COURT OF APPEALS
DECISION
DATED AND FILED

September 26, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1311-FT

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

IN RE THE MARRIAGE OF:

SYDNEY J. HARRIS, N/K/A SYDNEY J. TANNER,

JOINT-PETITIONER-APPELLANT,

V.

CHAUNCY STEED HARRIS,

JOINT-PETITIONER-RESPONDENT.

APPEAL from an order of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Sydney Tanner appeals an order modifying a provision of her divorce judgment that allocates dependency exemptions for

income tax purposes.[1] She argues that Chauncy Harris, her former husband, failed to meet his burden of proof and that the court violated procedural requirements by failing to take testimony. We reject these arguments and affirm the order.

¶2 The parties were divorced in 1997 after seventeen years of marriage. Pursuant to the parties' marital settlement agreement incorporated into their divorce judgment, the parties were awarded joint legal custody of their six minor children. Tanner had primary placement and Harris had periods of placement. He was ordered to pay 34% of his gross income for support, with a minimum $1,200 per month monthly payment. The parties agreed to divide the dependency exemptions for tax purposes.

¶3 In August 1997, custody proceedings concerning the parties' eldest son were filed. After a hearing and on the recommendation of a guardian ad litem, the court transferred primary placement of their eldest son to Harris. In March 2000, the court entered an order awarding all the income tax dependency exemptions to Harris.[2]

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All statutory references are to the 1997-98 version.

[2] The record reveals that shortly after the divorce judgment was entered, the court was deluged with a continual stream of ongoing custody and placement proceedings. In June 1997, Harris brought contempt proceedings relating to Tanner's alleged interference with his times of periodic placement. In September 1997, a temporary domestic abuse restraining order was issued. In October 1997, Harris brought contempt proceedings alleging interference with his placement rights and seeking transfer of custody and primary physical placement of all six children. The court issued an order concerning procedural matters and allowing the guardian ad litem access to counseling and law enforcement records. In November 1997, the court entered an interim order modifying certain placement issues concerning the exchange of the children, telephone use, notification of moving, and release of records.

(continued)

¶4 At the hearing, Tanner disputed Harris' motion. The court inquired whether Tanner was employed, and her counsel advised that she was not. The court stated that because Tanner was not working, it would be appropriate for Harris to claim the exemptions.

¶5 In response to Tanner's objections, Harris' counsel argued that two conditions had significantly changed since the time of the final hearing: First, the parties' eldest son was living with Harris instead of Tanner, and Tanner had remarried and has a baby. Second, counsel stated, without objection from opposing counsel:

> The second thing is at the time of the final divorce hearing [Tanner] was active in the Boy Scouts. She was currently a Cub Scout director for Cub World at Camp Phillips. She was in the process of looking for full-time employment to be a director in the Boy Scouts. That was clear. There's also language even in the placement portion indicating

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In February 1998, Harris brought contempt proceedings alleging interference with placement, harassment and seeking transfer of all of the children's physical placement. Affidavits and counter-affidavits were filed concerning numerous detailed allegations about the parties' relationship with one another and the children. In March 1998, after a hearing, the trial court entered an order regarding placement issues, and ordered psychological evaluations and a guardian ad litem report. In August 1998, the trial court entered a detailed five-page order relating to placement disputes. In September 1998, the court entered an order amending the August 1998 placement order. In April 1999, the court again amended the August 1998 order to resolve disputes over Boy Scouts and religious education activities.

On May 24, 1999, the court held a hearing for the purposes of determining child support and tax dependency exemptions. Tanner's counsel objected because the matter was scheduled for hearing without a formal motion. The court indicated that it was inclined to grant the motion, but stayed its ruling for 30 days to allow Tanner's counsel to respond. The court also ruled that it disbelieved there was any element of surprise because the issue had been an ongoing topic of discussion.

On June 30, 1999, Tanner filed a brief contending that the tax dependency issues were not properly before the court. On January 25, 2000, Harris filed a motion to review the allocation of tax dependency exemptions. In February 2000, the court entered an order resolving transportation issues relating to exchanging the children and prioritizing weekend activities that included a wedding celebration and a music competition.

> upon seeking of full-time employment what the situation would be for the children.
>
> We've rehashed that over probably umpteen hearings before you, Judge, so there are clearly changes in circumstances and I believe both of them are substantial enough to bring this to your attention.

¶6 The trial court recalled that Tanner was working and going to seek work at the time of the final hearing. Tanner's counsel replied that she had not been working. The court responded that she was "going to seek work." It recalled that it was contemplated at the time of the divorce that Tanner was going to seek full-time employment. The court stated: "[T]hat was the belief at the time and it was part of the settlement agreement at the time."[3]

¶7 Tanner did not dispute the accuracy of the court's finding, but "for the record [I] strenuously object to the procedure. At this point in time I don't believe there is any evidence before the Court upon which to base this finding." The Court asked: "Do you want to take testimony?" Tanner's counsel stated: "I think the Court thinks we would be wasting everybody's time here in doing that because the Court has already indicated where the Court is at." When asked what testimony he would present, counsel replied, "I don't know that I have to present anything" because Harris had the burden of proving a change in circumstances.

¶8 The court made the following ruling:

> Chauncy S. Harris has been paying a significant amount of child support throughout this action and even after the eldest child's physical placement was transferred to him. Further, it was anticipated at the time of the final hearing that Sydney J. Tanner would be seeking gainful employment and become gainfully employed and she has

[3] The financial statements Tanner filed at the time of the final hearing indicate that she had been self-employed part-time.

> failed to secure any employment since that time. Mr. Harris would gain significantly from the award of the tax exemptions and Ms. Tanner, on her own income, would not.

It is from this order Tanner appeals.

¶9 Under WIS. STAT. § 767.32, a trial court may revise child support and dependency exemptions ordered in a judgment of divorce when it finds there has been a substantial change in the parties' financial circumstances. "The first step in a substantial change analysis is a factual inquiry." ***Carpenter v. Mumaw***, 230 Wis. 2d 384, 390, 602 N.W.2d 536 (Ct. App. 1999). It requires the trial court to determine the parties' financial circumstances when the award was made and their present financial circumstances. *See* ***id.*** We do not overturn the trial court's findings of fact regarding the circumstances at the time of the divorce and at the time of the hearing on the motion for modification unless they are clearly erroneous. *See* ***id.*** at 390-91.

¶10 "Whether the change displayed by these factual findings is substantial is a question of law, which we review de novo." ***Id.*** at 391. However, when a question of law is intertwined with the factual findings, we give weight to the trial court's decision. *See* ***id.***

¶11 Tanner claims that Harris failed to meet his burden of proof under WIS. STAT. § 767.32(1)(a) to modify the child support order by reallocating the dependency exemptions because he presented no evidence. We are unpersuaded. It is undisputed that after their divorce, the parties agreed to transfer primary placement of their eldest son to Harris. The record reflects no corresponding financial contribution from Tanner to Harris. The transfer of placement supports

the court's finding of a substantial change in circumstances and its decision to transfer the dependency exemptions to Harris.

¶12 In addition, Tanner does not directly challenge the court's factual finding that she had not obtained full-time employment as contemplated at the time of the final hearing. This factor would also support the court's determination. On the record before us, the court's finding of changed circumstances is not clearly erroneous.

¶13 Tanner contends, nonetheless, that the parties' eldest son had reached the age of majority on January 24, 2000, and, therefore, his residence with his father is not a change of circumstances. We disagree. While at the time of the tax exemption hearing their son had reached majority, the court could reasonably infer that his presence in the household had imposed additional financial burdens on Harris. Also, the transfer of placement is just one of the court's considerations. We conclude that the record supports the court's determination.

¶14 Next, Tanner claims that the court employed an erroneous procedure. She contends that the court's decision should be vacated and the matter remanded to allow a fair hearing on the issue of a dependency exemption because no testimony had been presented at the March 2000 hearing. We disagree. First, the court is entitled to take judicial notice of the records in its own case. *See* ***State v. Miller***, 35 Wis. 2d 454, 478 n.3, 151 N.W.2d 157 (1967). Second, Tanner identifies no dispute of underlying facts. At the hearing before the trial court and on appeal, Tanner did not disclose what evidence she would have

offered had the court held an evidentiary hearing. Accordingly, any alleged procedural defect is harmless. *See* WIS. STAT. § 805.18.[4]

By the Court.—Order affirmed.

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

[4] While Tanner identifies as an issue that the trial court erroneously admitted into evidence two exhibits, she never advances an argument to this effect. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not briefed are deemed abandoned).