

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 27, 2005

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. 03-2555
STATE OF WISCONSIN**

Cir. Ct. No. 99FA005277

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE MARRIAGE OF:

MICHAEL J. LANDWEHR,

PETITIONER-APPELLANT,

V.

BERNADETTE N. LANDWEHR,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
WILLIAM SOSNAY, Judge. *Affirmed in part; reversed in part and cause
remanded.*

Before Deininger, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Michael Landwehr appeals an order denying his motion for a reduction in child support and for modification of the physical

placement schedule of his two children. The issue is whether the circuit court properly exercised its discretion in deciding these two matters. We reverse the child support decision and remand for redetermination of the issue. We affirm the physical placement decision.

¶2 Michael and Bernadette Landwehr divorced in June 2000. Michael agreed to give Bernadette primary physical placement of their two children, Natalia, d/o/b 5/25/93, and Elise, d/o/b 1/3/97. Michael received placement one evening and one overnight per week, and every other weekend. He also agreed to pay child support of \$1,800 per month or 25% of his gross income, whichever was larger.

¶3 At the time of the divorce, Michael earned \$86,400 per year. He traveled a good deal for his employer and worked at least forty-five hours per week. Shortly after the divorce, Michael left his employment and started his own business, PackX. His business partners were Brenda Moser, whom he later married, and Deborah Bonney. His self-employment allowed Michael to work more flexible hours. He also moved within a few minutes drive of his daughters' home.

¶4 David Aragon operated a temporary staffing agency, and agreed to provide staff for PackX. He also provided Michael with financing for startup costs, salary, and other operating expenses. In exchange, Aragon received 51% ownership of the business, and a security interest in various assets.

¶5 From November 2000 until September 2001, Michael maintained himself at his former salary of \$86,400 per year. Up until that time PackX continued to rely on loans from Aragon. With PackX's debt to Aragon reaching \$445,000, and business slowing after the 9-11 terrorist attack, Aragon decided in

November 2001 that he could no longer provide financing. That decision created a financial crisis for PackX.

¶6 As a result, Bonney left the company, and Michael reduced his salary to \$40,000 per year at the suggestion of his financial advisor. He also began looking for other financing. In January 2002, Michael and Aragon agreed to repayment terms that required PackX to continue seeking refinancing. It also provided that Michael and Moser would draw salaries as approved by the lending bank, with salary increases limited to 5% annually unless the lending bank or Aragon consented to a greater increase.

¶7 Michael continued his salary at \$40,000 per year through 2002. He ultimately received refinancing through the Small Business Administration and Associated Bank in September 2002, and reduced his debt to Aragon by \$200,000 with the loan proceeds. Neither lending entity imposed a salary limitation on Michael.

¶8 In January 2003, Michael and Aragon renegotiated the terms of the PackX debt to Aragon. Essentially, Aragon agreed to return his 51% interest in the company in exchange for monthly repayments over seven years and yearly payments of 25% of PackX's net yearly income, on the loan balance of approximately \$300,000. The agreement also restricted Michael's salary increases to no more than 5% annually until PackX satisfied its debt. Pursuant to that agreement, Michael increased his salary by 5%, to \$42,000 per year for 2003.

¶9 PackX's business improved substantially during 2002, with revenues exceeding one million dollars. PackX reported a net profit of \$3,900. Omitting deductions for depreciation and amortization, it cleared approximately \$60,000.

¶10 Michael brought his motion in June 2002, but the court did not hear and decide it until July 2003. In support of his request for a reduction in child support, Michael contended that he was justified in starting his own business, that he had valid business reasons to reduce his salary after September 2001, that business reasons continued to justify a reduced salary level, and that his salary was now restricted in any event by the January 2003 loan repayment agreement. In support of his request for a modification of the physical placement schedule, Michael contended that circumstances had substantially changed and justified approximately equal placement for the following reasons: the children were older, both were in school, he had moved nearby, and he had much more time to devote to them.

¶11 With respect to child support, the circuit court first determined that Michael had valid reasons to create his own business and did not do so to avoid or reduce his support obligation. However, the court found that the improvement in PackX's financial conditions during 2002 permitted Michael to earn far more in 2003 than what he continued to pay himself. In so finding, the court noted that the Associated Bank and Small Business Administration agreements did not prevent Michael from increasing his salary. The court stated that it had considered all the agreements, including the January 2003 repayment agreement, but it made no comment on the salary restriction that particular agreement contained. Based on Michael's enhanced earning potential, the court declined to reduce support.

¶12 With respect to physical placement, the court increased Michael's placement by ten overnights during the summer, but kept it the same during the school year. The court reasoned that the children were still young and were adjusting well and doing well in school, and increased placement would be too disruptive to their schedule and possibly affect their school performance. On

appeal, Michael asserts that the circuit court erroneously exercised its discretion by denying increased school year placement.

¶13 Child support determinations are 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. Whether to modify physical placement is also a discretionary decision. *Hughes v. Hughes*, 223 Wis. 2d 111, 119, 588 N.W.2d 346 (Ct. App. 1998). We affirm discretionary decisions when the circuit court applies the correct legal standard to the facts of record and reaches a reasonable result. *Id.* at 120. The court must also demonstrate a rational mental process by providing the reasons for its decision. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). The prerequisite for modifying child support is a determination of a substantial change in circumstances. WIS. STAT. § 767.32(1) (2003-04).¹ In the circumstances of this case, the circuit court may modify physical placement if it determines that modification is in the children's best interests and that there has been a substantial change in circumstance. WIS. STAT. § 767.325(1)(b).

¶14 Circuit courts may use earning capacity, rather than actual earnings, to determine child support and maintenance payments when the party in question is shirking. *See Abitz v. Abitz*, 155 Wis. 2d 161, 175, 455 N.W.2d 609 (1990). Shirking is a voluntary and unreasonable employment decision to reduce or forego income. *Finley v. Finley*, 2002 WI App 144, ¶15, 256 Wis. 2d 508, 648 N.W.2d 536.

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶15 We conclude there was sufficient evidence in the record for the circuit court to conclude that Michael could pay himself a higher salary from PackX revenue and still meet the company's expenses and debt obligations. To that extent, the court could reasonably determine that, strictly from a financial standpoint, Michael voluntarily and unreasonably limited his income to \$42,000 per year.

¶16 However, the circuit court, did not directly confront the issue of Michael's contractual obligation to restrict his salary increases to 5% percent per year from his 2002 base of \$40,000 per year. The court stated that it had considered the January 2003 debt repayment agreement, but it gave no explanation for disregarding it or the testimony from Aragon and Michael that the salary provision was inserted by Aragon's attorney to protect Aragon's interests. One might infer that the court disbelieved that testimony and concluded instead that, notwithstanding the provision's obvious benefit to Aragon, it was a sham provision that was inserted in the contract merely to help Michael in his effort to reduce support. One might also conclude that the circuit court overlooked the provision; or, alternatively, that the court considered the provision irrelevant for some other, undisclosed reason. We are simply not sure. Because we are not sure, we remand for a re-examination of the issue whether there is a valid contractual provision restricting the amount Michael can pay himself. Whatever decision the court arrives at on this issue and on the ultimate issue of Michael's child support obligation, the circuit court should state the reasons for its decision.

¶17 Michael also contends that the circuit court erred by not adjusting his support to what it would be under the child support guidelines for shared time payers, after the court increased his summer placement. Bernadette responds that Michael never asked the court to abandon the stipulated support payments on this

basis and apply the shared time percentage guidelines instead. Michael's briefs contain no cite to the record showing where he raised the issue. We decline to search the record to determine whether he did, and we therefore do not further address this issue.

¶18 Turning to Michael's challenge to the court's decision on physical placement, we conclude the circuit court reasonably exercised its discretion. WISCONSIN STAT. § 767.24(5) sets forth sixteen factors the court is to consider in determining physical placement. Michael argues that the circuit court erred by expressly considering only two of those factors, and failing to articulate any consideration of the remainder. However, there is no authority for the proposition that the circuit court must consider and discuss on the record each statutory factor in every case, regardless of its relevance. See *Lemere v. Lemere*, 2003 WI 67, ¶¶26-7, 262 Wis. 2d 426, 663 N.W.2d 789. The choice of which factors are relevant and significant to the decision lie within the circuit court's discretion. *Id.* In this case, the circuit court reasonably limited its discussion to the factors it deemed most relevant to the dispute. Michael has not demonstrated that any of the omitted statutory factors were highly relevant or compelled the equal placement he sought.²

¶19 Finally, Michael contends that the court failed to comply with WIS. STAT. § 767.24(4)(a)2, requiring that:

² The listed factors set forth in WIS. STAT. § 767.24(5) include child, spousal, and substance abuse, home, school, and religious adjustment, and health concerns. None of these were even arguably relevant to this case. Other factors were arguably relevant, but were not shown to favor one party's position over the other's, such as the parents' and the children's wishes, interaction with relatives and stepparents, and the parents' cooperation and communication with one another.

The court shall set a placement schedule that allows the child to have regularly occurring, meaningful periods of physical placement with each parent and that maximizes the amount of time the child may spend with each parent, taking into account geographic separation and accommodations for different households.

¶20 The statute provides no definition of “maximizes.” Nor does it explain how the court can maximize placement with one parent without reducing it for the other. In any event, WIS. STAT. § 767.24(4)(a)2 does not require nor presume equal placement. *Keller v. Keller*, 2002 WI App 161, ¶12, 256 Wis. 2d 401, 647 N.W.2d 426. Michael receives placement 129 days per year, and he cannot reasonably contend that he is deprived of “regularly occurring, meaningful periods of physical placement” with his children, nor that § 767.24(4)(a)2 compels a different result. No costs to either party.

By the Court.—Order affirmed in part, reversed in part and cause remanded.

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

