

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 30, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-2479-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

DAVID R. MYERS,

PETITIONER-APPELLANT,

V.

KIMBERLY A. MYERS,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Price County:
PATRICK J. MADDEN, Judge. *Reversed and cause remanded.*

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

¶1 PER CURIAM. David Myers appeals the provision in the judgment of divorce from Kimberly Myers that relates to child support.¹ David contends that the circuit court erroneously applied the child support guidelines found in WIS. ADMIN. CODE § DWD 40.04(2)(c). We agree and therefore reverse and remand for further proceedings.

BACKGROUND

¶2 David and Kimberly were married in 1991. This action was filed in 1999. They have three minor children. Property and child placement issues were settled before trial. Both parties agreed that each parent share physical placement and have the children 50% of the time. The principal issue in dispute between the parties was child support.

¶3 At trial, the court indicated that this case was covered by WIS. STAT. § 767.25(1j) and that it would apply the Department of Workforce Development's percentage standard. The trial court referred to the guidelines found in WIS. ADMIN. CODE § DWD 40.04(2)(c) and stated that it did not find any reason to deviate from the guidelines. The trial court determined that both parties should pay 29% of their gross incomes to each other. The end result was that David would pay Kimberly the difference between 29% of their gross incomes. David appeals.

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

STANDARD OF REVIEW

¶4 Determining the proper child support obligation of a party is committed to the sound discretion of the circuit court. *Luciani v. Montemurro-Luciani*, 199 Wis. 2d 280, 294, 544 N.W.2d 561 (1996). Deciding whether the trial court appropriately exercised its discretion is a question of law. *Id.* We must sustain a discretionary act if we find that the trial court "(1) examined the relevant facts, (2) applied a proper standard of law, and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Id.* (quoted source omitted).

DISCUSSION

¶5 David argues that the trial court erroneously applied the child support guidelines in WIS. ADMIN. CODE § DWD 40.04(2)(c). David further argues that the trial court did not properly address the statutory requirements under WIS. STAT. § 767.25(1m) to explain its deviation from the child support guidelines. *See* WIS. STAT. § 767.25(1n). We agree.

¶6 Except as provided in WIS. STAT. § 767.25(1m), "the court shall determine child support payments by using the percentage standard established by the department under s. 49.22(9)." WIS. STAT. § 767.25(1j). WISCONSIN STAT. § 49.22(9) provides:

The department shall promulgate rules that provide a standard for courts to use in determining a child support obligation based upon a percentage of the gross income and assets of either or both parents. The rules shall provide for consideration of the income of each parent and the amount of physical placement with each parent in determining a child support obligation in cases in which a child has substantial periods of physical placement with each parent.

Upon request of either party, the court may modify any child support payment determined under § 767.25(1j) if, after considering certain enumerated factors, the court finds that use of the percentage standard is unfair to the child or to either party. WIS. STAT. § 767.25(1m). If the court does make such a finding, it

shall state in writing or on the record the amount of support that would be required by using the percentage standard, the amount by which the court's order deviates from that amount, its reasons for finding that use of the percentage standard is unfair to the child or the party, its reasons for the amount of the modification and the basis for the modification.

WIS. STAT. § 767.25(1n). Therefore, the percentage standard established by the department under WIS. STAT. § 49.22(9) is the presumptive standard for determining child support.

¶7 Chapter DWD 40 of the Wisconsin Administrative Code is promulgated pursuant to WIS. STAT. § 49.22(9). Under these rules "percentage standard" means "the percentage of income standard under s. 40.03(1) which, multiplied by the payer's base or adjusted base, results in the payer's child support obligation." WIS. ADMIN. CODE § DWD 40.02(27). WISCONSIN ADMIN. CODE § DWD 40.03(1), entitled "DETERMINING CHILD SUPPORT USING THE PERCENTAGE STANDARD," explains the method for determining the income of the payer and applying specified percentages to that income according to the number of children. The percentage for three children is 29%. WIS. ADMIN. CODE § DWD 40.03(1).

¶8 WISCONSIN ADMIN. CODE § DWD 40.04(2)(c) establishes the method for calculating a shared time payer's child support obligation where each parent has the child for at least 147 overnights per year. The guidelines first

require a determination of each parent's support obligation under WIS. ADMIN. CODE § DWD 40.03(1)(c). In this case, it is 29% of each parent's gross income. *Id.*

¶9 Next, the guidelines require a determination of the percentage of the year that each parent provides overnight care. WIS. ADMIN. CODE § 40.04(2)(c)2. In this case, it is undisputed that the children are with both parents 50% of the time. The child support obligation is then reduced for each parent in accordance with table 40.04(2)(c). WIS. ADMIN. CODE § DWD 40.04(2)(c)3. The child support obligation for each parent is multiplied with the appropriate percentage from column B of table 40.04(2)(c). For 50% shared time, the percentage is 33.40%. *Id.* Each parent's child support obligation then becomes 9.69% of their gross income by multiplying 29% by 33.40%. Finally, the lesser child support obligation is subtracted from the greater to determine the child support obligation. WIS. ADMIN. CODE § DWD 40.04(2)(c)5.

¶10 The record reveals that the trial court clearly indicated that it thought it was applying the child support guidelines in WIS. ADMIN. CODE § 40.04(2)(c). The trial court stated that it did not find any reason to deviate from the child support guidelines. However, the trial court's determination of the child support obligation did, in fact, deviate from the guidelines. The court properly identified the initial child support obligation of each parent as 29% of their gross income, but it subtracted 29% of Kimberly's gross income from 29% of David's gross income without first reducing each parent's child support obligation in accordance with table 40.04(2)(c). *See* WIS. ADMIN. CODE § 40.04(2)(c)3.

¶11 Because the trial court applied the percentage standard improperly, it erroneously exercised its discretion.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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

