COURT OF APPEALS
DECISION
DATED AND FILED

October 29, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0479 **Cir. Ct. No. 89PA082960**

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

IN RE THE PATERNITY OF BIANCA N.H.:

STATE OF WISCONSIN,

PETITIONER,

FONTELLA D., N/K/A FONTELLA D.-T.,

PETITIONER-RESPONDENT,

V.

JAMES H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL J. DWYER, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. James H. appeals from a child support modification order, which increases the amount of his monthly child support payment to conform to the percentage standard established under WIS. STAT. § 49.22 (1999-2000).[1] James claims the trial court erroneously exercised its discretion when it refused to deviate from the statutory percentage standard. Because the trial court did not erroneously exercise its discretion by not deviating from the percentage standard when it modified the child support payments, we affirm.

BACKGROUND

¶2 On November 28, 1989, James acknowledged paternity of the minor child Bianca N.H., born as a result of his relationship with Fontella D.-T. At that time, an order for child support was entered, requiring James to pay child support of $433 per month. The order was subsequently modified on April 10, 1994, under which James was ordered to pay $603 per month. Subsequently, Fontella again moved to modify child support based on a substantial change in circumstances. The family court commissioner increased the child support to $754 per month.

¶3 Fontella requested a *de novo* review of the commissioner's order. In January 2000, after a hearing, the trial court concluded that there was no basis to deviate from the statutory percentage standard, and ordered James to pay child support of $1,067 per month. This amount represented 17% of his gross income—

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

the equivalent of the statutory percentage standard. James now appeals from that order.

ANALYSIS

¶4 James claims the trial court erroneously exercised its discretion when it declined to deviate from the statutory percentage standard in setting child support for the minor child whose parentage he acknowledges. We conclude that the trial court did not erroneously exercise its discretion.

¶5 The determination of appropriate child support is discretionary with the trial court, and we will not disturb it if the trial court considered the pertinent facts, applied the proper law, and reached a reasonable determination. ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). In reviewing a child support order under WIS. STAT. § 767.32, the trial court should consider the needs of the custodial parent and child, and the ability of the non-custodial parent to pay. ***Burger v. Burger***, 144 Wis. 2d 514, 523-24, 424 N.W.2d 691 (1988). When the trial court is the finder of fact, we shall not reverse its factual determinations unless they are clearly erroneous. WIS. STAT. § 805.17(2). In the exercise of fact-finding, it is the responsibility of the fact finder to assess the evidence before it, according it such weight and credibility it reasonably deems it worthy to receive. ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107, 293 N.W.2d 155 (1980).

¶6 The revision of child support orders in paternity actions is governed by WIS. STAT. § 767.32(2), which provides: "Except as provided in sub. (2m) or (2r), if the court revises a judgment or order with respect to child support payments, it shall do so by using the percentage standard established by the department under s. 49.22 (9)." Section 767.32(2m) further provides: "Upon request by a party, the court may modify the amount of revised child support

payments determined under sub (2) if, after considering the factors listed in s. 767.25 (1m), the court finds, by the greater weight of the credible evidence, that the use of the percentage standard is unfair to the child or to any of the parties." Based on this statutory language, together with the record facts, we conclude that the trial court did not erroneously exercise its discretion when it declined James's request to deviate from the percentage standard.

¶7 From our reading of James's briefs, we deem that there are two bases for his claim of trial court error. The first is the trial court's statement at the motion hearing that it found "no basis on this record to analyze the needs of the child or the resources of Miss T[] to meet those needs." The second is that the trial court erred by engaging in a "robotistic" application of the percentage standards, which produced an absurd result.

¶8 There is no doubt that the trial court made the above-quoted remark at the beginning of its oral decision. If that comment were the sum and substance of the trial court's deliberative process, we would agree that error may have been committed. However, when reviewing a trial court's ultimate disposition of a matter, which entails both fact-finding and reaching a conclusion of law, we are at liberty to review the entire record to see if reversible error has been committed. *See* ***State ex rel. Hensel v. Town of Wilson***, 55 Wis. 2d 101, 107, 197 N.W.2d 794 (1972).

¶9 From a review of the hearing, we conclude that the statement made by the trial court was unfortunately misspoken. Nevertheless, after reviewing the complete record, we are convinced that the trial court did consider the appropriate factors despite its misstatement. The trial court did, in fact, examine the very same factors that James criticizes the trial court for stating it would not examine.

¶10 The record demonstrates that the trial court recognized its responsibility to look to the statutory law for guidance. It acknowledged that the percentage guidelines were to be used unless the circumstances dictated that such an application was unfair. It then stated its opinion that the primary factors are the financial resources of the parents. From the evidence, it was clear that the concerned child was not the offspring of a marriage relationship and that both parents have subsequently established separate families with children as products of those marriages. The court, however, clearly declared that the responsibility to support the child born out of wedlock had priority. Then, the court expressly referred to WIS. STAT. § 767.25(1m)(f), when it found that the child had some extraordinary physical and educational needs that had to be met.

¶11 Next, the trial court reviewed the budgets that each party had submitted and whose contents were examined in detail both in direct and cross-examination at the motion hearing. It found that the budgets were basically comparable, and that the gross incomes of James and Fontella, agreed to by stipulation, were $75,319.81 and $34,164, respectively. The court applied the 17% statutory factor to the gross incomes of both parties to arrive at $1,546 as the amount that should be allocated for the support of the child. The court concluded that such a sum as shared by the parties was reasonable and not unfair. To reach these conclusions, it is evident from the record that the court considered not only the financial resources of both parents, but also the physical needs and the special educational needs of the child, complicated by uncertain insurance coverage. We conclude that the first basis of James's claim of error has no support in the record, and therefore fails.

¶12 As the second basis for claiming trial court error, James contends that the trial court's "robotistic" application of the percentage standard produced an absurd result. We are not convinced.

¶13 The trial court's oral decision was made after it examined the budgets of both parties, heard testimony relating to the special needs of the child, and reviewed the available financial resources of both parties, as qualified by their respective family obligations. It then made certain oral findings of facts, which we may presume were made after a consideration of all the evidence in the record. *See* ***State v. Wilks***, 117 Wis. 2d 495, 503, 345 N.W.2d 498 (Ct. App.), *aff'd*, 121 Wis. 2d 93, 358 N.W.2d 273 (1984). Moreover, the requesting party, here James, has the burden to prove that the statutory percentage is unfair. ***Luciani v. Montemurro-Luciani***, 199 Wis. 2d 280, 295-96, 544 N.W.2d 561 (1996). James failed to satisfy that burden.

¶14 The trial court found the budgets of both parents reasonable and quite comparable. Based upon the stipulation that had been entered, it determined that the gross income for James was $75,319.81 and for Fontella was $34,164. It found that there was no basis in the record to establish the yearly income of Fontella's husband. It found that the child had emotional, mental, and educational needs and that the physical needs were of an extraordinary nature. It found that the obligation of satisfying the needs of the child came first before the obligations of the second families. It found that the goal of maintaining the lifestyle of the parties when they were married was not a present factor. Finally, it found that in applying the percentage standard of 17% to the gross income of the mother resulted in a $484 obligation and $1,067 when applied to the father's gross income, for a total of $1,541. It then concluded that this amount was not unreasonable.

¶15 From our review of the hearing, it is evident that the trial court was quite circumspect in analyzing the relevant factors. We conclude that its findings are reasonably based and therefore not clearly erroneous. As a result, the claim that the percentage standard was applied in such a fashion to produce an absurd result is belied by the record.[2]

By the Court.—Order affirmed.

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

[2] We also reject James's claim that his higher salary somehow justifies deviating from the statutory percentage standard. Although deviation has been appropriate in case of high earning parents for whom 17% would produce support grossly out of proportion to a child's needs, that is not the case here. James is a firefighter, earning approximately $75,000 annually. Seventeen percent of $75,000 is not unreasonable under the facts and circumstances here.