COURT OF APPEALS DECISION DATED AND FILED

July 6, 2011

A. John Voelker
Acting 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. 2010AP2287

Cir. Ct. No. 2004FA412

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

IN RE THE MARRIAGE OF:

MARK EMMETT GILBERT,

JOINT-PETITIONER-APPELLANT,

V.

THERESA NOELLE GILBERT,

JOINT-PETITIONER-RESPONDENT.

APPEAL from an order of the circuit court for St. Croix County: EDWARD F. VLACK III, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Mark Gilbert appeals a postdivorce order concerning modification of child support. Mark argues the circuit court erroneously exercised its discretion by requiring him to equally share private

school tuition expenses for one child. He also argues the court's finding of a substantial change in circumstances is unsupported by the record. We affirm.

¶2 Mark and Theresa Gilbert were divorced on September 28, 2005. The parties have three minor children. Pursuant to a "Final Marital Agreement," the parties originally stipulated that Mark pay $1,000 monthly child support as a shared placement payer. The marital settlement agreement also provided that Mark pay private school tuition at his discretion. Mark ceased making tuition payments, and Theresa has made payments since April 2008.

¶3 In July 2009, Mark filed a motion to revise child support, and his monthly child support was reduced from $1,000 to $450. On November 18, 2009, Mark filed a motion to modify physical placement. On January 21, 2010, Theresa filed a contempt motion seeking retroactive modification of child support and an equal split of variable costs as sanctions for Mark's alleged failure to disclose attorney fees received from class action lawsuits.[1] A hearing was held on May 25, 2010. The court subsequently ordered a 50/50 placement schedule. Responsibility for the payment of variable costs, including private school tuition, was continued to June 1, 2010.

¶4 At the June 1 hearing, Mark argued the terms of the original marital settlement agreement allowed him to decide whether to pay tuition, and he could no longer afford it. On July 30, 2010, the court issued a written decision and order, requiring the parties to share the $294 monthly tuition expenses. The court stated that it found no evidence that sharing responsibility for variable costs would

[1] Mark is an attorney.

be unfair to the parties or the child, and "since the parties share placement equally," they should "share equally the future costs of private school tuition …." The court also found that any number of factors would constitute a substantial change in circumstances. Mark now appeals.

¶5 Modification of child support is committed to the sound discretion of the circuit court. ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. We generally look for reasons to sustain the circuit court's discretionary decision. ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968). We may search the record to determine if it supports the court's discretionary determination. ***Randall***, 235 Wis. 2d 1, ¶7. We will sustain a discretionary decision if the circuit court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion a reasonable judge could reach. ***Liddle v. Liddle***, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). Findings of fact will be affirmed unless clearly erroneous. WIS. STAT. § 805.17(2).[2]

¶6 Mark insists it was "an abuse of discretion for the trial court to ignore stipulated terms contained in the [marital settlement agreement]."[3] Mark argues we should "enforce the clear words of the stipulated contract," which "gives Mark 'sole' discretion about whether he would be paying more for the tuition." Mark also contends the circuit court erred by finding a substantial change of circumstances.

[2] References to the Wisconsin Statutes are to the 2009-10 version unless noted.

[3] We have not used the phrase "abuse of discretion" since 1992, when our supreme court replaced the phrase "abuse of discretion" with the phrase "erroneous exercise of discretion." *See, e.g.*, ***Shirk v. Bowling, Inc.***, 2001 WI 36, ¶9 n.6, 242 Wis. 2d 153, 624 N.W.2d 375.

¶7 Here, the circuit court's order to share tuition expenses resulted from a change in placement which Mark sought and received. In the case of a shared payer, the court must apply WIS. ADMIN. CODE § DCF 150.04(2)(b)6. (Nov. 2009), which requires assignment of variable costs in proportion to each parent's share of physical placement. Variable costs may be assigned separately or "incorporated in the fixed sum or percentage expressed child support order." *See **id.*** For purposes of child support, tuition falls within the definition of variable costs. *See* WIS. ADMIN. CODE § DCF 150.02(29) (Nov. 2009).

¶8 A substantial change in circumstances includes a change in the needs of the child, a change in the payer's earning capacity, or any other factor the court determines is relevant. WIS. STAT. § 767.59(1f)(c)(2)-(4). The circuit court properly found that a change in placement may constitute a change of circumstances. *See **Abel v. Johnson***, 135 Wis. 2d 219, 234, 400 N.W.2d 22 (Ct. App. 1986), *overruled on other grounds*, ***Herrell v. Herrell***, 144 Wis. 2d 479, 424 N.W.2d 403 (1988). The court also properly exercised its discretion by finding relevant Mark's reduction in child support. The court stated, "Mr. Gilbert is now paying $550 less each month in child support." Mark argues that his reduction in child support cannot be considered because, when the child support was reduced from $1,000 to $450 monthly, the court did so in light of the fact that Theresa was paying full tuition and therefore already "given credit" for her payments. However, placement was modified after Mark's reduced child support was set, and therefore the court appropriately considered his reduced child support as a relevant factor in requiring the parties to equally share private school tuition.

¶9 The circuit court also properly observed that the statutory goal of providing for the best interests of the child would be defeated if a party is precluded from modifying child support when it would be in the best interests of

the child. *See* ***Ondrasek v. Tenneson***, 158 Wis. 2d 690, 696-97, 462 N.W.2d 915 (Ct. App. 1990). The guardian ad litem recommended the child attend the private school. The court specifically found "there was no evidence presented as to why following the standard guidelines for division of variable costs would be unfair to either of the parties or [the child], other than arguing if it was affordable."

¶10 We are not persuaded by Mark's argument that the circuit court concluded in a prior order that the placement schedule change was not a substantial change in circumstances. Whatever may be said about the court's prior statement in the context of Mark's previous motion to modify the placement schedule, the circuit court relied upon several changes to support its subsequent July 31 finding of a substantial change in circumstances. The court's findings are supported by the record.

¶11 Mark also argues that during the June 1, 2010 hearing, the issue of substantial change of circumstances "was never mentioned by the court or any party." Mark contends "no evidence or argument whatsoever" was offered tending to demonstrate that a substantial change in circumstances occurred. However, the June 1 hearing was a continuation of the May 25, 2010 hearing. Mark did not provide a transcript of the May 25 hearing. We therefore assume the missing material supports the circuit court's decision. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993).

¶12 The record demonstrates that the circuit court employed a process of reasoning based upon relevant facts, and reached a reasonable conclusion. The final divorce judgment was modified such that the parties shared placement equally, and the court properly exercised its discretion by ordering the parties to also share equally the future costs of private school tuition.

By the Court.—Order affirmed.

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