COURT OF APPEALS
DECISION
DATED AND FILED

December 17, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2010 **Cir. Ct. No. 2003FA1073**

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

IN RE THE MARRIAGE OF:

JULEE ELLEN FRANKLIN,

PETITIONER-RESPONDENT,

V.

BRIAN AARON FRANKLIN,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Dane County: JUAN B. COLAS, Judge. *Modified and, as modified, affirmed.*

Before Dykman, P.J., Vergeront and Bridge, JJ.

¶1 PER CURIAM. Brian Franklin appeals postdivorce orders which modified his child support obligation by less than he had requested and required

him to make a contribution to the attorney fees of his ex-wife, Julee Franklin. Julee moves for sanctions based on briefing violations. For the reasons discussed below, we affirm the orders of the circuit court but deny the motion for sanctions.

BACKGROUND

¶2 Brian and Julee were divorced in 2004 after eleven years of marriage. At the time of the divorce, Brian was a self-employed carpenter whose largest business came from making crates, and Julee worked for the postal service. The parties had three children, two of whom were autistic and required special care. Pursuant to a marital settlement agreement, the court awarded the parties joint legal custody of the children, with primary physical placement to Julee, and ordered Brian to pay $1,350 per month in child support.

¶3 In 2006, Brian filed a motion to modify the physical placement schedule. After the parties failed to reach agreement in mediation on placement issues, Brian filed an additional motion in 2007 to modify his child support payments. Julee, in turn, moved for an award of attorney fees based on overtrial.

¶4 The parties stipulated that Brian's average income between 2004 and 2007 was $35,000 per year. However, Brian presented testimony from Don Kenney of Franklin Fueling Systems (FFS), Brian's largest customer, that the company was reducing its high volume orders for crates from Brian because it had found a cheaper supplier. Kenney could not estimate how much business FFS would have for Brian going forward since the company would still use him for custom orders. Brian also testified that, to compensate for his reduced crate business, he had started a new full time job at a lumber company that paid $8 an hour, and was in the process of seeking a higher paying job. This reduced his ability to get the children ready for school in the mornings or to go to the school

when one of the boys was acting out, which he had been able to do while self-employed at his shop across from the school. The other major change in the parties' circumstances from the time of the divorce was that Brian had moved out of his parents' home and had his own house with related expenses.

¶5 The circuit court slightly modified the placement schedule to allow Brian a few extra overnights on extended weekends during the school year as recommended by the Family Court Counseling Service, and reduced his child support payment to $1,181 per month, which was still considerably more than the guideline amount. The court rejected many of Julee's claims for overtrial, but did conclude that Brian had presented excessive testimony from Kenney, who was not prepared or able to address the relevant question of what volume of business Brian could actually expect. The court also concluded that Brian should not have pursued his claim for a substantial modification of placement to trial when he did not have any evidence to present that such a modification would be in the best interests of the children. The court awarded compensation for twelve hours of overtrial, based on six hours of actual trial and deposition time and an estimated six hours of preparation time related to those issues.

STANDARD OF REVIEW

¶6 A determination of child support lies within the circuit court's discretion, and the court's decision will not be disturbed on appeal so long as the court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789 (citation omitted).

¶7 An award of attorney fees is also within the circuit court's discretion, and will not be altered on appeal unless the circuit court erroneously exercises its discretion. ***Bisone v. Bisone***, 165 Wis. 2d 114, 123-24, 477 N.W.2d 59 (Ct. App. 1991).

DISCUSSION

Child Support

¶8 The circuit court may modify a child support order upon finding a substantial change in circumstances. WIS. STAT. § 767.59(1f)(a) (2007-08).[1] There is a rebuttable presumption of a substantial change in circumstances when at least thirty-three months have passed since the entry of the last child support order. Section 767.59(1f)(b)2. Upon a showing of a substantial change in circumstances, the same methodology for determining an initial child support award applies to any modification. *See* § 767.59(2)(a).

¶9 The circuit court shall ordinarily determine child support payments according to the percentage standards set forth by the Department of Workforce Development. ***Id.***; WIS. STAT. § 767.511(1j). The court may deviate from the percentage standards, however, if the greater weight of the credible evidence establishes that use of the standards would be unfair to the child or any of the parties. Section 767.511(1m). In considering whether to deviate from the standards, the circuit court should consider the following factors:

(a) The financial resources of the child.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

> (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 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.

Id. If the court determines that use of the percentage standards would be unfair, "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." WIS. STAT. § 767.511(1n).

¶10 Brian does not challenge the placement schedule on appeal. Instead, he argues that the circuit court erred in setting the amount of his child support because it should have applied the shared placement formula in determining the amount of support due under the percentage standard, and because it failed to consider all of the relevant factors or to make a finding of unfairness before deviating from the percentage standard it did apply.

¶11 The shared placement formula comes into play when each parent is awarded at least twenty-five percent of the placement time based on either overnights or equivalent care. WIS. ADMIN. CODE § DWD 40.04(2)(a)(1) (June 2007).[2] "Equivalent care" refers to a period of time which requires a parent to assume basic support costs such as food, shelter, clothing and transportation that are substantially equivalent to what a parent would spend to care for the child overnight. WIS. ADMIN. CODE § 40.02(3) and (10) (June 2007).

¶12 Brian argues that he should be considered to have a shared placement arrangement because he has seventy-eight overnights plus some amount of daytime placement on another seventy-eight days per year, totaling 156, or about forty-three percent of the days in the year. The flaw in Brian's reasoning, however, is that he fails to recognize that the shared placement formula is based upon *either* overnights *or* equivalent care. Brian's seventy-eight overnights are

[2] WISCONSIN ADMIN. CODE § DWD 40 has since been renumbered as WIS. ADMIN. CODE § DCF 150 and has been substantially revised.

less than twenty-five percent of the available overnights during the year, so he does not qualify for shared placement based on overnights. In terms of equivalent care, Julee actually has the children for more time than Brian on many of the overnight days that he is claiming constituted equivalent care, so larger portions of those days would actually be credited to her under an equivalent care analysis. In other words, Brian cannot simply add overnights to any other days in which the time the children spend some time with him. In order to qualify for shared placement under an equivalent care theory, he would need to show that the children are spending more than twenty-five percent of their total time with him, regardless of the number of overnights, based on the proportion of each day spent with each parent. He did not provide the court with an analysis showing that. The circuit court intuitively grasped the concept that Brian was double counting the overnights as if they were also equivalent care when it noted that Brian was requesting credit for three days on weekends, when he only had the children for about forty-eight hours. We conclude that the circuit court properly found that Brian would be required to pay $845 per month under the standard percentage guideline, without applying the shared placement formula.

¶13 The next question is whether the circuit court adequately explained the basis for its award. Brian contends that the circuit court failed to discuss relevant factors or to make a finding of unfairness before upwardly deviating from the guideline amount. He argues that the amount of child support ordered leaves him in poverty and is particularly unfair given that the circuit court acknowledged that Julee earned about thirty percent more than Brian even before Brian's crate business was reduced.

¶14 We disagree that the court failed to consider the relevant factors before making its upward deviation. First of all, much of Brian's argument that

the support award ignored his economic circumstances and left him in poverty is based on the premise that he will be earning significantly less than in past years. However, the court reasonably explained that it was relying on the stipulation regarding Brian's average income over the past few years to determine his current earning capacity because there was too short a time period after his crate business had been reduced and he had taken outside employment to be able to accurately assess what his actual income would be going forward. If Brian is able to supplement wages from his new job with self-employment, he could be earning the same as or more than he was before.

¶15 Secondly, the circuit court did acknowledge that there was a disparity of income in Julee's favor. It simply did not give that factor the amount of weight Brian would have liked. Brian also complains that the court gave consideration to the amount of Julee's budget that was attributed to the extraordinary needs of the two autistic children, without considering that Brian also incurred additional costs relating to the children's health needs. However, the record shows that Julee was much more specific in identifying what her additional costs were. The circuit court did not err in giving more consideration to better developed evidence.

¶16 Next, Brian's argument that the child support award leaves him below the poverty level assumes that his household should be considered somewhere between one and four people. He cites no authority, however, for the proposition that the poverty formula would consider his household to be more than one person, when the children have primary physical placement with their mother. He also appears to be comparing his disposable income against a gross income standard. His argument regarding the poverty level is too undeveloped to merit further discussion.

¶17 In sum, we are satisfied that the record shows that the circuit court was aware of the proper legal standard and was reasonably applying it to the facts before it when it made the child support determination. We see no basis to overturn the court's exercise of its discretion.

Overtrial

¶18 The circuit court found that Brian had overtried the case with respect to testimony from Donald Kenney, Dr. Kenneth Waldron, Teresa King, Sara Kademan, Phil Meissen and parts of his own testimony. We agree with the circuit court's assessment that Kenney's testimony was largely irrelevant because he did not address the central question of what amount of business Brian could expect to receive from his company going forward. We also agree with the court's determination that it was unreasonable to proceed with the other witnesses on the question of a change in placement because none of the witnesses testified that a substantial change in placement would be in the children's best interest and their testimony was unnecessary for Brian's alternate request for a minor modification that was already supported by the Family Court Counseling Service. We are therefore satisfied that the court properly exercised its discretion in awarding a contribution to attorney fees for overtrial. It does appear, however, that the circuit court erroneously calculated the duration of Waldron's deposition as two and one-half hours rather than the one and one-half hours reflected on the transcript. Since the circuit court doubled the actual time spent in trial and depositions to reach the total amount of overtrial time, we conclude that the award for attorney fees should be reduced by two hours, and we direct that this adjustment be made.

Sanctions on Appeal

¶19 Finally, Julee moves for sanctions based upon a number of alleged violations of the Rules of Appellate Procedure in Brian's brief. She claims that Brian has failed to provide citations to the record or legal authorities in several instances and has in other instances misrepresented the state of the record.

¶20 WISCONSIN STAT. RULE 809.83(2) provides this court with the authority to impose sanctions for noncompliance with an appellate rule. However, this court may also choose to excuse a minor rule violation and deny a request for sanctions because any noncompliance is de minimus or nonprejudicial. To do otherwise would invite a flood of motions raising trivial errors that are not an effective use of either the parties' or this court's time. As a practical matter, then, we usually grant motions for sanctions only when a rule violation is so significant as to impede the court's or opposing party's ability to evaluate the arguments made in the brief, or to give the violating party an unfair advantage in the litigation.

¶21 We have reviewed the alleged violations and Brian's responses. We conclude that, while there are a number of places where Brian could have been more careful in his brief, many of the alleged misrepresentations fall within the realm of reasonable characterizations. We therefore decline to impose sanctions.

By the Court.—Orders modified and, as modified, affirmed.

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