

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 19, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 03-1483
STATE OF WISCONSIN**

Cir. Ct. No. 98FA000010

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

DIANE D. ROYSTON N/K/A DIANE D. BUSCHKE,

JOINT-PETITIONER-APPELLANT,

v.

DANIEL E. ROYSTON,

JOINT-PETITIONER-RESPONDENT.

APPEAL from an order of the circuit court for Waushara County:
LEWIS MURACH, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. Diane D. Royston, now known as Diane D. Buschke, appeals from an order of the circuit court ordering the following:

Buschke must pay her ex-husband, Daniel E. Royston, child support in the amount of \$480.68 per month; Royston is awarded the right to claim the minor child as an exemption for federal and state income tax purposes; and Royston and Buschke must share equally the minor child's private school tuition and health insurance premiums. Buschke argues that the circuit court erroneously exercised its discretion by requiring her to contribute to the variable costs (the health insurance premiums and private school tuition) in addition to paying the statutorily mandated child support. Buschke further contends that the circuit court erroneously exercised its discretion by awarding Royston the tax dependency exemption when she is actually providing more of the minor child's total annual expenses. We disagree with all Buschke's contentions regarding the variable expenses and affirm the circuit court's order on that issue. We agree with Buschke as to the award of the tax dependency exception and thus reverse and remand with directions.

FACTS

¶2 Buschke and Royston filed a joint petition for divorce on February 10, 1998. On March 14, 1998, the parties entered into a Marital Settlement Agreement wherein they agreed to joint legal custody and shared physical placement of the minor child, Raelle. Based upon this shared physical placement, the parties agreed that child support would not be imposed against either party; however, they also agreed that should placement change, child support could be reopened at any time thereafter. Royston agreed to maintain Raelle on his comprehensive medical and hospitalization insurance policy and to properly tender payment of all related premium payments. The parties further agreed to alternate claiming Raelle as a dependent for federal and state income tax purposes, with Royston claiming the exemption in 1998 and Buschke claiming the

exemption in 1999, and continuing in that fashion thereafter. At the final hearing on June 15, 1998, the circuit court accepted the Marital Settlement Agreement and granted a judgment of divorce.

¶3 On April 29, 2002, Royston filed a motion for modification of physical placement, seeking primary physical placement of Raelle. Royston also sought child support in accordance with the child support guidelines and “such other and further relief as deemed just and equitable.” Subsequently, the parties stipulated that Royston should have primary physical placement of Raelle, with Buschke receiving “reasonable periods of physical placement ... upon reasonable prior notice to ... Royston.”

¶4 On March 6, 2003, a hearing was held on the issues of child support, health insurance, the tax exemption and private school tuition. In an order dated April 10, 2003, the circuit court ordered Buschke to pay Royston \$480.68 per month in child support, awarded Royston the right to claim Raelle as an exemption for federal and state income tax purposes for the 2002 taxable year and each year thereafter and required the parties to share equally Raelle’s private school tuition and health insurance premiums, the latter by calculating the difference between “an employee plus spouse versus an employee plus family plan.” Buschke appeals.

DISCUSSION

¶5 Buschke argues that the circuit court erroneously exercised its discretion in requiring her to contribute to the variable costs in addition to her court-ordered child support. Buschke asserts that in ordering child support, a circuit court must consider the total economic circumstances of the parties and claims that the circuit court had no authority to split child-related expenses beyond

what is provided in the child support statute. In other words, Buschke claims the circuit court erroneously exercised its discretion by ordering her to pay health insurance premiums and private school tuition in addition to the statutorily mandated child support amount without articulating why the deviation is not unfair to Raelle or to Buschke. We disagree.

¶6 The determination of child support is committed to the sound discretion of the circuit court. *McLaren v. McLaren*, 2003 WI App 125, ¶13, 265 Wis. 2d 529, 665 N.W.2d 405. We will not disturb a discretionary child support decision unless we are convinced that the circuit court has erroneously exercised its discretion. *See Cameron v. Cameron*, 209 Wis. 2d 88, 98-99, 562 N.W.2d 126 (1997). We will accept the factual findings upon which the trial court has based its child support award unless one or more of the findings are clearly erroneous. *See* WIS. STAT. § 805.17(2) (2001-02).¹ We will sustain a discretionary act if we find that the circuit court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *McLaren*, 265 Wis. 2d 529, ¶13.

¶7 A circuit court, in setting child support, is statutorily obligated to use the percentage standards set by the Wisconsin Department of Health and Family Services. *Id.*, ¶14; *also* WIS. STAT. § 767.25(1j). The percentage standards which the Department established are set forth in WIS. ADMIN. CODE ch. DWD 40 and currently require child support for one child to be set at 17% of the payer's base income. WIS. ADMIN. CODE § DWD 40.03(1). A circuit court may depart from

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise indicated.

the percentage standards “if, after considering the factors listed in § 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.” *McLaren*, 265 Wis. 2d 529, ¶14; *also* § 767.25(1m). The factors that courts may consider when contemplating a deviation from the percentage standards are found at § 767.25(1m):

- (a) The financial resources of the child.
- (b) The financial resources of both parents.
- (bj) Maintenance received by either party.
- (bp) The needs of each party in order to support himself or herself at a level equal to or greater than that established under 42 USC § 9902 (2).
- (bz) The needs of any person, other than the child, whom either party is legally obligated to support.
- (c) If the parties were married, the standard of living the child would have enjoyed had the marriage not ended in annulment, divorce or legal separation.
- (d) The desirability that the custodian remain in the home as a full-time parent.
- (e) The cost of day care if the custodian works outside the home, or the value of custodial services performed by the custodian if the custodian remains in the home.
- (ej) The award of substantial periods of physical placement to both parents.
- (em) Extraordinary travel expenses incurred in exercising the right to periods of physical placement under s. 767.24.
- (f) The physical, mental and emotional health needs of the child, including any costs for health insurance as provided for under sub. (4m).
- (g) The child’s educational needs.
- (h) The tax consequences to each party.

(hm) The best interests of the child.

(hs) The 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.

(i) Any other factors which the court in each case determines are relevant.

¶8 In *McLaren*, the circuit court ordered child support payments in compliance with statutory guidelines but then ordered additional payments for daycare expenses. *McLaren*, 265 Wis. 2d 529, ¶16. We concluded that the circuit court deviated from child support standards in ordering the additional payment of daycare expenses. *Id.*, ¶17. Because the circuit court deviated from child support standards, the circuit court was consequently required to address the WIS. STAT. § 767.25(1m) factors required for such a deviation. *Id.*

¶9 Here, the circuit court ordered child support monthly payments in the amount of \$480.68. Buschke appears to concede that this amount is in compliance with the 17% child support percentage guidelines. However, the circuit court also ordered, in addition to the child support, that the parties share equally Raelle's private school tuition and health insurance premiums. We conclude that the circuit court deviated from the child support percentage standards; in doing so, the circuit court was required to consider the WIS. STAT. § 767.25(1m) factors and specify why deviating from the guidelines was not unfair to Raelle or to Buschke. The circuit court fulfilled that obligation here.

¶10 In addressing the private school tuition, the circuit court stated

[B]oth parties testified that the school is a benefit to Raelle as well as an expense to the parents, and this is particularly noteworthy because Raelle was having some very real problems. She was involving herself in things that were illegal, that were damaging to her health, damaging to her reputation, damaging to her as a person. And the matters

ended up being addressed and some of the services provided, as were discussed here, and with the change of school that was necessitated by her expulsion for some of the activities described, she was put into another environment.

The indication is that she is doing well, that she has switched her circle of friends to those in the new school; that where as previously she was failing school grades, classes, she's now doing far better to the point of at least on the one occasion, making the honor roll; that was the testimony; and that we have not seen the reoccurrence of the prior conduct which was so destructive. At least there's not been any evidence offered of it.

So I am going to -- And both parties did testify that it was in her best interest to attend the Faith Christian School; each of the parties testified to that. That testimony is in the record here. The issue is who pays for it. I'm going to assign that equally between the parents.

Now, I do understand that this is showing a negative income of expenses with regard to Diane. I did not fail to appreciate the numbers here. We are talking about the contribution presently is \$95 a month, and the position by Diane is frankly that she can't afford it, but I see car payments of, what, 360-some bucks a month for a car. I heard testimony that in addition to the present residence, a new house is being built. I think there are other things that may have to -- Well, let's just say that the \$95 per month contribution toward Raelle, that would see to me to take priority over some of those other kind of expenditures, frankly, so I am going to split that as well....

....

We do have expenses above and beyond child support. The child support guidelines recognize certain things, and among the things that the guidelines take into account is the fact that ... there will be things that need to be done, that there may be extraordinary expenses as to children. So the guidelines are guidelines for basic support, and we do have here the additional issue of schooling, which is unusual but not off the page unusual.

Parochial schools are not that tremendously uncommon. The circumstances here are uncommon in that most kids don't get involved to the degree that Raelle did and the conduct that she got involved with and get themselves kicked out of school as well as making

themselves subject to certain other issues. So I do appreciate we have unusual expenses. I would point out of course that those are being shared and they are being shared equally and those are in addition to the food, clothing, shelter, and so, point is taken, but I would decline to change the order....

The circuit court acknowledged that it was deviating from the child support percentage standards. However, the circuit court also indicated that it considered some of the factors required by WIS. STAT. § 767.25(1m) in so deviating. The circuit court considered Buschke's financial resources (§ 767.25(1m)(b)), the physical, mental and emotional health needs of the child (§ 767.25(1m)(f)), the child's educational needs (§ 767.25(1m)(g)) and the child's best interests (§ 767.25(1m)(hm)). The circuit court appropriately exercised its discretion in ordering the parties to share the expense of Raelle's private school tuition.

¶11 In addition, the circuit court was well within its authority in ordering Buschke to share equally in health insurance premiums. WISCONSIN STAT. § 767.25(4m)(b) allows a court to order payment of health insurance expenses in addition to child support obligations:

In addition to ordering child support for a child under sub. (1), the court shall specifically assign responsibility for and direct the manner of payment of the child's health care expenses. In assigning responsibility for a child's health care expenses, the court shall consider whether a child is covered under a parent's health insurance policy or plan at the time the court approves a stipulation for child support under s. 767.10, enters a judgment of annulment, divorce or legal separation, or enters an order or a judgment in a paternity action or in an action under s. 767.02 (1)(f) or (j), 767.08 or 767.62 (3), the availability of health insurance to each parent through an employer or other organization, the extent of coverage available to a child and the costs to the parent for the coverage of the child. A parent may be required to initiate or continue health care insurance coverage for a child under this subsection. If a parent is required to do so, he or she shall provide copies of necessary program or policy

identification to the custodial parent and is liable for any health care costs for which he or she receives direct payment from an insurer. This subsection shall not be construed to limit the authority of the court to enter or modify support orders containing provisions for payment of medical expenses, medical costs, or insurance premiums which are in addition to and not inconsistent with this subsection.

In ordering Buschke to contribute half of the health insurance premiums and uninsured medical expenses, the circuit court stated

With regard to unpaid medical expenses, I am going to require that they continue to be shared between parents, and I would treat the marginal cost of providing the insurance coverage to be treated the same as one paid medical expense and is shared equally by the parties.

....

The premium should be treated as an uninsured [medical] expense because that's what it really boils down to.

Under § 767.25(4m)(b), the circuit court was well within its discretion in ordering Buschke to share the cost of Raelle's health insurance premiums and uninsured medical expenses. The court implicitly concluded that the small additional expense for the health insurance premiums was not a burden to either party. We conclude the circuit court reasonably required Buschke to share equally in the cost of the health insurance premiums.

¶12 Buschke further argues that the circuit court erroneously exercised its discretion by awarding Royston the tax dependency exemption. After a careful and thorough review of the court's decision and the record, we cannot discern the circuit court's basis for awarding Royston the tax exemption. We therefore reverse and remand for the circuit court to explain, by way of factual findings and

legal conclusions, why Royston should be awarded the tax dependency exemption for the minor child.

¶13 Again, an award of child support is within the discretion of the circuit court and will not be overturned unless the court abuses its discretion. *Fowler v. Fowler*, 158 Wis. 2d 508, 526, 463 N.W.2d 370 (Ct. App. 1990). A provision in a divorce judgment awarding the income tax dependency exemption for a minor child is an aspect of child support. *Id.* at 526-27. WISCONSIN STAT. § 767.25(1) states

(1) Whenever the court approves a stipulation for child support ... the court shall ...

....

(b) Ensure that the parties have stipulated which party, if either is eligible, will claim each child as an exemption for federal income tax purposes under 26 USC § 151 (c)(1)(B), or as an exemption for state income tax purposes under s. 71.07 (8)(b) or under the laws of another state. If the parties are unable to reach an agreement about the tax exemption for each child, the court shall make the decision in accordance with state and federal tax laws. In making its decision, the court shall consider whether the parent who is assigned responsibility for the child's health care expenses under sub. (4m) is covered under a health insurance policy or plan, including a self-insured plan, that is not subject to s. 632.897 (10) and that conditions coverage of a dependent child on whether the child is claimed by the insured parent as an exemption for purposes of federal or state income taxes.

Under 26 USC § 152(3) there is a rebuttable presumption that the custodial parent should be permitted to claim children as dependents for tax purposes unless the noncustodial parent provides more support than the custodial parent or the original divorce decree awarded the tax exemption to the noncustodial parent.

¶14 Buschke argues that her annual contributions to Raelle’s support far exceed the support Royston is providing. According to Buschke’s financial statement, her monthly income in 2002 was \$2,827.50 and therefore her \$480.68 child support is exactly 17% of her monthly income. Buschke also pays \$95 per month towards Raelle’s tuition expenses and approximately \$52.62 per month for health insurance premiums and uninsured dental costs (\$24 every two weeks for the insurance premium and \$2.31 every two weeks for uninsured dental and vision coverage). Buschke’s monthly payment therefore totals approximately \$628.30, approximately 22% of her income, for a total of \$7,539.60 each calendar year.

¶15 Royston testified that he had incurred additional expenses, such as electric, phone, food, medical and transportation costs, as the result of Raelle’s primary physical placement with him. Royston further testified that of his \$2,350.60 monthly expenses, “possibly” one-fourth of those expenses, or \$587.65, are attributable to Raelle. When pressed by Buschke’s counsel on cross-examination, Royston testified that dividing his expenses by one-fourth was not a good way to calculate his expenses as support for Raelle. He also testified that he spent three times as much clothing on Raelle as he did on himself, twice as much on food for her and “[e]xtra things like haircuts, make-up, you know, all that stuff....” Royston testified that he “probably” spends more than \$7,000 per year for Raelle’s expenses.

¶16 The circuit court stated

With regard to the tax exemption, I am going to award the tax exemption to Daniel. Both the federal tax law -- Start with Wisconsin state law. Wisconsin state law says that if the parties cannot agree, and they are not agreeing here, that the State -- that the Court should apply the state and federal guidelines. Under those guidelines, the party providing the greatest amount of the support would have the right to claim the exemption. The tax laws

also have a presumption built into it where the custodial parent, the person with the principal primary physical placement, is presumed to be the party spending the money, absent competent evidence to the contrary, ... but I don't think that the evidence is sufficient to overcome the presumption.

There were some estimates that Daniel was asked to make with regard to how much of the family income was going to go to this or to that. His most common answer was he didn't know, but he did venture a few estimates. I don't think the record before the Court is adequate to rebut the statutory -- or to rebut the presumptions inherent in the tax law. Bottom line is that Daniel gets the exemptions, so exemptions -- I should say for the one child.

¶17 The circuit court failed to make specific findings as to the amount of support Royston provides for Raelle. The court also failed to compare that amount to the amount provided by Buschke. Instead, the circuit court concluded that the record was inadequate to rebut the presumption in 26 U.S.C. § 152(3) that the custodial parent should receive the tax dependency exemption. We of course are obligated to search the record to sustain the circuit court's factual findings, which we have done here. However, after a search of the record, we cannot ascertain the circuit court's basis for determining that the presumption enjoyed by Royston to receive the tax dependency exemption had not been overcome by the evidence presented by Buschke. We conclude the circuit court erroneously exercised its discretion in awarding Royston the tax dependency exemption without explanation.

CONCLUSION

¶18 We reject each of Buschke's arguments regarding modification of child support, concluding that the circuit court acted well within its discretion in requiring her to share equally with Royston Raelle's health insurance premiums and private school tuition in addition to paying the statutorily mandated child

support. We therefore affirm the circuit court on this issue. However, we agree that the circuit court erroneously exercised its discretion in awarding the tax dependency exemption to Royston because it failed to make factual findings for its award and failed to demonstrate rationally how it reached its conclusion. We therefore reverse and remand for further proceedings consistent with this order.

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

Not recommended for publication in the official reports.

