COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3135

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

IN RE THE MARRIAGE OF:

BERNARD R. LYON,

PETITIONER-APPELLANT,

V.

RENEE G. HILGERS, F/K/A RENEE G. LYON,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Door County: PETER C. DILTZ, Judge. *Affirmed.*

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

¶1 PER CURIAM. Bernard Lyon appeals a judgment finding him accountable for $103,540 in child support arrearages. Lyon argues that the circuit court erred by failing to: (1) grant further child support credit for periods when

the minor children were living with Lyon; (2) validate a purported written agreement between Lyon and Renee Hilgers, his former wife or, in the alternative, grant Lyon credit for direct payments made to Hilgers after the agreement was signed; and (3) credit Lyon for the value of income tax exemptions claimed by Hilgers. We reject Lyon's arguments and affirm the judgment.

BACKGROUND

¶2 Lyon and Hilgers were married in Illinois on August 9, 1969. They have two children, Molly, born on April 1, 1979 and Travis, born on July 21, 1982. The couple divorced in Illinois on May 14, 1986. Joint custody was awarded to the parties. Hilgers was awarded physical custody during the normal school year, and Lyon was awarded physical custody during the ordinary summer vacation. Lyon was ordered to pay $800 per month in child support, except during his period of extended physical custody in the summer, when support was to be reduced to $400 per month.

¶3 The parties allegedly entered into an agreement on June 29, 1993. The agreement stated that Molly would live with Lyon, any child support arrearage Lyon owed would be eliminated, and Lyon would not be obligated to pay child support to Hilgers. It additionally stated that Hilgers would be awarded exemptions for the children on her federal and state income tax return and she would receive a $70,000 note as consideration for the agreement.

¶4 On May 26, 1998, Hilgers registered the child support order in Door County pursuant to WIS. STAT. § 806.24(2). After notification, Lyon filed a timely request for a hearing, contesting the validity and enforcement of the registered order. The circuit court concluded that Lyon was entitled to a credit against his arrearage in the amount of $12,060 for child support payments he made

to Hilgers before 1993. The circuit court also determined that Lyon was entitled to a credit of $400 per month during the twenty-seven months Molly lived with him, for a total credit of $10,800. The circuit court disregarded the alleged written agreement and found Lyon's child support arrearage to be $103,540. Judgment was entered in Hilgers' favor and against Lyon in that amount. This appeal followed.

DISCUSSION

I. STANDARD OF REVIEW

¶5 The circuit court may not revise a child support arrearage retroactively, nor grant credit against a child support arrearage except under circumstances described in WIS. STAT. §§ 767.32(1m)[1] and 767.32(1r).[2] *See*

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

WISCONSIN STAT. § 767.32(1m) reads as follows:

> In an action under sub. (1) to revise a judgment or order with respect to child support, maintenance payments or family support payments, the court may not revise the amount of child support, maintenance payments or family support payments due, or an amount of arrearages in child support, maintenance payments or family support payments that has accrued, prior to the date that notice of the action is given to the respondent, except to correct previous errors in calculations.

[2] WISCONSIN STAT. § 767.32(1r) provides:

> 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:
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> ….
>
> (b) The payer shows by documentary evidence that the payments were made directly to the payee by check or money

(continued)

Monicken v. Monicken, 226 Wis. 2d 119, 129, 593 N.W.2d 509 (Ct. App. 1999). The circuit court may grant credit against a child support arrearage when the payor proves by a preponderance of the evidence that a minor child lived with the payor with the consent of the payee for more than sixty days beyond a court ordered period of physical placement. *See* WIS. STAT. § 767.32(1r)(e). The trial court's exercise of discretion will be sustained if it is based on facts in the record and applicable law, and was the product of a rational mental process. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). The circuit court's

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> order, and shows by a preponderance of the evidence that the payments were intended for support and not intended as a gift to or on behalf of the child, or as some other voluntary expenditure, or for the payment of some other obligation to the payee.
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> (c) The payer proves by clear and convincing evidence, with evidence of a written agreement, that the payee expressly agreed to accept the payments in lieu of child or family support paid as provided in s. 767.265 or 767.29, not including gifts or contributions for entertainment.
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> (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.
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> (e) The payer proves by a preponderance of the evidence that the child lived with the payer, with the agreement of the payee, for more than 60 days beyond a court-ordered period of physical placement. Credit may not be granted under this paragraph if, with respect to the time that the child lived with the payer beyond the court-ordered period of physical placement, the payee sought to enforce the physical placement order through civil or criminal process or if the payee shows that the child's relocation to the payer's home was not mutually agreed to by both parents.
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> (f) The payer proves by a preponderance of the evidence that the payer and payee resumed living together with the child and that, during the period for which a credit is sought, the payer directly supported the family by paying amounts at least equal to the amount of unpaid court-ordered support that accrued during that period.

determination of historical facts will be sustained unless they are clearly erroneous. *See* ***In re Cheyenne D.L.***, 181 Wis. 2d 868, 872, 512 N.W.2d 522 (Ct. App. 1994).

II. ADDITIONAL CREDIT

¶6 Lyon argues that the circuit court erred by failing to grant him an additional child support credit for the period of time when the children lived with him in 1987 and when Molly lived with him from August 1993 through November 1995. He contends that the living arrangements were beyond the scope of the divorce judgment and that both he and Hilgers had agreed to those arrangements. He also argues that the circuit court failed to examine the relevant facts in giving Lyon a $400 per month credit. We disagree and conclude that the circuit court properly exercised its discretion.

¶7 Lyon and Hilgers agree that both children were physically placed with Lyon for part of 1987, but disagree on the length of that placement. Lyon testified that they were with him for seven months; Hilgers testified that the children were with Lyon for five months. While the children lived with Lyon, he paid Hilgers $400 per month for child support. The circuit court reasonably concluded that the reduction of Lyon's child support obligation to $400 per month for that time was reasonable and gave him no further credit against his child support arrearage for that period. We agree.

¶8 The circuit court noted that those payments were made in accordance with the 1986 divorce decree. Although the physical placement of the children differed from the physical placement contemplated in the judgment of divorce, the modification was made soon after that judgment was entered.

¶9 Both parties also agree that Lyon had physical placement of Molly from August of 1993 through November of 1995. The circuit court gave Lyon a credit of $400 per month for those twenty-seven months totaling $10,800. Lyon has not presented any additional evidence demonstrating that he was entitled to a greater or additional credit.

¶10 The circuit court made a reasonable consideration of the appropriate factors relating to Lyon's request for additional child support credit. It determined that child support in the amount of $400 per month was in accordance with the judgment of divorce. Therefore, it did not err by denying additional credit for the period both children were living with him and for granting a credit of $400 per month during the period when only Molly lived with him.

III. AGREEMENT BETWEEN THE PARTIES

¶11 Lyon argues that the circuit court erred when it failed to validate a purported written agreement between the parties. He contends that the agreement eliminated his obligation to pay past, present, and future child support. He also argues, in the alternative, that the circuit court should have given him credit for payments he allegedly made after the agreement was signed. We disagree with Lyon's arguments and conclude that the circuit court properly disregarded the purported agreement.

¶12 Lyon claimed that both he and Hilgers signed the agreement in 1993, though Hilgers denied ever signing the agreement. The circuit court found the genuineness of Hilgers' signature immaterial and instead found Lyon's argument implausible.

¶13 The agreement cites a $70,000 note as consideration. Lyon testified that there were actually two notes executed in 1980 between Lyon and his former mother-in-law, Mary Godin. The notes were for the sale and lease of farm equipment. However, Lyon admitted that no debt owed by Godin was listed as an asset at the time of the divorce. Additionally, Lyon did not list the debt owed by Godin when he filed for bankruptcy shortly after the divorce. In fact, the farm equipment subject to the sale and lease agreement had been repossessed by the original equipment dealer before the parties were divorced. As a result, the written agreement between the two parties, if genuine, would have failed for lack of consideration. We conclude that the circuit court properly disregarded the purported written agreement.

¶14 Lyon also argues that the circuit court erred when it failed to give him credit for direct payments made to Hilgers after the execution of the written agreement, totaling $1,823.71. We disagree.

¶15 The circuit court did not grant Lyon credit for the $1,823.71 allegedly paid after the signing of the agreement because he did not have the original canceled checks. The circuit court gave him sixty days to provide documentation of the alleged payments, but Lyon failed to do so. "The test to be applied by the appellate court must, of necessity, involve a determination whether the trial court's finding of fact could reasonably be made based upon the available information." ***Lellman v. Mott***, 204 Wis. 2d 166, 173, 554 N.W.2d 525 (Ct. App. 1996). Lyon was afforded every opportunity to present evidence regarding past payments. Considering Lyon's claim that he was not obligated to pay child support after June 29, 1993, and his failure to provide evidence of such payment, we conclude that the circuit court properly denied Lyon additional credit postagreement amount.

IV. TAX EXEMPTIONS

¶16 Finally, Lyon argues that the circuit court erred by failing to give him credit for the value of the right to claim the children as dependents. Lyon contends that he should have been given credit because Hilgers claimed the children as exemptions on her income tax returns from 1990 through 1993 and 1995 through 1997. Hilgers also claimed Travis as an exemption in 1994. We disagree that he is entitled to credit.

¶17 The circuit court may not grant a credit to a payor against a child support arrearage except under circumstances described in WIS. STAT. §§ 767.32(1m) and 767.32(1r). Credit for the value of tax exemptions against a child support arrearage is not an error in calculation under § 767.32(1m), and none of the exceptions under § 767.32(1r) apply. Therefore, the circuit court did not err by denying Lyon a credit for the value of the tax exemptions.

By the Court.—Judgment affirmed.

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