COURT OF APPEALS
DECISION
DATED AND FILED

October 21, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1250 **Cir. Ct. No. 2011PA50PJ**

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

IN RE THE PATERNITY OF K. O. E.:

STATE OF WISCONSIN AND CRYSTAL R. REDMANN,

PETITIONERS-RESPONDENTS,

V.

BEAU J. ELLENBECKER,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Beau Ellenbecker, pro se, appeals an order modifying physical placement and child support with respect to his son, K.O.E. He raises three main issues on appeal.[1] First, he argues the circuit court applied an incorrect legal standard when modifying Ellenbecker's periods of physical placement. We agree. We therefore reverse in part and remand for the court to reconsider the extent of Ellenbecker's periods of physical placement with his son.

¶2 Second, Ellenbecker argues the circuit court erroneously exercised its discretion by increasing his child support obligation. We conclude the court properly exercised its discretion in this regard, and we affirm that portion of the order requiring Ellenbecker to pay weekly child support of $68.

¶3 Third, Ellenbecker argues the circuit court erred by ordering him to pay $32 per week toward K.O.E.'s health insurance costs under a plan provided by K.O.E.'s mother, Crystal Redmann.[2] Ellenbecker argues he should instead be allowed to add K.O.E. to his own health insurance plan. We conclude the circuit court properly exercised its discretion by requiring Ellenbecker to contribute to the cost of Redmann's plan. However, under the relevant administrative regulation, Ellenbecker's contribution should have been limited to five percent of his income, or $20 per week. We therefore reverse that portion of the order requiring

[1] Ellenbecker's brief also identifies a fourth issue: "game playing" by K.O.E.'s mother and "[the] fact that K.O.E.'s needs are not being put first." The circuit court prevented Ellenbecker from making a record regarding this issue. Nonetheless, Ellenbecker does not develop any legal argument related to this issue on appeal. He does not explain why these assertions, if true, warrant reversal of the circuit court's order. We therefore decline to address this issue. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not consider undeveloped arguments).

[2] Redmann was formerly known as Crystal Thomas. We refer to her as Redmann throughout this opinion.

Ellenbecker to pay $32 per week toward the cost of Redmann's health insurance plan, and we remand with directions that the court modify the health insurance contribution to $20 per week.

BACKGROUND

¶4 K.O.E. was born to Redmann in January 2011. Ellenbecker voluntarily admitted paternity and was adjudicated K.O.E.'s father at a July 13, 2011 hearing. A final judgment of paternity was entered on August 4. Ellenbecker and Redmann were granted joint legal custody of K.O.E. and equal physical placement. Ellenbecker was ordered to pay Redmann biweekly child support of $85.46.

¶5 Redmann subsequently moved for relief from the August 4 judgment, asserting she had only agreed to equal placement and joint legal custody because Ellenbecker "threatened to send sensitive personal information regarding [her] past employment to [her] current employer[.]" Attorney Robin Veternick was appointed guardian ad litem for K.O.E. Following a hearing, the circuit court found that Redmann agreed to equal placement and joint legal custody under duress. The court therefore vacated the August 4 judgment and ordered a custody study.

¶6 A custody and placement hearing was held on April 9, 2012. Based on the testimony presented at the hearing, as well as the outcome of the custody study and attorney Veternick's recommendation, the circuit court granted Redmann sole legal custody and primary physical placement of K.O.E. The court found there was a "significant concern regarding [Ellenbecker's] substance abuse and mental health issues[,]" and it was therefore in K.O.E.'s best interest that Ellenbecker "assume a lesser role in raising the child." Commencing May 17,

2012, the court granted Ellenbecker periods of physical placement every Tuesday and Wednesday from 7:15 a.m. until 5:15 p.m.—a total of twenty hours per week. In addition, the court ordered Ellenbecker to pay Redmann $61 per week in child support commencing June 1, 2012, based on an imputed earning capacity of $9 per hour. Redmann was ordered to provide health insurance for K.O.E. through her employer, and Ellenbecker was ordered to contribute $13.23 per week toward the cost of that insurance.

¶7 In January 2013, Ellenbecker filed an "Order to Show Cause for Revision of Judgment (or) Contempt Proceedings[.]" He asserted Redmann had violated the court's previous orders by failing to provide her home address and updated insurance information. A family court commissioner denied Ellenbecker's motion, and Ellenbecker sought de novo review.

¶8 A de novo hearing was held before the circuit court on April 19, 2013. At the beginning of the hearing, attorney Veternick stated he had "taken a re-look" at the case and had recommendations that went beyond the scope of the family court commissioner's decision. The court inquired whether the parties had any objection to the court considering matters not litigated before the family court commissioner, and neither party objected. The court then proceeded to hear attorney Veternick's recommendations.

¶9 As relevant to this appeal, attorney Veternick noted the current court order provided Ellenbecker with physical placement of K.O.E. during the day each Tuesday and Wednesday. However, Ellenbecker had recently obtained employment that required him to work from 7 a.m. to 3:30 p.m. each weekday, which made it impossible for him to see K.O.E. during the appointed times. Because it was in K.O.E.'s best interest to have some contact with his father,

attorney Veternick recommended that Ellenbecker be granted physical placement every other weekend, from 6 p.m. on Friday until 6 p.m. on Sunday. Attorney Veternick further recommended that the court consider granting Ellenbecker physical placement on Tuesday nights, if the weekend placement proved successful.

¶10 Attorney Veternick noted that Redmann opposed granting Ellenbecker placement on alternating weekends because Ellenbecker had never complied with a previous court order requiring him to obtain a psychiatric evaluation. In light of Redmann's concern, the court suggested granting Ellenbecker physical placement on alternating Saturdays until he provided proof of a psychiatric evaluation, and then modifying placement "to the full weekend." Attorney Veternick agreed that approach would provide an incentive for Ellenbecker to complete the evaluation.

¶11 Ellenbecker was then given the opportunity to address the court. He began by stating the psychiatric evaluation had been completed, and he would provide attorney Veternick with the results following the hearing. Next, Ellenbecker attempted to raise concerns regarding K.O.E.'s health and Redmann's decision to place him in an in-home day care costing only $300 per month. At that point, the court interjected, and the following exchange took place:

> THE COURT: So what? I don't want to even hear any of this. This is ridiculous. You keep on bringing up stuff just to throw it up against the wall. You want the visitation or not? Are you going to sit here and argue about all this kind of crazy little stuff? You know, I'm fed up with it. Grow up. You know, when I hear this kind of stuff it makes me not even want to give you the visitation. But that is—you know, because you are [a] rabble rouser and a trouble maker. You stir the pot with people. We're trying to get cooperation here. How can any cooperation occur if you act like this? You are acting like this in court, I can't imagine what you must be like on your visitation things.

> All you want to do is stick it to [Redmann]. Yeah, that is all you want.
>
> [ELLENBECKER]: Sir—
>
> THE COURT: You want power and control over this situation. Do you want to have visitation or not? You need to start cooperating, buddy.
>
> [ELLENBECKER]: The visitation that I would like is because I'm concerned about [K.O.E.'s] health and safety.
>
> THE COURT: All you want is control. Don't give me that. Okay. I don't like your attitude at all about this. You know, you are winning points here from the Guardian ad Litem and then you come in and act like this, which you have in the past. I mean some of the stuff you've done to her is horrible. It's absolutely horrible and despicable.
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> [ELLENBECKER]: I do agree with you on that. I do. I really do. I do agree with you on that. At the same time, there's been instances on [Redmann's] behalf as well, though. For example, my unemployment has been suspended—
>
> THE COURT: Okay. All right. It's just going to be Saturdays for an extended period of time. I want you to have contact with this child, but I don't like your attitude. And it hasn't changed. That's the way you're going to be acting in court, I can't imagine how it must be to try to deal with you and the child. No. No. No. I've heard enough of that.

Ellenbecker then stated he was "just here to voice concerns about [K.O.E.]," and he did not understand the court's "attitude." The court responded, "No. I don't want to hear any more from you. I've heard enough to know what the situation is and this history, okay, to know what kind of trouble you're causing."

¶12 Redmann then objected to any change in physical placement, noting two years had not passed since the court's final judgment. *See* WIS. STAT. § 767.451(1)(a). However, attorney Veternick opined the proposed change would not violate the two-year rule because it would not actually change the amount of

physical placement Ellenbecker had, it would merely "shift[] it over to time that [Ellenbecker] is available[.]" The circuit court agreed with attorney Veternick that the proposed change would not substantially alter physical placement. The court therefore ordered that Ellenbecker would have physical placement of K.O.E. on alternating Saturdays from 10 a.m. to 6 p.m.—a total of eight hours every two weeks. Ellenbecker objected, arguing he was actually losing time with K.O.E. because the court's previous order granted him twenty hours of placement per week. The court responded, "Yeah. I guess you are losing. Okay. It's not about winning or losing. It's about the best interest of the child. So that would be about the equivalent length of time, so we don't have to worry about a substantial change in circumstance."

¶13 The court then proceeded to consider other issues. As relevant to this appeal, Ellenbecker asserted he should no longer have to contribute to the cost of Redmann's health insurance because he had obtained separate health insurance for K.O.E. through his employer. The court rejected this argument, reasoning Ellenbecker did not have a stable employment history and it was therefore unlikely Ellenbecker would maintain his health insurance for a significant period of time. In addition, because the cost of Redmann's insurance had increased, the court raised Ellenbecker's weekly contribution to $32. The court advised Ellenbecker he was not required to provide separate health insurance for K.O.E.

¶14 Finally, Redmann asked the court to modify child support because the previous support order was based on Ellenbecker's imputed income of $9 per hour, but he had since obtained full-time employment. Ellenbecker confirmed he was currently making $10 per hour. Based on Ellenbecker's increased earnings, the court raised his child support obligation to $68 per week.

¶15 A written order memorializing the court's rulings was entered on May 6, 2013. Ellenbecker moved for reconsideration with respect to physical placement, asserting he had provided psychiatric records and a negative drug test result to attorney Veternick and was complying with his treatment providers' recommendations. Ellenbecker therefore asked the court to follow attorney Veternick's recommendation and grant him physical placement of K.O.E. on alternating weekends. Attorney Veternick confirmed his receipt of Ellenbecker's psychiatric records. The court denied Ellenbecker's reconsideration motion on May 8, 2013, without explanation.

DISCUSSION

I. Physical placement

¶16 On appeal, Ellenbecker first argues the circuit court erred by reducing his physical placement of K.O.E. from twenty hours each week to eight hours every other Saturday. Whether to modify physical placement is committed to the circuit court's discretion. ***Hughes v. Hughes***, 223 Wis. 2d 111, 119, 588 N.W.2d 346 (Ct. App. 1998). Here, however, Ellenbecker argues the court erroneously exercised its discretion by applying an incorrect legal standard. Whether a court applied the correct legal standard is a question of law that we review independently. ***Id.*** at 120.

¶17 It is undisputed that the circuit court's May 6, 2013 order modifying physical placement of K.O.E. was entered less than two years after the final judgment. Under WIS. STAT. § 767.451(1)(a)2., a court may not make any modification to physical placement within two years after a final judgment that would "substantially alter the time a parent may spend with his or her child[,]" unless the party seeking modification "shows by substantial evidence that the

modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child[.]" The circuit court determined § 767.451(1)(a)2. was inapplicable because reducing Ellenbecker's physical placement from twenty hours each week to eight hours every other Saturday would not substantially alter the time he could spend with K.O.E. The court therefore applied WIS. STAT. § 767.451(3), which states that a court "may modify an order of physical placement which does not substantially alter the amount of time a parent may spend with his or her child if the court finds that the modification is in the best interest of the child." The court concluded it was in K.O.E.'s best interest to modify placement.

¶18 Ellenbecker argues the circuit court used an incorrect legal standard when it applied WIS. STAT. § 767.451(3) instead of § 767.451(1)(a)2. As an initial matter, we observe that Redmann failed to file a respondent's brief, and therefore has not responded to Ellenbecker's argument.[3] Failure to file a respondent's brief amounts to a tacit concession that the circuit court erred, *see* ***State ex rel. Blackdeer v. Township of Levis***, 176 Wis. 2d 252, 260, 500 N.W.2d 339 (Ct. App. 1993), and allows us to assume the respondent concedes the issues raised by the appellant, *see* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶19 Further, we agree with Ellenbecker that the circuit court applied an incorrect legal standard when modifying physical placement. Under the previous physical placement order, Ellenbecker had twenty hours of physical placement

[3] The State filed a respondent's brief, but addressed only child support and health insurance costs.

each week—a total of 1040 hours per year. After the court modified placement, Ellenbecker was left with eight hours every other week—a total of 208 hours per year. This was not a minor modification. Reducing Ellenbecker's physical placement by 832 hours per year—or eighty percent— substantially altered the time he could spend with K.O.E.

¶20 As a result, the circuit court should have applied WIS. STAT. § 767.451(1)(a)2. when deciding whether to modify physical placement. Under that statute, the court had to determine whether the proposed modification was "necessary" because "the current custodial conditions [were] physically or emotionally harmful to the best interest of the child[.]" WIS. STAT. § 767.451(1)(a). Because it applied the incorrect legal standard, the court failed to make these required findings. We therefore reverse in part and remand with directions that the court reconsider the extent of Ellenbecker's periods of physical placement with K.O.E.

¶21 Before leaving the topic of physical placement, we feel compelled to comment on the understandable frustration the circuit court expressed with Ellenbecker during the April 19, 2013 hearing. We are well aware a cold record does not fully reflect the tenor of conversations between the parties and the court. Moreover, this case has had a lengthy procedural history, which we have only partially summarized, and has involved a high level of acrimony between the parties. In particular, we agree with the circuit court that some of Ellenbecker's actions against Redmann have been "despicable." However, while we understand the court's frustration, it went too far when it prevented Ellenbecker from making a record regarding issues he believed were pertinent to physical placement. In light of the circuit court's comments about Ellenbecker and its failure to allow Ellenbecker to make a record, its decision to reduce Ellenbecker's physical

placement appears retaliatory rather than based upon a reasoned application of the facts to the law.

II. Child support

¶22 Ellenbecker next argues the circuit court erred by increasing his child support obligation to $68 per week. A court may revise child support only if it determines there has been a "substantial change in circumstances." WIS. STAT. § 767.59(1f)(a). Whether a substantial change in circumstances exists is a question of law that we review independently. ***Greene v. Hahn***, 2004 WI App 214, ¶23, 277 Wis. 2d 473, 689 N.W.2d 657.

¶23 The circuit court concluded a $1-per-hour increase in Ellenbecker's income constituted a substantial change in circumstances. We agree. Unless the amount of child support is expressed as a percentage of parental income, a change in the payer's income "may constitute a substantial change of circumstances sufficient to justify revision of the judgment or order[.]" WIS. STAT. § 767.59(1f)(c). Ellenbecker's child support obligation was not expressed as a percentage of his income.

¶24 Ellenbecker argues his increased income cannot be considered a substantial change in circumstances because a family court commissioner previously concluded a $10,000 increase in Redmann's annual income was not a substantial change in circumstances. However, Ellenbecker does not provide any evidentiary support for this assertion. He simply cites a February 6, 2012 order in which the family court commissioner stated, without further elaboration, "There has been no change in the parties[']circumstances to justify a modification of the child support order currently on file in this matter." Because the record does not contain a transcript of the hearing before the family court commissioner, we have

no way of knowing whether the evidence actually showed a $10,000 increase in Redmann's annual income. We therefore reject Ellenbecker's argument that his $1-per-hour wage increase could not constitute a substantial change in circumstances in light of the family court commissioner's prior decision.

¶25 "Once a substantial change in circumstances has been shown, the trial court must exercise its discretion as to modification of child support." ***Jalovec v. Jalovec***, 2007 WI App 206, ¶21, 305 Wis. 2d 467, 739 N.W.2d 834. We will affirm the court's discretionary decision if it examined the relevant facts, applied the correct standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737.

¶26 Ellenbecker argues the circuit court's increase in child support was an erroneous exercise of discretion for two reasons. First, he argues that, regardless of his increased income, the court should have declined to increase child support based on several other factors. For instance, he asserts he has moved into a bigger, more expensive apartment in order to accommodate K.O.E. He also notes K.O.E. has gotten older. In addition, he asserts Redmann is now married, and he argues her husband's income should be taken into account when calculating child support.

¶27 We decline to consider this argument because Ellenbecker failed to raise it in the circuit court. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (we generally do not consider arguments raised for the first time on appeal). Moreover, Ellenbecker does not provide any record citations supporting his assertions about the cost of his apartment and Redmann's husband's income. We have no duty to scour the record to review arguments

unsupported by record citations. *See* ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990).

¶28 Ellenbecker next argues the circuit court erroneously exercised its discretion when modifying child support because, despite the placement schedule ordered by the court, Ellenbecker has actually had placement of K.O.E. for seventeen to ninety-six hours per month since the May 16, 2013 order. Ellenbecker therefore asserts child support should be calculated using the shared placement formula set forth in WIS. ADMIN. CODE § DCF 150.04(2) (Nov. 2009).

¶29 If true, Ellenbecker's assertion about K.O.E.'s placement might form the basis for a motion to modify child support in the circuit court. It does not, however, permit this court to conclude the circuit court erroneously exercised its discretion at the time of the May 16 order. Ellenbecker's argument was not—and could not have been—raised in the circuit court. Again, we generally refuse to consider arguments raised for the first time on appeal. *See* ***Van Camp***, 213 Wis. 2d at 144.

¶30 Ellenbecker has not convinced us the circuit court erroneously exercised its discretion by increasing his child support obligation. We therefore affirm that portion of the order requiring Ellenbecker to pay $68 per week in child support.

III. Health insurance costs

¶31 Finally, Ellenbecker argues the circuit court erred by increasing the amount he must contribute toward Redmann's health insurance plan to $32 per week. In addition to ordering child support under WIS. STAT. § 767.511, a court must "specifically assign responsibility for and direct the manner of payment of

the child's health care expenses." WIS. STAT. § 767.513(2). As part of that authority, the court may require a parent "to initiate or continue health care insurance coverage for a child[.]" ***Id.*** The court may also order the noninsuring parent to contribute to the cost to enroll the child in a private health insurance plan. WIS. ADMIN. CODE § DCF 150.05(1)(b)3. (Nov. 2009). Such payments are treated as child support and are therefore modifiable, pursuant to WIS. STAT. § 767.59. ***Kuchenbecker v. Schultz***, 151 Wis. 2d 868, 876-77, 447 N.W.2d 80 (Ct. App. 1989) (applying WIS. STAT. § 767.32, the predecessor to § 767.59).

¶32 As discussed above, child support may be modified based on a substantial change in circumstances. *See* WIS. STAT. § 767.59(1f)(a). Here, the circuit court implicitly concluded the increased cost of Redmann's health insurance constituted a substantial change in circumstances, and Ellenbecker does not challenge that conclusion on appeal. Instead, he argues the court erroneously exercised its discretion by ordering him to pay half of Redmann's increased premiums instead of allowing him to purchase separate health insurance for K.O.E.

¶33 We disagree. When explaining its decision, the circuit court observed Ellenbecker did not have a stable employment history—a finding Ellenbecker does not challenge on appeal. The court therefore reasoned Ellenbecker's health insurance, which was provided through his employer, was "not going to be there anyway probably in the future[.]" Thus, if the court granted Ellenbecker's request, it was likely the parties would soon have to return to court for a new order requiring Ellenbecker to contribute to the cost of Redmann's health insurance. Under these circumstances, the court properly exercised its

discretion by ordering Ellenbecker to continue contributing to the cost of Redmann's plan.[4]

¶34 However, as the State concedes, the circuit court erred by requiring Ellenbecker to contribute $32 per week toward the cost of Redmann's plan. A noninsuring parent's contribution to the cost to enroll a child in a private health insurance plan is limited to "5% of the non-insuring parent's monthly income available for child support." WIS. ADMIN. CODE § DCF 150.05(1)(b)3. (Nov. 2009). It is undisputed that Ellenbecker makes $10 per hour, or $400 per week. As a result, his contribution to Redmann's insurance plan should have been limited to $20 per week. We therefore reverse in part and remand with directions that the circuit court modify the amount of Ellenbecker's health insurance contribution to $20 per week.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

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

[4] Ellenbecker asserts the circuit court prohibited him from providing separate health insurance for K.O.E. However, the court did no such thing. It merely ordered Ellenbecker to contribute to the cost of Redmann's plan and advised him he was not required to provide separate insurance for K.O.E.

Ellenbecker also asserts he has now purchased health insurance through the federal Health Insurance Marketplace, so his insurance is no longer contingent on his employment. Because Ellenbecker failed to raise this argument in the circuit court, we will not consider it on appeal. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997).