COURT OF APPEALS DECISION DATED AND FILED

October 31, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 01-0368

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

IN RE THE MARRIAGE OF:

DANIEL OTTE,

PETITIONER-RESPONDENT,

V.

YVONNE OTTE,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed.*

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Yvonne Otte appeals from an order modifying her child support obligation and denying her motion to have Daniel Otte held in contempt for denying her physical placement of their son on "no school" days. Yvonne argues that she is entitled to support set according to the shared-time

payer formula. We conclude that the circuit court properly exercised its discretion in deviating from the shared-time payer formula and in setting child support based on a share of variable expenses. Given ambiguity in the parties' agreement for physical custody on "no school" days, the circuit court's refusal to hold Daniel in contempt was proper. We affirm the order.

¶2 Yvonne and Daniel were divorced in 1995. At that time their son was almost two years old. Originally, the parties shared joint legal custody and equal periods of physical custody of their son. Daniel was paying child support. In 1997, an order was entered modifying custody. Daniel was granted sole legal custody and primary physical placement. A two-week rotation was ordered whereby the child would spend equal amounts of time with each Yvonne and Daniel. In April 1997, Yvonne was ordered to pay child support based on a percentage of her income as determined by application of administrative regulations for serial-family payers. Three additional hearings before the circuit court occurred between February and November 1998 to address competing motions for revision of the placement schedule, contempt for violation of the placement schedule, and contempt for the failure to meet financial obligations. Ultimately, the parties were referred to mediation to work out a new placement schedule.

¶3 A parenting agreement was executed on March 17, 1999. The parties continued to have equal periods of physical placement. Their son was to start kindergarten in August 1999. The agreement provided that if their son had a "no school" day, Yvonne "shall have placement on that school day." On such a day, Yvonne would be allowed to pick her son up from day care and return him to Daniel's residence by 4:30 p.m. On September 13, 1999, Daniel filed a motion to enforce the parenting agreement and modify the placement schedule. Yvonne

filed her motion to modify child support and the placement schedule and to have Daniel held in contempt on January 6, 2000. The parties appeared pro se before the circuit court.

¶4 The circuit court found that there was a substantial change of circumstances warranting a re-evaluation of child support. Yvonne was ordered to pay $150 per month as child support. The circuit court found this amount to be about one-half the total cost of child care, school expenses, and other activities the child might participate in. Yvonne argues that the circuit court erroneously exercised its discretion in setting child support because it did not apply the shared-time payer formula under WIS. STAT. § 767.25(1j) (1999-2000),[1] and WIS. ADMIN. CODE § DWD 40.04(2). She also contends that the circuit court failed to make required findings to support its determination that application of the shared-time payer formula was unfair. Her view is that Daniel should be paying child support reduced by one-half the amount of variable expenses.

¶5 Review of an order modifying child support is limited to whether the circuit court misused its discretion. ***Weston v. Holt***, 157 Wis. 2d 595, 602, 460 N.W.2d 776 (Ct. App. 1990). The circuit court has discretionary authority to set aside the guideline percentages when it finds that the use of the standard "is unfair to the child or to any of the parties." WIS. STAT. § 767.32(2m). *See* ***Luciani v. Montemurro-Luciani***, 199 Wis. 2d 280, 295, 544 N.W.2d 561 (1996). When this court reviews such decisions, we determine if the circuit court examined the

[1] WISCONSIN STAT. § 767.32(2) requires the circuit court to use the percentage standards when revising a child support order. All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

relevant facts, applied the correct standards and reached a rational decision. ***Id***. at 294.

¶6 Here, our review turns on the circuit court's findings with respect to the parties' assumption of payment for variable expenses. Yvonne correctly points out that the "assumption underlying the shared-time payer formula is that parents who have physical placement for a substantial number of overnights or the equivalent generally assume the variable costs for the children when the children are with them." ***Randall v. Randall***, 2000 WI App 98, ¶18, 235 Wis. 2d 1, 612 N.W.2d 737. However, the underlying assumption only means that a parent need not demonstrate the assumption of proportional variable costs as a condition precedent to application of the shared-time payer formula. *See* ***id.*** at ¶19. It is proper for the circuit court to consider the payer's past practice as evidence that he or she would not be assuming proportional costs. *See* ***id.*** at ¶20.

¶7 The circuit court recognized that Yvonne was a shared-time payer. It refused, however, to apply the formula because historically Yvonne had not paid a proportional share of variable costs such as school supplies, school lunches, and fees for various activities.[2] Moreover, the circuit court found that the parties' history of difficulty in sharing information and meeting joint obligations made it unlikely that Yvonne would assume a proportional share of variable expenses in

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[2] We reject Yvonne's contention that her past support payments constituted, in whole or in part, payment of variable expenses because those payments exceeded the amount of variable expenses and, as the circuit court found, were in excess of the child's needs. That support order was made under a different set of circumstances that are not subject to review here. Even if past support covered variable expenses, it illustrates the need for a support order to assure payments are made.

the future in the absence of a support order. It recognized that potential future litigation over these issues was not fair to the child.

¶8 While the circuit court did not make the findings in the language specified in WIS. STAT. § 767.25(1n),[3] its ruling encompassed the concepts outlined by the statute. We look to the totality of the circumstances to determine if an actual determination was made. *See* ***State v. Coles***, 208 Wis. 2d 328, 335, 559 N.W.2d 599 (Ct. App. 1997) (the failure to expressly state the adjudication "should not undo what nonetheless is clearly conveyed by the words and the procedure which the court otherwise did use."); ***Michael A.P. v. Solsrud***, 178 Wis. 2d 137, 151, 502 N.W.2d 918 (Ct. App. 1993) ("the trial court's failure to use the 'magic words' does not amount to reversible error."). The circuit court's failure to determine Yvonne's support obligation under the shared-time payer formula is harmless error. The court found that the underlying presumption of the share-time payer formula did not hold true in this case and that any arrangement which left the door open for further litigation over variable expenses was not fair

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[3] WISCONSIN STAT. § 767.25(1n) provides:

> 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.

We note that WIS. STAT. § 767.25(1n) is not referenced by WIS. STAT. § 767.32(2m), which authorizes the circuit court to deviate from the percentage standard when modifying a child support order. We do not decide whether § 767.25(1n) must be complied with in a modification situation.

to the child. The record supports these findings.[4] Further, we point out that the circuit court's finding is based on an assessment of the parties' credibility, a matter wholly within the province of the circuit court acting as the trier of fact. ***Wiederholt v. Fischer***, 169 Wis. 2d 524, 533, 485 N.W.2d 442 (Ct. App. 1992).

¶9 Yvonne contends that the circuit court should have made the change in child support retroactive to January 6, 2000, the day she filed her modification motion.[5] WISCONSIN STAT. § 767.32(1m) permits a retroactive reduction of child support to the date the motion was filed, but it does not require it. ***Benn v. Benn***, 230 Wis. 2d 301, 313, 602 N.W.2d 65 (Ct. App. 1999). Yvonne does not provide a record citation indicating that she asked the circuit court to exercise its discretion to determine if the modification should be retroactive.[6] We will not make an independent search of the record to find the evidence supporting an appellant's argument. ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463. We properly decline to review an issue on appeal when the appellant has failed to give the circuit court fair notice that it is raising a particular issue and seeks a particular ruling. *See* ***State v. Salter***, 118 Wis. 2d 67, 79, 346 N.W.2d 318 (Ct. App. 1984).

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[4] Yvonne contends that the total variable expenses are only $160 per month. Her reliance solely on Daniel's financial statement indicating monthly payments for day care, school lunch, snack milk, and extracurricular activities is misleading. Daniel testified to other expenses he has paid and that the costs will increase as his son becomes involved in more sports.

[5] On May 1, 2000, the circuit court ruled that Yvonne's child support obligation would be reduced. The order of November 8, 2000, indicated that the reduction was effective as of May 1, 2000.

[6] Yvonne's motion for modification asked that support be terminated effective January 1, 2000. The circuit court lacked authority to make the modification of support retroactive to a date before the motion was filed. WIS. STAT. § 767.32(1m).

¶10 We turn to consider Yvonne's claim that Daniel should have been found in contempt for his failure to abide by the parenting agreement's provision that she could have placement of their son on "no school" days. We review the circuit court's decision regarding contempt to determine if the circuit court properly exercised its discretion. ***Haeuser v. Haeuser***, 200 Wis. 2d 750, 767, 548 N.W.2d 535 (Ct. App. 1996). The mere violation of a court order is an insufficient basis for a contempt finding; the violation must be willful and contemptuous. *See* ***Benn***, 230 Wis. 2d at 309.

¶11 Yvonne contends that Daniel violated the placement agreement on October 28 and November 11, 1999. Both of these days were Thursdays. In those months in 1999, the child attended kindergarten all day on Mondays and Wednesdays, and a half day on Fridays. Yvonne suggests that because Daniel did not dispute her understanding that these two dates were "no school" days, there is agreement about what the parenting agreement means and unrefuted evidence that Daniel violated the agreement. She contends that the circuit court erred by substituting its own interpretation of what was meant by a "no school" day, an interpretation contrary to what she characterizes as the parties' undisputed interpretation.[7]

¶12 First, we reject Yvonne's contention that at the outset of the contempt proceeding there was agreement about what a "no school" day was. The record includes a letter Daniel wrote to Yvonne at the commencement of the kindergarten term which expressed his view that a "no school" day was "any

[7] The circuit court's order expresses its view that a no school day is a day on which school was scheduled but then unexpectedly cancelled and not merely that there never was school on that day.

Monday, Wednesday, or Friday morning when there is no school scheduled." While Daniel did not raise his competing interpretation as a defense to Yvonne's claim that he violated the "no school" day placement on two Thursdays,[8] it is misleading to suggest that the parties agreed on what the provision meant. Second, we do not read the circuit court's refusal to find Daniel in contempt to be based solely on a substituted interpretation of the "no school" provision. The circuit court's decision reflects that it found the provision to be ambiguous. Thus, the circuit court found that Daniel did not willfully violate a provision which was uncertain in application. The circuit court properly exercised its discretion in refusing to invoke contempt when the violation was not clear and willful.

¶13 Finally, and most importantly, we reject the notion that the circuit court made a binding judicial determination of what the "no school" provision means. As Yvonne points out, the circuit court's attempt to have the parties stipulate to a certain meaning of the "no school" provision failed. In the end, the circuit court was only asked to consider whether Daniel was in contempt for violating the provision. It concluded he was not. There was no modification to the placement schedule by the circuit court's May 1, 2000 ruling on the motion for contempt.[9] Thus, our affirmance should not be interpreted as an imprimatur of any particular meaning assigned to the "no school" provision.

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[8] Daniel relied on an oral agreement between the parties to switch placement days as evidence that he did not willfully violate the parental agreement.

[9] On November 8, 2000, the parties stipulated to a modification of the placement schedule as outlined in a letter dated April 25, 2000, from the guardian ad litem to the parties. This stipulation perpetuates the use of the term "no school" days without reference to a definition that Yvonne proposed in a letter dated July 1, 2000. Hopefully, in practice, the parties have been able to cooperate under the "no school" provision.

By the Court.—Order affirmed.

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