COURT OF APPEALS
DECISION
DATED AND FILED

June 29, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3472-FT

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

IN RE THE MARRIAGE OF:

KAY R. WICHMAN,

PETITIONER-APPELLANT,

v.

ROBERT J. WICHMAN,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Outagamie County: DENNIS C. LUEBKE, Judge. *Reversed and cause remanded with directions.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Kay Wichman appeals the portion of her divorce judgment requiring her to pay her former husband, Robert Wichman, as child

support 25% of her income, less $50 per month.[1] Wichman argues that the trial court erroneously exercised its discretion when it misapplied WIS. ADM. CODE § HSS 80.04(2), relating to shared-time payers. Because the trial court did not apply the "equivalent care" standard relating to shared-time payers pursuant to § HSS 80.02(25), we reverse and remand with directions to consider not only overnights but also "equivalent care" when making a shared-time payer determination.

Kay also contends that the trial court erred when it refused to consider the appropriate factors in concluding the 25% standard was fair. We recognize that this issue may not come up on remand. In the event it does, however, we note that when a party challenges the percentage standards application, the trial court shall exercise its discretion by considering the statutory factors set forth in § 767.25(1m), STATS., and by articulating the basis for its decision to either apply the standards or deviate from them.

The parties have two minor children who were ages nine and eleven at the time of the divorce. Robert earns approximately $32,000 per year as an assistant manager at a tire and auto center. Kay earns approximately $26,000 per year as a warehouse engineer, and her job requires her to work nights. Kay testified that her living expenses were $1,847 per month. She also testified that she maintained health insurance for the children through her employment.

After mediation, the parties agreed to joint legal custody and a physical placement schedule that resulted in the children spending approximately one-half their time with each parent. According to the agreement, during the

[1] This is an expedited appeal under RULE 809.17, STATS.

summers the children would be with Kay from 7:15 a.m. to 5:30 p.m. on Mondays and Thursdays, and until 8 p.m. Tuesdays and Wednesdays. The children would spend alternate weekends with Kay from Friday at 7:15 a.m. until Monday at 5:30 p.m.. Every other Friday they would spend with Kay from 7:15 a.m. until 5:30 p.m. Because of her work schedule, Kay agreed that the children should spend the majority of the overnights at Robert's home.

The school year schedule was similar, with the children being placed with Kay from 8 a.m. to 8 p.m. Monday through Thursday. They would spend every Friday with Kay from 8 a.m. to Saturday at 1 p.m. and every other weekend from Saturday at 1 p.m. until Monday at 8 p.m. The balance of their time would be spent with Robert.

Robert conceded that the children spent approximately 108 overnights with Kay, but maintained that because she did not meet the legislated overnight threshold, Kay was required to pay child support to Robert. The trial court agreed with Robert. Although there was no dispute that the children spent approximately equal time with each parent, the court concluded that Kay was not a "shared-time payer" under § HSS 80.02(25) and (28) because she did not meet the "threshold" number of 109.5 overnights per year.[2]

[2] WIS. ADM. CODE § HSS 80.02 Definitions, provides in part:

> (25) "Shared-time payer" means a payer who provides overnight child care or equivalent care beyond the threshold and assumes all variable child care costs in proportion to the number of days he or she cares for the child under the shared-time arrangement.
>
> ….
>
> (28) "Threshold" means 30% of a year or 109.5 out of every 365 days.

As a result, the trial court ordered that Kay pay 25% of her gross earnings to Robert for child support minus the $50 per month. Kay paid for the children's health insurance. *See* WIS. ADM. CODE § HSS 80.03(1). The court rejected Kay's argument that she was a shared-time payer providing "equivalent care" within the meaning of § HSS 80.02(25). The court explained that Kay's argument would require the court to "engag[e] in a very particularized analysis accounting for hours and minutes and seconds of the day carving out some sort of special percentage for each couple that comes before us."

The court stated that the amounts of time the children spent with each parent was "taken into consideration when establishing the guidelines under [§] HSS 80 and the threshold," and if Kay were to prevail with her argument, she would in effect be "getting the benefit of it twice." The court concluded that implicit in appellate court decisions is "that we can't fine-tune things as closely or based upon the factors that you are suggesting," and that it was not "permitted to under the law as it applies to do that."

Determining a party's proper child support obligation is committed to trial court discretion. *See* ***Luciani v. Montemurro-Luciani***, 199 Wis.2d 280, 294, 544 N.W.2d 561, 566 (1996). We must sustain a discretionary act if the trial court "(1) examined the relevant facts, (2) applied a proper standard of law, and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Id***. A trial court erroneously exercises its discretion if its decision embodies a misapplication of the law. ***Prosser v. Cook***, 185 Wis.2d 745, 751, 519 N.W.2d 649, 651 (Ct. App. 1994).

Unless successfully challenged as unfair, a trial court is statutorily obligated to use the child support percentage standards set by the Department of

Health and Family Services. Section 767.25(1j), STATS. ("Except as provided in sub. (1m), the court shall determine child support payments by using the percentage standard established by the department under s. 49.22(9)."). The percentage standards fix child support at a percentage of a payer's gross income. WIS. ADM. CODE § HSS 80.03(1). For two children, the sum is 25%. ***Id***.

A "shared-time payer" is one who "provides overnight child care *or equivalent care* beyond the threshold and assumes all variable child care costs in proportion to the number of days" the child is cared for. WIS. ADM. CODE § HSS 80.02(25) (emphasis added). The threshold is "30% of a year *or* 109.5 out of every 365 days." WIS. ADM. CODE § HSS 80.02(28) (emphasis added). Accordingly, the code assumes that the paying parent has physical placement of the child for 30% of the time. ***Prosser***, 185 Wis.2d at 751, 519 N.W.2d at 651.

Under the heading entitled "**Determining the child support obligation in special circumstances**," the code sets out a formula to determine the child support obligation where both parents provide care beyond the threshold. WIS. ADM. CODE § HSS 80.04. In essence, the shared-time payer formula starts with the § HSS 80.03 percentage base, and then reduces the support obligation for the time the child is placed with the paying parent that exceeds 30% *or* 109.5 days. ***Prosser***, 185 Wis.2d at 752, 519 N.W.2d at 651 (emphasis added).

The number of overnights a child spends with a parent is one method to determine whether a parent is a shared-time payer. The code recognizes that there may be care "equivalent" to overnight care ("overnight equivalents"), such as when the "payer provides day care while the payee is working." *See* WIS. ADM. CODE § HSS 80.02(25) and accompanying Note ("Upon request of one of the

parties the court may determine that the physical placement arrangement other than overnight care is the equivalent of overnight care.").

Kay argues that the trial court erroneously focused on the number of overnights in determining her payer status and failed to consider the "equivalent care" standard set forth in § HSS 80.02(25). We agree. The trial court limited its analysis of Kay's "shared-time payer" status to calculating the number of overnights. It failed to consider whether the placement schedule resulted in Kay providing "equivalent care" beyond the threshold of 30% per year. *See* ***id***. We conclude the court erroneously exercised its discretion by failing to apply the "equivalent care" language of §§ HSS 80.02(25) and 80.04(2).

We are sympathetic with the court's concern that Kay's argument would require it to scrutinize not just the number of hours, minutes and seconds the child spends with each parent, but also the quality of the time, and whether the time is spent eating, sleeping, at home or at school.[3] We are unpersuaded, however, that Kay's argument necessarily leads to such an absurd result. This is true especially here, where the parties agree that the children spend nearly an equal amount of time with each parent. In the exercise of its discretion, the court may look at equivalent care in a general way, but should not limit itself solely to the number of overnights.

The formulas contemplate the payer parent has physical placement for approximately 30% of the time. Under the plain language of §§ HSS 80.02(25) and 80.04(2), the court must consider whether the care Kay provides is

[3] We note, however, that nothing in WIS. ADM. CODE § HSS 80.02(25) implies that the court must employ a "quality of time" analysis in evaluating the extent to which a parent provides "equivalent care."

equivalent to overnight care and whether Kay is a "shared-time payer." If so, the appropriate formula set forth in § HSS 80.04(2) applies.[4] Consequently, we reverse the child support ruling and remand for a determination of payer status with consideration to be given to Kay's "equivalent care."

Next, Kay argues that the trial court erroneously exercised its discretion by failing to consider appropriate factors when it rejected her request to deviate from the percentage standards. We recognize that this issue may not arise on remand. In the event it does, however, we point out that the trial court uses the percentage standards unless a party requests a deviation and the court finds that the percentage standards are unfair to the child or any party. *See* § 767.25(1j) and (1m), STATS. When a party challenges the application of the percentage standards, the trial court shall exercise its discretion by considering the statutory factors set forth in § 767.25(1m) and by articulating the basis for its decision to either apply the standards or deviate from them. *See* ***Luciani***, 199 Wis.2d at 295, 544 N.W.2d at 567.[5] Also, the trial court is permitted to use its discretion by modifying the

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[4] We note that the trial court may order support payments from either parent or both parents. *See* § 767.25(1)(a), STATS.; *see also* ***Matz v. Matz***, 166 Wis.2d 326, 329-30, 479 N.W.2d 245, 246-47 (Ct. App. 1991) (trial court has discretion to order support from primary custodian).

[5] Section 767.25(1m), STATS., provides:

> **(1m)** Upon request by a party, the court may modify the amount of child support payments determined under sub. (1j) if, after considering the following factors, the court finds by the greater weight of the credible evidence that use of the percentage standard is unfair to the child or to any of the parties:
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> (a) The financial resources of the child.
> (b) The financial resources of both parents as determined under s. 767.255.
> (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).

(continued)

percentage standard calculations when it determines that strict compliance would be unfair. *See* ***id***.

In ***Molstad v. Molstad***, 193 Wis.2d 602, 607, 535 N.W.2d 63, 65 (Ct. App. 1995), we explained that the trial court may consider "the time a child is placed with the paying parent in making its child support determination," and that it is not required "to apply the mathematical formulas contained in the child support standards." The child support determination is discretionary, and "[i]n exercising its discretion, the trial court may consider those factors that are relevant to the child support determination. Section 767.25(1m)(i), STATS." ***Molstad***, 193 Wis.2d at 607, 535 N.W.2d at 65.

Here, the record indicates the trial court summarily concluded that it perceived no reason that the application of the percentage standards was unfair.

(bz) The needs of any person, other than the child, whom either party is legally obligated to support.

(c) 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.

The record fails to demonstrate that the court considered the factors under § 767.25(1m), STATS., as a basis for its determination. We conclude that because Kay had requested a deviation from the standards, the trial court was required to consider these factors. In the event this issue is raised on remand, the court should consider the factors under §767.25(1m) and state its reasoning on the record.

By the Court.—Judgment reversed and cause remanded with directions.

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