COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3060 **Cir. Ct. No. 93-FA-128**

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

IN RE THE MARRIAGE OF:

DIANE L. FINSTER,

PETITIONER-APPELLANT,

V.

JAMES R. FINSTER,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Polk County: ROBERT H. RASMUSSEN, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

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

¶1 PER CURIAM. Diane Finster appeals an order denying her motion to modify the child support obligations of James Finster, her former spouse. She argues that although the trial court correctly found a substantial change in

circumstances, it failed to articulate a rational basis for denying her motion. She further argues the court erroneously failed to set support on the basis of James's earning capacity. She also contends that the court erroneously failed to set a fixed sum, but instead allowed the percentage support order to remain in effect.

¶2 Based upon our review of the court's decision, we are unconvinced it discloses a rational basis for denying Diane's motion for child support modification and therefore reverse. However, because the court's finding that James was not shirking finds support in the record, this finding is not clearly erroneous and is sustained. We also conclude that WIS. STAT. §§ 767.25(1)(a) and 767.32(1)(d) require the court to modify a child support order to express a fixed sum rather than a percentage, and the court erred when it failed to do so. Therefore, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

I. Background

¶3 The facts of this case are extensive. We do not attempt their comprehensive recitation, but rather outline the background to put the parties' arguments in perspective. The parties have two sons and were divorced in 1993. At the time of the divorce, Diane was employed as a school district media director with a gross monthly income of $3,083. James, who holds a master's degree, was employed as a library media specialist with a gross monthly income of $2,880.

¶4 Diane received sole legal custody and primary placement of the children. James's child support obligation was set at 17% of his gross income. The court deviated from the percentage standard of 25% "due to the extreme distance and extraordinary expense for transportation of the minor children of the parties for visitation and physical placement with [James]."

¶5 Although the parties do not set out the precise details of James's subsequent work history, the record indicates that following the divorce, he was laid off from his employment as a library media specialist and thereafter held a variety of jobs, including substitute teaching, ski instructing and vehicle sales. In November 1997, James moved approximately one-half mile from Diane and the children's residence. In May 2000, the court entered an order based on the parties' stipulation to amend the judgment. It provided that the parties share joint legal custody, with Diane having primary placement. Both parties were ordered to participate in therapy. Diane withdrew her request for revision of the child support order.

¶6 A July 2000 order supplemented the previous order and required the parties not to make disparaging remarks about one another in front of the children. In February 2001, Diane moved the court to require James to seek full-time employment and to increase child support. She also moved to suspend James's physical placement due to James's striking one of their sons in face. Diane alleged James had previously abused her and the children.

¶7 Subsequently, an order amending the judgment was entered upon the parties' stipulation. This order suspended James's placement periods with one of their sons pending consultation with a therapist and the guardian ad litem's recommendation. With the other son, telephone contact was permitted and placement periods were dependent upon the guardian ad litem's recommendation after consultation with counselors. James was ordered to seek full-time employment and apply for a minimum of ten jobs per month.

¶8 Subsequently, in September, Diane sought a modification of child support.[1] At the hearing on her motion, James testified that he had been laid off from previous employment, but recently had obtained employment as a car salesman and received $520 every two weeks charged against future commissions. James's financial statement showed his 2000 income was $16,124.74. He claimed over $50,000 in debts for past attorney fees. Diane testified that she worked full time as a teacher and also tutored and worked for businesses part-time for extra income. According to her financial statement, her 2001 income as a teacher was $57,000. Diane testified that child support had been paid sporadically over the years and asked the court to set a specific sum based on 25% of James's income.

¶9 James, who appeared pro se, cross-examined Diane concerning her lack of cooperation with respect to the children's placement periods with him. Diane had written a letter to a counselor flatly refusing to participate in re-unification therapy, required under a previous court order. Diane objected on the ground that interference by one parent with the rights of another is not a relevant factor in setting child support. The trial court ruled that it intended to consider the interference issue.

¶10 Accordingly, Diane called Susan Phipps-Yonas, a licensed psychologist, to testify. Phipps-Yonas testified that James should participate in therapy to develop a more positive relationship with the children. She stated that the boys felt James was physically aggressive and made negative comments about their mother. Phipps-Yonas further testified that Diane should not share her

[1] James filed a motion concerning placement periods. That motion was heard separately and is not subject of this appeal.

negative feelings about James with the boys. She said Diane maintained that James was abusive to her and talked about this with their sons. Phipps-Yonas acknowledged that her opinion was not based on a comprehensive evaluation but on limited information.[2] She was unaware that James had not seen his oldest son for more than six months and did not know "what's going on now." She was also unaware that Diane refused to participate in re-unification therapy.

¶11 James testified that Diane frustrated and interfered with his ability to see their sons by refusing to talk to him, by denigrating him in the children's presence and by refusing to follow scheduled placements. He stated that he was denied information regarding the children's activities. James conceded a single incident when he was driving that he turned and "punched" one of his sons in the face. James testified that he basically has no relationship with his sons as a result of Diane's interference. He objected to paying more support because he believed that any additional money would not be used for the children's benefit, but to fund Diane's legal fees to carry out her vendetta against him.

¶12 The court found that "For the past nine years this court has been responsible for refereeing the ongoing unreasonableness of two educated people who absolutely refuse to allow a blend of maturity, tolerance, patience, common sense and intelligence to govern their conduct toward each other and with regard to the manner in which they parent their children." The court found that Diane engaged in a concerted course of conduct resulting in "parental alienation

[2] Apparently, comprehensive evaluations had been done in the past but were not made part of the record before us on appeal.

syndrome."[3] The court also determined that James's ability to pay support has "been substantially diminished given his sporadic work history" and his "sporadic work history is not the product of shirking." The court specifically found that James's "work ethic is intact and that factors other than lack of motivation or lack of concern about the economic welfare and support of his children have undermined [James's] ability to attain the earning capacity which would be indicated by his education and past work experience." The court denied Diane's motion to modify support other than ordering that she is entitled to take both sons as dependents for tax purposes. Diane appeals the order.

II. Legal Standards

¶13 Child support modification is committed to trial court discretion. ***Beaupre v. Airriess***, 208 Wis. 2d 238, 243, 560 N.W.2d 285 (Ct. App. 1997). "We will not reverse a trial court's discretionary ruling where the trial court arrives at a conclusion that is one a reasonable judge could reach and consistent with applicable law." ***Id.*** Wisconsin case law shows "the great amount of discretion given to the circuit court in setting and modifying child support … the circuit court is in the best position to examine the relevant circumstances and determine whether a modification is appropriate." ***Rottscheit v. Dumler***, 2003 WI 62, ¶122, 664 N.W.2d 525 (citing ***Sellers v. Sellers***, 201 Wis. 2d 578, 594-95, 549 N.W.2d 481 (Ct. App. 1996) ("[W]e ultimately must trust the sound judgment of the trial court because the outcome in divorce cases is intensively fact specific for

[3] The court's finding to this effect reflects issues addressed in earlier proceedings. The record reflects the court's frustration due to the parties' lack of progress in addressing these issues.

each case."). Our supreme court has recognized that "What is right for one family may not be right for another." ***Rottscheit***, 2003 WI 62, ¶122.

¶14 Under WIS. STAT. § 767.32, a "substantial change in circumstances" is a prerequisite to modify an existing support order. ***Zutz v. Zutz***, 208 Wis. 2d 338, 343, 559 N.W.2d 919 (Ct. App. 1997). "[T]he court's power to modify is not the power to grant a new trial or to retry the issues determined in the original judgment, but only to adapt the decree to some distinct and definite change in the financial circumstances of the parties or children." ***Beaupre***, 208 Wis. 2d at 245 (citations omitted). Whether there has been a substantial change of circumstances presents a mixed question of fact and law. ***Rosplock v. Rosplock***, 217 Wis. 2d 22, 32-33, 577 N.W.2d 32 (Ct. App. 1998). The circuit court's finding of fact regarding "before" and "after" circumstances and whether a change has occurred will not be disturbed unless it is clearly erroneous. ***Id.*** at 33. However, whether the change is substantial is a question of law that we review de novo. ***Id.*** The finding of a material change does not, however, necessitate support modification. ***Zutz***, 208 Wis. 2d at 343-44. A substantial change in circumstances should be such that it would be unjust or inequitable to strictly hold either party to the judgment. ***Rosplock***, 217 Wis. 2d at 33.

III. Issues

A. Substantial Change in Circumstances

¶15 Diane claims that the court erred when it denied her motion in part on allegations of parental alienation syndrome. Diane also argues that the trial court erroneously exercised its discretion when it found that there was a substantial change in circumstances but failed to modify support. Because the court found that James no longer has travel expenses to exercise his placement

rights, she claims the court must modify his support obligation. She argues that James has proven no increased costs or expenses and, therefore, his elimination of travel expenses entitles her to an increase in support.[4]

¶16 We first address the court's reference to parental alienation syndrome. "The primary goals of child support statutes are to 'promote the best interests of the child' and 'avoid financial hardship for children of divorced parents." ***Rottscheit***, 2003 WI 62, ¶31. Based on WIS. STAT. § 767.32(1)(c)4, a court is encouraged to examine any factor it deems relevant. Custody and placement issues generally do not affect a parent's obligation to pay support. WISCONSIN STAT. § 767.25(3) provides: "Violation of physical placement rights by the custodial parent does not constitute reason for failure to meet child support obligations."

¶17 Here, the issue before the court was not whether James had paid support under the current order. Rather, the question presented was whether, under WIS. STAT. § 767.32, Diane established a basis for a child support increase. Section 767.25(3), which prohibits parents who are wrongfully denied physical placement from withholding child support, is not intended as authority for a parent to violate a placement order and rely on the statute as grounds for additional support.

¶18 Although placement issues do not generally affect the amount of child support, Diane herself suggests that the issues may be relevant when they

[4] Diane further contends, in her reply brief, that James includes facts in his brief that are not part of the record. We disregard facts that are without record support. We are bound by the record as it comes to us. *See* ***Eberhardy v. Circuit Court for Wood County***, 102 Wis. 2d 539, 571, 307 N.W.2d 881 (1981); ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

have a financial connection.[5] She argues, however, that in order to consider placement factors when addressing child support, the court must show a logical connection was established. We agree. Consistent with the court's broad discretion in child support matters, the court may consider placement issues, but here, the trial court did not explain its reasons for relying on parental alienation syndrome as a reason for denying modification of support. We therefore remand for the court to articulate its decision.[6]

¶19 Next, we reject Diane's argument that James's decreased travel expenses necessarily require the court to modify support. Her argument fails to take into account the parties' changed incomes and circumstances since the previous order. Also, Diane fails to state with specificity what her and the children's expenses are. In determining whether a material change is substantial, the court must evaluate all relevant circmstances and not just one aspect of one party's expenses. ***Rottscheit***, 2003 WI 62, ¶41. Diane's argument, implying that modification of child support is required in every case a material change is shown, is unpersuasive. *See* ***Zutz***, 208 Wis. 2d at 343-44.

¶20 Because we agree that the trial court failed to articulate its reasons for concluding that Diane's interference with James's attempts to foster a

[5] In making this argument, Diane does not concede that she caused parental alienation syndrome, but maintains that it resulted from James's own conduct. To the extent Diane challenges the court's finding of parental alienation syndrome, we do not address this factually laden issue because the record before us is not complete. *See* ***Ryde v. Dane County***, 76 Wis. 2d 558, 563, 251 N.W.2d 791 (1977).

[6] We acknowledge our obligation to search the record to determine whether in the exercise of proper discretion a trial court's determination can be sustained. ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). Due to the factual complexities of this case, as well as the limited record provided on review, we conclude a remand is necessary.

relationship with their children is related to his child support obligations, we reverse on this basis. Also, the court did not indicate whether the change in James's travel expenses and the changes in the parties' overall economic circumstances resulted in a change "such that it woud be unjust or inequitable to hold either party to the judgment." ***Rosplock***, 217 Wis. 2d at 33. Therefore, we reverse the court's denial of Diane's motion to modify support and remand with directions to articulate a rational basis. It is within the court's discretion whether to accept additional testimony on remand.

B. Shirking

¶21 Because the shirking issue will no doubt arise on remand, we address it here for reasons of efficiency. Diane argues that James was shirking his child support obligation and the trial court erroneously refused to apply James's earning capacity in setting support. Because the record permits the court to find that James was not shirking, we do not overturn its determination.

¶22 The trial court may consider earning capacity when a parent is "shirking" his or her child support obligations. *See* ***Van Offeren v. Van Offeren***, 173 Wis. 2d 482, 496, 496 N.W.2d 660 (Ct. App. 1992). "Shirking" cases arise where a payer voluntarily fails to exercise his or her full capacity to earn in order to avoid the obligation to pay child support. ***Id.*** Shirking does not require a finding that the parent deliberately reduced his or her earnings to avoid support obligations. *See* ***id.*** The trial court may find shirking if it finds that the child support obligor's employment decision was both voluntary and unreasonable under the circumstances. *See* ***id.***

¶23 Whether the employment decision is unreasonable presents a question of law. *See* ***id.*** at 492. However, because the trial court's legal

conclusion is intertwined with factual findings, we give the trial court appropriate deference. *See* ***id.*** at 492-93.

¶24 Here, there is apparently no dispute with James's assertion he was laid off from his employment as a library media specialist. The trial court apparently deemed credible James's testimony relating to his income-producing endeavors and found that given his age and work history, he was making appropriate efforts to generate income through employment as a substitute teacher, ski instructor and vehicle salesperson. Credibility determinations are for the trial court when it acts as the factfinder. *See* ***Micro-Managers, Inc. v. Gregory***, 147 Wis. 2d 500, 512, 434 N.W.2d 97 (Ct. App. 1988). We will not overturn the trial court's findings unless they are clearly erroneous. *See* ***id.*** While Diane reaches a different conclusion based on the evidence, we are bound by the trial court's inferences and findings because they are based upon credibility assessments. *See* WIS. STAT. § 805.17(2). Based on James's testimony, we sustain the trial court's determination that James was not shirking.

C. Percentage v. Fixed Amount

¶25 Finally, Diane argues that the court erred by failing to grant her request to modify the child support order from a percentage to an amount expressed in a fixed sum. We agree. This issue is resolved by resort to statutory language, an issue of law we decide independently. ***State v. Setagord***, 211 Wis. 2d 397, 405-06, 565 N.W.2d 506 (1997). The purpose of statutory interpretation is to ascertain and give effect to legislative intent. ***Id.*** at 406. We first look to the language of the statute itself. ***Id.*** If the meaning of the statute is unambiguous, we apply it as written. ***Id.***

¶26 The statutory language is unambiguous. Although support orders expressed as percentages were previously allowed, effective September 1, 2001, "the support order must be expressed as a fixed sum unless the parties have stipulated to expressing the amount as a percentage of the payer's income and the requirements under WIS. STAT. § 767.10(2)(am)1 to 3, [governing stipulations in family matters] are satisfied." WIS. STAT. § 767.25(1)(a). Also,

> In an action under this section to revise a judgment or order with respect to child or family support, the court is not required to make a finding of a substantial change in circumstances to change a fixed sum the manner in which the amount of child or family support is expressed in the judgment or order.

WIS. STAT. § 767.10(32)(1)(d).

¶27 We read this language as explicit legislative direction to courts to modify percentage orders to fixed sum orders, unless the parties have stipulated otherwise and their stipulation conforms to WIS. STAT. § 767.10(2)(am)1 to 3. Here, Diane moved to modify the order to be expressed in a set sum. No stipulation for a percentage order is present. Under the statutory scheme outlined in WIS. STAT. §§ 767.25(1)(a) and 767.32(1)(d), the trial court was required to grant that aspect of her motion.[7]

¶28 On remand, the court is directed to enter a fixed sum for child support. While the court is generally required to apply percentage standards to determine the amount, a party may request a court to modify the amount of child support due under the percentage guidelines. WIS. STAT. § 767.25(1m). A court

[7] The order was entered September 30, 2002, subsequent to the effective date of WIS. STAT. § 767.25(1)(a).

can modify the amount under § 767.25(1m) if 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." The variety of factors to consider include the financial resources of the child and the parents; maintenance; the needs of each party to support himself or herself; the child's educational needs; the best interests of the child; "[t]he 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" and any other factors which the court finds to be relevant. ***Id.***

¶29 Thus, the judge has broad discretion in setting appropriate child support. If the circuit court does deviate from the applicable percentage standard under WIS. STAT. § 767.25(1n), it must state the amount that would be due under the percentage standard, the difference between that amount and the amount awarded, and the reasons supporting deviation from the percentage standard. ***Id.*** In any event, absent a stipulation, the court must express that amount as a fixed sum. WIS. STAT. § 767.25(1)(a).

IV. Conclusion

¶30 Based upon our review of the court's decision, we are unconvinced that it discloses a rational basis for denying Diane's motion for modification of child support. Because the court's finding that James was not shirking finds support in the record, the court was not required to set support based upon earning capacity rather than actual earnings. Further, we conclude that WIS. STAT. § 767.25(1)(a) and 767.32(1)(d) require the court to modify a child support order to express a fixed sum, rather than a percentage. Therefore, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion. It is within the court's discretion whether to accept additional testimony on remand.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

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