COURT OF APPEALS
DECISION
DATED AND FILED

September 2, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2692 **Cir. Ct. No. 2007FA243**

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

IN RE THE MARRIAGE OF:

TAMMY FLYNN,

JOINT-PETITIONER-RESPONDENT,

V.

BENJAMIN JOHN FLYNN,

JOINT-PETITIONER-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Snyder, J.

¶1 PER CURIAM. Benjamin Flynn appeals a judgment of divorce from Tammy Flynn. He contends the trial court erroneously exercised its

discretion when it ordered child support in an amount higher than in the percentage guidelines and ordered him to reimburse Tammy for half of a COBRA payment to which he did not consent and for half of a car payment and a credit card payment which he claims were solely her obligations. We disagree with Benjamin and affirm the judgment.

¶2 Benjamin and Tammy were married in 1996 and divorced on their joint petition in May 2008. They have two sons, Marcus and Dray. Benjamin has two daughters, Chelsea and Jade, from a prior marriage. Tammy is the only mother figure the girls have known. All four children lived with Benjamin and Tammy during the marriage and continue to live with Tammy.

¶3 The family has some atypical expenses. The girls' biological mother has no contact with them and pays virtually nothing on her child support obligation. Jade, now sixteen, has been an Olympic-level gymnast since she was five. Training and national competitions cost about $11,000 a year. Marcus, eleven, was born with encephalopathy and an unknown genetic syndrome. Tammy testified that Marcus functions at the level of a five-year-old due to severe global and cognitive delays, and performs his activities of daily living at the level of a two- or three-year-old. Marcus also has life-threatening allergies, sleep and blood-clotting disorders and gastroesophageal reflux disease, and has medical appointments five to ten times a month.

¶4 Benjamin agreed to pay thirty-one percent of his gross income for child support. *See* WIS. ADMIN. CODE § DCF 150.03(1)(d) (Feb. 2009).[1] Tammy requested an upward deviation equal to forty percent.

¶5 On July 3, 2008, the court entered a fifteen-page Findings of Fact, Conclusions of Law and Judgment of Divorce ("July 3 Findings, Conclusions and Judgment").[2] On July 28, the court vacated the July 3 Findings, Conclusions and Judgment as having been entered in error and reopened the matter. On September 18, 2008, the court filed a five-page "Memorandum Decision of Child Support, Health Insurance Premiums, Joint Debts, and Tax Deductions." In addition to addressing the stated matters, the memorandum decision also ordered entry of the previously vacated July 3 Findings, Conclusions and Judgment.

¶6 Based on the parties' testimony and their written filings, the court found that under WIS. STAT. § 767.511(lm) use of the percentage guidelines was unfair to Tammy and the children because: the commitment for Jade's gymnastics is significant but her accomplishments also may result in significant college scholarship opportunities; the children's extracurricular activities are consistent with those they enjoyed during the marriage; Marcus has extraordinary medical and educational needs; the considerable time Tammy must devote to Marcus' extraordinary needs and the other children's needs and extracurricular activities reduces her earnings; Benjamin's former wife effectively left Benjamin and Tammy to shoulder all financial responsibility for Chelsea and Jade; Benjamin has

[1] All references to the Wisconsin Administrative Code are to the February 2009 version and all references to the Wisconsin Statutes are to the 2007-08 version.

[2] The judgment of divorce was entered on July 3, 2008, but granted on May 28, 2008.

"moved on" and shares living expenses with his girlfriend; Chelsea and Jade requested limited placement with Benjamin; and there is a "huge disparity in income and expenses" between the parties. *See also* WIS. ADMIN. CODE § DCF 150.03(11). The court concluded that an upward deviation was in the best interest of the minor children. Accordingly, the court ordered Benjamin to pay an amount equal to forty percent of his gross income as Tammy requested.

¶7 In addition, the court ordered Benjamin to reimburse Tammy for half of a one-month health insurance premium through COBRA and half of other miscellaneous expenses. The COBRA cost arose because Benjamin had agreed to provide the children's health and dental insurance coverage through his employment. Benjamin lost his job in late 2007. The children's health insurance through that employer would expire on December 31, 2007, and they would not be eligible for coverage through Benjamin's new employer until February 1, 2008. Without Benjamin's consent, Tammy paid $968 for COBRA coverage for the month of January. Concluding the coverage was necessary, the court ordered Benjamin to reimburse Tammy $484 for half of it. It also ordered him to reimburse her $395 for half of a credit card payment and half of one car payment. Finally, the court awarded Benjamin the tax deductions on all four children. Benjamin now appeals the upward deviation from the child support guidelines, the $484 COBRA contribution and the $395 payment.

¶8 A court has broad discretion in setting appropriate child support. ***State v. Dumler***, 2003 WI 62, ¶16, 262 Wis. 2d 292, 664 N.W.2d 525. It may modify the amount of child support under the support guidelines if it 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." ***Id.*** The court first must consider a variety of factors, including the parties' and the children's needs; the best interests

of the children; each parent's earning capacity; and any other factors the court finds to be relevant. *See* WIS. STAT. § 767.511(1m)(a)-(i). If the court does not adhere to the percentage standard, it must articulate the reasoning underpinning the decision to deviate from it. ***Rumpff v. Rumpff***, 2004 WI App 197, ¶14, 276 Wis. 2d 606, 688 N.W.2d 699; *see also* § 767.511(ln)[3] *and* WIS. ADMIN. CODE § DCF 150.03(11)(b).

¶9 Benjamin contends the court erroneously exercised its discretion:

> The trial court failed to consider, or even mention, any of the factors in § 767.511(1n), Wis. Stats., completely failed to state the amount by which the court's order deviates from the guideline amount, failed to make a finding or to give any reasons why the use of the percentage standard is unfair and gave absolutely no rationale for concluding that 40% of Benjamin's gross income is an appropriate amount of child support.

¶10 Benjamin is not looking for a proper exercise of discretion; he is looking for magic words. The memorandum decision states that the parties agreed that Benjamin would pay thirty-one percent of his income until the trial court set the amount and that it increased the amount to the requested forty percent "to compensate Tammy for her extraordinary expenses and limited ability to earn

---

[3] WISCONSIN STAT. § 767.511(1n) provides:

> 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.

income because of Marcus' time[-]consuming needs." Granted, the decision states only the starting and ending percents and not "the amount by which the court's order deviates from the guideline amount," but we refuse to read the statute as requiring the judge to do the math. Further, the court's July 3 Findings, Conclusions and Judgment expressly stated that it found the use of the percentage guidelines "unfair to Tammy and unfair to the children for the following reasons," which it explained in four lengthy paragraphs over two pages and supported with citations to WIS. STAT. § 767.511(lm)(c), (f), (g) and (hs). It also might have cited paragraphs (a), (b), (h) and (hm) because it considered Benjamin's first wife's abdication of her financial duties, both parties' financial resources, fair allocation of the dependency exemptions, and the best interests of the children. The court thoroughly explained its rationale for the upward deviation.

¶11 Nevertheless, Benjamin insists that none of the court's reasons furnish legal support for ordering forty percent. He notes that he already covers Marcus' extraordinary expenses because he provides health insurance coverage and is obligated for fifty percent of any uninsured medical expenses; that Tammy's role as primary caregiver is not a legal basis to deviate from the guidelines; that Tammy's limited work hours are of her choosing because, since the children are of school age, she could work "all day, every day" as well as on weekends when he has placement; that Marcus' daily needs "seem to be more of an emotional … than a financial issue" (we assume he means for Tammy); that a disparity in incomes and expenses does not render him able to pay forty percent; and that the actual disparity is less because Tammy's family assists her financially.

¶12 Again, Benjamin elevates form over substance. The court examined the parties' incomes, expenses and obligations. It compared Tammy's household of five to Benjamin's shared arrangement and found Tammy's daily

responsibilities "mind-numbing." Of the two, Benjamin has more flexibility to increase his earnings. We reject his argument.

¶13 Finally, we disagree that the court "gave absolutely no rationale for concluding that 40% of Benjamin's gross income is an appropriate amount of child support." Implicit in the court's statement that it increased the amount to "the requested 40%" is a credibility finding—i.e., that it accepted Tammy's testimony as to the children's needs, her ability to earn income and what level of child support was necessary. We defer to the trial court even in its implicit credibility determinations. *See* ***Jacobson v. American Tool Cos.***, 222 Wis. 2d 384, 390, 588 N.W.2d 67, 70 (Ct. App. 1998). The record supports the court's implied finding that forty percent was an appropriate level of child support. *See* ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737.

¶14 Benjamin next contends the order that he pay half of the COBRA premium which Tammy secured without his consent also represents an erroneous exercise of discretion. Again we disagree. The court found that Benjamin lost his job and insurance coverage through no fault of his own, that Tammy was concerned about the children being without coverage for even a month and that she purchased the insurance without Benjamin's consent. It heard Tammy's testimony that during the period of COBRA coverage, Dray broke his arm. The court found that the insurance was necessary. We must accept a trial court's factual findings which are not clearly erroneous. ***Bentz v. Bentz***, 148 Wis. 2d 400, 403-04, 435 N.W.2d 293 (Ct. App. 1988). Ordering Benjamin to pay half of the premium was a determination wholly within the trial court's province and was reasonable given the record before it.

¶15 The last item Benjamin challenges is the order that he reimburse Tammy $395 for half of her car payment and half of a credit card payment which she incurred. He argues that the court accepted the Partial Marital Settlement Agreement which allocated these debts to Tammy on the date of divorce, yet ordered him to reimburse her.

¶16 The court found that Tammy sought over $3,000 in reimbursement for various credit card debts. Upon examination, it concluded that only two involved joint debts, and ordered Ben to pay half of what Tammy already had paid on the date of divorce. Thus, the court appropriately gave different treatment to debts paid pre-divorce and those to be paid after. This, too, was a proper exercise of discretion.

By the Court.—Judgment affirmed.

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