

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 10, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2006AP2488

Cir. Ct. No. 2000PA5589

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE PATERNITY OF M.W.P.:

DAWN M. PASNIAK,

PETITIONER-RESPONDENT,

v.

DAVID E. BIELINSKI,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DOMINIC S. AMATO, Judge. *Affirmed.*

Before Wedemeyer, Fine and Kessler, JJ.

¶1 KESSLER, J. David E. Bielinski appeals from the trial court's order which retains child support at seventeen percent of Bielinski's imputed gross income without downward deviation for shared placement pursuant to WIS.

ADMIN. CODE § DWD 40.04(2) (Dec. 2003).¹ Because the trial court has provided a thorough and thoughtful analysis of its reasons for deviating from § DWD 40.04(2) in setting child support, and thus demonstrates a reasoned exercise of its discretion, we affirm.

BACKGROUND

¶2 This case was before us previously in *Pasniak v. Bielinski*, No. 2006AP2488, unpublished slip op. (WI App Oct. 2, 2007) (*Pasniak I*). At that time, we affirmed the trial court's exercise of discretion in determining Bielinski's income, and in imposing all of the litigation expenses to Bielinski. *Pasniak I*, ¶1. However, because the trial court had not explained its reasons for deviating from the percentage guidelines as to child support, we remanded so the trial court could make a record of those reasons. *Id.* The trial court has made that record, and retained the amount of child support originally ordered. Bielinski appeals, repeating many of the arguments made in the first appeal.² Those issues already resolved in *Pasniak I* we will not discuss further.

DISCUSSION

¶3 Bielinski asserts that the trial court failed to follow the Department of Workforce Development (DWD) guidelines for child support. But, as we previously explained, a court is not required to follow the DWD guidelines if it states its reasons on the record for deviating from those guidelines. *See Pasniak I*,

¹ All references to the Wisconsin Administrative Code are to the December 2003 version unless otherwise noted.

² Bielinski argues in his brief, essentially, that the trial court improperly imputed income to him.

¶14; *see also* WIS. STAT. § 767.511(1n) (2005-06).³ The essence of Bielinski’s appeal is his claim that the trial court did not properly exercise its discretion when it refused to reduce his child support obligation by a percentage applicable to shared placement of the child.

¶4 We review a trial court’s determination of child support under an erroneous exercise of discretion standard. *Modrow v. Modrow*, 2001 WI App 200, ¶9, 247 Wis. 2d 889, 634 N.W.2d 852. Whether the trial court properly exercised its discretion, however, is a question of law. *Luciani v. Montemurro-Luciani*, 199 Wis. 2d 280, 294, 544 N.W.2d 561 (1996). “An appellate court will sustain a discretionary act if it finds that the trial court (1) examined the relevant facts, (2) applied a proper standard of law, and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995); *Modrow*, 247 Wis. 2d 889, ¶9. “The [trial] court’s articulation of its reasoning process is

³ The legislature has reorganized and renumbered the family code since this action began. The prior statute was WIS. STAT. § 767.25(1m) and (1n) (2003-04). The language of the statute has not changed. We refer in this opinion to the current numbering of the relevant statutes. WISCONSIN STAT. § 767.511 (2005-06), entitled “[c]hild support,” states, in pertinent part:

(1n) 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.

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

essential in reaching a reasonable determination and to aid [an appellate] court in reviewing the discretionary decision.” *Luciani*, 199 Wis. 2d at 295.

¶5 The trial court, pursuant to WIS. ADMIN. CODE § DWD 40.03(1)(a), initially set Bielinski’s support at seventeen percent of what the court found to be Bielinski’s imputed annual gross income of \$157,000. We affirmed that action, but remanded to provide the trial court with the opportunity “to set forth its specific reasons” for not applying the shared placement guidelines of WIS. ADMIN. CODE § DWD 40.04(2), pursuant to WIS. STAT. § 767.25(1n). See *Pasniak I*, ¶¶9, 18. Based on this seventeen percent of income determination, the trial court ordered Bielinski to pay child support in the amount of \$2,224.16 per month. *Id.*, ¶10. Bielinski claims entitlement to downward deviation from that amount based on his assumed placement with the child for thirty-eight percent of the year. However, this assumption of thirty-eight percent of placement is premised on Bielinski having consistent negative tests for controlled substances; otherwise, his placement is limited to alternate weekends with supervision by his family. Alternate weekend placement only (two nights in each placement times twenty-six weeks per year is fifty-two nights) would not be sufficient placement to trigger the shared placement reduction under § DWD 40.04(2).⁴

⁴ WISCONSIN ADMIN. CODE § DWD 40.04, entitled “[d]etermining the child support obligation in special circumstances,” states, in pertinent part:

(2) DETERMINING THE CHILD SUPPORT OBLIGATIONS OF SHARED-PLACEMENT PARENTS. (a) The shared-placement formula may be applied when both of the following conditions are met:

1. Both parents have court-ordered periods of placement of at least 25% or 92 days a year. The period of placement for each parent shall be determined by calculating the number of overnights or equivalent care ordered to be provided by the

(continued)

¶6 The trial court properly determined the amount by which its order deviates from the percentage standard, if the shared placement reduction in WIS. ADMIN. CODE § DWD 40.04(2) is applied. The result would be child support of \$1,883.00 per month, a difference of \$341.16 per month from the seventeen percent actually ordered.

¶7 Bielinski also complains because the trial court determined that no income should be imputed to Pasniak. Had income been imputed to her, and had shared placement applied, Bielinski's payment would have been further reduced. *See* WIS. ADMIN. CODE § DWD 40.04(2)(b).⁵ Pasniak has three children at home, ages five, two and three months (at the time of the June 2006 hearing). After considering whether she could support herself and her children, based on the testimony of a vocational expert, the trial court concluded that her limited earning

parent and dividing that number by 365. The combined periods of placement for both parents shall equal 100%.

⁵ WISCONSIN ADMIN. CODE § DWD 40.04(2)(b) states:

(b) The child support obligations for parents who meet the requirements of par. (a) may be determined as follows:

1. Determine each parent's monthly income available for child support under s. DWD 40.03(1). In determining whether to impute income based on earning capacity for an unemployed parent or a parent employed less than full time under s. DWD 40.03(3), the court shall consider benefits to the child of having a parent remain in the home during periods of placement and the additional variable day care costs that would be incurred if the parent worked more.

2. Multiply each parent's monthly income available for child support by the appropriate percentage standard under s. DWD 40.03(1).

3. Multiply each amount determined under subd. 2. by 150%.

capacity of \$21,000 to \$25,000, and the desirability that she remain at home with the children, made it unreasonable to impute income to her or to reduce the child support award by the shared placement formula set forth in § DWD 40.04(2). Although the trial court did not make a specific finding as to the actual cost of daycare (because neither party presented any evidence of that cost), the vocational expert acknowledged that daycare is a legitimate factor to consider when returning to work and that if she returned to work, Pasniak would have to pay for daycare.

¶8 After considering, on the record, the applicable statutory factors,⁶ the trial court also concluded that using the percentage standard reduction would be unfair to both Pasniak and the child because it was in the best interest of the child that Pasniak not work outside the home at this time. *See* WIS. STAT.

⁶ *See* WIS. STAT. § 767.511, entitled “Child support,” which states, in pertinent part:

(1m) DEVIATION FROM STANDARD; FACTORS. 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:

....

(b) The financial resources of both parents.

....

(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).

....

(d) The desirability that the custodian remain in the home as a full-time parent.

§ 767.511(1m)(d) (permitting deviation from the guidelines based on “[t]he desirability that the custodian remain in the home as a full-time parent”).

¶9 The trial court found that Bielinski is living an elite lifestyle, that he has healthy economic support permitting him to buy what he wants when he wants to buy it, to sell when he wants to sell, and to change business or occupation if he is dissatisfied. Bielinski had testified that he had been involved in several failed business ventures, that he owned several vehicles, a condo in Vale, Colorado, and had purchased and sold a lakefront home in Wisconsin. The trial court noted the federal poverty guidelines, pursuant to which someone living in poverty would receive \$881.50 per month. Bielinski’s mother acknowledged that the child is not living a lifestyle even close to that enjoyed by Bielinski, that Pasniak was unable to adequately support the minor child, and that Bielinski had the ability to provide full support for the child.

¶10 The trial court concluded that it would not reduce the percentage standard pursuant to WIS. ADMIN. CODE § DWD 40.04(2) based on shared placement as Bielinski requested, holding:

[I]t takes basic economic health to raise a child, to provide for all that child’s needs.

....

[T]he percent[age] standards are not in the best interest of the child, and will not provide adequate care and custody, and needs, health, safety, medical, raising the child, all the normal responsibilities it takes to raise a child today.

¶11 The trial court properly considered and expressed the reasons for the modification of the amount of child support. These included: Pasniak’s economic situation; Bielinski’s lifestyle; and the child’s right to support. The trial court concluded that applying the reduction standard under WIS. ADMIN. CODE

§ DWD 40.04 would be unfair and inappropriate in view of the strong economic health and privileged lifestyle of Bielinski.⁷

¶12 We express our thanks to Attorney Dana L. Winger, the guardian *ad litem* for the child in these proceedings. We appreciate the clear analysis, the detailed citations to the record, and the thorough and careful presentation of the trial court’s findings. Her briefs in this case were of great assistance to the court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

⁷ The trial court specifically noted that “[applying the percentage standard is] unfair to the child, [where] the economic health of the father is substantial, and economic health of the mother is at best, average, less than average.”

