COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2998 **Cir. Ct. No. 92-FA-129**

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

IN RE THE MARRIAGE OF:

SANDRA L. PAULOSKI, N/K/A SANDRA L. ROBERTS,

PETITIONER-RESPONDENT,

V.

STEPHEN J. PAULOSKI,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: LEE S. DREYFUS, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Stephen Pauloski appeals from an order addressing child support and attorney's fees in his post-divorce dispute with Sandra Pauloski, n/k/a Sandra Roberts. We affirm.

¶2 Stephen and Sandra were divorced in 1993. In July 1995, after suffering a heart attack, Stephen moved the circuit court to suspend child support due to his health and the need to locate new employment.[1] In a September 13, 1995 order, the court commissioner found that as long as Stephen was partially disabled, he was not shirking his child support obligation. The commissioner suspended Stephen's child support obligation retroactive to July 1995 and ordered that his obligation remain suspended until further order of the court.

¶3 In July 1996, in response to Sandra's motion alleging that Stephen was shirking his child support obligation, the court commissioner entered another order relating to child support. The commissioner found that Stephen was a full-time student in a nursing program with an anticipated graduation date in 1998. The commissioner recognized that even though Stephen had a child support obligation, it would be unfair to require him to pay support at that time. The commissioner found that Stephen's career change (from painter to nursing) was reasonable under the circumstances, and therefore Stephen was not shirking his child support responsibility. Under those circumstances, the commissioner decided, "[Stephen's] obligation to pay child support shall continue to be suspended." The commissioner provided that any child support arrearage would continue to accrue interest, and Stephen remained obligated to pay the arrearage as soon as reasonably possible. The commissioner required Stephen to keep the court apprised of his academic progress and status.

[1] Stephen's health forced him to give up his painting business and seek new training and employment.

¶4 In May 2002, the parties returned to court to litigate Stephen's request for child support from Sandra retroactive to 1999 because the parties' child had resided primarily with him since then. Stephen also sought current support from Sandra along with a contribution to his attorney's fees.

¶5 After a hearing, the circuit court made the following findings. The original judgment of divorce contemplated that the child would live the majority of the time with Sandra, and Stephen would pay child support. However, the parties did not adhere to most of the court orders governing placement. Stephen had a heart attack in 1995 and his child support was "held open" effective January 28, 1995. At that time, Stephen was in arrears on his child support, but he was not required to make payments on either the arrearage or the current obligation. Thereafter, Stephen returned to school to obtain a nursing degree. Stephen's current child support obligation was not reinstated until he completed school and obtained employment in July 1998. Therefore, for a three-year period, Stephen did not make any child support payments. As of 1999, the child lived primarily with Stephen.

¶6 The court ruled that even though the child lived primarily with Stephen since 1999, it would be inequitable to order child support payments from Sandra to Stephen for this period of time because Stephen did not pay child support from July 1995 through July 1998. Turning to current child support, the court found that because the child now resides primarily with Stephen, Sandra owes child support.[2] The court declined to order Sandra to contribute to Stephen's attorney fees. Stephen appeals.

[2] Sandra has not appealed this child support determination.

¶7 On appeal, Stephen argues that the circuit court erroneously modified child support. We conclude that the premise of Stephen's argument is wrong because the circuit court did not modify child support. Child support was never modified or eliminated; it was suspended. Working from and applying the court commissioner's orders suspending child support during Stephen's illness and retraining as a nurse, the court weighed the equities and determined that Stephen would not receive child support retroactive to 1999 because he had already benefited from not having to pay child support from 1995-98. The court established a current child support obligation for Sandra and balanced what would have been Sandra's child support obligation from 1999 against Stephen's suspended and unpaid child support obligation from 1995-98.

¶8 Determinations of child support are within the circuit court's discretion. We will affirm the circuit court if the record shows that discretion was exercised and we can detect a reasonable basis for the court's decision. ***Prahl v. Brosamle,*** 142 Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987). Parents must support their children, ***Rottscheit v. Dumler,*** 2003 WI 62, ¶31, 262 Wis. 2d. 292, 664 N.W.2d 525, and Stephen could not have reasonably believed that his child support obligation for 1995-98 vanished into thin air.[3] The suspension of child support left open the distinct possibility that Stephen would have to account for this child support in the future.[4] The court offset Stephen's unpaid child support from 1995-98 against

[3] Even incarcerated persons are not automatically relieved of their child support obligations. ***Rottscheit v. Dumler,*** 2003 WI 62, ¶30, 262 Wis. 2d 292, 664 N.W.2d 525.

[4] We note that Stephen's motion sought a suspension of child support, not cancellation, elimination or modification to zero. Our analysis on appeal might be different had Stephen's motion requested or the court commissioner's order included a provision for the disposition of the suspended child support payments.

Sandra's unpaid child support from 1999 forward. A divorce action is equitable in nature, ***Caulfield v. Caulfield,*** 183 Wis. 2d 83, 90, 515 N.W.2d 278 (Ct. App. 1994),[5] and the circuit court's child support ruling was equitable under the facts and circumstances.

¶9 Stephen argues that the circuit court erred when it declined to order Sandra to contribute to his attorney's fees. The court found that the parties' respective attorney's fees were reasonable, Stephen's income was twice that of Sandra's, and Stephen was able to bear the cost of his own attorney's fees. Furthermore, because the parties incurred roughly the same amount of fees and each party contributed to the cost and length of the litigation, each party would bear his or her own fees.

¶10 On appeal, Stephen argues that the circuit court should have awarded him attorney's fees because Sandra engaged in overtrial when she refused to acknowledge that the child lived primarily with him since 1999, and required Stephen to litigate post-1999 child support.

¶11 Our review of the record indicates that Stephen did not make an overtrial argument to the circuit court in support of his request for attorney's fees.[6] At some stage a party must specifically inform the circuit court of the legal theory supporting its claim or face having the issue waived. ***State v. Rogers,*** 196 Wis. 2d

[5] We do not address any of Stephen's other challenges to the child support ruling.

[6] Stephen may have raised this argument in a trial brief, but the brief is not included in the record on appeal. Therefore, we cannot consider it. It is the appellant's responsibility to compile the record on appeal, and we are bound by the record as it comes to us. ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993).

817, 827, 539 N.W.2d 897 (Ct. App. 1995); *see also* ***Evjen v. Evjen,*** 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992).

¶12 Even if this issue were not waived, we would conclude that the circuit court properly exercised its discretion in requiring each party to bear his or her own attorney's fees. ***Ondrasek v. Ondrasek,*** 126 Wis. 2d 469, 483, 377 N.W.2d 190 (Ct. App. 1985) (award of attorney's fees is discretionary). "[T]he overtrial doctrine allows a party in a family law case to seek attorney fees when another party's unreasonable approach to litigation" causes unnecessary fees to be incurred. ***Raz v. Brown,*** 2003 WI 29, ¶35, 260 Wis. 2d 614, 660 N.W.2d 647.

¶13 Here, the court found that each party acted unreasonably at times during the litigation, caused more litigation and failed to prevail on various claims. The court also considered that Stephen's financial situation was significantly better than Sandra's. The court had a proper basis for denying Stephen a contribution to his attorney's fees.

By the Court.—Order affirmed.

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