# COURT OF APPEALS
# DECISION
# DATED AND RELEASED

March 12, 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

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**Nos. 95-2537**
**96-0009**

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

**In re the Marriage of:**

**MICHAEL R. LUTERBACH,**

**Petitioner-Appellant,**

**v.**

**DENISE M. LUTERBACH,**
**n/k/a DENISE M. PATULSKI,**

**Respondent-Respondent.**

APPEAL from orders of the circuit court for Waukesha County: CLAIR VOSS, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. In these consolidated appeals, Michael R. Luterbach appeals from an August 1995 child support order and a December 1995 order denying his motion to modify the August 1995 child support order. While we affirm the August 1995 order setting child support, we reverse the December 1995 order because the trial court had jurisdiction to entertain

Luterbach's child support modification motion during the pendency of Luterbach's appeal from the August 1995 order. Therefore, we remand to the circuit court for a hearing on Luterbach's motion to modify child support.

The August 1995 child support order was entered after hearings on Denise M. Patulski's motion to set child support.[1] In setting child support, the court had to determine the parties' respective incomes. The court set Luterbach's income at $69,000 per year and Patulski's at $15,000. Luterbach disputes these determinations on appeal.

Postdivorce child support issues are within the trial court's discretion. *See* ***Luna v. Luna,*** 183 Wis.2d 20, 25, 515 N.W.2d 480, 482 (Ct. App. 1994). We will uphold the trial court's discretionary decision if it exhibits a rational reasoning process based on the facts in the record or reasonable inferences therefrom and the correct application of the proper legal standards to those facts. *See* ***Haugan v. Haugan,*** 117 Wis.2d 200, 216, 343 N.W.2d 796, 804 (1984). We sustain the trial court's income determinations.

Luterbach contends that the trial court exhibited a bias in favor of mothers because its income determination did not require Patulski to work full time and bear equal responsibility for the support of the children. We disagree with Luterbach's characterization of the trial court's decision. The court found that Patulski, who had chosen not to work full time, was earning less than $10,000 per year working part time. The court found that she could earn $20,000 per year working full time and attributed that amount to her, less a $5000 day care expense which it believed Patulski would incur if she actually worked full time. Therefore, the court imputed $15,000 in income to Patulski for purposes of determining child support under the shared-time payer formula. *See* WIS. ADM. CODE §§ HSS 80.02(25) and 80.04(2). It is apparent from the trial court's decision that it expected Patulski to support the children with full-time employment and for that reason attributed what it believed to be the equivalent of a full-time income to her.

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[1] Under the parties' 1991 judgment of divorce, Patulski's 1994 remarriage terminated Luterbach's family support obligation and required the entry of a child support order.

Luterbach also argues that the trial court erroneously reduced Patulski's income from $20,000 to $15,000 to reflect an unsubstantiated $5000 day care expense Patulski would incur if she worked full time. He complains that he was not given a similar child care expense credit even though he works full time and has placement of the children for an equal amount of the time.[2] While we agree that the trial court unevenly approached the question of day care expenses in light of the parties' shared placement of their children, we sustain the trial court's attribution of $15,000 in annual income to Patulski on another ground. *See* ***Bence v. Spinato,*** 196 Wis.2d 398, 417, 538 N.W.2d 614, 620 (Ct. App. 1995).

As Patulski convincingly argues in her respondent's brief, the trial court's attribution to her of $20,000 per year income was inaccurate in light of the evidence adduced at trial. At the time of the hearing, Patulski was earning $7 per hour working 20 to 25 hours per week. Working full time at $7 per hour, Patulski would earn $14,560 annually. Although the trial court may have erred in granting Patulski a $5000 child care credit for which there was no evidence at the hearing, we can sustain its attribution of $15,000 per year to Patulski because this amount is consistent with what Patulski could earn if she were working full time.

Luterbach challenges the trial court's attribution of $69,000 income to him for child support purposes. We conclude that the trial court properly exercised its discretion in this regard as well. Evidence of Luterbach's weekly income for the one-year period preceding the hearing[3] showed a weekly salary at a level which previously yielded a $75,000 annual income (as demonstrated by Luterbach's 1992 and 1993 tax returns). After the motion was filed, Luterbach's payroll checks became fewer and farther between.[4] Luterbach

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[2] In setting child support, the trial court found that the parties were in a shared-time placement arrangement within the meaning of WIS. ADM. CODE §§ HSS 80.02(25) and 80.04(2).

[3] Patulski's child support motion was filed in July 1994. The hearings were held in October and November 1994. The child support order on appeal was issued in August 1995.

[4] The record indicates that for the calendar 1994 period preceding service of Patulski's motion, Luterbach received a salary of approximately $43,000 in weekly paychecks of $1442. From service of the motion in July 1994 until the time of the hearings in October and November 1994, Luterbach received only six $1442 paychecks.

testified that he did not believe he should have to pay child support because the children spent an equal amount of time with him and Patulski. The court pegged Luterbach's income at $69,000 which "reflect[ed] a middle ground of the $75,000 he has earned in the past with claims that he will earn as low as $63,000" based on evidence presented at the hearing that Luterbach's corporation was experiencing decreased revenue, resulting in less income to Luterbach.

Although the trial court did not explicitly find, there is evidence in the record from which the court could have inferred that Luterbach was capable of earning more than the few paychecks he received subsequent to service of the motion to set child support. Furthermore, the trial court, as the arbiter of witness credibility and demeanor, *see* ***Village of Big Bend v. Anderson,*** 103 Wis.2d 403, 410, 308 N.W.2d 887, 891 (Ct. App. 1981), questioned Luterbach's testimony regarding his income and characterized some of Luterbach's testimony as "evasive." Based on this record, we conclude that the court properly exercised its discretion in setting child support based on $69,000 in income attributable to Luterbach.

We turn to the trial court's denial of Luterbach's September 1995 motion to modify the August 1995 child support order. The trial court declined to entertain the motion on the ground that it lacked jurisdiction to modify the August 1995 order once Luterbach filed his appeal. Luterbach's modification motion claimed a substantial change in circumstances and estimated that his 1995 income was going to be $17,000, well below the $69,000 attributed to him as a result of the October and November 1994 child support hearings.

A trial court's ability to act during the pendency of an appeal is governed by § 808.075, STATS. The application of this statute to the facts of Luterbach's modification motion presents a question of law which we review de novo. *See* ***Dep't of Revenue v. Sentry Fin. Servs. Corp.,*** 161 Wis.2d 902, 910, 469 N.W.2d 235, 238 (Ct. App. 1991). Section 808.075(4) provides that the circuit court may revise a child support order during the pendency of an appeal. *See* § 808.075(4)(d)4. Under § 767.32(1)(a), STATS.,[5] child support may be modified if

[5] This section has been amended. *See* 1995 Wis. Act 77, § 592; 201, § 674; 289, § 270; 404, § 247. None of these amendments are pertinent to our analysis.

there has been a substantial change in circumstances. Luterbach's motion alleged a substantial change of circumstances and he so argued in attempting to get a hearing on the motion. Patulski's appellate argument does not persuade us that the trial court lacked jurisdiction to consider Luterbach's motion. Accordingly, we reverse the December 1995 order denying Luterbach's motion to modify child support and remand for a hearing on that motion.

Because we affirm in part and reverse in part, no costs are awarded to either party.[6]

*By the Court.*—Order in appeal No. 95-2537 affirmed; order in appeal No. 96-0009 reversed and cause remanded for proceedings consistent with this opinion.

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

[6] Patulski's motion to have Luterbach's appeal deemed frivolous pursuant to RULE 809.25, STATS., is denied.