COURT OF APPEALS
DECISION
DATED AND FILED

December 12, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-1525-FT

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

IN RE THE MARRIAGE OF:

GAYLENE SCHWALEN, F/K/A GAYLENE HOWEY,

PETITIONER-APPELLANT,

V.

JAMES E. HOWEY,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Gaylene Schwalen appeals an order denying her request to increase child support for her children.[1] She argues that (1) a substantial change in circumstances entitles her to an increase; (2) the children's best interests require an increase; and (3) the application of a 29% standard is fair.[2] Because the record supports the trial court's discretionary determination, we affirm the order.

BACKGROUND

¶2 In 1994, Gaylene was divorced from James Howey. At the time of the divorce, James was an airline pilot, earning approximately $130,000 per year, and Gaylene was a homemaker. The children were placed in the primary care of Gaylene. The parties stipulated that James would pay $2,400 per month support, and the court accepted the stipulation and entered judgment accordingly. Gaylene subsequently brought a motion to increase child support, and that motion was denied on February 9, 1995. In May 1998, Gaylene again requested an increase in support, based upon her allegation of a substantial change in circumstances.[3] *See* WIS. STAT. § 767.32.

¶3 At the hearing on her motion, James testified that he presently earned approximately $13,500 per month. Gaylene was not employed at the time of the hearing. She had remarried, and her husband earned $3,112.76 per month. Her financial disclosure statement claimed that her household, consisting of

[1] This is an expedited appeal under WIS. STAT. RULE 809.17.

[2] In her reply brief, Gaylene asserts that the original divorce judgment did not state that the stipulation was fair to both parties and the children. The record fails to suggest, however, that as a basis for relief, Gaylene seeks to reopen the stipulation. Therefore, we do not address this issue.

[3] After the family court commissioner granted Gaylene's motion, James sought de novo review in the circuit court.

herself, her husband and her three children, incurred monthly expenses of $5,792.96. Gaylene contended that her family's monthly expenses exceeded their monthly income and, therefore, the $2,400 per month child support was insufficient to meet the three children's expenses for food and clothing.

¶4 Gaylene testified that now that the children are teenagers, ages sixteen, fourteen and thirteen, their expenses have increased. She contended that the children's medical expenses had increased due to allergies and attention deficit disorder. Entertainment expenses were also higher. Her sixteen-year-old daughter had purchased a $1,100 car, and insurance and licenses were expensive. All three children were in sports. Another one was in the band and was planning a trip to a Florida competition. One went on a school trip to England. The school also had trips to Russia and Scotland that she would like the children to take. Gaylene also complained that James has not set any money aside for the children's college expenses.

¶5 The trial court reviewed Gaylene's budget. It determined that some of the expenses listed did not directly relate to the children's needs. For example, the budget included a $650-per-month expenditure for legal fees. The budget also included a $775 expense for food and household items, but that expense was for five people. The court found that $2,400 appeared sufficient to meet the needs of the children as shown by the evidence. The court stated, "We're dealing with how much money should Mr. Howey be asked for to pay child support for the three children … not spousal – ex-spousal support, not support for your new husband." The court denied Gaylene's motion. Gaylene appeals the order.

STANDARD OF REVIEW

¶6 The scope of our review is limited. A motion to modify child support is addressed to trial court discretion. *See* ***Burger v. Burger***, 144 Wis. 2d 514, 523, 424 N.W.2d 691 (1988). We will not reverse a discretionary determination "if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987). "Indeed … we generally look for reasons to sustain discretionary decisions." ***Burkes v. Hales***, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991) (citation omitted).

¶7 Underlying a discretionary decision may be issues of fact and law. We uphold a factual finding unless it is clearly erroneous, paying proper deference to the trial court's assessment of the weight and credibility of the testimony. *See* WIS. STAT. § 805.17(2). Appellate courts search the record for evidence to support findings reached by the trial court, not for evidence to support findings the trial court did not but could have reached. *See* ***In re Estate of Dejmal***, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). Appellate court deference considers that the trial court has the superior opportunity to observe the demeanor of witnesses and gauge the persuasiveness of their testimony. *See* ***id.*** at 151-52. We review issues of law de novo. ***Rosplock v. Rosplock***, 217 Wis. 2d 22, 32, 577 N.W.2d 32 (Ct. App. 1998).

DISCUSSION

1. Presumed substantial change in circumstances

¶8 Gaylene argues that the court erred by finding that James rebutted the thirty-three-month presumption of a substantial change in circumstances. *See*

WIS. STAT. § 767.32(1)(b). We disagree. Under § 767.32, a party may move for a modification of child support based upon a substantial change in circumstances. A "substantial change in circumstances" is a prerequisite that a party must establish to modify an existing support order. *See* ***Zutz v. Zutz***, 208 Wis. 2d 338, 559 N.W.2d 919 (Ct. App. 1997). The first step in a substantial change analysis is a factual inquiry. *See* ***Erath v. Erath***, 141 Wis. 2d 948, 953, 417 N.W.2d 407 (Ct. App. 1987). It requires a determination of the parties' financial circumstances when the award was made and a determination of their present financial circumstances. *See* ***id.*** However, the ultimate conclusion of whether the change is substantial is a question of law that we determine de novo. ***Rosplock***, 217 Wis. 2d at 32.

¶9 Pursuant to WIS. STAT. § 767.32(1)(b), the passage of more than thirty-three months since the entry of the last child support order establishes a rebuttable presumption of a substantial change in circumstances.[4] The rebuttable presumption does not, however, interfere with the court's discretion in modifying support. The ***Zutz*** case points out:

> The thirty-three month presumption … did only one thing: it set out a rule that the elapse of thirty-three months gives a party a prima facie claim that child support should be

[4] WISCONSIN STAT. § 767.32(1)(b) provides:

> In any action under this section to revise a judgment or order with respect to an amount of child support, any of the following shall constitute a rebuttable presumption of a substantial change in circumstances sufficient to justify a revision of the judgment or order:
>
> ….
>
> 2. Unless the amount of child support is expressed in the judgment or order as a percentage of parental income, the expiration of 33 months after the date of the entry of the last child support order, including a revision of a child support order under this section.

> modified. Aside from that, however, the family court maintains its discretionary authority to hear evidence and evaluate if the DHSS standards should possibly not apply because they would result in unfairness.

Id. at 344-45.

¶10 The trial court in ***Zutz*** recognized that the expiration of more than thirty-three months from the previous order established a prima facie claim. *See* ***id.*** Therefore, it found that there was a "substantial change" in circumstances. *See* ***id.*** The finding of a "substantial change" does not, however, necessitate an increase in support:

> Nonetheless … once the family court reached this conclusion, the thirty-three month statutory presumption became irrelevant to the issue of whether child support should be modified. … The family court found that there was no reason to set aside [the] previous agreement, even though it was not in accordance with DHSS standards, because the agreement was still serving the needs of their child and was still fair to [the parties].

Id.

¶11 While the court agreed that James had experienced a predictable increase in income, it essentially concluded that this change was not substantial because, even at the previous level, his income exceeded that which was necessary to amply meet the demonstrated needs of the children. It found that Gaylene's claim that her expenses had increased to the point that she had insufficient funds to feed and clothe her children lacked credibility. It noted that her budget was inflated and it contained items not related to the children, such as legal fees. Also, the court pointed out that certain expenses, such as extensive traveling, were items to which James could be asked to voluntarily contribute, but were not part of a regular household expense. Thus, the court essentially determined that while the

parties experienced changes since the 1995 order, the children's needs were being met and the changes were not sufficiently substantial to justify a modification.

¶12 The record supports the court's determination that the testimony and financial statements rebutted the thirty-three-month presumption of a substantial change in circumstances. In any event, under the ***Zutz*** analysis, even if the presumption applied, the court was still entitled to deny Gaylene's motion for an increase because it found that the evidence presented demonstrated that $2,400 per month met the children's needs.

¶13 Gaylene fails to demonstrate error. While she contends that expenses of raising the children have increased, she does not point to any specific proofs in the record, other than her bald assertions. For example, she does not compare her previous budget to her current budget. Instead, Gaylene argues without elaboration that "the Financial Statements of the parties cannot be identical to those filed in 1994. It is not reasonable to infer that they are identical." Gaylene fails, however, to accompany this argument with record citation. It is not clear from the record that Gaylene submitted her 1994 financial statement at the modification hearing or that it was made part of the record on appeal. "[I]t is not the duty of this court to sift and glean the record *in extenso* to find facts which will support an [argument]." ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990). Accordingly, she does not demonstrate

reversible error.[5] Therefore, we agree with the trial court's determination that Gaylene failed to show a substantial change in circumstances.

¶14 Also, the court also expressed its concern that excessive support would be a form of disguised maintenance to support Gaylene and her new husband. This is a valid consideration that amounts to a finding that excessive support would be unfair to James. *See* ***Nelsen v. Candee***, 205 Wis. 2d 632, 642, 556 N.W.2d 784 (Ct. App. 1996). Because the trial court properly determined that the children's needs were being met and the current support order of $2,400 per month was fair to both parties, we do not reverse its decision on appeal.

¶15 Nevertheless, Gaylene argues that the court erroneously exercised its discretion because it failed to adequately set forth its reasoning with respect to the thirty-three-month presumption, the needs of the children or the parties' financial circumstances. We conclude that the court made an adequate record. Although a memorandum decision or formal findings on the record would have greatly assisted our review, we cannot conclude that the record is devoid of the court's reasoning. The court entered into a lengthy discussion in which it noted Gaylene's current income and expenses, that $2,400 per month appeared to meet the children's needs, that it would not order excessive child support and the fact that the children are now older did not necessarily result in a substantial change in circumstances.

[5] Also, in a one-sentence argument, Gaylene claims "consideration of new spouses [sic] income is appropriate," citing ***Abitz v. Abitz***, 155 Wis. 2d 161, 171, 455 N.W.2d 609 (1990). It is unclear whether she claims the court erred by failing to consider James' new wife's income, or whether the sentence contains a typographical error and she meant that the court erroneously considered her new husband's income. Because the argument is undeveloped, we do not address it further. *See* ***Shannon v. Shannon***, 150 Wis. 2d 434, 446, 442 N.W.2d 25 (1989). We note, however, that the record fails to support either interpretation.

¶16 For example, it stated, "What is substantial about the kids growing older? You haven't said, for example, so and so has, you know, a certain medical situation requiring $10,000 more a year to take care of." Gaylene replied "Court costs have been court costs. If you want – if you want, I have thousands and thousands and thousands of dollars [in] court costs."[6] The court ruled that court costs did not qualify as an increased cost of raising the children. The court further stated:

> I'm just simply asking you what is it out there that requires me to move the $2400 a month upward to what you're asking for. … What is it that is so substantial here as to cause me to do that. And other than kids getting older and buying [a] $1100 car and, you know, they eat more and maybe the clothes are a little more expensive, what else is there? Is there anything else?

When Gaylene again responded, "court costs," the court rejected her explanation, stating, "those are your costs not the kids' costs." We conclude that the record adequately supports the court's determination and, therefore, do not reverse on appeal.

2. Children's best interests

¶17 Next, Gaylene argues that the best interests of the children require an award of child support that would "provide the greatest amount of income possible in order to maintain the children at the standard of living they would have enjoyed [had] the family remained intact," attributing this quote to ***Resong v. Vier***, 157 Wis. 2d 382, 390, 459 N.W.2d 591 (Ct. App. 1990). ***Resong***, however, does not contain this language. Gaylene may be referring to ***Abitz***, 155 Wis. 2d at 176 in

[6] The record indicates the parties engaged in a protracted periodic placement dispute.

which our supreme court ruled: "The *stated* goal of child support is to provide the greatest amount of income possible in order to maintain the children at the standard of living they would have enjoyed had the family remained intact." This is a factor the court may consider in setting an amount of child support, had the court found a substantial change in circumstances. *See* WIS. STAT. §§ 767.25(1m)(f)[7] and 767.32. Also, even if the court had found a substantial change, the record fails to show that the $2,400 per month support payment is inadequate to provide the children with a comparable standard of living. Finally, this factor is only one among several that the court may consider in setting support. In performing a discretionary function, giving consideration to various factors involves a weighing and balancing operation, but the weight to be given a particular factor in a particular case is for the trial court, not the appellate court to

[7] WISCONSIN STAT. § 767.25 Child support.

> (1j) Except as provided in sub. (1m), the court shall determine child support payments by using the percentage standard established by the department under s. 49.22 (9).
>
> (1m) Upon request by a party, the court may modify the amount of child support payments determined under sub. (1j) if, after considering the following factors, the court finds by the greater weight of the credible evidence that use of the percentage standard is unfair to the child or to any of the parties:
>
> ….
>
> (c) The standard of living the child would have enjoyed had the marriage not ended in annulment, divorce or legal separation.
>
> ….
>
> (1n) If the court finds under sub. (1m) that use of the percentage standard is unfair to the child or the requesting party, 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 the party, its reasons for the amount of the modification and the basis for the modification.

determine. *See* ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977). We conclude the record reveals an appropriate exercise of discretion.

3. Percentage standards

¶18 Finally, Gaylene argues that the trial court erred by failing to apply the statutory standards. Because the court found no substantial change in circumstances, the court was not required to consider this issue. In any event, the court essentially determined that an application of the standards would result in excessive support and constitute disguised maintenance. This amounts to a finding of unfairness and, accordingly, demonstrates a rational basis for the court's determination. *See* ***Parrett v. Parrett***, 146 Wis. 2d 830, 842, 432 N.W.2d 664 (Ct. App. 1988) (which cautions against applying the guidelines when the facts of the case bear little relationship to the statewide statistical norm that the guidelines attempt to capture).

By the Court.—Order affirmed.

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