COURT OF APPEALS
DECISION
DATED AND FILED

January 19, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP330 **Cir. Ct. No. 2007FA1358**

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

IN RE THE MARRIAGE OF:

LISA KRISIK-TREVINO,

PETITIONER-RESPONDENT,

V.

JOSE E. TREVINO,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed.*

Before Brown, C.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Jose E. Trevino appeals from the portions of his judgment of divorce from Lisa Krisik-Trevino addressing the child support and

maintenance components of the family support award. He argues that both result from an erroneous exercise of discretion. We disagree and affirm.

¶2 Jose and Lisa married in December 2002 and divorced in September 2007. Their three minor children were ages eight, seven and five at the time of trial. Jose's gross annual income is $220,000. Lisa, a full-time homemaker who was diagnosed with multiple sclerosis (MS) in 2005, has zero earnings.

¶3 In preparation for trial, Lisa underwent two vocational evaluations. Jose's vocational expert testified that he deemed Lisa able to perform certain entry-level jobs earning eight to twelve dollars an hour and that she could apply for Social Security benefits and still earn up to $12,000 a year from employment.[1] Lisa's vocational expert testified that the limitations and vagaries of MS visited on Lisa prevent her from performing substantial gainful employment or pursuing retraining, resulting in a total loss of earning capacity.

¶4 Significant to this case is that Jose's prior marriage ended in divorce in May 2002. At the time of the divorce, one of his two sons from that marriage still was a minor. His former wife is totally disabled. Per the divorce judgment, Jose paid $7000 monthly family support. During his and Lisa's divorce trial, Jose filed a motion in Ozaukee county circuit court to modify that family support obligation, as his son had reached the age of majority.

¶5 After testimony and closing arguments here, the trial court took the issues under advisement pending resolution of the Ozaukee county matter. That

[1] Lisa testified that she was denied Social Security benefits and had appealed the denial. As part of the judgment of divorce, the trial court ordered Lisa to pursue the appeal and to keep Jose apprised of the status of the appeal on a quarterly basis.

court terminated family support but ordered indefinite-term maintenance at the same $7000 a month—$84,000 a year—Jose had been paying.[2] Jose took the position that the trial court here should subtract $84,000 from his gross income when doing its calculations in this matter.

¶6 The court rejected Jose's argument. It held maintenance open and ordered him to pay $5622 monthly family support. For the child support component, the court considered Jose's full $220,000 gross annual income and the number of his overnights with the children and, under the shared-placement formula of WIS. ADMIN. CODE § DCF 150.04(2), calculated his monthly obligation to be $4122. For the maintenance portion, the court accepted the opinion of Lisa's vocational expert as the more credible because the types of jobs Jose's expert suggested were incompatible with the nature and unpredictability of Lisa's MS symptoms. It ordered him to pay $1500 a month for an indefinite period. Jose appeals both components.

¶7 WISCONSIN STAT. § 767.531 (2007-08)[3] authorizes a court to order family support. We will sustain a family support award unless the trial court erroneously exercised its discretion. *See* ***Jasper v. Jasper***, 107 Wis. 2d 59, 63, 318 N.W.2d 792 (1982). To be sustained, a discretionary decision need not be one another judge or court would reach, but one a reasonable judge or court could reach by considering the relevant law, the facts and a process of logical reasoning. ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

[2] The order was affirmed on appeal. *See* ***Gonzalez v. Trevino***, No. 2009AP3014, unpublished slip op. (Wis. Ct. App. Dec. 1, 2010).

[3] All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

¶8 While WIS. STAT. § 767.531 does not set forth specific factors to calculate family support, the award should be based on the same criteria used to fashion child support and maintenance orders. *See* ***Vlies v. Brookman***, 2005 WI App 158, ¶14, 285 Wis. 2d 411, 701 N.W.2d 642. The court first must calculate child support under WIS. STAT. § 767.511 and the child support percentage standards provided in WIS. ADMIN. CODE § DCF 150.03. *See* ***Vlies***, 285 Wis. 2d 411, ¶15. Absent a showing of unfairness by the great weight of the credible evidence, the standards are presumptively applicable. ***State v. Alonzo R.***, 230 Wis. 2d 17, 28, 601 N.W.2d 328 (Ct. App. 1999).

¶9 A court determines a shared-placement parent's child support obligation through a formula that begins by determining the parent's monthly income available for child support. *See* WIS. ADMIN. CODE § DCF 150.04(2). As is relevant here, that amount is found by dividing the parent's annual gross income by twelve. *See* WIS. ADMIN. CODE §§ DCF 150.02(21) and 150.03(1).

¶10 Jose argues that the proper starting figure for the child support component was $136,000—his gross income less his existing $84,000 legal maintenance obligation to his first ex-wife. That obligation, he contends, renders $220,000 as his starting income "incorrect" and unfair to him. He claims the court erroneously exercised its discretion because it failed to consider WIS. STAT. § 767.511(1m)(b), (bz) and (c) or to otherwise articulate its reasons for "implicitly" denying his request to deviate from the guidelines.

¶11 Under the statutory provisions Jose cites, the court "may" modify the amount of child support payments determined pursuant to the guidelines if, after considering both parents' financial resources, the needs of any other person a party is legally obligated to support, and the standard of living the children would have

enjoyed had the marriage not ended in divorce, it finds by the greater weight of the credible evidence that use of the percentage standard is unfair to the child or to either party. *See* WIS. STAT. § 767.511(1m)(b), (bz) and (c) The court found that Jose makes an "excellent" salary and is able to pay, that Lisa has no income or earning capacity, that Jose has been making the payments to his first ex-wife, and that, no longer being a serial-family payer, Jose's minor children's needs should be his primary obligation. The court found Lisa's budget to be more reasonable and accurate than Jose's. It recognized that the resultant unequal disposable incomes were warranted to enable Lisa to meet a "very tight" budget for her and the three children. These findings reflect a consideration of the relevant law and are supported by the record.

¶12 Despite conceding he is not a serial family payer, Jose's argument that his gross income should be reduced by the amount of his existing legal obligation for maintenance mirrors the serial family payer calculation. *See* WIS. ADMIN. CODE §§ DCF 150.02(2) and 150.04(1) (the "adjusted monthly income available for child support" means the payer's monthly income available for child support "less the amount of any existing legal obligation for child support"). Jose observes that DCF 150.04(1) is "silent" in regard to a prior court order for maintenance," and argues that "to pretend that [$220,000] is an accurate reflection of his 'financial resources' is simply disingenuous."

¶13 We read the "silence" as deliberate choice. Had the legislature or the Department of Children and Families intended existing legal obligations—whether for child support *or* maintenance—to be treated in the same manner, either entity could have drafted its respective statute or code provision to reflect that purpose. For instance, WIS. STAT. § 767.511(1m)(bj) permits a court to consider "[m]aintenance received by either party" when contemplating deviation

from the guidelines. Clearly having thought about maintenance, the legislature could have drafted the statute to provide that maintenance "paid or received" would merit consideration. We decline to usurp its authority or to inflate ours.

¶14 Furthermore, the party seeking a deviation from the standards has the burden of proving that applying the standards is unfair. ***Winkler v. Winkler***, 2005 WI App 100, ¶27, 282 Wis. 2d 746, 699 N.W.2d 652. Other than establishing the expense itself and the legal obligation from his first divorce, Jose has not proved that using the child support guidelines was "unfair" to him. Granted, two divorces and three new children in less than a decade have markedly altered his financial position and its attendant lifestyle. If anyone is to feel the pinch, however, it should be Jose and not his minor children. The child support calculation is not the product of an erroneous exercise of discretion.

¶15 Jose also contends the trial court erroneously exercised its discretion in determining the maintenance component, in view of the support and fairness objectives. *See* ***Vlies***, 285 Wis. 2d 411, ¶15. He argues that the court nominally ticked through the WIS. STAT. § 767.56 factors but did not adequately explain how its findings justify an indefinite $1500 a month in this short-term marriage. He specifically complains that the court accepted Lisa's claim that her MS precludes any employment while "completely ignor[ing]" that she failed to implement her doctor's recommendations for ameliorating her symptoms through gait training, strength training or evaluation and possible treatment of her cognitive deficits, or to follow through on her referral to the Department of Vocational Rehabilitation. He also argues the court failed to consider the lifestyle to which the parties had grown accustomed and anticipated had they stayed married. We disagree.

¶16 The court expressly recognized that "Lisa did not pursue certain recommendations" her doctor made but concluded that it ultimately agreed with Lisa's expert that gainful employment is not possible "at this time." Jose offered no evidence that even had Lisa followed every suggested avenue, her symptoms would have improved at all, let alone by trial. Should there be a substantial change in circumstances, Jose may seek a modification of the maintenance component of the award. *See* ***Rohde-Giovanni v. Baumgart***, 2004 WI 27, ¶30, 269 Wis. 2d 598, 676 N.W.2d 452.

¶17 The court also exhaustively examined the statutory factors. The court found that, in part due to the parties' agreement that Lisa would be a full-time homemaker, Jose's "excellent" income increased by $50,000 during the marriage. It found that Lisa's MS directly caused a total loss of earning capacity and precludes gainful employment or retraining, that she will never become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and that her "reasonable" budget reflected her and the children's current needs, while Jose's budget was "inflated and not very accurate." Where there is conflicting testimony, the trial court is the ultimate arbiter of the credibility of witnesses. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979). The court also considered Jose's other court-ordered obligation, observing that he and Lisa had lived without that $84,000 throughout the marriage. The court's maintenance decision considered both support and fairness and represents a proper exercise of discretion.

By the Court.—Judgment affirmed.

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