COURT OF APPEALS
DECISION
DATED AND FILED

June 5, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2340 **Cir. Ct. No. 2003FA21**

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

IN RE THE MARRIAGE OF:

LESLIE COLYN HELMEN,

PETITIONER-APPELLANT,

V.

KEVIN DUANE HELMEN,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Leslie Helmen appeals an order denying her motion to modify child support and maintenance. Leslie argues the court

erroneously exercised its discretion by disregarding certain sources of Kevin Helmen's income when determining whether there had been a substantial change in circumstances for child support purposes. We agree with Leslie that there was a substantial change in circumstances as a matter of law. Further, we conclude the court erroneously exercised its discretion regarding maintenance. We therefore reverse and remand for the court to properly exercise its discretion to review child support and maintenance.

BACKGROUND

¶2 Leslie and Kevin had two minor children when they divorced in May 2004 after twenty-five years of marriage. Kevin worked as a physician for Western Wisconsin Medical Associates. In 2003, Kevin had total earnings of $121,197.92. His May 2004 financial disclosure statement indicated his yearly income was $102,609.36. Leslie worked as a public school teacher, earning $49,373.20 annually. The parties agreed to joint legal custody and equal shared physical placement, and Kevin agreed to pay $1,000 monthly child support and $1,250 monthly maintenance.

¶3 Kevin has worked for Western Wisconsin Medical Associates for over twenty-four years and is a shareholder in the practice. In both 2009 and 2010, Kevin earned over $212,000. In addition, he received $14,400 annual rental income. Kevin asserted his wages increased because he was now working five days per week, rather than four, and that this constituted overtime pay. In both 2009 and 2010, Kevin contributed $22,000 to his retirement account. Kevin asserted the court should subtract these contributions from his total income, as well as the pay attributed to his overtime hours, thereby reducing his annual income to $142,672 per year.

¶4 Leslie continued teaching, earning approximately $76,000 annually in 2009 and 2010. She asserted that despite her increased earnings, she still ran a $2,000 monthly deficiency. As Kevin did not file a financial disclosure statement, there was no evidence of his monthly expenses.

¶5 The circuit court denied Leslie's motion to revise child support, concluding there was not a substantial change in circumstances. At the motion hearing, the court explained:

> I look at 40 hours['] income, or basically full-time income, one income, both sides.
>
> People can and do work two or three or four jobs, and I don't think that should be divided with the ex. And I have always done it that way. You probably hadn't heard that before, but that's what I have done. And rental income is included in that.
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> ….
>
> I think every Judge does it a bit different, but I have consistently done it that way believing that if people want to, you know, basically try to kill themselves by working way too many hours, just to keep up, that's their business. I agree 40-hour income is the one that ought to count for ordinary wage earnings, whatever. Definition of full time is—can be argued, I suppose.

Thus, the court accepted Kevin's position that, for support purposes, his annual income was only $142,672. The court excluded the $22,000 voluntary retirement contributions, the $47,557.40 earned for working overtime, and the $14,400 in rental income. Regarding the retirement contributions, the court indicated that money would only be considered at the point Kevin withdrew it as income after retirement.

¶6 Although it found there was no substantial change in circumstances, the court modified Kevin's child support obligation downward "due to the recent

emancipation of one minor child." The court ordered a set amount of $669.99 monthly support, based on the reduced income figures Kevin provided.

¶7 As to the motion to modify maintenance, the court concluded there had been no substantial change in circumstances because "[n]either parties' financial situation has deteriorated since the time of the original divorce" and the "fairness and support objectives" of maintenance did not dictate modification. The maintenance determination was based on the same figures as the support determination. Leslie now appeals.

DISCUSSION

Child support

¶8 Leslie argues the circuit court erroneously exercised its discretion by omitting income sources from Kevin's gross income and by failing to apply the percentage standard or address the statutory factors that may allow deviation from the percentage standard.

¶9 Child support determinations are within the circuit court's discretion and will not be reversed absent an erroneous exercise of discretion. ***Welter v. Welter***, 2006 WI App 54, ¶4, 289 Wis. 2d 857, 711 N.W.2d 705. Child support modification may be ordered only upon a finding of a substantial change in circumstances. ***Winkler v. Winkler***, 2005 WI App 100, ¶24, 282 Wis. 2d 746, 699 N.W.2d 652. Once a substantial change in circumstances has been shown, the court must exercise its discretion as to modification of child support. ***Id.***, ¶25.

¶10 Generally, when determining child support, a court must apply the percentage standard to "gross income." ***Id.***, ¶26; *see* WIS. STAT. § 767.59(2)(a); WIS. ADMIN. CODE § DCF 150.03 ("The court shall determine a parent's monthly

income available for child support [based on] the parent's annual gross income ....").[1] By definition, gross income includes: salary and wages; interest and investment income; voluntary deferred compensation, and voluntary employee contributions to any pension or retirement account whether or not the account provides for tax deferral or avoidance; and all other income, whether taxable or not. WIS. ADMIN. CODE § DCF 150.02(13)(a).

¶11 However, there is an exception to the general rule requiring child support based on the percentage standard:

> Upon request by a party, the court may modify the amount of revised child support payments determined under [the percentage standard in] par. (a) if, after considering the factors listed in s. 767.511(1m), the court finds, by the greater weight of the credible evidence, that the use of the percentage standard is unfair to the child or to any of the parties.

WIS. STAT. § 767.59(2)(b). But, the party seeking a deviation from the percentage standard has the burden of proving that its application is unfair. ***Winkler***, 282 Wis. 2d 746, ¶27. "Absent a finding of unfairness, grounded in the specific facts of the case, and after considering all fifteen enumerated factors set out in [§ 767.511(1m)] and any other factors relevant to the particular case, a ... court is not authorized to deviate from the percentage standards." ***Id.***, ¶28. Further:

> If the court deviates from the percentage standard, "the court 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 party, its

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted. All references to WIS. ADMIN. CODE ch. DCF 150 are to the November 2009 version.

> reasons for the amount of modification and the basis for the modification."

Welter, 289 Wis. 2d 857, ¶5 (quoting WIS. STAT. § 767.25(1n)).

¶12 Applying the above standards here, the circuit court erroneously exercised its discretion in several respects. First, when determining whether there was a substantial change in circumstances, it was error to omit from Kevin's gross income his overtime wages, rental (investment) income, and voluntary retirement contributions from wages. All three clearly fall within the definition of income generally, and gross income specifically. *See* WIS. STAT. § 767.59(1f)(c)1.; WIS. ADMIN. CODE §§ DCF 150.02(13)(a), 150.03.

¶13 Second, considering Kevin's current gross income of approximately $236,400, the only reasonable conclusion is that there was a substantial change in circumstances since support was last set, when he earned in the range of $102,000 to $122,000.[2] *See* WIS. STAT. § 767.59(1f)(c)1.

¶14 Third, to determine whether it was unfair to apply the percentage standard to the entirety of Kevin's gross income, the court was required to consider all fifteen factors enumerated in WIS. STAT. § 767.511(1m), and explain its analysis on the record. *See* WIS. STAT. § 767.511(1n). We also note that such

[2] While not necessary to our conclusion, we observe that Leslie's motion asserted thirty-three months had expired since the last order setting child support. That circumstance would create a rebuttable presumption of a substantial change in circumstances. *See* WIS. STAT. § 767.59(1f)(b)2. We further observe that the court revised Kevin's support obligation downward because during the pendency of the proceedings one of the children had been emancipated. It is difficult to envision how that circumstance could not constitute a substantial change in circumstances, and a circuit court has no authority to modify support on that basis or any other unless it finds a substantial change in circumstances. *See* WIS. STAT. § 767.59(1f)(a). In any event, the court's partial modification erroneously failed to either apply the percentage standard to Kevin's gross income or comply with the requirements for deviating from that standard.

an analysis would presumably require Kevin to provide the court with the financial disclosure statement mandated by WIS. STAT. § 767.127(1), especially given he has the burden to prove unfairness.

¶15 Fourth, the court erred by applying its own policy of never considering overtime or rental income for purposes of child support. Not only is this practice contrary to statute, we specifically rejected such a practice in ***Welter***, where we held:

> [T]he circuit court erred when it upheld the court commissioner's decision to exclude overtime pay as a general policy without exception when applying the percentage standard. Overtime income clearly constitutes a portion of salary and wages, and Wisconsin law does not exclude overtime income in the application of the percentage standard.
>
> .... It is erroneous for a court commissioner or a court to set forth a general policy regarding the calculation of a child support obligation when the law calls for an exercise of discretion.

Welter, 289 Wis. 2d 857, ¶¶6-7.

¶16 Finally, the court erred by excluding from Kevin's gross income the wages he voluntarily diverted into a retirement account. Not only was this procedure contrary to statute as discussed above, it was unsupported by reasoned analysis. Furthermore, this practice would create a massive loophole for child support payers to shelter ordinary income from their obligations to support their children. And, again, we have disapproved of a similar practice in a previous case. In ***Winkler***, we concluded a payer could not exclude a pension benefit from child support by rolling it into a retirement account. ***Winkler***, 282 Wis. 2d 746, ¶26. We held, "Winkler's ability to defer receipt of the benefit, potentially until the child is an adult, cannot be used to deprive the child of the benefit of this support."

Id. As we recently observed in ***Lyman v. Lyman***, 2011 WI App 24, ¶¶13, 23, 331 Wis. 2d 650, 795 N.W.2d 475, "[A]ll income is presumed to be available to meet a parent's obligation to his or her child," and "[c]hild support is calculated by using the payor's gross income, not net income."

¶17 Having concluded the court erroneously exercised its discretion and there was a substantial change in circumstances as a matter of law, we remand for the court to properly exercise its discretion to review child support consistent with WIS. STAT. § 767.59(2)(a). Further, Leslie argues the circuit court must make any child support revision retroactive to the date she served her modification motion on Kevin. *See* ***Waters v. Waters***, 2007 WI App 40, ¶16, 300 Wis. 2d 224, 730 N.W.2d 655 ("If the circumstances warrant an increase in child support, [the payee] is entitled to an increase from the date the notice of the action was given to [the payer]."); WIS. STAT. § 767.59(1m). Kevin concedes Leslie's argument by failing to respond. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Further, the court's child support review shall encompass the downward modification that it made based on one child's emancipation.

Maintenance

¶18 Leslie argues the court also erroneously denied her motion to modify maintenance. We "review a trial court's decision to deny an extension of maintenance as a discretionary decision, including the decision whether there is a substantial change in circumstances." ***Cashin v. Cashin***, 2004 WI App 92, ¶44,

273 Wis. 2d 754, 681 N.W.2d 255.[3] A discretionary determination "must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." ***LaRocque v. LaRocque***, 139 Wis. 2d 23, 27, 406 N.W.2d 736 (1987) (quoting ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981)).

¶19 In order to modify a maintenance award, the party seeking the modification must demonstrate there has been a substantial change in the financial circumstances of the parties. ***Rohde-Giovanni v. Baumgart***, 2004 WI 27, ¶30, 269 Wis. 2d 598, 676 N.W.2d 452; ***Gerrits v. Gerrits***, 167 Wis. 2d 429, 437, 482 N.W.2d 134 (Ct. App. 1992). When considering a request for maintenance modification, the circuit court must reconsider the factors used to arrive at the initial maintenance award under WIS. STAT. § 767.56. ***Kenyon v. Kenyon***, 2004 WI 147, ¶13, 277 Wis. 2d 47, 72, 690 N.W.2d 251. The goal of maintenance, and of maintenance adjustment, is to allow the parties to maintain a standard of living comparable to that enjoyed during the marriage. ***Id.***, ¶37; ***Gerrits***, 167 Wis. 2d at 438. This goal is subject to the related objectives of support and fairness. ***LaRocque***, 139 Wis. 2d at 32-33.

¶20 Here, the court denied Leslie's motion to modify maintenance because: "Neither part[y's] financial situation has deteriorated since the time of the original divorce. After considering the fairness and support objectives of maintenance, it is clear that Petitioner failed to demonstrate a substantial change in

[3] In ***Cashin***, we rejected "a two-part standard [of review], distinguishing between the issue of substantial change in circumstances and the issue of whether and how to modify maintenance." ***Cashin v. Cashin***, 2004 WI App 92, ¶¶42-44, 273 Wis. 2d 754, 681 N.W.2d 255.

circumstances or that fairness somehow dictates further modification of maintenance." We conclude the court erroneously exercised its discretion.

¶21 First, the court applied an improper standard. The question here is not whether Leslie's financial situation has *deteriorated*. Rather, the proper inquiries are whether the parties' financial situations have changed, and whether they are maintaining the same standard of living enjoyed during the marriage. "[T]he focus should be on *any* financial changes the parties have experienced." ***Rohde-Giovanni***, 269 Wis. 2d 598, ¶30 (emphasis added). A narrow focus on deterioration fails to account for "the fact that maintaining two households is more expensive than maintaining one ...." ***Johnson v. Johnson***, 225 Wis. 2d 513, 518, 593 N.W.2d 827 (Ct. App. 1999). This "means that 50% of the total income at the time of the divorce will rarely allow either of the parties to maintain the marital standard of living. In most cases, both parties will take a cut in lifestyle as a result of the divorce." ***Id.*** Thus, a positive change in Kevin's financial circumstances may warrant an increase in maintenance. *See* ***id.*** at 518-19.

¶22 Additionally, the court did not address the statutory maintenance factors. Further, as discussed above, Kevin failed to provide the court with the mandatory financial disclosure form. *See* WIS. STAT. § 767.127(1). A court cannot properly exercise its discretion regarding maintenance in the absence of a complete factual record. Finally, the maintenance determination must be made after the child support determination. WIS. ADMIN. CODE § DCF 150.03(6). Thus, our resolution of the child support issue further supports a reconsideration of the maintenance request. Because the court applied an improper standard, failed to address the statutory factors, and the record does not demonstrate a reasoned exercise of discretion, we remand the issue to the circuit court. *See* ***King v. King***,

224 Wis. 2d 235, 256, 590 N.W.2d 480 (1999) (remand is appropriate where court erroneously exercised discretion regarding maintenance).

Appellate costs

¶23 The prevailing party on appeal is generally entitled to recover certain costs. *See* WIS. STAT. RULE 809.25(1). Leslie shall not, however, recover any costs associated with her deficient appendix. "The appellant's brief shall include a short appendix containing, at a minimum, the findings or opinion of the circuit court [and] limited portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning ...." WIS. STAT. RULE 809.19(2)(a).

¶24 Leslie's appendix failed to include any portion of the motion hearing transcript containing the court's reasoning, despite discussing and quoting it in her brief. Meanwhile, her appendix includes the divorce judgment and marital settlement agreement in their entirety, both of which are largely, if not completely, irrelevant to the issues presented on appeal. Additionally, counsel certified to the court that the appendix complied with WIS. STAT. RULE 809.19(2)(a). *See* WIS. STAT. RULE 809.19(2)(b). We caution counsel that future violations may result in sanctions. *See* WIS. STAT. RULE 809.83(2).

By the Court.—Order reversed and cause remanded with directions.

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