assist Colleen in eventually entering the workforce when the twins are older so that she may become economically self-sufficient in the future. We note that should extraordinary events dramatically change Earl's income beyond that which the trial court could reasonably anticipate, Earl has the option of requesting an adjustment to the court order. *See* ***Poindexter***, 142 Wis.2d at 533, 419 N.W.2d at 230. While the maintenance award was generous, this is a twelve-year marriage involving a spouse who has been out of the workforce for a

substantial period of time. Although Colleen is a high school graduate with some junior college credits, she does not possess a college degree or marketable job skills that will enable her to become economically self-sufficient in the immediate future. Therefore, we conclude that that the eight-year limited term maintenance award requiring declining percentage payments based upon Earl's average annual income satisfies the ***LaRocque*** fairness objective and is not an erroneous exercise of the trial court's discretion.

2. CHILD SUPPORT AWARD

The trial court ordered child support in the amount of twenty percent of Earl's average annual income, but not less than $2,800 per month, plus twenty percent of any annual income exceeding $167,600. The court also ordered that any amount in excess of $2,400 per month child support be placed in an educational trust for the minor children.[1]

Child support awards are entrusted to the sound discretion of the trial court, and we will not reverse absent an erroneous exercise of discretion. *See* ***Schwantes v. Schwantes***, 121 Wis.2d 607, 630-31, 360 N.W.2d 69, 80 (Ct. App. 1984). The trial court has discretion to determine and adjudge the amount a person should reasonably contribute to the support of his or her child, and shall also determine how that sum should be paid. Section 767.25, STATS. The court properly exercises its discretion when it considers the needs of the primary custodian and the children, as well as the ability of the noncustodial parent to pay. ***Edwards v. Edwards***, 97 Wis.2d 111, 116, 293 N.W.2d 160, 163 (1980).

[1] The court stated, "so the Court will order, at a minimum, $400 per month be placed in an educational trust for the benefit of the minor children and any amounts in excess, then, as calculated, likewise be placed in that trust."

Generally, under § 767.25(1j), STATS., the court is required to determine child support payments using the percentage standard established by the Department of Health and Social Services under § 49.22(9), STATS. The trial court may deviate from those percentage standards if, after considering the statutory factors enumerated in § 767.25(1m), the court finds by the greater weight of credible evidence that the use of the percentage standards is unfair to the child or any of the parties. Section 767.25(1m), STATS.; *see also* ***Hefty***, 172 Wis.2d at 138, 493 N.W.2d at 38.

In this instance, the trial court deviated from the support guidelines because of several unusual factors: a unique custody arrangement in which the eldest child was placed with Earl while the other children were placed with Colleen; Earl's substantial and varied income; and Colleen's unemployment and need to care for the young twin sons. Accordingly, the court calculated child support at twenty percent of Earl's average annual income as a floor, but not less than $2,800 per month. It also ordered that twenty percent of any income exceeding Earl's average annual income be allocated to child support. In this case, the court considered the applicable statutory factors in § 767.25(1m), STATS., and found that the percentage guidelines would be unfair. The court then set child support as a combination of a fixed sum and percentage of parental income pursuant to § 767.25(1)(a).[2]

[2] Section 767.25(1)(a), STATS., provides that when a court enters a divorce judgment, it shall:

> Order either or both parents to pay an amount reasonable or necessary to fulfill a duty to support a child. The support amount may be expressed as a percentage of parental income or as a fixed sum, or as a combination of both in the alternative by requiring payment of the greater or lesser of either a percentage of parental income or a fixed sum.

The court also ordered that any amount of child support exceeding $2,400 per month be set aside in an educational trust for the minor children. Section 767.25(2), STATS., specifically allows a trial court to set aside a portion of the child support order in a trust for the support, education and welfare of the children. In this case, Earl specifically suggested the creation of an educational trust but contests that portion of the support order that directs that twenty percent of any increase in income be placed in the trust. Earl contends that a single unique year could swell his income and create a windfall beyond the children's educational needs. Because Earl specifically approved of the trust's creation, the trial court's order that a percentage of additional earnings be placed in the trust is a proper exercise of the its discretion. Should Earl's income increase dramatically, he can petition the court for relief based upon the unanticipated increase in income and the trust's enrichment beyond that reasonably needed to provide for the children's education. *See* ***Poehnelt v. Poehnelt***, 94 Wis.2d 640, 648-49, 289 N.W.2d 296, 300 (1980) (child support may be modified with a showing that there has been a substantial or material change in the parties' or children's circumstances). In the absence of such extraordinary circumstances, however, we conclude that the trial court properly exercised its discretion by ordering twenty percent of Earl's additional income into the children's trust during their minority.

3. FRIVOLOUS APPEAL UNDER § 809.25(3), STATS.

Finally, Colleen requests that fees and costs be assessed against Earl pursuant to § 809.25(3), STATS., the frivolous appeal statute. Colleen contends that Earl knew or should have known that his appeal of the child support order was

without any basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law. Section 809.25(3)(c)2, STATS. Colleen argues that Earl proposed the very arrangement before the trial court and therefore his appeal must be frivolous. Earl presented alternative suggestions to the trial court regarding the establishment of an educational trust. One of his suggestions was to establish a child support floor and determine that any excess money go to educational trusts for the children. We do not perceive Earl's appeal of the trial court's ultimate determination to order twenty percent of his excess income into the trust as inconsistent with his position at trial. We decline to assess costs against Earl because his appeal is not so lacking in merit as to award frivolous costs.

By the Court.—Judgment affirmed.

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