

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 7, 2008

David R. Schanker
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.

Appeal No. 2008AP164

Cir. Ct. No. 2003FA9074

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE MARRIAGE OF:

SANDRA L. GONZALEZ N/K/A SANDRA L. HOTZ,

PETITIONER-RESPONDENT,

v.

MARTIN R. GONZALEZ,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Reversed in part and remanded with directions.*

Before Curley, P.J., Kessler, J., and Daniel L. LaRocque, Reserve Judge.

¶1 LAROCQUE, J. Martin Gonzalez appeals from provisions of a divorce judgment, awarding child support to Sandra Gonzalez of \$532 per month, despite his having obtained primary placement of one of the parties' two minor children, and equal placement of the other child. He contends that the trial court did not have sufficient reason to deviate from the Child Support Percentage of Income Standard, WIS. ADMIN. CODE § DWD 40. He also challenges that part of the property division awarding Sandra a \$2,000 cash payment, contrary to the terms of a court-approved partial marital settlement agreement. For reasons set forth herein, we conclude that the trial court should have applied the child support standards, and should have excluded the \$2,000 cash payment as part of the property division. We therefore reverse those parts of the judgment challenged on appeal and remand with directions.

BACKGROUND

Child Support Award.

¶2 By the time the trial court granted the disputed child support award at the trial held on February 19, 2007, the issue had already been discussed at several previous hearings. In 2005, the family court commissioner entered an undisputed temporary child support order for \$532 per month from Martin to Sandra, for the parties' minor children, Jamie (d.o.b. 11/7/90) and Sara (d.o.b. 4/28/99) based upon their equally shared child placement and Martin's greater income, "per shared placement guidelines."¹

¹ WISCONSIN ADMIN. CODE § DWD 40.04(2) sets forth the formula for shared-placement parents, that is, where both parents have court-ordered periods of placement of at least 25% or 92 days a year.

¶3 A year later, July 12, 2006, the parties appeared before the trial court, *pro se*, and, after the court realized the parties were unprepared for trial, it was postponed. During the discussion of unresolved issues, Sandra reluctantly acknowledged a change in placement for Jamie, now fifteen years old, who had been residing primarily with Martin for about eight months. The parties continued to share equal placement with Sara. Martin was invited to file a motion to amend the temporary order with the family court commissioner's office, but the trial court declined to address a change at what amounted to a status conference, but did tell Sandra: "If the child is not living with you, you don't qualify under Wisconsin law for support."

¶4 By the time of the next status conference, on October 23, 2006, the parties had recorded the placement arrangement in writing in a formal stipulation, confirming Martin's sole custody and primary placement of Jamie and "fifty-fifty" custody and placement of Sara.² Despite Martin's objections, Sandra expressed a desire to keep the support order in place despite the substantial change in placement, and the trial court responded: "It doesn't work that way. You can't get child support for a child [with whom] you have no custody or placement."

¶5 The case went to trial on February 19, 2007. The trial court confirmed its prior approval of the written placement agreement. Nevertheless, the trial court ruled that the "child support will continue to be set pursuant to the July 1, 2005 order" (the temporary order of the family court commissioner) and

² At various stages of this proceeding, the parties and the trial court described Martin's placement with Jamie as "100%," and at other times as "primary placement." The testimony revealed that Jamie had apparently had a falling out with her mother and visited her only occasionally, residing full time with her father.

ordered Martin to pay the monthly sum of \$532. As noted earlier, that order had been calculated under the equal shared placement standard for both children, rather than the split-placement standard.³ In so doing, the trial court acknowledged its order was made “despite the fact that when child support was originally set, it included both children as a shared placement order.” The trial court conceded: “Now that one child is shared and the other is not shared, there might be one theory upon which, without considering the overall family scheme, where mom could owe dad child support.” The trial court nevertheless left the family court commissioner’s calculation in place as part of “the holistic order that I am setting in this case.”

¶6 The trial court’s apparent object was to approximate an equal disposable income for each party. After using the Mac Davis computer program, the trial court concluded that its decision would leave the parties’ monthly disposable income “only about \$100 apart.” The trial court concluded that its decision was “the right formula for this family at this time.”

Property Division.

¶7 By the time of trial on February 19, 2007, the parties had reached a settlement agreement as to a property division, and the trial court indicated approval. Martin contends that the trial court accepted the agreement, but in ruling from the bench at the end of trial, deviated from the agreement in one respect without explanation. This was with respect to the \$2,000 cash payment

³ WISCONSIN ADMIN. CODE § DWD 40.04(3) sets forth the formula for split-placement parents, that is, where parents have two or more children and each parent has placement of one or more but not all of the children.

Martin had agreed to make to Sandra if she filed her 2005 tax return without claiming any dependency exemptions. This \$2,000 cash payment dispute arose because the parties could not agree on who was entitled to claim the children as dependency exemptions on the separately filed 2005 tax returns.

¶8 Martin filed his 2005 tax return, claiming both children as dependency exemptions, based on the fact that he was supporting both children during that tax year. Sandra, who obtained an extension to file her 2005 tax return, objected to Martin claiming both children. The parties eventually resolved the matter by agreeing that Martin would pay Sandra the \$2,000 if she would file “single without claiming the children...” Despite that agreement, Sandra later filed her 2005 tax return, claiming one child as a dependent.

¶9 When the parties, at the October 2006 status conference, debated the equity of these facts, the trial court tentatively ruled: “So he doesn’t owe you 2,000 [dollars] if you didn’t file single without claiming the children.” Then, at the morning session of the trial on February 19, 2007, when Martin challenged Sandra’s remarks as an attempt by her to selectively abide by the property settlement, the trial court stated:

No, she [is] not. Whether she does or not ... the two of you entered into a contract. You gave the contract to me as your resolution on these issues, and you have to live by the contract ... So when you give me an agreement, you ask me to accept the terms and not to pick them apart and that’s what I’m doing. I’m accepting your terms and not picking them apart.

At the end of the afternoon session, however, after the trial court reviewed and approved the specifics of the agreement, it ordered Martin to pay \$2,000 “for the 2005 tax refund equalization” without further explanation. When Martin attempted to address the matter, the trial court indicated that the record was closed.

ANALYSIS

A. *Child Support.*

¶10 The determination of child support is committed to the sound discretion of the trial court. *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. A failure to apply the correct law is an erroneous exercise of discretion. See *Resong v. Vier*, 157 Wis. 2d 382, 387, 459 N.W.2d 591 (Ct. App. 1990).

¶11 The law applicable to the instant case is contained in the Wisconsin statutes. WISCONSIN STAT. § 767.511(1j) (2005-06)⁴ states in pertinent part: “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).” WISCONSIN STAT. § 49.22(9) requires the Department of Workforce Development to publish a standard to be used by courts in determining child support obligations. Section 767.511(1m) provides:

DEVIATION FROM STANDARD; FACTORS. 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.

⁴ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

- (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 USC 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. 767.41.
- (f) The physical, mental, and emotional health needs of the child, including any costs for health insurance as provided for under s. 767.513.
- (g) The child's educational needs.
- (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.

Section 767.511(1n) provides in pertinent part:

DEVIATION FROM STANDARD; RECORD. 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.

¶12 The trial court's use of a computer program to analyze financial information is not error. *See Bisone v. Bisone*, 165 Wis. 2d 114, 122-23, 477 N.W.2d 59 (Ct. App. 1991). Here, however, the trial court used the program primarily to reach an approximate equal division of disposable income between the parties. In computing child support, the trial court has no obligation to equalize the income of the parties. But a disparity in disposable income does not in and of itself make the application of the percentage standards unfair to one of the parties. *Maritato v. Maritato*, 2004 WI App 138, ¶17, 275 Wis. 2d 252, 685 N.W.2d 379.

¶13 The trial court did not find, nor would the record support a finding, by the greater weight of the credible evidence, that a deviation from the child support standards should occur in this case. *See* WIS. STAT. § 767.511(1m). A deviation must be based on unfairness to the children or the parties, and consideration of the relevant factors set forth in § 761.511(1m). Because § 761.511(1j) directs the court to use the percentage standards established by the DWD standards, unless the court finds by the greater weight of the credible evidence that unfairness and other factors justify a different amount, we conclude that the trial court should have used the standards in this case.

¶14 In this appeal, Martin calculated the results of a child support order under the relevant provisions of WIS. ADMIN. CODE § DWD 40 percentage of income standards, applied to the income and placement circumstances, as of the

trial in February 2007. He used income figures for the parties as follows: \$58,000 annually for Martin and \$38,000 annually for Sandra.⁵

¶15 The first step calculation of Sandra's obligation to Martin, Jamie's primary placement parent, is as follows: 17% of \$3166 (Sandra's gross monthly income, which is \$38,000 divided by twelve), which equals \$538.22. WIS. ADMIN. CODE § DWD 40.03(1)(a).

¶16 The first step calculation of Martin's obligation to Sandra, for equal, shared time with Sara, is as follows: 17% of Sandra's monthly income, \$3166, which, as noted above, equals \$538.22; 17% of Martin's monthly income, \$4833 (\$58,000 divided by twelve), which equals \$821.61. Next, we take 1.5 times Sandra's monthly figure, which equals \$807.33, and 1.5 times Martin's monthly figure, which equals \$1,232.42. *See* WIS. ADMIN. CODE § DWD 40.04(2)(b)3.⁶ Then, we note that 50% of her \$807.33 for the equal shared time of Sara comes to \$403.67. Likewise, we take 50% of his \$1,232.42 for the equal, shared time of Sara, which comes to \$616.21. Finally, we subtract Sandra's obligation for Sara (\$403.67) from Martin's obligation to Sandra for Sara (\$616.21), to reach Martin's

⁵ Martin accepted the use of \$58,000 annual income for him and \$38,000 for Sandra. We conclude that these income figures are consistent with the trial court's factual findings for several reasons. First, Sandra does not dispute them. Second, and more importantly, the trial court's written findings of fact in support of the judgment records Sandra's income as \$40,000 (higher than Martin's figure used in the calculation, which works to Sandra's benefit), and is consistent with Sandra's trial testimony. The written findings list Martin's income at "\$57,000-\$62,000." Martin's use of \$58,000, at the lower end of this range, is consistent with the trial court's oral decision on the record, finding Martin's income to be "\$62,000 from 2005 ... a reduced income of about \$58,000 this year...."

⁶ According to the Note following WIS. ADMIN. CODE § DWD 40.04(2)(b)3.: "The 150% accounts for household maintenance expenditures duplicated by both parents, such as a bedroom, clothes and personal items."

first step obligation to Sandra of \$212.54. *See* WIS. ADMIN. CODE § DWD 40.04(2) (determining the child support obligations of shared-placement parents).

¶17 Next, because Sandra is the parent with the greater support obligation under these calculations (\$538.22 for her and \$212.54 for him), she is the “split-placement payer.” WISCONSIN ADMIN. CODE § DWD 40.04(3), which “determine[es] the child support obligations of split-placement parents,” tells us in sub. (3)(c) to: “Offset resulting amounts under par. (b) against each other. The parent with a greater child support obligation is the split-placement payer.”

¶18 Thus, we must subtract Martin’s shared placement obligation of \$212.54 for Sara from Sandra’s obligation of \$538.22 Martin, who has primary placement of Jamie. In doing so, we arrive at net child support due from Sandra to Martin of \$325.68 per month. We have checked the administrative code provisions used, and the resulting calculations. We conclude that Martin’s figures are accurate.

¶19 The award of child support to Sandra is therefore reversed, and the matter is remanded to revise the judgment to provide for a child support award to Martin consistent with the preceding calculations. We point out, however, that although this revision is effective as of the date of the divorce, the trial court retains the discretion to modify the child support as of any date thereafter, consistent with the facts of record and the applicable law.⁷

⁷ We reject Martin’s contention that the revision should be effective as of the date he first became Jamie’s primary placement parent. We do so because he never moved to revise the temporary order, raising the issue only at a status conference. By failing to move for revision, he tacitly accepted the trial court’s determination that the temporary order would remain in effect until the court made new calculations.

B. Property Division.

¶20 Martin also alleges that the trial court erred in awarding Sandra the \$2,000 because such award was contrary to the terms of the stipulated property division. We agree and reverse that portion of the judgment.

¶21 A trial court's property division determination is within its sound discretion, and we uphold such a determination unless it erroneously exercised that discretion. *Steinmann v. Steinmann*, 2008 WI 43, ¶20, ___ Wis. 2d ___, 749 N.W.2d 145. An erroneous exercise of discretion occurs if the trial court makes an error of law, or fails to base its decision on the facts of the case. *Id.*

¶22 The trial court's oversight concerning a single settlement provision is understandable. For several years prior to trial, the parties' dysfunctional relationship involved a failed reconciliation, a mediator, family counselors, a guardian ad litem, at least six different attorneys of record, recorded status conferences to sort through, endless position changes, along with a lot of disorganized and confusing records. Nevertheless, the trial court here unequivocally approved the parties' property division stipulation, but departed from it without explanation at the conclusion of its decision from the bench. The trial court's handwritten findings, conclusions and judgment, undoubtedly made necessary by the fact that the parties were *pro se*, makes no explicit reference to the \$2,000 payment, but recites "prop division pursuant to stip 7/26/06 see attached and trial transcript."

¶23 Because the approved stipulation provided that payment of \$2,000 was due only upon a condition which was not met, and the trial court did not give a reason for the departure from this provision, we reverse and remand that part of the trial court's decision. We conclude that this constituted an erroneous exercise

of discretion. Accordingly, the award to Sandra of that sum is reversed and the matter is remanded to revise the property division eliminating the obligation to pay the \$2,000. The trial court retains the discretion to fashion appropriate relief, should it appear that the money has already been paid. If not paid, the sum can be used to adjust or offset any sums due from Martin to Sandra.⁸

By the Court.—Judgment reversed in part and remanded with directions.

Not recommended for publication in the official reports.

⁸ Martin may have been made responsible to make a larger cash payment of which the \$2,000 was a part.

