COURT OF APPEALS
DECISION
DATED AND FILED

May 21, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP745 **Cir. Ct. No. 2006PA419**

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

IN RE THE PATERNITY OF M. R. K.:

ROCK COUNTY CHILD SUPPORT,

PETITIONER,

CLAIRE E. K.,

PETITIONER-RESPONDENT,

V.

MARTIN P. S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: RICHARD T. WERNER, Judge. *Affirmed*.

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Martin P.S., pro se, appeals an order that modified child support, found neither party in contempt, and denied attorney fees to either party. Martin contends that the circuit court erroneously exercised its discretion in setting the child support that Martin is obligated to pay Claire E.K. He also contends that the circuit court erred by failing to apply its child support award retroactively to the date of the child support order issued by the court commissioner and by failing to award Martin attorney fees. We reject these contentions for the reasons set forth below and affirm.

¶2 In October 2007, the circuit court entered a judgment of paternity adjudicating Martin the father of Claire's child, M.R.K., and ordering Martin to pay temporary child support to Claire pending a hearing. In January 2009, following evidentiary hearings, the court entered a supplemental judgment of paternity ordering Martin to pay Claire $874.77 per month in child support for M.R.K.

¶3 In July 2012, Claire moved to modify child support based on Martin's increased income. The family court commissioner held a hearing and then modified Martin's child support obligation to $2,064.33 per month by order dated December 18, 2012, retroactive to the date of the motion to modify support.

¶4 Martin moved for a hearing de novo. Martin requested that the circuit court deviate from the standard child support percentages and instead order Martin to pay $874.77 in child support, the amount he had paid under the court's prior child support order. Martin argued that it was unfair to order Martin to pay the amount he would owe under the standard child support percentages because Martin had business expenses that reduced the amount of income he had available for child support. *See* WIS. ADMIN. CODE § DCF 150.02(16) (Nov. 2009). Martin

also argued that it would be unfair to him to order child support based on the standard percentages because the estimated annual cost to raise a child in the Midwest is $8,620, which the prior child support amount already fully satisfied. Martin argued that use of the standard percentages was unfair because it resulted in payments to Claire in excess of the amount needed to support M.R.K., and thus Martin's payments would go towards support of Claire's second child. Martin sought to reinstate his previously ordered child support amount, retroactive to the date that the court commissioner's order for an increased amount went into effect.

¶5 In February 2014, following evidentiary hearings, the circuit court found that it was appropriate to follow the standard child support percentages. The court used the applicable high income payer percentages under WIS. ADMIN. CODE § DCF 150.04(5) and Martin's 2012 adjusted gross income as modified by subtracting Martin's reasonable business expenses. Using that formula, the court set Martin's child support at $1,669.00 per month. The court also found that neither party was in contempt, and denied attorney fees to either party. Martin appeals.

¶6 We review a circuit court's decisions as to child support, contempt, and attorney fees for an erroneous exercise of discretion. ***McLaren v. McLaren***, 2003 WI App 125, ¶13, 265 Wis. 2d 529, 665 N.W.2d 405 (child support); ***Benn v. Benn***, 230 Wis. 2d 301, 308, 602 N.W.2d 65 (Ct. App. 1999) (contempt); ***Lellman v. Mott***, 204 Wis. 2d 166, 175-76, 554 N.W.2d 525 (Ct. App. 1996) (attorney fees). We will sustain a discretionary act if the circuit court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a decision that a reasonable judge could reach. ***McLaren***, 265 Wis. 2d 529, ¶13. "Although the proper exercise of discretion contemplates that the circuit court explain its reasoning, when the court does not

do so, we may search the record to determine if it supports the court's discretionary decision." ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737.

¶7 A circuit court is required to set child support according to the percentage standards developed by the Wisconsin Department of Children and Families (DCF) unless application of the standards would be unfair to the child or any of the parties. WIS. STAT. § 767.511(1j) and (1m) (2013-14).[1] If a party challenges the fairness of application of the standards, a circuit court must consider statutory factors and articulate the basis for its decision to either remain within the guidelines or allow a deviation. ***Luciani v. Montemurro-Luciani***, 199 Wis. 2d 280, 295-96, 544 N.W.2d 561 (1996). A party challenging the standards bears the burden to prove unfairness by the greater weight of the credible evidence. ***Id.*** The court may depart from the standards if, after considering the following factors, the court finds that use of that standard is unfair to the child or to either party:

> (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.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

> (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 child 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. 767.41.
>
> (f) The physical, mental, and emotional health needs of the child, including any costs for health insurance as provided for under s. 767.513.
>
> (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.

WIS. STAT. § 767.511(1m).

¶8 Martin argues that the circuit court erroneously exercised its discretion by failing to consider the required statutory factors and failing to articulate its reason for denying Martin's request to deviate from the standards. Martin argues that strict application of the standards resulted in a child support order that was unfair to Martin because it resulted in an amount of child support that exceeds the actual costs to raise a child. Thus, Martin asserts, the support

award relieves Claire of any financial responsibility for M.R.K. and allows Claire an excess of income to pay for her second child, debts, and a former live-in boyfriend. We disagree.

¶9 The circuit court explained that it determined that it was appropriate to follow the child support percentage standards after considering the evidence presented at the hearings. The court considered Martin's financial resources and expenses, the costs to the parties for health insurance for M.R.K., and the parties' earning capacities. *See* WIS. STAT. § 767.511(1m)(b), (f), (hs) and (i). While the circuit court did not specifically identify the statutory factors by name, it is the consideration of the factors rather than their identification that is significant. *See* ***State v. Odom***, 2006 WI App 145, ¶25, 294 Wis. 2d 844, 720 N.W.2d 695 (when a circuit court is required to address specific factors, the circuit court must discuss the application of the factors to the facts, but need not recite them). Additionally, a circuit court need not consider those statutory factors that are not implicated by the facts of a case. *See* ***LeMere v. LeMere***, 2003 WI 67, ¶26, 262 Wis. 2d 426, 663 N.W.2d 789. Here, many of the statutory factors were inapplicable because the parties were never married and Martin does not have any placement with M.R.K. *See*, *e.g.*, § 767.511(1m)(bj) (maintenance), (c) (child's standard of living during marriage), (ej) (periods of physical placement), and (em) (travel expenses to exercise placement). Indeed, Martin does not argue that the circuit court failed to consider any particular relevant statutory factor, nor does he develop an argument as to how an analysis of the statutory factors would support a finding of unfairness. Because the circuit court expressly considered the facts pertaining to the relevant statutory factors in explaining its determination that it was appropriate to apply the standards, we reject Martin's argument that the court failed to either

consider the statutory factors or explain its reason to deny Martin's request for deviation.

¶10 We also reject Martin's argument that the circuit court erred by failing to undertake an analysis of fairness, instead using a "robotistic utilization of the percentage standards" leading to "absurd results." *See* ***Hubert v. Hubert***, 159 Wis. 2d 803, 814, 465 N.W.2d 252 (Ct. App. 1990) ("[I]n cases where the parties have a substantial marital estate and income far beyond the average income of most people, the robotistic utilization of the percentage standards may give absurd results."). Rather than robotically applying the standards, the circuit court cited the hearing testimony as to the parties' relative financial situations in determining that it was appropriate to set child support according to the high income payer standards. The court also made factual findings as to the amount of Martin's reasonable work-related expenses reducing the amount of income Martin has available for child support. The circuit court determined that, using that reduced income and the high income payer child support standards, the amount of monthly child support due to Claire was $1,699.

¶11 Additionally, on our review of the record, we conclude that Martin did not meet his burden to establish that use of the child support percentage standards was unfair and thus the circuit court did not erroneously exercise its discretion by utilizing the standards. *See* ***Randall***, 235 Wis. 2d 1, ¶7 (we may search the record for support of the court's exercise of discretion). The amount of child support calculated in this case is not an amount "so far beyond the child's needs as to be irrational" such as when "[n]o basis exists in th[e] record for a finding that [the] child has a need even approaching that amount." *See* ***Parrett v. Parrett***, 146 Wis. 2d 830, 841-42, 432 N.W.2d 664 (Ct. App. 1988). As the supreme court has explained, the reasoning in extremely high income cases "came

from the court's recognition that a case may exist where application of the percentage standards would result in a child support award far beyond the child's needs, thereby justifying deviation from the general rule of strict adherence." ***Luciani***, 199 Wis. 2d at 299.

¶12 Here, Martin did not present evidence that the child support payments as calculated under the standards would far exceed M.R.K.'s actual needs; rather, he cited a study as to the estimated average cost to raise a child in the Midwest and argued that he should not be expected to pay more than that amount. He then argued that some of his payments to Claire would necessarily be used in Claire's budget for debt payments and care for Claire's other child and former live-in boyfriend. Claire testified that she earns $13.20 an hour and works thirty-seven and a half hours per week; that she lives with her two children, M.R.K. and T.K.; that Claire's former live-in boyfriend was not employed when he lived with Claire; that Claire uses her wages and the child support from Martin to support herself and her two children; and that Claire's total monthly expenses are $3,593. On this record, Martin has not shown that the child support payments of $1,699 so far exceed M.R.K.'s needs as to render the child support amount absurd. That is, Martin's arguments that the payments exceed the estimated average cost to raise a child in this region and that Claire's household will necessarily benefit collectively from the payments do not amount to a showing of unfairness requiring deviation from the child support standards. Similarly, Martin's arguments that his child support payments allow Claire to make payments toward her personal debt and that Claire may have provided support to an unemployed live-in boyfriend are insufficient to meet Martin's burden to show that utilizing the standards would be unfair.

¶13 Finally, Martin contends that the circuit court erred by failing to make its child support award retroactive to the date of Claire's July 2012 motion to modify child support and failing to award Martin attorney fees. Martin argues that the circuit court created a windfall for Claire of the excess amounts Martin paid in child support between the court commissioner's ruling and the circuit court's decision following the hearing de novo. Martin contends that the windfall rewards Claire for her overtrial, which Martin asserts is demonstrated by the following actions by Claire that ultimately delayed the hearing de novo by more than a year: retaining an attorney shortly before the originally scheduled hearing; making a vague discovery request; requesting mediation; and substituting counsel shortly before a rescheduled hearing date.[2] Martin asserts that the circuit court erred by failing to award Martin his attorney fees as compensation for Claire's overtrial. *See* ***Johnson v. Johnson***, 199 Wis. 2d 367, 376-77, 545 N.W.2d 239 (Ct. App. 1996) ("The policy underpinning an overtrial attorney's fees award is to compensate the overtrial victim for fees unnecessarily incurred because of the other party's litigious actions."). Again, we disagree.

¶14 On August 5, 2013, Martin moved to hold Claire in contempt for failing to provide requested tax returns, wage statements, and a household budget. Martin argued that the case had been continued several times to facilitate a settlement, but that no contact was forthcoming from Claire or her counsel. Martin argued that Claire was refusing to cooperate and withholding discovery in an attempt to delay, causing Martin additional attorney fees. Martin requested

[2] We note that the record does not fully support these assertions; nonetheless, for purposes of this opinion, we will assume without deciding that the delays as to the hearing de novo were caused as Martin posits.

retroactive application of any reduction in Martin's support obligation, and reiterated that request in his trial brief.[3] Claire opposed Martin's motion, arguing that she had provided Martin with all requested documents and that Martin had failed to provide her with his financial information. Claire sought her attorney fees based on Martin's delay and discovery violations. After further argument from the parties, the circuit court found that neither party was in contempt for failing to provide discovery and declined to award attorney fees to either party. The court modified Martin's child support effective the first day of the month following the court's decision.

¶15 We are not persuaded that the circuit court erroneously exercised its discretion by setting a prospective effective date of the child support modification or by declining to award attorney fees. Martin bases both claims of circuit court error on his assertion that Claire caused the delay and additional attorney fees through overtrial. However, the circuit court found that the parties were not in contempt and had complied with discovery requests, and Martin does not dispute the court's factual findings. We discern no erroneous exercise of the court's discretion as to the effective date of the child support modification or as to attorney fees.

[3] Claire contends that Martin forfeited his arguments as to overtrial and attorney fees by failing to raise them in the circuit court. Our review of the record, however, reveals that Martin raised those arguments in his August 5, 2013 motion for contempt and in his trial brief. We therefore determine that the arguments were preserved for appeal. However, we decline Martin's invitation to deem his arguments conceded by Claire's failure to refute them on the merits. Whether a circuit court properly exercised its discretion is itself a question of law, subject to our independent review. *See* ***Seep v. State Pers. Comm'n***, 140 Wis. 2d 32, 38, 409 N.W.2d 142 (Ct. App. 1987) (application of a legal standard to the facts is a question of law); ***Fletcher v. Eagle River Mem'l Hosp., Inc.***, 156 Wis. 2d 165, 168, 456 N.W.2d 788 (1990) (courts are not bound by parties' legal concessions).

By the Court.—Order affirmed.

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