COURT OF APPEALS DECISION DATED AND FILED

May 2, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP438 **Cir. Ct. No. 2002PA53**

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

IN RE THE PATERNITY OF COLT T. HARTWICH:

TIMOTHY L. HARTWICH,

PETITIONER-RESPONDENT,

V.

MICHELLE M. PETERSON, N/K/A MICHELLE M. O'CONNELL,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Chippewa County: THOMAS J. SAZAMA, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Michelle O'Connell appeals a child support order. The trial court applied both the serial-family payer rule and the shared placement formula and set the amount of child support at $10 per month, even though

Timothy Hartwich pays $1,050 per month for another child born subsequently but who obtained a support order first. O'Connell alleges the support award in the present case: (1) is fundamentally unfair; (2) is based upon a misapplication of child support guidelines; (3) contravenes legislative intent; and (4) violates constitutional equal protection and due process guarantees. O'Connell also contends the court erred by refusing to impute income to Hartwich. We reverse and remand for further proceedings consistent with this opinion.

Background

¶2 Colt Hartwich was born on March 30, 1997, but there was no immediate adjudication of paternity. On September 11, 2002, Hartwich filed the present action to establish paternity and address other corollary issues such as child support. On October 23, 2002, O'Connell filed a response and counterclaim seeking custody and placement of Colt, and "an award of child support." A temporary order was entered on November 21, 2002, addressing placement while the action was pending. The issue of legal custody was reserved, and child support was not addressed. By this time, Colt was five and one-half years old.

¶3 On November 25, 2003, the parties executed a written stipulation that established Hartwich as Colt's father and gave O'Connell sole legal custody and primary placement of Colt. The parties also agreed to alternate periods of placement with Hartwich 27% of the time. The stipulation further provided that Hartwich pay interim child support in the sum of $650 per month, subject to further review and re-establishment. The stipulation was approved and incorporated into a May 17, 2004 order. Issues remaining to be decided were the amount of the final child support order and the effective date for the commencement of the support order. A hearing was conducted on May 13, 2004.

It appears the guardian ad litem was not present. Testimony was taken as to the income and assets of both parties. The testimony at the hearing came solely from Hartwich and O'Connell. The vast majority of the testimony concerned whether to impute income to Hartwich from his assets.

¶4 Hartwich testified at the hearing that while this action was pending, he was ordered to pay child support on behalf of another child, Alyna, who was then two years old.[1] Hartwich was asked several questions on direct examination with regard to the child support payments on behalf of that child:

> Q: Mr. Hartwich, you are currently paying child support on behalf of another child, is that right?
>
> A: Yes.
>
> Q: What is that child's name?
>
> A: Alyna Hartwich.
>
> Q: When were you first ordered to pay child support on behalf of Alyna?

[1] Hartwich insists in his brief that O'Connell does not cite any portion of the record where the date of the birth of Hartwich's other child, Alyna, is established, and therefore O'Connell's arguments based upon birth order are made without proper citation to the record and are in violation of WIS. STAT. § 809.19(1)(d) and (e). As such, Hartwich insists the arguments should be stricken. In this particular instance, O'Connell provided a citation to the record in footnote 1 of her reply brief. We admonish both counsel in this case based upon the briefs as a whole that assertions of fact in an appellate brief that are not properly demonstrated to be part of the record on appeal will not be considered. *See* ***Nelson v. Schreiner***, 161 Wis. 2d 798, 804, 469 N.W.2d 214 (Ct. App. 1991). Here, numerous citations in the briefs are to records generally, with no citation to page or line. It should be clear to all lawyers that appellate briefs must give references to pages of the record on appeal for each statement and proposition made in the appellate brief. ***Haley v. State***, 207 Wis. 193, 198-99, 240 N.W. 829 (1932). A reviewing court is not required to sift through the record to support a party's contentions; the rules make it clear that a party's brief must make appropriate references to the record on appeal. ***Siva Truck Leasing v. Kurman Distribs.***, 166 Wis. 2d 58, 70 n.32, 479 N.W.2d 542 (Ct. App. 1991); *see also* WIS. STAT. §§ 809.19(c), (d) and (e). Moreover, many arguments in the briefs are unsupported or insufficently supported by legal authority, and in this regard we direct the party's attention to our decision in ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980).

> A: I don't remember, two years ago.
>
> Q: November of 2002?
>
> A: Yes.
>
> Q: How much do you pay per month?
>
> A: $850 a month.
>
> Q: Are you also required to contribute to daycare expenses for Alyna?
>
> A: Yes.
>
> Q: That is pursuant to the Court's order?
>
> A: Yes.
>
> Q: How much do you pay per month for child care?
>
> A: It varies, but it's around $200 or $220.
>
> Q: $220 per month?
>
> A: Yes.
>
> Q: And those expenses are included in your statement of expenses on page 3, is that right?
>
> A: Yes.

¶5 The parties allege the order for Alyna was entered in Eau Claire County but the record does not contain an Eau Claire County child support order. Hartwich was not cross-examined with regard to the child support paid on behalf of Alyna, and there was no evidence introduced by either party as to the income level used to establish the child support of $1,050 per month.[2] Alyna was born

[2] The date of the alleged Eau Claire County order is unclear. The evidence also varies with regard to the childcare payment in Eau Claire County. The testimony at the hearing indicates Hartwich paid "around $200 or $220." The statement of expenses received into evidence indicated childcare expenses of $200 per month. Moreover, Hartwich's Demonstrative Exhibit A, submitted to the court with his written closing argument, indicated $2,400 yearly for child care expenses, which equates to $200 per month. For purposes of our discussion, we will utilize $200 per month as the amount for childcare expenses under the Eau Claire County order.

after Colt, but her child support order was apparently entered before a child support order was entered for Colt.

¶6 At the conclusion of the hearing, the trial court requested written closing arguments from the parties on the issue of imputed income. Hartwich indicated his assets were valued at approximately $1.1 million, but claimed a salary of only $30,000 from a snow removal business. Despite his assets, Hartwich contended that he could not make ends meet.

¶7 Hartwich appended to his written closing argument a "demonstrative exhibit," which essentially was his proposed calculation of child support. Hartwich sought to deduct his support obligation for Alyna pursuant to the serial-family payer rule, and further sought to reduce his support to reflect the nights Colt spent with O'Connell pursuant to the shared placement formula. Hartwich's calculations resulted in a proposed $10 per month net payment for Colt's child support.

¶8 The trial court issued a memorandum decision dated August 27, 2004. The decision focused on whether to impute income from Hartwich's assets. The court found that Hartwich's assets totaled approximately $1.1 million, primarily from investing profits from previous business ventures in real estate and other investments. The court also accepted Hartwich's contention that his income was $30,000 yearly. However, the trial court rejected O'Connell's request to impute income from Hartwich's assets. The court adopted the child support calculations set forth in the demonstrative exhibit appended to Hartwich's written closing arguments. The court deducted $12,600 for Alyna's child support from the $30,000 income and then also deducted for shared time placement for Colt. It ordered child support payments for Colt of $10 per month.

¶9 On September 17, 2004, O'Connell sought post-trial relief via motions for reconsideration and a new trial. O'Connell argued the memorandum decision was not based upon all available evidence and was a misapplication of the child support guidelines contained in WIS. STAT. § 767.25(1m).[3] O'Connell contended it was "glaringly unfair" to require Hartwich to pay "less than 1% of the amount Mr. Hartwich pays per year to the child from the first support obligation." O'Connell argued alternatively that if the court did not misapply the guidelines, the statute unconstitutionally denied equal protection and due process simply because Colt was not the child of an intact family or first in line to the courthouse for a paternity adjudication. O'Connell also continued to insist that the trial court erred by refusing to impute income to Hartwich's assets. The trial court entered findings of fact, conclusions of law and an order denying post-trial motions on December 28, 2004. This appeal followed.

Standard of Review

¶10 The calculation of child support is entrusted to the discretion of the trial court and is not disturbed on review unless there has been an erroneous exercise of discretion. A discretionary determination is upheld as long as the court examined the relevant facts, applied a proper standard of law, and reached a conclusion a reasonable judge could reach, using a demonstrated rational process. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. The application of a statute or administrative rule presents a question of law that we review without deference to the trial court. ***Id.***, ¶14.

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[3] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise indicated.

Discussion

¶11 Ordinarily, the "straight percentage" standard for child support is determined using WIS. ADMIN. CODE § DWD 40.03(1), which applies specific percentages to a parent's monthly income according to the number of children, such as 17% for one child and 25% for two children.[4] Section DWD 40.04 provides that child support "may be determined under special circumstances" according to prescribed formulas that reduce the amount of support determined under § DWD 40.03(1).

¶12 One of the "special circumstances" under § DWD 40.04 is that of the shared-placement payer, where the child's placement is shared between the parents, as determined in § DWD 40.04(2). Another special circumstance is that of the serial-family payer, where the payer has more than one family. *See* § DWD 40.04(1).

¶13 The parties do not dispute that Hartwich is a shared-placement payer or the application of the shared-placement formula. We therefore turn to the issue of whether the trial court erred in also applying the serial-family payer formula to reduce Hartwich's child support obligation.

¶14 This court observed in ***Randall v. Randall***, 2000 WI App 98, ¶15 n.5, 235 Wis. 2d 1, 612 N.W.2d 737, that the special circumstances formulas are

[4] We observe that WIS. ADMIN. CODE ch. DWD 40 was revised and renumbered, effective January 1, 2004. The Note to § DWD 40.01 indicates that "[a] modification of any provision of this chapter shall apply to orders established after the effective date of the modification." The parties have not briefed the issue, but the record reveals the parties used the current ch. DWD 40 guidelines, and our references to ch. DWD 40 are therefore to the current version.

mandatory for determining child support unless the court finds them unfair. When presented with a party's challenge to the application of a special circumstances formula, circuit courts in exercising discretion are to consider the statutory factors in WIS. STAT. § 767.25(1m), set forth below,[5] to determine whether the use of the

[5] WISCONSIN STAT. § 767.25(1m) provides:

> (1m) Upon request by a party, the court may modify the amount of child support payments determined under sub. (1j) if, after considering the following factors, the court 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:
>
> (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 U.S.C. § 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. 767.24.
>
> (f) The physical, mental and emotional health needs of the child, including any costs for health insurance as provided for under sub. (4m).

(continued)

formula is unfair to the child or to the parents.[6] *See* ***Randall***, 235 Wis. 2d 1, ¶15. If the court makes such a finding of unfairness, it "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. § 767.25(1n).

¶15 In the present case, the record is unclear as to whether the applicability of the serial-payer formula was raised at trial, and the trial court merely stated: "I will adopt the calculations shown on [Hartwich's] demonstrative exhibit attached to his written argument, a copy of which is attached hereto, to establish Hartwich's current child support order." The court did not consider in its memorandum decision the required statutory factors under WIS. STAT. § 767.25(1m).

> (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.

[6] We noted in ***Randall*** that requiring a circuit court to determine the child support obligation of shared-placement parents appeared to conflict with the discretionary "may" contained in the introductory sentence to WIS. ADMIN. CODE § DWD 40.04(2). However, we were bound by our supreme court's decision in ***Luciani v. Montemurro-Luciani***, 199 Wis. 2d 280, 295, 544 N.W.2d 561 (1996). *See* ***Randall v. Randall***, 2000 WI App 98, ¶15, 235 Wis. 2d 1, 612 N.W.2d 737.

¶16 Regardless, the unfairness issue was clearly presented to the trial court by O'Connell in the motion and brief in support of reconsideration, and the trial court specifically ruled on the issue. However, the trial court again merely concluded without analysis or discussion that it "properly calculated the amount of child support pursuant to the provisions of WIS. ADMIN. CODE § [DWD] 40.04," and that "[t]here is insufficient evidence to support a deviation from the application of the percentage standards required by § 767.25, Wis. Stats."

¶17 In order to properly exercise discretion justifying a disparity where the child support award for one child is $1,050 per month and the award for another child is $10 per month, we conclude the trial court must consider the statutory factors in WIS. STAT. § 767.25(1m), employ a process of reasoning based on the facts of record and reach a conclusion based on a logical rationale. *See* ***Luciani v. Montemurro-Luciani***, 199 Wis. 2d 280, 295, 544 N.W.2d 561 (1996). The circuit court's articulation of its reasoning process is essential to reach a reasonable determination and to aid reviewing courts to determine whether the decision was an appropriate exercise of discretion. ***Id.*** The trial court erroneously exercised its discretion by failing to consider the statutory factors and articulate its reasoning in this case. Accordingly, we reverse and remand for a redetermination of Hartwich's child support obligation.

¶18 Hartwich insists that O'Connell had the burden to present evidence at trial to show that applying the serial-family payer formula would be unfair. Hartwich contends that O'Connell failed to meet her burden of proof on the issue of unfairness, and the trial court was bound to reduce Hartwich's obligation by the actual amount of the existing support order.

¶19 O'Connell responds in her reply brief that "[i]t cannot be O'Connell's burden because she would never be able to meet that burden, not having standing in [the Eau Claire] proceeding, and not being able to access that information." O'Connell claims that paternity proceedings are confidential and thus she could never prove such issues as whether Hartwich disclosed different financial information to the mother in the alleged Eau Claire County case, or whether the court in the other case imputed income for any reason.

¶20 We need not reach the issue of whether O'Connell would ever be able to demonstrate unfairness, due to confidentiality or otherwise. That issue is unsupported by citation to legal authority and is otherwise inadequately briefed in this court. On remand, the trial court may decide the issue upon proper briefing if necessary.

¶21 We acknowledge that the party requesting the departure from the percentage standards bears the burden of proof before the trial court. ***Raz v. Brown***, 213 Wis. 2d 296, 303, 570 N.W.2d 605 (Ct. App. 1997). However, we disagree with Hartwich that the trial court was bound in this case by the serial-family payer rule to reduce Hartwich's support obligation by the amount of the existing support obligation. Rather, when applying the statutory factors, the court was free to refuse to apply the serial-family payer rule if, after consideration of the enumerated factors, it determined by the greater weight of the credible evidence that use of the rule would be unfair to the child or one of the parties. *See* WIS. STAT. § § 767.25(1m)(a)-(i). Child support guidelines should not be mechanically applied. It was the trial court's responsibility in the exercise of its discretion to balance all of the relevant factors when determining the child support award in this case.

¶22 Moreover, the extension of Hartwich's argument is troubling because it appears to encourage a race to the courthouse. The child from the first support order receives the full benefit of the payer's income, and the amount available for the support of subsequent children diminishes, if the amount of the existing child support obligation is used to automatically reduce the obligation being calculated. As the number of multiple family situations increase, the need for circuit courts to properly exercise discretion when considering the statutory factors set forth in WIS. STAT. § 767.25(1m) becomes more and more imperative in order to avoid unfairness in the context of multiple support obligations.

¶23 Even more problematic is that the trial court applied without analysis a $12,600 reduction for the alleged Eau Claire County obligation that was obviously based upon a higher income than the $30,000 income determined in this case. Every subsequent child is stuck with reductions based on an existing child support order, even when the existing award is based upon a different finding of income. On this record, basic fairness required that, at the very least, the serial-family payer analysis take into consideration the income level used to establish the first support order. Upon remand, the trial court in its discretion may decide whether to take further evidence.[7] But on the evidence in this record, we conclude that applying the serial-family payer formula was an erroneous exercise of discretion.

¶24 Moreover, it is unclear on this record whether Hartwich is a serial-family payer. "Serial-family payer" is defined in WIS. ADMIN. CODE § DWD

[7] Nothing prevented the trial court from accepting additional evidence after O'Connell moved for reconsideration. *See* ***Salveson v. Douglas County***, 2000 WI App 80, ¶¶41-43, 234 Wis. 2d 413, 610 N.W.2d 184; *see also* WIS. STAT. § 805.17(3).

40.02(25) as "a payer with an existing legal obligation for child support who incurs an additional legal obligation for child support in a subsequent family as a result of a court order." "Payer" is defined in § DWD 40.02(24) as "the parent who incurs a legal obligation for child support as a result of a court order."

¶25 O'Connell argues that it was not until after he filed his paternity action and after O'Connell counterclaimed for support that Hartwich was ordered to pay child support by the Eau Claire County court. Thus, O'Connell asserts Hartwich did not have an existing legal obligation for child support and was not a serial payer at the time O'Connell requested support. Hartwich responds that it is undisputed that at the time of trial, he had a legal obligation to support Alyna.

¶26 The legal question of what date or dates are relevant in determining serial payer status was not briefed in the trial court, nor has either party provided us any authority on appeal. This legal issue, however, is premature at this point because the record does not clearly establish the factual issue of the date of the alleged Eau Claire order. On remand, the trial court may consider whether the definition of "serial-family payer" is met under the facts as established.

¶27 There also appears to be a question of whether Hartwich is a serial-family payer because Colt is arguably not part of "a subsequent family" pursuant to the definition of "serial-family payer" under WIS. ADMIN. CODE § DWD 40.02(25). We recognize that the applicability provision of § DWD 40.04(1) was amended to add the phrase "a subsequent family *or subsequent paternity judgment or acknowledgment*." (Emphasis added.) However, this additional phrase does not appear to have been added to the definition of "serial-family payer" in § DWD 40.02(25). These issues were not argued or briefed by the parties. Whether "subsequent family" must be read in light of the amended applicability provision

is also an issue that was not briefed. The circuit court may examine these issues on remand if appropriate.

¶28 We turn next to the issue of imputed income. The trial court refused to impute a reasonable earning potential from Hartwich's $1.1 million in assets. A court may impute income from assets if the parent has ownership and control over real or personal property, the parent's assets are underproductive, and at least one of the following apply: the parent has diverted income into assets to avoid paying child support, or income from the parent's assets is necessary to maintain the child or children at the standard of living they would have had if they were living with both parents. *See* WIS. ADMIN. CODE § DWD 40.03(4)(a).

¶29 The trial court found that Hartwich had ownership and control of real and personal property and that his assets were underproductive. The court then stated: "When one first listens to a description of and then studies Mr. Hartwich's financial circumstances, one is immediately inclined to conclude that he is pretty well-off and can afford to pay a significant chunk of money for child support. I have been inclined to do so in this matter."

¶30 However, the trial court next stated that after taking a "second, closer look" at the evidence and the Wisconsin Administrative Code requirements for imputing income, "I am not able to fit these circumstances into the requirements for imputation of income." The court concluded that Hartwich did not divert assets to avoid paying child support and that the income from Hartwich's assets was not necessary to maintain Colt at the standard of living Colt would have if he were living with both parents together. The court reasoned that Hartwich commenced the action, which "is hardly something someone trying to avoid paying child support would do." The court also emphasized that most of

Hartwich's assets were purchased or acquired before Colt was born. The court also noted that O'Connell had not testified that she and Colt "enjoy less now than when they resided with Mr. Hartwich or even that they would be better off financially if they lived with him."

¶31 It does not follow that because a parent commences an action for paternity and child support, the parent is not diverting income to avoid paying child support. Moreover, the court provided no authority to conclude that the acquisition of assets pre-birth is determinative for imputing income under the administrative regulations. In addition, the court did not address the evidence that Hartwich continued to infuse large sums of money into unprofitable assets while the child support claim was pending. Given the court's specific finding as to unproductive assets, the abbreviated discussion regarding the diversion of Hartwich's assets is not an appropriate exercise of discretion.

¶32 Finally, the trial court refused to impute income because the court found there was no evidence that imputing income was necessary to maintain Colt at the standard of living he would have if he were living with both parents. However, the imputation of income requires that only one of the factors of WIS. ADMIN. CODE § DWD 40.03(4)(a)2, apply. Nevertheless, the trial court's decision does not indicate whether it considered that O'Connell's expenses apparently exceeded her income. We therefore conclude the trial court erroneously exercised its discretion on the issue of imputation of income.

¶33 Because we conclude the trial court erroneously exercised its discretion, we need not reach the issues of whether the application of the serial-

family payer formula in this case resulted in a violation of the constitutional guarantees of due process and equal protection.[8] The court will not ordinarily reach constitutional issues when the resolution of other issues disposes of the appeal. ***Labor & Farm Party v. Elections Bd.***, 117 Wis. 2d 351, 354, 344 N.W.2d 177 (1984).

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.

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[8] O'Connell appears to argue that equal protection precludes a first born or adjudicated child from enjoying a better standard of living than a child from a subsequent family, which purportedly would not be the case were the children from an intact family and subject to the straight percentage standard in WIS. ADMIN. CODE § DWD 40.03(1). In Wisconsin, a payer may not use the provisions of the serial-family payer rule as a basis for seeking modification of an existing order based upon a subsequently incurred legal obligation for child support. *See* WIS. ADMIN. CODE § DWD 40.04(1)(a). The apparent public policy of the serial-family payer rule in Wisconsin is to first consider the support obligation of the child "first in time," defined as the earlier born child or the child for which the first legal obligation is incurred. *See* Carlton D. Stansbury, *Which Came First? The Serial Family Payer Formula*, Wis. Lawyer, April 1995, (Magazine), at 18-19. By contrast, other states' guidelines permit a reduction of child support because of subsequent family children, stating that obligors have the same duty to support both prior and subsequent children. *See* Susan A. Roerich, Comment, *Making Ends Meet: Toward Fair Calculation of Child Support When Obligors Must Support Both Prior and Subsequent Children*, 20 WM. MITCHELL L. REV. 967, nn. 138-141 (Summer 1994). In addition, commentators have stated that as the number of multiple family situations continues to increase, the calculation of child support is becoming increasingly complicated, and the problem may even become more complex. *See, e.g.*, Stansbury, *supra*, at 15. The parties cite no Wisconsin case discussing equal protection as applied to the straight percentage standards contained in WIS. ADMIN. CODE § 40.03(1) and the serial-family payer standards contained in § DWD 40.04(1).