COURT OF APPEALS
DECISION
DATED AND FILED

March 31, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1359 **Cir. Ct. No. 98FA000202**

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

IN RE THE MARRIAGE OF:

SHARON M. BLOMDAHL,

PETITIONER-RESPONDENT,

V.

COREY C. BLOMDAHL,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: FAYE M. FLANCHER, Judge. *Affirmed.*

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

¶1 ANDERSON, P.J. Corey C. Blomdahl appeals from a trial court order denying his request for modification of placement and support. Corey argues that the trial court did not give adequate explanation or articulation of a considered rationale and therefore erroneously exercised its discretion when it

denied his request for overnight equivalents pursuant to WIS. ADMIN. CODE § DWD 40.02(25). We disgree and affirm the trial court.

¶2 *Law*. The decision to modify child support is left to the trial court's discretion. ***Rottscheit v. Dumler***, 2003 WI 62, ¶11, 262 Wis. 2d 292, 664 N.W.2d 525. Absent a showing of erroneous exercise of such discretion, the trial court's decision regarding modification will be upheld. ***Id.***; *see also* ***Abitz v. Abitz***, 155 Wis. 2d 161, 174, 455 N.W.2d 609 (1990). The discretionary decision of the trial court is not erroneous if the decision reflects "a reasoning process dependent on facts in, or reasonable inferences from, the record and a conclusion based on proper legal standards." ***Id.*** at 161 (citation omitted). However, a determination regarding whether a change is substantial presents a question of law and will be reviewed by this court de novo. *See* ***Peters v. Peters***, 145 Wis. 2d 490, 493-94, 427 N.W.2d. 149 (Ct. App. 1988).

¶3 WISCONSIN STAT. § 767.32(1)(c) (2001-02)[1] governs modification of an existing order for child support. Under the statute, the party seeking modification bears the burden to demonstrate a substantial change in circumstances to merit modification. ***Rottscheit***, 262 Wis. 2d 292, ¶11. Circumstances substantial enough to warrant modification include: a change in the payer's income, evidenced by information received under WIS. STAT. § 49.22(2m) by the department or the county child support agency under WIS. STAT. § 59.53(5) or by other information, from the payer's income determined by the court in its most recent judgment or order; a change in the needs of the child; a

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

change in the payer's earning capacity; and any other factor the court determines is relevant. § 767.32(1)(c).

¶4 Under WIS. STAT. § 767.32(1)(b), the following constitute rebuttable grounds for modification: commencement of receipt of aid under two statutorily defined programs, expiration of thirty-three months since the date of entry of the last child support order unless the support amount was entered as a percentage, failure of the payer to timely disclose under WIS. STAT. § 767.27(2m), and a difference between the amount of child support ordered by the court and the amount that the payer would have been required to pay based on the percentage standard under WIS. STAT. § 49.22(9).

¶5 Other factors considered relevant in a determination of substantial change in circumstances can include "aging of the children, the increased cost of living, the ability of the noncustodial parent to pay, the marital status of the parents, and the financial status of the parents and their spouses." ***Beaudoin v. Beaudoin***, 2001 WI App 42, ¶6, 241 Wis. 2d 350, 625 N.W.2d 619 (citation omitted).

¶6 Finally, the trial court's power to alter the support decree is limited to modification reflecting a "distinct and definite change in the financial circumstances of the parties or children" and does not permit a new trial or retrial of issues determined in the initial divorce judgment. ***Id.***

¶7 *Facts*. Corey and Sharon M. Blomdahl were divorced on March 30, 1999. The parties appeared in court on this date with a written Partial Marital Settlement Agreement resolving all issues except custody, placement and child support, which were resolved that day by oral agreement.

¶8 When the oral stipulation was placed on the record, the issue of physical placement was taken into account. Corey's attorney told the court:

> The agreement was reached in recognition of the fact that the time that both parents spend with [the child] amounts to 50/50 in terms of time and effort that both parents are putting into the care and raising of this child. That is not reflected, however, in the enumeration of overnights where [the child] stays.

¶9 Corey's attorney also represented to the court that the agreed upon child support of 8.3% was an "eyes wide open" agreement, in which Corey

> recogniz[ed] that he may have an argument for substantially less support, eyes wide open by Mrs. Blomdahl who may have an outcome different in the placement arrangements that she's agreed to which would have resulted in child support much greater than has been agreed to…. This is a compromise by both parties.

¶10 Corey's attorney emphasized to the court:

> And again, your Honor, what we're saying is we want the court to recognize the agreement in its totality recognizing that the child support level is being set and compromised and recognize that by not counting overnights the parties agree.

¶11 The result of the divorce hearing was that the parties agreed to joint legal custody, substantially equal placement and that Corey would pay child support in an amount equal to 8.3% of his gross income. They agreed that all variable/out-of-pocket costs (i.e., clothing, school fees, etc.) would be shared equally. Based on the parties stipulation as to child support, the court ordered Corey to pay 8.3% of his gross income, finding that there was "substantially shared placement," and that the agreed upon support was "fair and reasonable."

¶12 On February 21, 2002, Corey filed an order to show cause motion requesting modification of placement and support. This motion was denied by the

family court commissioner. Corey then petitioned the trial court for a de novo review.

¶13 The placement modification hearing before the trial court occurred on August 15, 2002. The court found that there had not been a substantial change in circumstances since the parties' judgment of divorce. The court declined Corey's request to alter placement to 50/50. It also refused to change Corey's support order from a percentage to a fixed amount because it did not have sufficient evidence regarding the parties' current incomes.

¶14 Corey subsequently filed a motion for modification of child support on September 5, 2002, requesting the court to "reduce the amount of child support paid by the father in accordance with DWD 40 and equivalent overnights. If any support ordered to have it be a fixed amount." In his accompanying affidavit, Corey states: "Trial orders by Hon. Judge Constantine and Hon. Flancher indicate father has had substantially equal placement. I request the support be eliminated or lowered to conform with DWD 40 standards. If lowered it be fixed."

¶15 The family court commissioner denied the modification of support request; however, it did grant a change in the percentage order of 8.3% to a fixed amount of $94 per week by applying the shared placement formula and the WIS. ADMIN. CODE § DWD 40.04. Corey requested a de novo review of the order.

¶16 On November 7, 2002, the trial court conducted a de novo hearing on support. At the beginning of the hearing, the court noted that it had looked at the minutes of the hearing conducted by the family court commissioner and "it looks like there was—well, maybe not every night equivalent, but the shared time placement formula and DWD 40 was used."

¶17 At the hearing, Corey relied on Exhibit 1—a schedule of the hours Corey and Sharon each spend with their son—to support his modification request. The court's examination of Corey went into detail about Corey's work schedule, confirming that Corey works full-time and that the child attends kindergarten full-time. Corey's attorney argued:

> We'd like to ask again that the previous order of 8.3 percent be changed to a fixed amount according to [WIS. ADMIN. CODE § DWD 40.04(2)] because the parties are shared-time payers. With the number of overnights of 155 for dad and 210 for mom, they're both over the threshold.
>
> In addition, each pays all of the variable expenses for the time that they have the child. Because father spends more waking hours with [the child], his variable expenses in proportion to the amount of time he spends are higher. The percentage of waking hours that he spends with Danny is 56 percent and mom spends 44 percent of the time with [the child]. Therefore we ask that you take into consideration the waking hours in which most of the variable costs are incurred and expended as overnight equivalents and calculate the amount of support based on the overnight equivalents and ratio of 56 to 44 percent, based either on the party's hourly wages or based on their taxes for 2001.

¶18 In short, Corey requested changing the current percentage order to a fixed amount (a change that does not require a showing of a substantial change in circumstances, *see* WIS. STAT. § 767.32(1)(d)) and changing the fixed amount to reflect "overnight equivalents" under WIS. ADMIN. CODE §§ DWD 40.04(2) & 40.02(25) (a modification which would require a substantial change in circumstances, *see* § 767.32(1)(a)).

¶19 In its decision, the court considered Corey's primary evidence—Exhibit 1. For example, with respect to Corey's placement with his son from 4:15-8:00 p.m., the court asked, "And why do you think that should be considered

an overnight equivalent, sir? How does four hours turn into—why should the Court consider that four hour block of time an overnight?"

¶20 The court determined that Exhibit 1 did not show that Corey's placement time with the child should be recalculated to include "overnight equivalents." The court then determined that the family court commissioner applied the correct statute in calculating support under WIS. ADMIN. CODE § DWD 40.04(2)(c) as a shared-time payer with father having 155 overnights and mother having 210. The court upheld the family court commissioner's order using the formula found in the § DWD 40.04(2)(c).[2] Corey appeals.

¶21 On appeal, Corey argues that the trial court erroneously exercised its discretion when, without a reasoned explanation, it denied his request that the time he had placement of the child be considered as "overnight equivalents." He bases his argument on a Note to the WIS. ADMIN. CODE § DWD 40:02(25):

> (25) "Shared-time payer" means a payer who provides overnight child care or equivalent care beyond the threshold and assumes all variable child care costs in proportion to the number of days he or she cares for the child under the shared-time arrangement.
>
> Note: There are physical placement arrangements in which the payer provides child care beyond the threshold and incurs additional cost in proportion to the time he or she provides care, but because of the physical placement arrangement he or she does not provide overnight care (e.g., payer provides day care while the payee is working). Upon request of one of the parties the *court may determine* that the physical placement arrangement other than overnight care is the equivalent of overnight care. (Emphasis added.)

[2] Corey originally agreed to pay 8.3% of his gross income, or $85.42 per week; the new amount of support is approximately an increase of $10.00 per week.

¶22 Corey complains that because this Note gives the trial court discretion—"court may determine"—the trial court erred when it failed to explain why it rejected his request to count his childcare time as the functional equivalent of overnights.

¶23 Corey argues that the "facts of record in this case as to the division of time were undisputed and they ostensibly provided a basis for the granting of overnight equivalents." Corey "concedes the law did not compel the court to grant him the relief he requested." Nonetheless, he insists that the law "did require the court, using a demonstrated reasoning process, to apply the undisputed facts of this case to the language of WIS. ADMIN. CODE § [DWD] 40.04(25)." Corey contends, "[I]t is precisely at this point where the court faltered. Instead of explaining why the facts adduced by Corey did not justify the relief he requested, the court simply stated it would not grant overnight equivalents." Corey complains that the court "did not grasp the import of the parties' schedule and therefore, utterly failed to fully comprehend the basis for Corey's motion."

¶24 *Discussion.* Corey argues that the trial court did not give adequate explanation or articulation of a considered rationale and therefore erroneously exercised its discretion when it denied his request for overnight equivalents pursuant to WIS. ADMIN. CODE § DWD 40.02(25).

¶25 Corey argues that the trial court misread or misunderstood the schedule of the hours Corey and Sharon each spend with their son as provided to the court in Exhibit 1.

¶26 Exhibit 1 is reproduced in Corey's appendix. However, we have reviewed the record and Exhibit 1 is not in it. It is not enough to provide a copy of Exhibit 1 in an appendix. An appendix may not be used to supplement the record.

Reznichek v. Grall, 150 Wis. 2d 752, 754 n.1, 442 N.W.2d 545 (Ct. App. 1989). When an appeal is brought upon an incomplete record, this court will assume that the record supports every fact essential to sustain the trial court's decision. ***Suburban State Bank v. Squires***, 145 Wis. 2d 445, 451, 427 N.W.2d 393 (Ct. App. 1988). Therefore, we assume that the trial court did not misunderstand Exhibit 1. *See* ***id.*** As a result, we assume that Exhibit 1 contains every fact essential to affirm the trial court. *See* ***id.***

¶27 Corey additionally argues that "[t]he original trial court understood this anomaly [of their placement schedule] and, at the time of the divorce, construed the arrangement as substantially equal placement." However, Corey's argument ignores several relevant points. First, it ignores that the original trial court also found 8.3% to be fair to both parties. Second, it ignores that the trial court that conducted the August 15, 2002 modification hearing found that there had not been a substantial change in circumstances since the parties' judgment of divorce.

¶28 In addition, although the court did not make an express finding as to a substantial change in circumstances at the November 7, 2002 hearing, the court's rejection of Exhibit 1 as demonstrating a need for modification may be construed as a finding of no substantial change. Moreover, the court's ruling of no substantial change from the prior hearing carries over to the November 7 hearing, as there was no argument from Corey as to a substantial change warranting modification. Also, it does not appear that Corey could have met the burden of showing a substantial change given that the schedule had been in effect since the judgment of divorce was entered.

¶29 Finally, Corey's argument ignores that, when an issue is taken into account in the initial divorce decree, the trial court is not permitted to retry the issue. *See* ***Beaudoin***, 241 Wis. 2d 350, ¶6. Corey's attorney emphasized to the court that the agreement is a compromise recognized by both parties. Corey's attorney also represented to the court that the agreed upon child support of 8.3% was an "eyes wide open" agreement, in which Corey

> recogniz[ed] that he may have an argument for substantially less support, eyes wide open by Mrs. Blomdahl who may have an outcome different in the placement arrangements that she's agreed to which would have resulted in child support much greater than has been agreed to…. This is a compromise by both parties.

¶30 The record reflects that the trial court, in its rhetorical questioning, did take into account and did understand Corey's evidence, but was not persuaded: "And why do you think that should be considered an overnight equivalent, sir? How does four hours turn into—why should the Court consider that four hour block of time an overnight?" Thus, the trial court did not err when it denied Corey's request for overnight equivalents. *See* ***id.*** The trial court properly chose not to alter the support decree because Corey did not meet his burden of showing a "distinct and definite change in the financial circumstances of the parties or children." *See* ***id.***

¶31 We end our discussion by observing that Corey's motion for modification was based primarily on a Note to WIS. ADMIN. CODE § DWD 40.02(25). This statute has been revised and renumbered (change became effective January 1, 2004).[3] The current definition for "Shared-time payer" is in

[3] WISCONSIN ADMIN. CODE § DWD 40.02 Definitions.

(continued)

§ DWD 40.02(26), and it has been renamed "Shared-placement payer"; the definition itself has been changed and most significantly, our Legislature has completely eliminated the Note that Corey relied upon. *See* § DWD 40.02(26).

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

History: Cr. Register, January, 1987, No. 373, eff. 2-1-87; r. (2)(b) to (d), r. and recr. (12) to (14), renum. (26) to (28) to be (27) to (29) and am. (29), cr. (26), Register, August, 1987, No. 380, eff. 9-1-87; r. and recr., Register, February, 1995, No. 470, eff. 3-1-95; CR 03-022: am. (2), r. and recr. (3), r. (4), renum. (5) through (10) to be (4) through (9), am. (8), cr. (10), r. and recr. (13), (20), (25), (28) and (30), renum. (14), (16), (17) and (18) to be (16), (17), (18) and (20), am. (16) and (18), cr. (14), am. (15), renum. (19), (22), (23) and (24) to be (22), (23), (24) and (25), cr. (19), r. and recr. (21), renum. (26) and (27) to be (27) and (28) and am., cr. (26), r. and recr. (29), renum. (31) to be (30) Register December 2003 No. 576, eff. 1-1-04.