COURT OF APPEALS
DECISION
DATED AND FILED

December 11, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0386 **Cir. Ct. No. 89-FA-27**

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

IN RE THE MARRIAGE OF:

CHERYL JEAN SWETLIK,

JOINT-PETITIONER-RESPONDENT,

V.

WILLIAM PHILIP SWETLIK,

JOINT-PETITIONER-APPELLANT.

APPEAL from an order of the circuit court for Brown County: SUE E. BISCHEL, Judge. *Affirmed*.

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

¶1 PER CURIAM. William Swetlik appeals an order denying his motion to modify his $4,000 per month child support obligation. He argues that the trial court failed to apply the correct legal standard in determining that

modification was inappropriate. He further contends that the trial court erroneously exercised its discretion by determining that his former wife, Cheryl Swetlik, did not use the child support as hidden maintenance to subsidize her lifestyle. He also claims that because the $4,000 had been set when he had three minor children, it is now excessive because only one of the children remains a minor. Because the record discloses a rational basis for the court's determination, we affirm the order.

BACKGROUND

¶2 The Swetliks were divorced in 1990. Child support for their three minor children was set at $3,000 per month. In 1995, Cheryl filed a motion seeking additional support. At that time, William's gross income was $429,000 from his orthodontics practice. The parties stipulated to an order increasing support to $4,000 per month.

¶3 In 2000, after two of the parties' children reached the age of majority, William filed a motion for reduction of child support.[1] At the time, William's gross income was approximately $446,554 a year. At the hearing, the trial court did not make specific findings with respect to William's financial resources, other than to observe that they were significant and undoubtedly exceeded Cheryl's. There is no dispute that William's income and resources enabled him to pay $4,000 per month child support. Based upon his son's

[1] William's two oldest children attended college with expenses paid by an educational trust funded by William. At the time of the hearing, it contained $314,672. A separate trust for Adam, the youngest child, contained $140,421.

activities and needs, however, William believed that $1,300 to $1,500 per month would be ample support.

¶4 Cheryl has a bachelor's degree in business administration.[2] At the time of the motion hearing, Cheryl worked thirty hours a week at $7.25 per hour as a 4-H assistant at the Brown County Extension office. She also earned approximately $10 per hour when she occasionally bartended. Cheryl reported a gross monthly income of $930. According to her financial disclosure statement, Cheryl owned her residence, valued at $200,000, debt-free. In addition, she had approximately $800,000 in savings, retirement plans and other assets. Cheryl claimed that her monthly expenses were $4,346 for herself, her minor child and her two older children when college was out of session.

¶5 The record discloses that Adam has always attended public schools and wants to attend public high school. Adam participates in band and piano lessons. He also skis, plays football, baseball, soccer and water sports. Over a 2.7-year period, all expenses paid for Adam averaged $1,393.28 per month, according to an analysis performed by William's expert witness, whose testimony is unrefuted.

¶6 William testified that his family had no country club memberships, vacation cottages, or boats or campers. He believed that: "concentrating on school and getting a good education, combined with hard work, would lead [the children] to financial solvency and a decent living …." Because he had previously

[2] At the time of the divorce, Cheryl waived maintenance and received payments of $4,500 per month for 48 months. These terminated in 1994.

paid $4,000 to support his three children, he believed that sum was excessive to support only one.

¶7 The court found that there had been a substantial change in circumstances; first, William's income had increased since the date of the last child support modification and, second, because the two older children reached the age of majority, Adam is the last minor to whom William owes a support obligation.

¶8 Despite its finding of changed circumstances, the court denied William's request to lower his child support obligation. The trial court did not apply the percentage standard, and no one challenges this determination.[3] The court rejected William's suggestion that Adam's needs could be met by a payment of $1,500 per month, noting that this sum represents 4.2% of William's income. The court determined that $4,000 per month reflected an appropriate child support payment based upon William's ability to pay and the standard of living to which Adam was entitled. William appeals the order.

DISCUSSION

1. Legal standards

¶9 William argues that the trial court erroneously exercised its discretion when it applied an incorrect legal standard. He contends that the court erred when it stated that he failed to meet his burden of proving that the present level of support is unfair to him because it constitutes hidden maintenance. We

[3] The percentage standard for one child is 17%, which equals $6,092 per month.

agree that this characterization of the issue obscures the applicable legal analysis. Nonetheless, for the reasons that follow, we are unconvinced that the court's decision reflects an erroneous exercise of discretion.

¶10 An award of child support is subject to modification if future circumstances warrant revision. ***Johnson v. Johnson***, 78 Wis. 2d 137, 143-44, 254 N.W.2d 198 (1977). WISCONSIN STAT. § 767.32 governs the analysis employed when deciding a motion to modify child support. "A revision, under this section, of a judgment or order with respect to an amount of child or family support may be made only upon a finding of a substantial change of circumstances." WIS. STAT. § 767.32(1)(a). A change in payer's income, "from the payer's income determined by the court in its most recent judgment or order for child support, including a revision of a child support order under this section[,]" may constitute a substantial change of circumstances sufficient to justify a revision of the judgment or order. WIS. STAT. § 767.32(1)(c)(1). The burden is upon the party seeking modification to show that the circumstances upon which the initial order was based have materially changed. ***Thies v. MacDonald***, 51 Wis. 2d 296, 301, 187 N.W.2d 186 (1971).

¶11 Having found that a substantial change in circumstances has occurred, it is within the trial court's discretion to modify or refuse to modify the child support award. ***Long v. Wasielewski***, 147 Wis. 2d 57, 60, 432 N.W.2d 615 (Ct. App. 1988). If the court revises a judgment or order with respect to child support, it shall do so using the percentage standards established under WIS. STAT. § 49.22(9), unless, after considering the factors listed in WIS. STAT. § 767.25(1m),

it finds that use of the percentage standards is unfair to the child or either party. WIS. STAT. § 767.32(2m).[4]

[4] WISCONSIN STAT. § 767.25, "Child support" reads in part:

> **(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:
>
> (a) The financial resources of the child.
>
> (b) The financial resources of both parents.
>
> (bj) Maintenance received by either party.
>
> (bp) The needs of each party in order to support himself or herself at a level equal to or greater than that established under 42 U.S.C. 9902 (2).
>
> (bz) The needs of any person, other than the child, whom either party is legally obligated to support.
>
> (c) If the parties were married, the standard of living the child would have enjoyed had the marriage not ended in annulment, divorce or legal separation.
>
> (d) The desirability that the custodian remain in the home as a full-time parent.
>
> (e) The cost of day care if the custodian works outside the home, or the value of custodial services performed by the custodian if the custodian remains in the home.
>
> (ej) The award of substantial periods of physical placement to both parents.
>
> (em) Extraordinary travel expenses incurred in exercising the right to periods of physical placement under s. 767.24.
>
> (f) The physical, mental and emotional health needs of the child, including any costs for health insurance as provided for under sub. (4m).
>
> (g) The child's educational needs.

(continued)

¶12 An award of child support is measured by the needs of the custodial parent and child and the ability of the noncustodial parent to pay. ***Van Offeren v. Van Offeren***, 173 Wis. 2d 482, 492, 496 N.W.2d 660 (Ct. App. 1992). The court must consider the needs of the child, the needs of the parent with primary physical placement, and the ability of the other parent to pay, including the level of subsistence and comfort in everyday life that was enjoyed by the child prior to the divorce due to his parents' financial resources. ***Cameron v. Cameron***, 209 Wis. 2d 88, ¶¶35-36, 562 N.W.2d 126 (1997). The child's standard of living should be that which the child would have enjoyed had the marriage continued. ***Id.*** at ¶36. Thus, it accommodates the parents' subsequent financial prosperity or adversity. ***Id.***

¶13 We review a determination regarding whether there has been a change in circumstances sufficient to warrant a modification of child support as a mixed question of fact and law; we will uphold the trial court's findings regarding

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(h) The tax consequences to each party.

(hm) The best interests of the child.

(hs) The earning capacity of each parent, based on each parent's education, training and work experience and the availability of work in or near the parent's community.

(i) Any other factors which the court in each case determines are relevant.

(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.

what changes have occurred in the parties' circumstances unless those findings are clearly erroneous, but we will independently consider the legal significance of those changes. ***Rosplock v. Rosplock***, 217 Wis. 2d 22, 32-33, 577 N.W.2d 32 (Ct. App. 1998).

¶14 If the record supports a determination that there has been a substantial change of circumstances, we will review the trial court's decision regarding the amount of the modification under the erroneous exercise of discretion standard. *See* ***Benn v. Benn***, 230 Wis. 2d 301, 307-08, 602 N.W.2d 65 (Ct. App. 1999). We affirm a trial court's discretionary decision if the court makes a reasoned decision and applies the correct legal standard to the facts of record. ***Id.*** at 308.

¶15 We accept all trial court findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). Whether the trial court applied the correct legal standard is a question of law that this court reviews independently. ***Cook v. Cook***, 208 Wis. 2d 166, 172, 560 N.W.2d 246 (1997).

¶16 We conclude that the record fails to reveal that the court applied an incorrect legal standard. First, the parties agree with the trial court's assessment that William has met his burden to demonstrate a substantial change in circumstances. The parties agree that the two oldest children reaching the age of majority and William's increased income support the trial court's determination that a substantial change in circumstances has occurred since the previous order.

¶17 In addition, the parties do not challenge the trial court's determination that the percentage standards should not apply. Thus, we conclude that the trial court's decision, that the percentage standards call for a monthly child support for Adam of more than $6,000, is equivalent to an express finding that

their application would be unfair to William. Because there is no dispute, the trial court's rulings that there is a substantial change in circumstances and that the percentage standards should not be applied are sustained.

¶18 As a result, the only issue remaining is whether the trial court erroneously exercised its discretion when it set monthly support for Adam at $4,000. There is no question that this amount is within William's ability to pay. Also, there is no dispute that $4,000 per month far exceeds Adam's basic needs. The essential question, therefore, is whether under WIS. STAT. § 767.25(1m), the court's order reasonably reflects the amount required to support Adam at the standard of living he would have enjoyed had the marriage remained intact.

¶19 Had the marriage remained intact, Adam would have been living in a household that had an annual income in excess of $400,000. The trial court noted that William's income has increased significantly over the years and that the legal standard to be applied requires that Adam share in his father's prosperity. *See* ***Hubert v. Hubert***, 159 Wis. 2d 803, 815-16, 465 N.W.2d 252 (Ct. App. 1990).

¶20 Now, with the current level of support, the household in which Adam lives has an income in the range of $65,000 per year. The trial court's analysis was in large part based on its concern that a child support reduction would have created an even greater disparity between Adam's current standard of living and that which he would have had if his parents had not divorced.

¶21 The court's findings imply that while Adam's lifestyle with his mother is no doubt comfortable, it is not extravagant. For example, the court observed that at the time of the divorce, Adam lived with his family in a residence valued at $385,000, and now lives in a $200,000 residence. The court found that $4,000 per month does not result in a windfall and that Adam is not living at an

extravagant standard in relation to what he would have, had the marriage continued.

¶22 The record discloses, however, that Adam's standard of living was not the only factor the court considered. The court considered the financial resources of both parties. The court determined that child support of $4,000 per month would not create any hardship for William and would not contradict any values that the parents have instilled in their children.

¶23 The court also considered that Cheryl had primary placement and that William had a little more than the normal standard secondary placement schedule.[5] As a result, this factor did not call for a decrease in child support.

¶24 In addition, the court took into consideration that while two fewer children at home may result in some lower expenses for Cheryl, "there [are] some fixed costs there that aren't going to change no matter whether you have one teenager, two or three." The court's findings imply that the child support Cheryl receives bears a reasonable relationship to the cost of maintaining a comfortable and affluent household for Adam.

¶25 The record reflects that the court applied the correct legal standards under WIS. STAT. §§ 767.25 and 767.32. Because it applied the proper legal standards to the facts of record and reached a reasonable decision, our standard of review requires that we sustain the court's decision on appeal.

[5] William's placement schedule consists of one night a week and alternate weekends, commencing Thursday at 6 p.m. to Sunday at 7 p.m.

2. Hidden maintenance

¶26 William argues, however, that the sum he pays in excess of the approximately $1,500 per month necessary to meet Adam's basic needs constitutes hidden maintenance to Cheryl. He claims that Wisconsin law that does not require him to support Cheryl in the guise of child support.

¶27 William correctly states the law. *See* ***Nelsen v. Candee***, 205 Wis. 2d 632, 556 N.W.2d 784 (Ct. App. 1996). Here, however, the trial court found that Cheryl has not enhanced her own financial position via child support and was not using it as a maintenance substitute. We conclude that the trial court could reasonably reach this determination. Under WIS. STAT. § 767.25(1m)(e), the trial court could validly consider that if the marriage had continued, not only would Adam enjoy an enhanced standard of living in a material sense but, given the level of financial resources available, he would also have the advantage of a custodial parent in the home at least the majority of the time.

¶28 Consequently, it was entirely reasonable for the court to consider the value of the custodial services Cheryl performed in determining her contribution to Adam's support. *See* WIS. STAT. § 767.25(1m)(e). The record would permit a finding that a reduction in William's support obligation would necessitate an increase in Cheryl's contribution, which would increase Cheryl's work hours to Adam's detriment.

¶29 The court acknowledged that a thirteen-year-old does not necessarily require a full time parent at home. Nonetheless, the court could reasonably conclude that Cheryl's part-time work schedule benefited Adam and was

appropriate given the financial resources of both parties.[6] Because the record reveals a rational basis, we do not disturb the court's discretionary determination.

¶30 William argues that the trial court erred when it determined that Cheryl is not now in a better financial situation than she was at the time of the divorce. He contends that she in a better situation and, even if she were in the same situation, her financial status demonstrates that she is using the support payments to benefit herself. We are unpersuaded. In comparing Cheryl's financial situation between 1990 and the present, William does not take into account inflation or market forces. He also ignores Cheryl's property division payments of $54,000 between 1990 and 1994, which improved her financial situation.

¶31 We conclude that comparisons between Cheryl's 1990 financial status and her current status are of little value to the determination at hand. Relative to Cheryl's financial situation at the time of the divorce, it is sufficient to note that William identifies no drastic changes. Also, the record does not indicate that Cheryl has adopted an extravagant lifestyle or surrounded herself with luxuries. She testified that her children are her most valuable assets. William does not disagree. Because the record supports the trial court's determination that William's child support obligation of $4,000 per month is rationally related to Adam's support, we do not overturn it on appeal.

[6] The court imputed income to Cheryl as if she were working full time, and its decision implies that her potential full-time earnings would be of marginal significance.

3. Excessive support

¶32 Finally, William argues that the trial court erroneously determined, in effect, that $4,000 per month is not excessive support. His essential premise is that if $4,000 per month was sufficient support for three children, it must necessarily be excessive for one. We disagree.

¶33 The trial court noted that $4,000 per month would probably not have supported three children at a standard of living they would have enjoyed had the marriage remained intact. The court's observation indicates that $4,000 was probably somewhat low given the parties' financial circumstances. Also, the court's findings indicate that many of Cheryl's expenses, such as those relating to real estate taxes, utilities and transportation, do not decrease merely because two of the children reached the age of majority. In addition, the court could reasonably have determined that as Adam matures, the costs of supporting him increase. Consequently, under the circumstances before us, we reject William's argument that his child support obligation is excessive.

CONCLUSION

¶34 The issue before us is not whether the facts of record could support a contrary result. Our function is to determine whether a reasonable judge could have reached the same result as the one here. "It is recognized that a trial court in an exercise of its discretion may reasonably reach a conclusion which another judge or another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning." ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). Because the record discloses a rational basis for the court's determination, we do not reverse it on appeal.

By the Court.—Order affirmed.

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