COURT OF APPEALS
DECISION
DATED AND FILED

October 6, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP220 **Cir. Ct. No. 2003FA8692**

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

IN RE THE MARRIAGE OF:
DAYSHA J. SMITH, PREVIOUSLY KNOWN AS DAYSHA J. LAMBOUTHS,

PETITIONER-RESPONDENT,

V.

ANTWAIN L. LAMBOUTHS,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed*.

Before Kessler, Brennan and Bradley, JJ.

¶1 BRADLEY, J. Antwain Lambouths appeals the circuit court's post-judgment child support order. He contends the circuit court erroneously exercised its discretion when it ordered him to pay $975 under the straight

percentage placement standard instead of $670 under the split/shared percentage placement standard. *See* WIS. ADMIN. CODE §§ DCF 150.03, 150.04 (Nov. 2009). Because the circuit court properly exercised its discretion, we affirm.

BACKGROUND

¶2 Smith and Lambouths were divorced in July 2004. They have four children together. The oldest child is no longer subject to the child support order. One of the remaining three children lives 100% of the time with Smith. The other two children are placed with Smith 66.85% of the time and with Lambouths 33.15% of the time. Since 2004, the parties have been in court on custody and placement matters twelve times. It is undisputed that the parties do not get along and do not communicate effectively.

¶3 Lambouths brought the motion to modify child support that underlies this appeal. The court commissioner determined that Lambouths should pay $975 under the straight percentage placement formula and Smith would be responsible for all variable expenses because of the acrimonious relationship. Lambouths filed a *de novo* appeal to the circuit court requesting that his payment be reduced to $669.93, which he argued was the proper amount based on the split/shared percentage placement formula. At the *de novo* hearing, the circuit court addressed the issue of variable costs with Smith, who explained that she pays all the variable costs for all three children. Smith told the circuit court she did not have a specific list with her, but shared some of the variable costs she could think of offhand:

- $40/week for transportation and food for one daughter;

- $90-105 every three months for contact lenses for each child (all three children wear contact lenses);
- $65 for a swim uniform;
- $200 each for the two younger children for summer camp; and
- student and activity fees and weekly extracurriculars.

¶4 The circuit court said, "[s]o variable costs could be more than the difference between 670 and 970," and Lambouths' lawyer agreed. The issue was whether to order Lambouths to pay the $670 under the split/shared placement formula *plus* variable costs or whether to order Lambouths to pay the $975 under the straight placement formula and have Smith continue to pay all the variable costs out of that amount.

¶5 The circuit court encouraged Smith to submit a more formal accounting of the variable costs after the hearing, but the circuit court issued its decision before Smith did so. There is nothing in the record suggesting Smith submitted any variable expense list after the hearing.

¶6 The circuit court's written decision explained:

- Under the split/shared placement, Lambouths would be required to pay $690/month.[1]

[1] Lambouths questions why the circuit court used $690, pointing out that under the split/shared placement formula, his monthly payment would be $669.93, which rounded to the nearest dollar is $670. The circuit court used both $670 and $690 at the *de novo* hearing, but used $690 in the written order. It is unclear why the circuit court used $690 instead of $670. This $20 distinction does not make a difference in our opinion.

- Under the straight placement formula used by the court commissioner, Lambouths would be required to pay $975/month.[2]

- It considered the factors it found relevant under WIS. STAT. § 767.511 (2013-14)[3] and determined that the use of the split/shared formula was unfair for the following reasons: (1) "the parties have demonstrated the inability to co-parent on major decisional points"; (2) Smith has one child 100% of the time and the other two children "twice as many overnights" as Lambouths; (3) Smith "pays all of the variable expenses for the 3 children."

¶7 Based on these reasons, the circuit court found the straight percentage placement payment of $975 with Smith being responsible for all the variable expenses for all three children was the most reasonable option. Lambouths appeals.

DISCUSSION

¶8 The amount of child support "is committed to the sound discretion of the trial court and we will affirm the court's discretionary act if the trial court examined the relevant facts, applied a proper standard of law, and used a rational process to reach a conclusion that a reasonable judge could reach." ***Rumpff v. Rumpff***, 2004 WI App 197, ¶10, 276 Wis. 2d 606, 688 N.W.2d 699. If a circuit

[2] Lambouths also argues there is no explanation as to where the circuit court got the $975 figure. The circuit court found that Lambouths' gross monthly income was $3364 and 29% (the correct percentage for three children) of that amount is $975. We reject his contention that there is no evidence as to where the $975 figure came from.

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

court "does not explicitly state its reasons for a child support order, we may search the record for reasons to sustain the trial court's discretionary decision." ***Id.***, ¶14.

¶9 Lambouths argues the circuit court erroneously exercised its discretion by ordering him to pay child support under the straight percentage placement formula even though the facts here involve a split and shared placement scenario. He argues the circuit court ordered the payment without considering the factors in WIS. STAT. §§ 767.511(1m) & (1n).

¶10 WISCONSIN STAT. § 767.511(1m) allows the circuit court to deviate from the presumptive percentage standard if after considering the relevant statutory factors, 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." Subsection (1m) lists the following factors:

> (a) The financial resources of the child.
>
> (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 child 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.

¶11 WISCONSIN STAT. § 767.511(1n) provides:

> 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 circuit court referenced the factors in WIS. STAT. § 767.511(1m) and specifically cited paragraph (1m)(i), which as noted above allows the circuit court to consider "[a]ny other factors which the court in each case determines are relevant." The circuit court here clearly thought the relevant factors making the split/shared percentage formula unfair were: (1) the acrimonious relationship of the parties, who were not communicating or co-parenting well as evidenced by their frequent motions and trips to court; (2) one child living 100% of the time

with Smith and the other two children spending twice as many nights with Smith; and (3) Smith was paying all the variable expenses for these three children. The circuit court is not required to discuss all the factors enumerated in § 767.511(1m), but must consider the ones relevant to the case. ***State v. Alonzo R.***, 230 Wis. 2d 17, 28, 601 N.W.2d 328 (Ct. App. 1999) ("A court need consider only those factors that are relevant."). Here, the circuit court considered the factors it found most relevant.

¶13 In searching the record to uphold the circuit court's discretionary determination, we note that these parents are described as "combative" and unable to communicate. There was great concern about using the split/shared percentage because it requires cooperation and communication by these parents *every* month to share the variable costs and/or pay the costs. Neither the court commissioner nor the circuit court believed this to be a reasonable option. The circuit court discussed examples of the variable costs and explained that the variable costs each month for the three children may exceed the difference between the $975 payment under the straight percentage formula and the $690 payment under the split/shared percentage formula. The record shows that the circuit court did properly consider factors under WIS. STAT. § 767.511(1m) in setting child support. The circuit court did not go through each factor one by one; instead, it skipped directly to the factors it found most relevant to the particular facts. This is permitted under the law, *see* ***Alonzo R.***, 230 Wis. 2d at 28, and most likely the result of the circuit court trying to effectively administer justice in a very busy family court system to parties who have returned to court twelve times.

¶14 We also conclude that the circuit court satisfied its obligations under WIS. STAT. § 767.511(1n), which requires it to state the dollar amount under the percentage standard, the amount the circuit court's award deviates from that

standard, its reasons as to why the presumptive standard is unfair, and its reasons and basis for the deviation. Here, the circuit court specifically stated the dollar amount under both the straight percentage standard—$975—and the dollar amount under the split/shared percentage standard—$690. Although it did not specifically state the difference between these two amounts, the amount is easily computed by subtracting one from the other to get $285. The circuit court stated its reasons for deviating from the split/shared percentage and it explained why it found the $690 amount to be unfair. It specifically told Lambouths at the *de novo* hearing that the difference between these two amounts could cover the monthly variable expenses for all three children. The circuit court further explained in its written order the reason for deviation:

(1) "the parties have demonstrated the inability to co-parent on major decisional points" suggesting that getting an agreement each month on variable expenses would be impossible; and

(2) the "mother has full placement and support obligations for one of the three children, twice as many overnights as respondent father for the remaining 2 children … and pays all of the variable expenses for the 3 children."

¶15 The circuit court found it would not be reasonable or fair under these circumstances to use the split/shared placement formula. We conclude the circuit court reasonably exercised its discretion when it imposed child support under the straight percentage formula and ordered Smith to be responsible for all three children's variable expenses. *See* ***Rumpff***, 276 Wis. 2d 606, ¶16 (Where the circuit court properly exercises its discretion with evidence in the record to support

it, we will affirm a circuit court's decision to order payment under the straight percentage formula instead of the shared percentage formula.).

¶16 Lambouths cites the unpublished case of ***Wolfe-Ginter v. Ginter***, No. 2009AP2862, unpublished slip op. (WI App July 29, 2010), because ***Wolfe-Ginter*** held the circuit court erroneously exercised its discretion in ordering a child support payment based on the straight placement formula instead of the shared-payer placement formula. ***Id.***, ¶1. There, the circuit court ordered the father to pay 29% of his income in child support, which was $1117/month. ***Id.***, ¶6. Under the shared placement formula, the father would have paid $195/month, plus $94/month in variables, resulting in a difference of $828/month. ***Id.***, ¶¶6, 18 & n.6. We concluded in ***Wolfe-Ginter*** that the circuit court failed to comply with WIS. STAT. § 761.511(1n) by not identifying the amount of support under the shared placement formula or discussing variable expenses. ***Wolfe-Ginter***, No. 2009AP2862, unpublished slip op. ¶18. We held that the substantial difference of $828 without any evidence in the record to justify the amount was unreasonable and an erroneous exercise of discretion. ***Id.***, ¶¶18, 20.

¶17 Lambouths' case is distinguishable from ***Wolfe-Ginter***. Here, the circuit court identified the amount of support under both formulas, it addressed variable expenses, and it provided sufficient reasons for making the award that it did. The difference between the two amounts is smaller, $285/month, and there is evidence in the record to support variables close to that amount. The circuit court's decision ordering the straight placement formula, with Smith paying all the variable expenses for all three children, was reasonable and supported by the record. The circuit court did not erroneously exercise its discretion.

By the Court.—Order affirmed.

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