COURT OF APPEALS
DECISION
DATED AND FILED

May 3, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2010AP1400
2010AP2562

Cir. Ct. No. 2005FA642

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

IN RE THE MARRIAGE OF:

RHONDA L. JOHNSON,

PETITIONER-RESPONDENT,

V.

ROBERT C. JOHNSON,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Outagamie County: JOHN DES JARDINS, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Robert Johnson appeals from two orders denying his motion to modify child support.[1] Because the circuit court properly exercised its discretion, we affirm.

FACTS

¶2 Rhonda and Robert Johnson divorced in September 2006. They stipulated to the financial terms of the judgment, and the circuit court expressly found "the agreement of the parties to be fair and equitable as to financial issues and to be in the best interest of the minor children, as well as both parties, as to the issues of custody and physical placement." Rhonda and Robert agreed to a fifty-fifty shared time physical placement of their three children, who were then ages nine, five and two. As to child support, the judgment stated: "Based upon the shared time physical placement schedule, the respective incomes of the parties, and the fact that [Rhonda] is providing health and dental coverage for the minor children, neither party will pay child support to the other at this time." According to the judgment of divorce, Rhonda's monthly income was $4,416, and Robert's monthly income was $2,098. Robert moved to modify child support in December 2009. At that time, Rhonda's monthly income was $5,218, and Robert's monthly income was $2,876.

DISCUSSION

¶3 The scope of appellate review is limited. A motion to modify child support is addressed to circuit court discretion. *See* ***Burger v. Burger***, 144

[1] The circuit court denied Robert's request twice, first without a hearing and second, on reconsideration, after both Robert and Rhonda testified.

Wis. 2d 514, 523, 424 N.W.2d 691 (1988). We will not reverse a discretionary determination "if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987). "Indeed … we generally look for reasons to sustain discretionary decisions." ***Burkes v. Hales***, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991) (citation omitted).

¶4 Underlying a discretionary decision may be issues of fact and law. We uphold a factual finding unless it is clearly erroneous, paying proper deference to the circuit court's assessment of the weight and credibility of the testimony. *See* WIS. STAT. § 805.17(2).[2] Appellate courts search the record for evidence to support findings reached by the circuit court, not for evidence to support findings the court did not but could have reached. *See* ***In re Estate of Dejmal***, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). Appellate court deference considers that the circuit court has the superior opportunity to observe the demeanor of witnesses and gauge the persuasiveness of their testimony. *See* ***id.*** at 151-52. We review issues of law de novo. ***Rosplock v. Rosplock***, 217 Wis. 2d 22, 32, 577 N.W.2d 32 (Ct. App. 1998).

¶5 The revision of a child support order is governed by WIS. STAT. § 767.59. A child support order may be revised "only upon a finding of a substantial change in circumstances." WIS. STAT. § 767.59(1f)(a); *see also* ***Zutz v. Zutz***, 208 Wis. 2d 338, 343, 559 N.W.2d 919 (Ct. App. 1997). The first step in a substantial change analysis is a factual inquiry and requires a determination of the

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

parties' financial circumstances when the award was made and a determination of their present financial circumstances. *See* ***Erath v. Erath***, 141 Wis. 2d 948, 953, 417 N.W.2d 407 (Ct. App. 1987). The circuit court's findings of fact regarding the "before" and "after" circumstances and whether a change has occurred will not be disturbed unless clearly erroneous. ***Harris v. Harris***, 141 Wis. 2d 569, 574, 415 N.W.2d 586 (Ct. App. 1987). However, the ultimate conclusion of whether the change is substantial is a question of law that we determine de novo. ***Rosplock***, 217 Wis. 2d at 32.

¶6 The passage of thirty-three months creates a rebuttable presumption that a substantial change in circumstances has occurred. WIS. STAT. § 767.59(1f)(b)2. The rebuttable presumption does not, however, interfere with the court's discretion in modifying support. As we pointed out in ***Zutz***, the statutory presumption "gives a party a prima facie claim that child support should be modified. … [T]he [circuit] court maintains its discretionary authority to hear evidence and evaluate" whether a modification in child support is justified. ***Zutz***, 208 Wis. 2d at 344. The passage of time, alone, does not compel the modification of child support, and the circuit court retains the discretion not to set aside a previous agreement if "the agreement was still serving the needs of the[] child[ren] and was still fair to" the parents. ***Id.*** at 344-45.

¶7 With those standards in mind, we turn to Robert's arguments. Robert first takes issue with the circuit court's initial order in which the circuit court held that, although the income of both parties had increased "a little bit," the change did not "ris[e] to the level of [being] unjust and – or inequitable" to either party and that Robert had "made the agreement" set forth in the judgment of divorce and "[h]e should stay with the agreement." Robert correctly points out that the circuit court did not account for the statutory presumption – under WIS.

STAT. § 767.59(1f)(b)2., the passage of more than thirty-three months since entry of the prior support order constituted a substantial change in circumstances. However, Robert moved for reconsideration and, after hearing testimony from both Robert and Rhonda, the circuit court issued additional findings and held that Rhonda had rebutted the statutory presumption. Because the circuit court's reconsideration effectively supplanted its original order, we need not further consider the merits of the initial order.[3]

¶8 Robert argues that Rhonda's income had increased by 32% while his income had increased only 13% and that such a "substantial" change in the parties' incomes warrants a modification of child support.

¶9 The factual underpinnings of Robert's argument are mistaken. Both in his circuit court and appellate briefs, Robert relies on income figures from sources other than the judgment of divorce, such as those contained in the pre-judgment temporary order or in 2005 social security benefits statements. Robert's reliance on those documents is misplaced. For purposes of a motion to modify child support, the beginning comparison point is the court order establishing the existing order, in this case, the judgment of divorce. Per the judgment of divorce, Rhonda's monthly income at the time of the divorce was $4,416. Her monthly income at the time of the reconsideration hearing was $5,218, an increase of $802. Robert's monthly income at the time of the divorce was $2,098 and his monthly income at the time of the reconsideration hearing was $2,876, an increase of $778.

[3] However, we expressly reject Robert's suggestion that ***Rosplock v. Rosplock***, 271 Wis. 2d 27, 577 N.W.2d 32 (Ct. App. 1998), cannot be relied upon because it involved a change in maintenance whereas this case involves child support. Modifications to both maintenance and child support are governed by WIS. STAT. § 767.59 and, therefore, principles set forth in ***Rosplock*** may be applied to this case.

Thus, the circuit court's finding that both parties' incomes had increased "slightly" and "close to the same percentages" is not clearly erroneous.

¶10 Robert also relies on the fact that the children are older than they were at the time of the divorce. Robert asserts that the children's "financial needs have increased due to their involvement in additional extracurricular activities [and] the development of additional personal needs."

¶11 The aging of the children, standing alone, does not compel a modification of child support. In the divorce judgment, the parties agreed to share "variable expenses" on a 50/50 basis. Those variable expenses expressly included fees for "extra-curricular activities" such as softball and Girl Scouts, activities that Robert cited in his testimony as examples of the children's increased needs. Therefore, we agree with Rhonda that Robert failed to show that additional costs arising from the aging of the children was not contemplated in the judgment of divorce.

¶12 In its reconsideration decision, the circuit court focused on two factors that Robert ignores in his appellate briefs. Rhonda testified that she had twice been diagnosed with cancer and had undergone several surgeries. The circuit court described Rhonda's cancer diagnoses as a "huge black cloud" hanging over her. The circuit court found that Rhonda had "incurred substantial [out-of-pocket] costs related" to her treatments. The circuit court stated that Rhonda's health issues were a "very important factor and a heavy factor" and that it was taking into consideration both the uncertain prognosis and her substantial medical expenses.

¶13 The circuit court also discussed Robert's employment in its decision. The circuit court found that Robert worked "about 30 hours a week" at a radio job,

work that Robert enjoyed and was "very good" at. The circuit court found, however, that Robert "ha[d] the ability to be employed at a higher paying job and he chooses to stay at a lower payer job." The circuit court noted that Robert had tended bar in the past, was "very good and would have no problem getting a part-time job as a bartender." The circuit court found "Robert's income could be expanded by $10,000" and "he shouldn't be working 30 hours a week and then asking somebody else, with health problems, in a job that requires 40 hours, to pay in extra child support." "[B]ecause of the factors that have been presented," the circuit court concluded that Rhonda had "rebutted the presumption" in WIS. STAT. § 767.59(1f)(b)2., and it denied Robert's motion to modify child support.

¶14 Robert makes no effort to refute the circuit court's decision. He does not argue that the factors considered by the circuit court were improper. In his reply brief, Robert contends that the circuit court "failed to explain why or how Rhonda rebutted the presumption" created by WIS. STAT. § 767.59(1f)(b)2. The circuit court's lengthy remarks about Rhonda's health and Robert's employment provide sufficient explanation and support the circuit court's discretionary decision.

By the Court.—Orders affirmed.

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