COURT OF APPEALS
DECISION
DATED AND FILED

January 21, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP497 **Cir. Ct. No. 2001PA38PJ**

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

IN RE THE PATERNITY OF KATLYNN M. DIETZEN:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

JACKI ANDERSON,

PETITIONER-RESPONDENT-CROSS-APPELLANT,

V.

MICHAEL DIETZEN,

RESPONDENT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Ozaukee County: SANDY A. WILLIAMS, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. This is the latest chapter in the ongoing child-support dispute between Michael Dietzen and Jacki Anderson. Dietzen appeals the portions of an order that denied his motions to reduce child support and for sanctions against Anderson and granted Anderson's motion for revised child support. Anderson cross-appeals the portion of the order making her solely responsible for the minor child's variable expenses. Dietzen and Anderson both move for sanctions, costs, and attorney fees on grounds that the other's appellate position is frivolous. We affirm the order and deny both motions.

¶2 Dietzen's and Anderson's nonmarital daughter, Katlynn, was born in October 1997. Dietzen's paternity was adjudicated in 2001. In October 2004, they entered into a court-approved stipulation that terminated "all child support … present and future." In September 2007, the State, by the Ozaukee County Child Support Agency, moved to modify child support based on thirty-three months having passed since the stipulation. *See* WIS. STAT. § 767.59(1f)(b)2. (2011-12)[1]; *see also* ***Tierney v. Berger***, 2012 WI App 91, ¶25, 343 Wis. 2d 681, 820 N.W.2d 459. In December 2007, the court found a substantial change in circumstances and ordered Dietzen to pay $511.73 a month.[2]

¶3 In early 2009, Dietzen moved to modify the support level; the court reduced it to $434.97. That order was modified in February 2013 on the State's motion, increasing the order to $517.22. A few months later, on learning that his income increased due to a job change, Anderson moved for another support

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] Child-support figures will be expressed in monthly amounts.

modification. In December 2013 the court ordered Dietzen to pay $626.48 per shared-placement and high-income payer guidelines, *see* WIS. STAT. §§ 767.511(1j) and 49.22(9); *see also* WIS. ADMIN. CODE § DCF 150.04(2), (5) (Nov. 2009), and Anderson to be fully responsible for Katlynn's variable costs.[3] This appeal and cross-appeal followed.

Dietzen's Appeal

¶4 One of Dietzen's complaints is that the circuit court should have enforced the 2004 no-support stipulation. This claim is not properly before us. He did not appeal the circuit court's 2007 order modifying the stipulation. The filing of a timely notice of appeal is necessary to give this court jurisdiction over the appeal. WIS. STAT. RULE 809.10(1)(e).

¶5 Further, there is no indication that he raised this challenge at the hearings on the State's 2007 or his 2009 motion to modify. He therefore waived his right to have it considered on appeal. *See* ***State v. Gilles***, 173 Wis. 2d 101, 115, 496 N.W.2d 133 (Ct. App. 1992) (appellant must give circuit court fair notice that he or she is raising particular issue).

¶6 Principles of judicial estoppel also defeat his claim. Judicial estoppel may be invoked where a party successfully asserts one position in a legal proceeding and later asserts an inconsistent position. *See* ***Riccitelli v. Broekhuizen***, 227 Wis. 2d 100, 111-12, 595 N.W.2d 392 (1999). As Dietzen

[3] "Variable costs" are "the reasonable costs above basic support costs incurred by or on behalf of a child, including but not limited to, the cost of child care, tuition, a child's special needs, and other activities that involve substantial cost." WIS. ADMIN. CODE § DCF 150.02(29).

moved in 2009 to modify support and persuaded the court to adopt his position, he is precluded from asserting here that the 2004 stipulation should be upheld.

¶7 Last, his claim fails on the merits. The stipulation does not comport with Wisconsin law. Parties generally may enter into a stipulation that governs the minimum amount due for child support. ***May v. May***, 2012 WI 35, ¶17, 339 Wis. 2d 626, 813 N.W.2d 179. This one set a maximum of zero. A stipulation setting a non-modifiable ceiling offends public policy and is not enforceable. *See* ***Frisch v. Henrichs***, 2007 WI 102, ¶67, 304 Wis. 2d 1, 736 N.W.2d 85.

¶8 Dietzen also argues that WIS. STAT. § 767.553(1)(b) allows a support adjustment only once a year and the circuit court adjusted the order twice in 2013. He misreads the statute. The limitation does not apply here because annual adjustments were not made a part of the original order. *See* § 767.553(1)(a).

¶9 Dietzen next challenges the court's oral ruling. The court stated:

> Alright. Mr. Dietzen, I know you will not like this, but the law does provide child support can be changed based on income. And I hope you heard what [the child support agency representative] was doing. She utilized the formula that all Courts use and she came up with $626.48, so I am going to order that. But I am also going to order that all variables are now the responsibility for Ms. Anderson, because child support is to pay for those things.

Dietzen contends the court "failed to provide a 'demonstrated rational process' for continuing and increasing the support order" and instead "blindly" followed the State's recommendation.

¶10 Modification of child support is committed to the circuit court's sound discretion. ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. We will sustain a discretionary decision if the 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). We look for reasons to sustain a discretionary decision, ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968), and may search the record to determine if it supports that determination, ***Randall***, 235 Wis. 2d 1, ¶7. We affirm findings of fact unless clearly erroneous. WIS. STAT. § 805.17(2).

¶11 A child support order may be revised "only upon a finding of a substantial change in circumstances." WIS. STAT. § 767.59(1f)(a). The first step in the analysis is a factual inquiry as to the parties' financial circumstances both when the award was made and in their current financial circumstances. ***Erath v. Erath***, 141 Wis. 2d 948, 953, 417 N.W.2d 407 (Ct. App. 1987). The circuit court's findings of fact regarding the "before" and "after" and whether a change has occurred will not be disturbed unless clearly erroneous. ***Rosplock v. Rosplock***, 217 Wis. 2d 22, 33, 577 N.W.2d 32 (Ct. App. 1998). The ultimate conclusion of whether the change is substantial is a question of law that we determine de novo. ***Id.***

¶12 The evidence showed Dietzen's income had increased and that sixteen-year-old Katlynn had various high-school-related expenses. Such evidence may contribute to a finding of a substantial change of circumstances sufficient to justify revising a child support order. *See* WIS. STAT. § 767.59(1f)(a), (c)1. (change in payer's income), and ***Burger v. Burger***, 144 Wis. 2d 514, 524, 424 N.W.2d 691 (1988) (minor child's age increase or reaching school age may establish increased need). We conclude the change was substantial and that the findings were sufficient to warrant an increase in the support order.

¶13 Dietzen also contends the percentage standards method works an absurd result because, even though he rebutted the presumptive use of the percentage standards, the circuit court "robotic[ally]" adhered to them.

¶14 Use of the percentage standards generally is mandatory. WIS. STAT. § 767.511(1j); *see also* WIS. STAT. § 767.59(2). A court may deviate from the percentage standard if, after considering various factors, 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. Secs. 767.511(1m) and 767.59(2)(b).

¶15 Dietzen argues that using the percentage-of-income standard is unfair to him. He submits that the disparity between his and Anderson's incomes is a reflection of his hard work and her "poor lifestyle choices." The disparity is relevant only if he could show he was unable to pay the ordered child support or that it would adversely affect Katlynn or himself. *See* ***Luciani v. Montemurro-Luciani***, 199 Wis. 2d 280, 309, 544 N.W.2d 561 (1996). He has not done so.

¶16 He also asserts that, as Anderson did not prove that Katlynn's needs warrant increased support, ordering support commensurate with his increased income results in a subsidy to Anderson in the guise of child support. As Anderson was not the party urging the court to deviate from the percentage standards, she did not have to prove that Katlynn's needs grew. *See* WIS. STAT. § 767.59(2)(b).

¶17 That the court did not expressly tick through each factor in its ruling does not make its conclusion "robotic." The court addressed Katlynn's bank account, the parents' financial resources, placement, Katlynn's health insurance, Katlynn's best interests, and the child support agency representative's opinion that there was no reason to deviate from the percentage model's recommendation. *See*

WIS. STAT. § 767.511(1m)(a), (b), (ej), (f), (hm), and (i). A court need consider only those factors that are relevant. ***State v. Alonzo R.***, 230 Wis. 2d 17, 28, 601 N.W.2d 328 (Ct. App. 1999).

¶18 Dietzen's discussion of each statutory paragraph suggests he wants a "do-over" of the circuit court's fact finding. Even if the evidence would admit contrary findings, we must accept the circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2); ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983). We conclude the court implicitly found that Dietzen did not meet his burden of showing unfairness or an inability to pay. *See* ***Schneller v. St. Mary's Hosp. Med. Ctr.***, 162 Wis. 2d 296, 311, 470 N.W.2d 873 (1991). Absent such a showing, the percentage standards are presumptively applicable. ***Alonzo R.***, 230 Wis. 2d at 28. Our review of the record satisfies us that the court's discretionary ruling had a reasonable basis. The percentage method does not work an absurd result in this case.

¶19 Finally, Dietzen asserts that the court erred in not ordering WIS. STAT. § 802.05 sanctions against Anderson's counsel because the motion to modify child support had no legal footing. As each of his foregoing arguments against Anderson's motion failed, this last one necessarily fails as well.

Anderson's Cross-Appeal

¶20 Anderson argues that when the circuit court bases a child support order on the shared-placement guidelines it must order the parties to assume variable costs in the same proportion as the placement. She contends that because she and Dietzen each have fifty-fifty placement, the circuit court therefore erred in ordering her to be responsible for all of Katlynn's variable costs. We disagree.

¶21 WISCONSIN ADMIN. CODE § DCF 150.04 tells how to determine a child support obligation in special circumstances, for example as here where parents share placement. The rule provides that once support is determined under § DCF 150.04(2)(b)5, "the court shall assign responsibility for payment of the child's variable costs in proportion to each parent's share of physical placement, with due consideration to a disparity in the parents' incomes." WIS. ADMIN. CODE § DCF 150.04(2)(b)6.

¶22 Anderson focuses on "in proportion to each parent's share" as the controlling language. We are persuaded, however, that "with due consideration to a disparity in the parents' incomes" invests the circuit court with the discretion to craft an order it deems fitting in the particular case.

¶23 The court was aware that the parties had equal placement. It examined Katlynn's variable expenses. Having increased Dietzen's child support obligation, the court ordered Anderson to assume full responsibility for variables "because child support is to pay for those things." The conclusion is one a reasonable judge could reach and reflects the discretion the rule envisions.

Motions for Costs and Fees

¶24 Each party moves for costs and attorney fees on the basis that the other's appellate position is frivolous under WIS. STAT. RULE 809.25(3)(c). We determine as a matter of law whether an appeal is frivolous. ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 236, 517 N.W.2d 658 (1994). We must be able to conclude that the entire appeal/cross-appeal was frivolous. *See* ***Baumeister v. Automated Prods., Inc.***, 2004 WI 148, ¶26, 277 Wis. 2d 21, 690 N.W.2d 1. The question is "'whether the claim is so indefensible that the party or … attorney should have known it to be frivolous.'" ***Id.***, ¶28 (citation omitted). All doubts

about the reasonableness of a claim must be resolved against the party asserting that the action is frivolous. ***Id.*** Pro se litigants also must make a reasonable investigation of the facts and the law before filing an appeal. ***Holz v. Busy Bees Contracting, Inc.***, 223 Wis. 2d 598, 608, 589 N.W.2d 633 (Ct. App. 1998).

¶25 There is no evidence that the claims on either side were brought *solely* to harass or maliciously injure the other party. We also conclude they are not without *any* reasonable basis in law or equity. We deny both requests for an award of costs and fees.

By the Court.—Order affirmed.

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