COURT OF APPEALS
DECISION
DATED AND FILED

November 20, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1846-FT **Cir. Ct. No. 96-FA-51**

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

IN RE THE MARRIAGE OF:

RICHARD J. SCHWARTEN,

PETITIONER-RESPONDENT,

V.

LESLIE SMITH, F/K/A LESLIE SCHWARTEN,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

Before Nettesheim, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Leslie Smith has appealed from an order requiring the respondent, Richard J. Schwarten, to pay child support of $300 per month for the support of the parties' two minor daughters. Smith contends that the trial court

should have applied the child support percentage standards and ordered Schwarten to make payments of $847 per month, representing 25% of his gross monthly income. Pursuant to this court's order of August 27, 2002, and a presubmission conference, the parties have submitted memorandum briefs. Upon review of those memoranda and the record, we affirm the order of the trial court.

¶2 The parties were divorced in 1996. In February 1998, the parties agreed to amend the divorce judgment to provide that Schwarten would pay support of $100 per week for the girls, who were placed with Smith. Support was to increase to $125 per week on June 1, 1998. The trial court issued an order amending the divorce judgment in accordance with the parties' agreement on February 9, 1998.

¶3 Shortly after the first amendment of the divorce judgment, Smith notified Schwarten of her intent to move outside Wisconsin with the children. Schwarten initially opposed the removal of the children, but in May 1998 entered into a second stipulation to amend the divorce judgment. In the second stipulation, the parties agreed that Smith could move the children out of state, and that Schwarten would have placement of the children for the summer, commencing one week after school was recessed and ending one week before school began in the fall. The stipulation also provided that Smith would make the children available to visit Schwarten in Wisconsin for a three- to four-day period during the school year, and that he could visit the children if he traveled to their new home state. The stipulation provided that in lieu of child support, both parties would share equally in any transportation costs associated with compliance with the placement schedule. The stipulation also provided that in lieu of child support,

the parties were to establish college education funds for the children, with monthly payments of not less than $50 per child.[1] The parties stipulated that imposition of the child support percentage standards would be unfair and not in the best interests of the children because Schwarten had a pre-existing serial family support obligation, he would have substantial summer placement, there would be extraordinary travel expenses associated with seeing the children, and the children would benefit from the college fund. The trial court approved the stipulation and amended the divorce judgment accordingly on May 11, 1998.

¶4 Smith moved with the children first to Tennessee, and then to Louisiana. In April 2002 she moved for modification of the divorce judgment, requesting that Schwarten be required to pay 25% of his gross income as child support. After conducting an evidentiary hearing on June 11, 2002, the trial court found that there had been a "slight" change in the parties' circumstances, that Schwarten's income was approximately $3000 per month, and that child support of $300 per month, rather than 25% of his gross income, was an appropriate amount.

¶5 Modification of a child support award may be made only upon a finding of a substantial change in circumstances. WIS. STAT. § 767.32(1)(a) (1999-2000).[2] When child support is not expressed as a percentage of parental income in a divorce judgment, the passage of thirty-three months from the date of

[1] Smith's obligation under this provision was to commence when she obtained full-time employment. Schwarten's obligation was to commence when Smith notified him that she had commenced full-time employment.

[2] All references to the Wisconsin Statutes are to the 1999-2000 version.

the entry of the last child support order creates a rebuttable presumption of a substantial change in circumstances. Sec. 767.32(1)(b)2.

¶6 Although the trial court stated simply that it found a "slight" change in circumstances, Schwarten has not contended on appeal that because the trial court did not expressly find a substantial change in circumstances, it exceeded its authority when it modified support. Moreover, as already noted, WIS. STAT. § 767.32(1)(b)2 creates a rebuttable presumption that a substantial change in circumstances occurred in this case because more than thirty-three months had passed since entry of the last support order. Based on § 767.32(1)(b)2, and Schwarten's failure to argue on appeal that a substantial change in circumstances did not occur, we conclude that a substantial change in circumstances exists as a matter of law.

¶7 In contending that the trial court was required to apply the child support percentage standards after it found a substantial change in circumstances, Smith relies on 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).

¶8 She also relies on WIS. STAT. § 767.32(2m), which 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.

¶9 Smith argues that no party requested that the trial court deviate from the percentage standards. This argument is specious. Schwarten opposed Smith's

motion for modification of support, contending that no support was warranted. Schwarten's failure to expressly contend that the percentage standards should not be applied cannot reasonably be deemed a waiver of his right to oppose the trial court's use of the percentage standards when modifying the support order.

¶10 In her brief-in-chief, Smith also argues that the trial court's finding that Schwarten's current income is $3000 per month, rather than $3388, is clearly erroneous. However, in her reply brief she states that "it is not the amount of the income we necessarily argue with," and that her real objection is to the trial court's failure to apply the percentage standards to Schwarten's income, or to adequately explain why application of the percentage standards would be unfair to the parties or the children.

¶11 The trial court's finding that Schwarten's income is approximately $3000 per month is supported by Schwarten's testimony at trial regarding a reduction in the substantial amount of overtime he had previously worked. Based on this evidence, and the concession made in Smith's reply brief, we need address Smith's objection to the finding no further.

¶12 In contending that the percentage standards should have been applied by the trial court, Smith relies on evidence presented at the June 2002 hearing indicating that Schwarten no longer has a serial family support obligation, neither daughter has visited Schwarten since February 2001, and Schwarten has failed to put funds into a college account for the girls. Smith also relies on evidence indicating that one of the daughters suffers from emotional problems which necessitate her attendance at year-round school, and eliminates the possibility of summer placement with Schwarten. In addition, she relies on

Schwarten's failure to pay all of the mental health counseling bills which he is obligated to pay under the trial court's prior orders.

¶13 Smith also appears to argue that because a substantial change in circumstances occurred, application of the percentage standards by the trial court was mandatory. However, this argument ignores ***Zutz v. Zutz***, 208 Wis. 2d 338, 344, 559 N.W.2d 919 (Ct. App. 1997), which held that the elapse of thirty-three months as set forth in WIS. STAT. § 767.32(1)(b)2 gives a party a prima facie claim that child support should be modified, but does not deprive the trial court of its discretionary authority to hear evidence and evaluate whether the percentage standards should apply. Section 767.32(1)(b)2 "did not curtail the family court's discretionary power to consider an existing agreement and not modify child support arrangements when such a modification would be unfair to the child or one of the parties." ***Zutz***, 208 Wis. 2d at 340.

¶14 In addressing a motion for modification of child support, the trial court is required to consider the needs of the custodial parent and children, and the ability of the noncustodial parent to pay. ***Burger v. Burger***, 144 Wis. 2d 514, 523-24, 424 N.W.2d 691 (1988). Our review of the trial court's discretionary decision is confined to whether the court examined the relevant facts, applied the proper legal standard, and reached a logical conclusion. ***Zutz***, 208 Wis. 2d at 342. We will not reverse a discretionary determination "if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987). "Indeed, … we generally look for reasons to sustain discretionary decisions." ***Burkes v. Hales***, 165 Wis. 2d 585, 591, 478 N.W.2d 37 (Ct. App. 1991) (citation omitted).

¶15 The trial court may give weight to an existing agreement when making a determination as to whether to modify child support to meet the percentage standards. ***Zutz***, 208 Wis. 2d at 345. In this case, the trial court noted that the parties entered into an arrangement in 1998. Pursuant to their stipulation, the parties agreed that Schwarten would not be obligated to pay child support, provided he relinquished his objections to the children's out-of-state move. The trial court did not disturb this arrangement when it modified support.

¶16 The trial court could consider that Schwarten gave up significant rights by entering into the 1998 agreement, in exchange for which he was not required to pay support. It could also reasonably conclude that, while changes in the parties' circumstances warranted an increase in support to $300 per month, they were not so significant as to warrant application of the percentage standards, and that, in light of the parties' 1998 agreement, applying those standards would be unfair to Schwarten.

¶17 The facts of record support the trial court's exercise of discretion. As noted by the trial court, the parties' respective incomes were not significantly different than in 1998. The trial court nevertheless increased support to $300 per month, noting that Schwarten's support obligation from his prior marriage had ended, that summer placement had not occurred as contemplated in the 1998 agreement, and that Schwarten apparently would not have summer placement in the future with the daughter who was in year-round school. However, in declining to increase support to 25% of Schwarten's income, the trial court also reasonably considered that Schwarten would have travel expenses to see the children in the future, and that he should maintain contact with them. The trial court also noted that Schwarten had substantial health care expenses for the girls, including

insurance costs and uninsured mental health care bills.[3] In addition, it considered that one of the girls had lived with Schwarten from June 1999 to February 2001.

¶18 In modifying support, the trial court also reasonably refused to attach significance to Schwarten's failure to comply with the portion of the 1998 agreement requiring him to deposit money into a college fund. Pursuant to the terms of the agreement, the parties' obligations to make deposits into a college fund were mutual. Since Smith herself had deposited only $250, the trial court could reasonably conclude that neither party was benefiting from, or being harmed by, this portion of the agreement. Since the trial court's elimination of the college fund provision benefited Smith as much as Schwarten, Schwarten's failure to deposit the funds cannot be deemed so significant as to compel application of the percentage standards.

¶19 The trial court thus considered appropriate factors in evaluating Smith's motion for modification of child support. Based upon those factors, it could reasonably conclude that an increase in support to $300 per month was warranted, but that an increase to $847 per month as requested by Smith would be unfair to Schwarten.

By the Court.—Order affirmed.

[3] Smith objects to Schwarten's failure to pay a $405 bill from a mental health counselor as required pursuant to the 1998 agreement. Although Schwarten acknowledged that he had not paid the bill, the trial court was not required to conclude that Schwarten's noncompliance was so significant as to warrant increasing support to an amount indicated by the percentage standards, particularly since Smith may move to find Schwarten in contempt if he fails to comply with his obligations under the support order.

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