

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 29, 2010

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. 2009AP2862

Cir. Ct. No. 2006FA421

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

GRETCHEN L. WOLFE-GINTER,

PETITIONER-RESPONDENT,

V.

MICHAEL DONALD GINTER,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County:
RICHARD T. WERNER, Judge. *Reversed and cause remanded with directions.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 VERGERONT, J. Michael Ginter appeals the circuit court's post-judgment child support order. He contends the circuit court erroneously exercised

its discretion in ordering him to pay 29% of his gross income in child support for his three children in lieu of applying the shared placement payer formula and requiring that he share the variable expenses for the children. He does not contest the use of a percentage of his gross income in lieu of assigning him a share in the variable expenses but, he contends, the court arrived at 29% without following the procedures set out in WIS. STAT. § 767.511(1n) (2007-08).¹ The result, he asserts, is an unreasonably high child support order. We agree the court erroneously exercised its discretion, and we therefore reverse and remand.

BACKGROUND

¶2 The judgment of divorce between Michael and Gretchen Wolfe-Ginter was entered in August 2007. Pursuant to their marital settlement agreement, their three minor children were to be with Michael 43% of the time and with Gretchen 57% of the time. The parties agreed not to strictly follow the shared placement child support guidelines, under which Michael would have paid only \$25 per month to Gretchen due to the disparity in their incomes and the amount of placement Michael had. Instead, he would pay no child support and the parties would share equally in identified variable expenses.

¶3 Shortly thereafter, conflicts arose regarding the children's activities and payment of the variable expenses. Both parties filed contempt motions. After several hearings, the circuit court found Michael, but not Gretchen, to be in contempt of court and ordered Michael to pay the outstanding amount to Gretchen minus the expenses the court credited to Michael.

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise specified.

¶4 One month after the final contempt hearing, the parties returned to court for a post-divorce ruling on custody, placement, and child support. At the hearing, Gretchen and Michael stipulated to a new custody and placement arrangement whereby Gretchen's placement would increase to 69% and Michael's would decrease to 31%. This necessitated a new child support order. The parties stipulated that the required procedure of exchanging bills and paying each other for half of the others' variable expenses was not working and needed to be replaced. Gretchen had testified during the contempt hearings that the variable expenses for the year beginning August 2007 through July 2008 amounted to \$3634.

¶5 Gretchen asked the court not to apply the shared placement standard under WIS. ADMIN. CODE § DCF 150.04(2) (Nov. 2009),² which involves apportioning variable expenses. Instead, Gretchen argued, the court should apply the standard under § DCF 150.03(1)(c) for non-shared placement parents ("the straight percentage standard") under which a parent pays 29% of his or her gross income to the other parent for support of three children and variable expenses are not apportioned. Under this arrangement, Gretchen proposed, she would pay all of the children's variable expenses, thereby eliminating the conflict over their repayment. Gretchen argued that *Rumpff v. Rumpff*, 2004 WI App 197, 276 Wis. 2d 606, 688 N.W.2d 699, supported her position that a court may use its discretion to order a shared placement parent to pay the straight percentage standard in lieu of splitting the variable expenses.

² All references to the Wisconsin Administrative Code are to the November 2009 version unless otherwise specified.

¶6 Michael argued that 29% of his gross income, about \$1117 per month, would result in a significant overpayment by him. Instead, he proposed that the court should apply the shared placement standard and add to that an amount equal to his share of the variable expenses, paid on a monthly basis. With his income of approximately \$46,000 and Gretchen’s income of approximately \$85,000, that standard would require him to pay Gretchen \$195 per month in child support. According to Michael’s calculations, assigning him 31% of the annual variable expenses, which is the percentage the guardian ad litem recommended, would amount to an additional \$85 per month.³ Thus, Michael asserted, the total would be approximately \$280 per month—far less than the \$1117 per month Gretchen proposed.

¶7 Relying on *Rumpff*, the circuit court ordered Michael to pay Gretchen 29% of his gross monthly income, or \$1117.66 per month, and ordered Gretchen to pay all of the variable expenses, except those incidental to Michael’s placement. The court found that such an order “should result in less conflict between these parties, as there will be no need for each to contact the other about expenses related to the children.”

DISCUSSION

¶8 On appeal, Michael contends the circuit court erroneously exercised its discretion by ordering him to pay child support in a much higher amount than required by the applicable shared placement standard without following the statutory procedures for deviating. Gretchen maintains that the court’s decision to deviate from the shared placement standard was reasonable and was supported by

³ As we explain in footnote 6, our calculation of 31% of the monthly variable expenses to which Gretchen testified is \$94. This discrepancy is immaterial to our decision.

relevant factual findings, and that the court did not need to specifically state the information on the record as required by WIS. STAT. § 767.511(1n) because Michael's attorney had already done so during the hearing.

¶9 The setting of child support is committed to the discretion of the circuit court, and we affirm the circuit court's decision "if it examined the relevant facts, applied the correct standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Randall v. Randall*, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737 (citation omitted). Although a proper exercise of discretion contemplates that the circuit court explain its reasoning, when the court does not, we may search the record to determine if the record supports the court's discretionary decision. *Id.* (citation omitted).

¶10 We begin with a summary of the statutory framework. Except as provided in WIS. STAT. § 767.511(1m), the circuit court must determine child support payments by using the standards established by the Department of Children and Families. § 767.511(1j). These standards include the straight percentage standard, under which the payer pays 29% of gross income for three children. WIS. ADMIN. CODE § DCF 150.03(1)(c). There are, in addition, other standards for "special circumstances," which reduce the amount of support required by the straight percentage standard. § DCF 150.04. One of the special circumstances is shared placement. *See* § DCF 150.04(2). The special circumstances standards, like the straight percentage standard, are included in the presumptive standards that are to be applied under WIS. STAT. § 767.511(1j). *See Randall*, 235 Wis. 2d 1, ¶15 n.6 (referring specifically to the shared placement standard).

¶11 A “shared placement parent” is one who has placement at least 25% of the time “and is ordered by the court to assume the child’s basic support costs in proportion to the time that the parent has placement of the child.” WIS. ADMIN. CODE § DCF 150.02(25m). Which parent pays support and in what amount is determined by a formula taking into account the parties’ incomes and amount of placement.⁴ § DCF 150.04(2). In addition, the court is to assign responsibility for payment of the children’s variable expenses, which are defined in the regulation, “in proportion to each parent’s share of physical placement, with due consideration to a disparity in the parents’ incomes.” § DCF 150.04(2)(b)6.

¶12 There is no dispute in this case that the presumptive standard applicable under WIS. STAT. § 767.511(1j) is that for shared placement. Gretchen does not dispute that under this standard Michael would be obligated to pay her \$195 per month plus some share of the variable expenses.

¶13 WISCONSIN STAT. § 767.511(1m) allows the court to modify the child support payment determined under the presumptive standard upon request of either party, if, after considering the enumerated factors, the court finds that use of that standard is unfair to the child or to either party.⁵ If the court makes such a

⁴ After performing the calculations required by WIS. ADMIN. CODE § DCF 150.04(2) to determine the child support obligations of shared placement parents, the parent with a greater child support obligation is “the shared placement payer.” That parent pays the lesser of the amount determined under the shared placement formula and the amount using the straight percentage standard in § DCF 150.03(1). § DCF 150.04(2)(b)5.

⁵ WISCONSIN STAT. § 767.511(1m) provides:

Deviation from standard; factors. 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:

(a) The financial resources of the child.

finding, it “shall state in writing or on the record the amount of support that would be required by using the percentage standard, the amount by which the court’s

(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.

(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 daycare 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.

order deviates from that amount, its reasons for finding that use of the percentage standard is unfair to the child or the party, its reasons for the amount of the modification and the basis for the modification.” § 767.511(1n).

¶14 Although Michael asserts that the circuit court erroneously exercised its discretion by not considering the factors under WIS. STAT. § 767.511(1m) in making its decision to deviate from the shared placement standard, he also states: “The difficulties between the parties [regarding sharing the variable expenses] *do* constitute a sufficient factual basis for the Court’s conclusion that it is unfair to follow the guidelines.” (Emphasis in original.) We therefore do not understand Michael to be challenging the court’s decision to deviate from the shared placement standard by ordering a monthly payment that includes his share of the variable expenses. Rather, we understand he is challenging the court’s failure to follow the procedures required by § 767.511(1n) in deciding the amount he is to pay. That is the issue we address.

¶15 The legislature has set forth a specific procedure that a court must follow, set out in WIS. STAT. § 767.511(1n), when it finds that use of the presumptive standard is unfair. This procedure requires the court, in exercising its discretion, to acknowledge on the record the amount by which its order deviates from the presumptive standard and explain the reasons why it is necessary to deviate by that amount. “The circuit court’s articulation of its reasoning process is essential in reaching a reasonable determination and to aid this court in reviewing the discretionary decision.” *Luciani v. Montemurro-Luciani*, 199 Wis. 2d 280, 295, 544 N.W.2d 561 (1996) (citation omitted).

¶16 Gretchen correctly acknowledges that, while the court’s child-support decision need not expressly reference all of the factors enumerated in WIS.

STAT. § 767.511(1m), the decision must identify, pursuant to § 767.511(1n), which relevant factors played a role in the court's deviation from the presumptive standard. *See State v. Alonzo R.*, 230 Wis. 2d 17, 28, 601 N.W.2d 328 (Ct. App. 1999). Gretchen cites the following as the relevant factual findings the court stated on the record in support of its decision:

... although we have had three extended hearings this year concerning the payment of variable expenses and how that either worked or didn't work ... and certainly that is something that is not good for the parties, it just keeps the acrimony alive. And it's not good for the children because they may miss out on certain activities in the long run.

¶17 The court further explained its decision by finding that Gretchen

will have primary placement of the children, she will have impasse breaking authority with regard to decisions having to be made for the children and she will be the sole parent responsible for seeing that the children attend all medical/dental/orthodontia/optical and counseling appointments; therefore, the Court finds that this is an appropriate case to deviate from the shared time payor formula and orders a straight 29% gross income child support payment....

¶18 These passages show why the circuit court decided to deviate from the shared placement standard (which includes allocating variable expenses). They do not explain why the court ordered Michael to pay 29% of his gross income instead. Specifically, the court does not identify the amount of support the shared placement formula would require, the amount of the variable expenses, and an appropriate share to assign to Michael. This is necessary to identify the amount that would be required under the shared placement standard, as required by WIS. STAT. § 767.511(1n). The circuit court also did not identify the amount of the deviation, as required by the statute. By our calculations, the amount of deviation is approximately \$828 per month (assuming Michael is assigned responsibility for

31% of the variable expenses).⁶ While one can find and calculate these figures from the record even though the court has not done so, it is not possible to figure out from the record *why* the court decided such a substantial deviation is warranted. The court's order appears to result in Gretchen receiving \$7430 more than the amount of annual variable costs to which she testified, in addition to the shared placement child support amount of \$195 per month. This substantial increase cannot be explained by the need to reduce conflict between the parties over variable expenses. That need is addressed by ordering a fixed amount per month (whether an amount in dollars or a percent of gross income) as Michael's fair share of the variable expenses. The amount the court arrived at is what needs an explanation.

¶19 In ordering Michael to pay 29% of his gross income in child support, the circuit court relied on *Rumpff*, 276 Wis. 2d 606, as does Gretchen. The circuit court and Gretchen view *Rumpff* as standing for the proposition that “if the court in its discretion feels that ... variable expenses are an issue as they have been here, that the court can use the straight 29 percent ... rather than vary it with the shared time formula.” This is not an accurate reading of *Rumpff*. In *Rumpff* we did not establish a general rule that a court may properly use the straight percentage standard rather than the shared placement standard when the variable expenses are a problem. Rather, we upheld the circuit court's order that the parent pay a straight percentage of gross income in return for being relieved of responsibility

⁶ As already noted, Gretchen does not contest that under the shared placement formula Michael would pay \$195 per month. Assuming that 31% is a fair share of the variable expenses for Michael to pay, and accepting Gretchen's testimony during the contempt hearings that the annual variable expenses were \$3634 for the year beginning August 2007 through July 2008, Michael's share would be \$1126.54 annually or \$94 per month. Thus, under the shared placement standard, Michael's monthly obligation, including the variable expenses, would be approximately \$289 per month.

for variable expenses because we “identif[ied] ample evidence to support the court’s child support order.” *Rumpff*, 276 Wis. 2d at 617. In other words, on the facts of that case, the circuit court order was a proper exercise of discretion. *See id.*

¶20 In this case, the circuit court did not articulate, and we do not find in the record, any evidence or rationale that reasonably supports the court’s order of 29% of Michael’s gross income. Because the circuit court did not follow the procedures required by WIS. STAT. § 767.511(1n) and arrived at a result that is not reasonably supported by the record, we conclude that the court erroneously exercised its discretion.

CONCLUSION

¶21 Because the circuit court erroneously exercised its discretion in ordering Michael to pay 29% of his gross income, we reverse and remand. On remand the court shall determine the amount of child support Michael shall pay consistent with WIS. STAT. § 767.511(1n).

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

Not recommended for publication in the official reports.

