COURT OF APPEALS
DECISION
DATED AND FILED

February 5, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1538 **Cir. Ct. No. 1999FA928**

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

IN RE THE MARRIAGE OF:

JOHN STEPHEN HAYE,

PETITIONER-APPELLANT,

V.

ROBIN JO HAYE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed*.

Before Higginbotham, P.J., Vergeront and Bridge, JJ.

¶1 PER CURIAM. John Haye appeals an order modifying his child support obligation. John argues, notwithstanding the wording of WIS. ADMIN.

CODE § DWD 40.04(5)(a) (January 2004),[1] which provides a court "may" apply reduced child support percentages to a high-income payer, that a court is required to do so absent a determination that use of § DWD 40.04 (5)(a) would be unfair. John also argues the circuit court erroneously exercised its discretion by refusing to grant the high-income payer reduction in this case.

¶2 We assume, without deciding, that the reduction under WIS. ADMIN. CODE § DWD 40.04(5) must be considered upon the request of a high-income payer. However, under the facts of this case, we conclude the court implicitly determined the use of § DWD 40.04(5)(a) would be unfair. Because the court did not erroneously exercise its discretion by refusing to grant John the high-income payer reduction, we affirm the order.

FACTUAL BACKGROUND

¶3 John and Robin Haye were divorced on December 21, 2000. John is a dentist and Robin is an airline attendant. Two children were born during the parties' six-year marriage. Pursuant to a marital settlement agreement, John paid approximately $3,000 monthly child support. Both parties waived maintenance. All variable expenses were paid by Robin. In addition, the marital settlement agreement limited the ability of either party to modify child support for a period of seven years, beginning January 1, 2001, subject to a definition of "substantial change of circumstances." The agreement stated the following would not be a substantial change of circumstances: "

[1] All references to ch. DWD 40 are to the January 2004 version of the chapter. We note that ch. DWD 40 was renumbered to ch. DCF 150 under WIS. STAT. § 13.92(4)(b)1., Register November 2008 No. 635.

> (a) increases in earned or unearned income by either party, whether or not substantial; (b) Robin increasing or decreasing her work hours; (c) children residing more or less time with either parent, whether overnight or during the day; (d) increases or decreases in the parties' net worth; (e) either party receiving any gifts or inheritances; or (f) either party remarrying or cohabiting.

¶4 In October 2004, Robin filed a motion to modify placement, which also included a request to modify child support "at a level consistent with the Wisconsin Child Support Guidelines." The matter was heard, and the court issued an oral decision on December 18, 2006. The court increased Robin's periods of placement consistent with an earlier temporary order. The court also concluded the marital settlement agreement regarding child support was contrary to public policy and unenforceable.[2]

¶5 The court found a substantial change of circumstances, stating that had it not been for the marital settlement agreement, the child support would have been "almost double." The court then determined John's income for purposes of modifying child support. After characterizing as a "sham" an alleged transaction in which John purported to sell back to his father his interest in the family dental practice,[3] the court found John's income for the three years since the filing of Robin's motion to be $297,542 in both 2004 and 2005, and $248,552 for 2006.

[2] Relying upon our decision in ***Ondrasek v. Tenneson***, 158 Wis. 2d 690, 462 N.W.2d 915 (Ct. App. 1990), the court noted "the paramount goal of the child support statute is … the best interest of the child … and therefore, the child's best interests transcended an agreement … of the parties." The court concluded the "continuing duty to ensure appropriate child support can't be abrogated by an agreement of the parties because the rights of the child to support does not belong only to the divorcing parties, it belongs primarily to the children …." The court also concluded the right to seek modification when circumstances change was not the parties' right to negotiate away.

[3] The court stated, "I didn't find Dr. Haye very credible. In fact, I didn't find his witnesses credible at all."

The court found Robin's annual income was $28,136 for the first two years and $25,771 for 2006. The court also indicated that application of shared-placement reductions were appropriate.

¶6 The court further observed that, given the pending status of Robin's motion since late 2004, there would be child support arrearages. The court stated, "I want it paid off, obviously, but I'm going to let you … work that out." The court further indicated, "if you folks can't stipulate [to] it, I will decide it."

¶7 A further hearing was held on May 1, 2007. In the interim, correspondence concerning various disputes was filed. Among other things, the parties disputed what amount the court found as John's income for the relevant years, whether high-income payer reductions were appropriate, and whether the issue of high-income payer reductions had been properly raised by John.[4] In its oral decision, the court attempted to clarify its ruling concerning John's income and then determined the high-income reductions would not be applied.

¶8 John requested the court reconsider its ruling, "to at least the extent that that will give some discount to my client for his high income …." John also insisted the effect of a statement by the court that the children deserved higher

[4] With regard to whether John waived the issue of high-income payer reductions, we note that in correspondence to the court dated January 4, 2007, John states in response to correspondence from Robin arguing the issue was not raised previously, "we always assumed you would apply the high income payer reduction …." John insisted he submitted exhibits at the hearing reflecting the high-income payer reductions. Robin submitted correspondence to the court dated February 21, 2007, again contending, "Dr. Haye never requested the application of the High Income Payor …." John responded with correspondence dated March 5, 2007, in which John insists the high-income payer formula was previously presented to the court, "Although it was not denominated as such …." We need not decide this issue because we conclude the court implicitly determined at the May 1, 2007 hearing that the use of the high-income payer reduction would be unfair.

support in the past was a retroactive adjustment of the child support. The court rejected this argument, stating, "[o]ne of the reasons for child support at the specific level it's set is that the children live the same lifestyle they would have but for the divorce …."

¶9 During a recess, the parties stipulated "that the amount of the arrears without interest through the end of 2006 is $54,991." The court then provided John ninety days to pay the arrears and ordered interest on the arrears to commence on the date of entry of judgment. The parties also agreed that child support for 2007 would be "a continuation of what the court ordered for 2006." The court entered an order on June 4, 2007, which provided, among other things, that child support arrears for the years 2004, 2005, and 2006 were $54,991. Current child support was established at $4,681 monthly. John now appeals from that order.

DISCUSSION

¶10 Modification of child support is committed to the sound discretion of the circuit court. ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. We generally look for reasons to sustain the circuit court's discretionary decision. ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968). We may search the record to determine if it supports the court's discretionary determination. ***Randall***, 235 Wis. 2d 1, ¶7. We will sustain a discretionary decision if the circuit court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion a reasonable judge could reach. ***Liddle v. Liddle***, 140

Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). Findings of fact will be affirmed unless clearly erroneous. WIS. STAT. § 805.17(2).[5] The circuit court is also the ultimate arbiter of the credibility of witnesses. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 249, 274 N.W.2d 647 (1979).

¶11 Ordinarily, the "straight percentage" standard for child support is determined using WIS. ADMIN. CODE § DWD 40.03(1), which applies specific percentages to a parent's monthly income according to the number of children, such as 17% for one child and 25% for two children. Section DWD 40.04 provides that child support "may be determined under special circumstances" according to prescribed formulas that reduce the amount of support determined under § DWD 40.03(1).

¶12 One of the "special circumstances" under WIS. ADMIN. CODE § DWD 40.04 is that of the shared-placement payer, where the child's placement is shared between the parents, as determined by § DWD 40.04(2).[6] Another "special circumstance" is that of the high-income payer, where the payer has an income above an indicated level. *See* § DWD 40.04(5)(c) and (d).

¶13 John argues that we held in ***Randall***, 235 Wis. 2d 1, ¶15, in the context of a shared-placement payer, that a court must determine child support obligations using WIS. STAT. § DWD 40.04(2), notwithstanding the use of the term "may" in § DWD 40.04(2), unless the court determined the use of § DWD

[5] References to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted. However, WIS. STAT. ch. 767 was substantially renumbered and revised by 2005 Wis. Act 443. Because the parties use the renumbered statutes, we utilize the 2005-06 version of ch. 767.

[6] The parties do not dispute that John is a shared-placement parent or the court's application of the shared-placement formula.

40.04(2) would be unfair. John contends ***Randall*** should be applied in the same manner to the high-income payer situation. John asserts that "[a]lthough no case has established that use of the high-income payer formula also is required, there is no logical reason to treat them differently."[7]

¶14 We assume, without deciding, that the reduction under WIS. ADMIN. CODE § DWD 40.04(5) must be considered upon the request of a high-income payer.[8] However, under the facts of this case, we conclude the circuit court implicitly determined the use of § DWD 40.04(5)(a) would be unfair.

¶15 Here, the record gives us sufficient information as to why the circuit court declined to apply the high-income reductions.[9] The court provided two primary reasons for declining to apply the high-income payer reductions. First, it is apparent from the court's oral decisions that its principal purpose in declining to apply the high-income reductions was that the children enjoy the same standard of living they would have but for the divorce, an appropriate factor for the court to consider under WIS. STAT. § 767.511(1m)(c). As the court noted, the marital settlement agreement limited annual child support to $36,000 annually. Had it not

[7] John includes in his appendix a purported reprint of child support calculations used by Judge Mac Davis. John requests that we take judicial notice of this document. We decline to do so, as we do not consider it appropriate for judicial notice.

[8] WISCONSIN ADMIN. CODE § DWD 40.04(5)(c) provides the court may apply reduced percentages to the portion of a payer's monthly income available for child support that is greater than or equal to $7,000 and less than or equal to $12,500. Subsection (d) provides reduced percentages for monthly income available for child support that is greater than $12,500.

[9] John contends "[t]he circuit court's decision modifying the amount of child support in this case makes no effort to enumerate, much less discuss, the sixteen factors listed in [WIS. STAT.] § 767.511(1m)." We may, but are not required to, search the record to determine whether the record supports the circuit court's decision. ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737.

been for the limits on modifiability of child support payments in the invalid agreement, child support would have been significantly higher under the straight percentage standards. The other primary reason the court specified for denying the request to apply the high-income payer reductions was the fact that variable costs were paid by Robin. We also consider this an appropriate factor under § 767.511(1m)(i). In addition to these two primary reasons, we note the best interests of the children was an underlying consideration throughout the court's decision, another proper factor under § 767.511(1m)(hm). Therefore, although not specifically enumerated as such, we are satisfied the court considered sufficient statutory factors and the record supports the court's implicit decision that application of the high-income reductions would be unfair under the facts of this case.

¶16 John insists the court essentially concluded he was underpaying under the marital settlement agreement, and "determined to try to rectify that by denying John high-income payer status on the motion to modify." John argues this unlawfully provided Robin a retroactive child support increase, in violation of WIS. STAT. § 767.59(1m).

¶17 We are not persuaded this situation fits within the prohibition against retroactive modification of child support, and we see no legitimate reason to conclude the invalidity of the marital settlement agreement was not an appropriate factor to consider in determining unfairness. Indeed, in rejecting John's argument the court stated, "One of the reasons for child support at the specific levels set is that the children live the same lifestyle they would have but for the divorce …." As mentioned previously, it is apparent this statutory factor was the court's primary purpose in declining to apply the high-income reductions. *See* WIS. STAT.

§ 767.511(1m)(c).[10] We therefore reject John's assertion that this was an improper retroactive child support increase.

¶18 John also contends the failure to use the high-income formula "cost" him $24,137 in arrears. John argues the application of both the shared-placement reduction and the high-income payer discount would reduce the arrears for the relevant period to $30,854. However, the parties stipulated on the record during a recess at the hearing on May 1, 2007, "that the amount of the arrears without interest through the end of 2006 is $54,991." The court then entered an order on June 4, 2007, which provided, among other things, that child support arrears for the years 2004, 2005, and 2006 were $54,991 "for the reasons stated on the record." Under these circumstances, John will not be heard to complain the failure of the court to apply the high-income payer reduction "cost" him $24,137 in arrears.

¶19 John next points to a statement of the circuit court, "$248,000 is not that high an income, very frankly. If it was $650,000 I would probably consider it high income." John argues that "[a]pparently, the reference to $650,000 had something to do with John's income at the time of divorce, but whether John's income has gone up or down, the statement that $248,000 is not a high income is absurd." John further contends the court's statement suggests "the court was simply ignoring the criteria for high-income payers set forth in [WIS. ADMIN. CODE §] DWD 40.04(5)."

[10] The court's decision to apply interest to the arrears only from the date of entry of judgment also contradicts John's argument that the court retroactively modified child support.

¶20 We are not persuaded that the court intended the above statement as a reason for denying the high-income reductions. Immediately prior to that statement the court stated, "I'm not going to apply the high income factor in this case based upon the reasons I've already indicated." The court then expressed doubts as to John's actual income, stating:

> I wasn't sure of the income factors or income figures, either, but I certainly did note that income went from $650,000 down to $248,000, and those figures changed fairly drastically later after this just about concurrently with the legal action in this matter occurring. I've already indicated what I thought of the credibility of the witnesses which testified concerning that income.

Although the court's statement that $248,000 "is not that high an income" could have been clearer, we are not convinced it suggests the court simply ignored the criteria set forth in WIS. ADMIN. CODE § DWD 40.04(5), as John contends.

¶21 John also argues that Robin's payment of all variable expenses for the minor children "has no measurable significance because the amount of her variable expenses was never quantified by Robin, who failed to present any budget at all." We disagree. There is no dispute Robin was obligated to pay variable expenses and there is sufficient evidence in the record of variable expenses and Robin's standard of living.[11] The court properly considered the payment of

[11] John argues in his reply brief that Robin failed to introduce a financial statement showing a budget for herself and the children or quantifying the variable costs she incurred on behalf of the children. John asserts that had Robin put in exhibits presenting "either of those crucial elements relevant to standard of living and need, they would have been included in Record Item 75 or Record Item 79, the Exhibit List and Exhibits filed at the December 11, 2006 trial." John argues that because the record does not include the December 11 transcript of the trial, we would speculate to conclude sufficient evidence "would somehow affirm the trial court." In this regard, we note exhibits 1-33 from the December 11, 2006 proceeding, including but not limited to Robin's deposition transcripts, are contained at Record Item 89 in the record on appeal and we conclude the record contains sufficient evidence of variable expenses.

variable expenses in deciding whether the application of the high-income payer reductions was unfair.

¶22 In sum, we conclude an adequate basis exists in the record to support the court's determination to deny application of the high-income payer reductions in this case. The court's decision, as a whole, examined the facts and reached a reasoned and appropriate decision. The court did not erroneously exercise its discretion.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.32(1)(b)5.