COURT OF APPEALS
DECISION
DATED AND FILED

January 9, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-0125

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

IN RE THE MARRIAGE OF:

LOUISE O'GORMAN,

PETITIONER-APPELLANT,

V.

MICHAEL O'GORMAN,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: LEE E. WELLS, Judge. *Modified and, as modified, affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Louise O'Gorman appeals from the circuit court order granting Michael O'Gorman's motion for credit toward his child support arrearage. We modify the order and, as modified, affirm.

BACKGROUND

¶2 When Louise and Michael O'Gorman divorced in February 1987, the circuit court ordered Michael to pay child support. In June 1995, Michael sustained serious injuries during the course of his employment, rendering him permanently disabled and unable to earn a living. Although he eventually received worker's compensation and federal disability insurance benefits, Michael went into arrearage on his child support obligation.

¶3 Based on Michael's entitlement to federal disability insurance benefits, Rebecca, the couple's youngest daughter, applied for child's insurance benefits under 42 U.S.C. § 402(d). In July 1998, she received $8,763.75 in benefits for the period of February 1996 through June 1998. Pursuant to WIS. STAT. § 767.32(1r)(d) (1997-98),[1] Michael moved for Rebecca's benefits to be credited against his arrearage. The circuit court granted the motion.

DISCUSSION

¶4 Louise challenges the crediting of benefits paid directly to Rebecca against Michael's child support arrearage. She notes that "for a period of almost 3 years [she] was solely responsible for the care, custody, housing, clothing, feeding, and educating of her daughter while receiving no payments toward all of these costs from [Michael]." She concedes that under WIS. STAT. § 767.32(1r)(d), Michael "is to be given credit for unpaid support accrued, if Federal Disability Insurance Benefits are paid to the Clerk of Courts to be received by [her]." She argues, however, that if this court accepts Michael's argument, the outcome would

[1] All references to the Wisconsin Statutes are to the 1997-98 version.

be that "Rebecca … receives a windfall of almost $9,000, [Michael] receive[s] a credit against child support arrears, and [she] receives nothing." She maintains that such an outcome "is unjust and is not the correct interpretation of Section 767.32(1r)(d)."

¶5 Louise contends that WIS. STAT. § 767.32(1r)(d) "is so ambiguous that it is capable of being understood in two or more different senses by reasonably informed persons."[2] Michael responds that § 767.32(1r)(d) is clear and unambiguous, and provides the proper basis for the circuit court's decision. Michael is correct.

¶6 As we recently summarized:

> Construction of a statute or its application to a particular set of facts is a question of law we review de novo. In determining a statute's meaning, our goal is to ascertain the legislature's intent. To make this determination, we look to the statute's plain language. If the statute is plain on its face, our inquiry ends, and we must simply apply the statute to our case's facts.

Monicken v. Monicken, 226 Wis. 2d 119, 130, 593 N.W.2d 509 (Ct. App.) (citations omitted), *review denied*, 228 Wis. 2d 175, 602 N.W.2d 761 (1999). WISCONSIN STAT. § 767.32(1r) provides, in relevant part:

> In an action under sub. (1) to revise a judgment or order with respect to child support or family support, the court may grant credit to the payer against support due prior to the date on which the petition, motion or order to show cause is served for payments made by the payer other than payments made as provided in s. 767.265 or 767.29, in any of the following circumstances:

[2] Louise also argues that "Wisconsin Law is quite clear that child support is to be paid directly to the custodial parent," and that "the plain reading" of WIS. STAT. § 767.32(1r)(d) "is in conflict with the current statutory and administrative law relative to child support payments." Other than citing the definitions of "payor" and "payee" contained in WIS. ADMIN. CODE § HSS 80.02, however, Louise provides no authority to support this argument. Accordingly, we will not address it. ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980).

> ….
>
> (d) The payer proves by documentary evidence that, for a period during which unpaid support accrued, the child received benefits under 42 USC 402(d) based on the payer's entitlement to federal disability insurance benefits under 42 USC 401 to 433. Any credit granted under this paragraph shall be limited to the amount of unpaid support that accrued during the period for which the benefits under 42 USC 402(d) were paid.

The statute clearly requires only that the child receive benefits under 42 U.S.C. § 402(d), not that a custodial parent receive them.

¶7 The circuit court issued its decision after reviewing the briefs of the parties and hearing their arguments. The court commented: (1) "[a]ny credit granted under [WIS. STAT. § 767.32(1r)(d)] shall be limited to the amount of unpaid support that accrued during the period for which the benefits under 42 [U.S.C. § 402(d)] were paid; and so in our case, if we apply that, you can see that the unpaid support actually exceeds those benefits"; (2) "[a] family court is a court of equity"; (3) "we realize what's happened to [Michael] in terms of his job status and his income substantially affected by that injury in '95, and that's the time period we're talking about"; and (4) "[Louise's] concern is that this money that would fit the description under [WIS. STAT. § 767.32(1r)(d)] didn't go to [her]," and her position is that "[she] didn't have a chance to use the money to pay for [her] needs, not on behalf of [her]self but [her] needs in terms of raising [her] daughter."

¶8 The circuit court then received factual information from Michael's attorney: (1) damage resulting from Michael's "injury on the job" as a steelworker "prevented him from really seeking any type of gainful employment based on the Social Security decision"; (2) Michael "calculated a percentage of what he was receiving on worker[']s comp[ensation], and then sent not necessarily monthly

checks but checks on a periodic basis on the accumulated 17 percent of what he received"; (3) in November 1998, Michael was receiving "[$]1250 Social Security a month, and disability and unemployment insurance of [$]1310" for "a total gross of [$]2560" per month; and (4) Rebecca received the child's insurance benefit lump sum payment of $8,763.75 when she was eighteen years old, after she graduated from high school. Explaining that it had been trying to determine whether Michael had attempted to "legally or illegally divert the money" from Louise's access "on a monthly basis" to pay for Rebecca's needs, the court concluded:

> [C]learly that did not happen here. The opposite happened.
>
> [Michael] didn't get the money until … after April 15th of 1998, which is about a month and a half before the daughter graduates, and she didn't get the money—the money wasn't physically available to her until after she had been 18 and graduated from high school.…
>
> Seems to me that this is very clearly from a standpoint of equity and also standpoint of [WIS. STAT. § 767.32(1r)(d)], … a classic case where this money should be … deducted from the amount of the support arrearage that has developed over this period of time.…
>
> ….
>
> … [T]he only draw[]back on this is the mother has never touched the money as a payee. I appreciate that.
>
> But looking at it in a discretionary way and equitable way, the respondent never caused it to happen that way. He is the one who had the diminished physical capacity which provides for Social Security, a by[-]product being given to his child who is under the age of 18 and ends when she is 18; … the language of the statute specifically does not name the payee there and saying this money has to have been paid to the payee. So legally I think that he's entitled to a deduction of the arrearage based upon the amount paid by Social Security to his daughter Rebecca.
>
> Equitably, it's even a stronger position ….
>
> ….
>
> I think he's very clearly in an equitable situation entitled to reduction of his arrearage.…

¶9 Clearly, the circuit court exercised discretion under WIS. STAT. § 767.32(1r)(d) to grant Michael credit against his child support arrearage. We must sustain this discretionary decision if the circuit court "considered the relevant facts, properly interpreted and applied the law, and reached a reasonable determination." ***Ness v. Digital Communications, Inc.***, 227 Wis. 2d 592, 600, 596 N.W.2d 365 (1999). The hearing record demonstrates that the court did so.[3]

¶10 Louise also argues:

> [Michael] notes in his Brief … that [his] arrears as of May 1, 1999, were $7,856.16, together with interest of $4,118.60, and receiving and disbursement fees of $25.00, for a total of $11,999.76, less a subsequent payment of $346.00 for a total balance due of $11,653.76.
>
> It is undisputed that the Workers' Compensation [sic] payment is in the amount of $8,763.75. Even assuming that the Court of Appeals accepts [Michael's] argument … that the entire $8,763.75 should be applied to [his] child support arrears, this still leaves a balance due of $2,890.01. However, Judge Wells fixed [Michael]'s child support arrears at $1,646.36. Judge Wells apparently applied a retroactive reduction against child support interest of [Michael].
>
> Clearly, under 737.32(1m), the Court is not able to grant a retroactive reduction for child support arrears. The Trial Court erred in granting this retroactive reduction.

Louise is wrong; the circuit court did not "appl[y] a retroactive reduction against child support interest."

¶11 During the October 19, 1999 motion hearing, Michael's attorney notified the court that since the previous hearing in June, when the May 1, 1999 figures were used, Michael's arrearage had decreased to $5,780.16 (due to his

[3] The circuit court intended to grant credit for the full amount of the child's insurance benefits paid directly to Rebecca. Accordingly, we modify the court's order to reflect a credit of $8,763.75, rather than $8,763.36; as modified, we affirm that portion of the order.

monthly $346 payments), and the accrued interest had increased to $4,629.95. The circuit court used the new arrearage and interest figures when applying the credit and calculating the balance due, but it neglected to include the $25 receipt and disbursement fee; thus it fixed Michael's child support arrears as of October 19, 1999, at $1,646.36 rather than $1,671.36.[4] Accordingly, we modify the circuit court's order to reflect that Michael's child support arrearage as of October 19, 1999, was $1,671.36; as modified, we affirm that portion of the order.

By the Court.—Order modified and, as modified, affirmed.

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

[4] We note that after the circuit court completed its calculations and announced its result, it asked counsel for both parties whether they reached the same figure. One of Michael's attorneys said that he agreed with the figure. Louise's attorney said he agreed with the figure if the interest against arrears was computed correctly. The circuit court responded by instructing Michael's attorneys to draft an order showing the arrearages it had indicated. The court also told Louise's attorney that he was "welcome to bring a motion" if he discovered that "the interest got fuddled along the way." Neither the briefs nor the record indicates that such a motion was ever filed.