COURT OF APPEALS
DECISION
DATED AND RELEASED

February 27, 1997

No. 96-0128

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

TERRY L. BENN,

Plaintiff-Respondent,

v.

JAMES H. BENN,

Respondent-Appellant.

APPEAL from a judgment and orders of the circuit court for Grant County: JOHN R. WAGNER, Judge. *Affirmed*.

Before Eich, C.J., Roggensack and Deininger, JJ.

EICH, C.J. James H. Benn appeals from a judgment of divorce and from posttrial orders modifying his child support obligation. He claims the trial court erred in: (1) setting maintenance payments; (2) ordering him to pay a minimum amount of child support; and (3) modifying the child support award after his discharge in bankruptcy. We affirm.

James and Terry Benn separated in 1994. A temporary order required James to pay child support in the amount of twenty-five percent of his gross income, but not less than $185 per week, and to make monthly payments on several of the parties' debts, including $300 per month toward the couple's home mortgage. In February 1995, the court found James in contempt for failing to make the payments required by the order. Shortly thereafter, the Benns entered into a partial stipulation that, among other things, divided their marital assets and debts, but left issues of child support and maintenance for trial.[1]

The parties were divorced in June 1995. The judgment provided that they would have joint legal custody of their two minor children, and Terry would have primary physical placement. The judgment also incorporated the terms of the earlier stipulation, made the temporary child support payments permanent (at least until the children turned eighteen) and ordered James to pay maintenance to Terry in the sum of $200 per week for fifteen years.

Within a few weeks of the judgment, James filed a Chapter Seven bankruptcy proceeding, which resulted in the discharge of several of his debts, including the mortgage and attorney-fee obligations he had assumed in the divorce stipulation. He then moved the trial court for reconsideration of the maintenance provisions of the judgment. Terry also sought modification of the decree, claiming that as a result of James's bankruptcy she had become responsible for the house payments and the attorney fees. James countered with additional motions, claiming that he could not "meet his obligations" because the child support and maintenance payments were "unfair" and "unduly burdensome."

Finding that James's salary had increased and his debts had decreased since the divorce, the trial court denied James's motions and again found him in contempt for failing to pay support and maintenance. With respect to Terry's motion, the court ruled that James's discharge in bankruptcy constituted a substantial change in circumstances in that it decreased his obligations while increasing Terry's, and ordered James's child support

[1] The stipulation provided that James would continue to make payments toward the $17,200 mortgage balance and would pay $1500 toward Terry's attorney fees within a month of the divorce.

payments increased by $450 per month for ten months and by $300 after that date.[2]

I. Standard of Review

Determination of child support, and the amount and duration of maintenance, is committed to the sound discretion of the trial court. ***Luciani v. Montemurro-Luciani***, 199 Wis.2d 280, 294, 544 N.W.2d 561, 566 (1996); ***Brabec v. Brabec***, 181 Wis.2d 270, 277, 510 N.W.2d 762, 764 (Ct. App. 1993). We will not reverse a discretionary determination by the trial court if the record shows that discretion was exercised and we can perceive a reasonable basis for the court's decision. ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). Thus, "where the record shows that the court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law, we will affirm the decision even if it is not one with which we ourselves would agree." ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991) (footnote omitted). Indeed, "`we generally look for reasons to sustain discretionary decisions.'" ***Id***. at 591, 478 N.W.2d at 39 (quoted source omitted).

The trial court made several factual findings on which it based its exercise of discretion. We accept the trial court's findings of fact unless they are clearly erroneous—even though the evidence would admit contrary findings. Section 805.17(2), STATS.; ***Noll v. Dimiceli's, Inc.***, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983).

II. Maintenance

James argues that the trial court erroneously exercised its discretion when it set maintenance at $200 per week for fifteen years. Pointing

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[2] James's posttrial motions were limited to the terms of the stipulation and judgment. And while his notice of appeal states that he is appealing from both the judgment and the subsequent orders, his arguments with respect to the latter are confined to the postbankruptcy modification of child support, which we discuss in Part IV. We do not consider that any other challenges to the orders have been raised on this appeal.

to the "fairness" objective of maintenance payments, James asserts that the trial court expressed only one reason for the award, as follows: "The reason I am doing that is I feel that he is capable of doing it." James contends that this statement is the antithesis of the "reasoned consideration of facts and conclusions" so essential to a sustainable exercise of discretion. He also states that the only other possible reason for the decision was the judge's belief that James could afford maintenance because he was considering remarriage to a woman with children. We disagree.

Section 767.26, STATS., sets forth a nonexclusive list of criteria to guide the court's exercise of discretion in determining maintenance,[3] and we are satisfied that the trial court properly considered them in this case. After considering evidence of the parties' earnings, actual and projected ($55,145 for James and $14,190 for Terry), the court went on to state:

> The court has to look at the length of the marriage, about a fifteen year marriage. The physical-emotional health of the parties.... [b]oth appear to be in good physical health. I haven't seen any indication of problems. The property division [has] been agreed on .... The educational level of the parties [indicates] both [have] high school educations.... The earning capacity of the party requesting maintenance [shows] Terry has ... three-and-a-half times less earning ability as [James] does. [H]er educational background .... [and] employment skills, work experience, absence from the job market [for] about four-and-a-half years, the expense necessary to acquire sufficient education or training to enable [her] to find appropriate

[3] In exercising its discretion to set maintenance, the trial court must consider various statutory factors, including the length of the marriage; the parties' ages, health, education and earning capacities; the feasibility of the party seeking maintenance to become self-supporting at a level reasonably comparable to that enjoyed during the marriage; the tax consequences to each party; and contributions by one party to the education or increased earning power of the other. Section 767.26, STATS. The court may also consider "such other factors as [it] may in each individual case determine to be relevant," ***id.***, and "the dual objectives of maintenance," which are support and fairness. ***Brabec v. Brabec***, 181 Wis.2d 270, 277, 510 N.W.2d 762, 764 (Ct. App. 1993).

> employment [shows it would be difficult] [f]or her to ... generate income of that amount. [The] feasibility of [Terry] to become self-supporting at a standard of living reasonably comparable to that of the marriage [indicates] .... that may never be accomplished. Tax consequences to each party, if [James] pays maintenance he's going to deduct. If she receives it, she's going to pay on it.... Neither party really made any contribution to the other party's education, training or increased earning capacity.

The court then set child support and maintenance—the latter at $200 per week for fifteen years—and stated at that point: "The reason I am doing that is I feel that he is capable of doing it," and continued with a discussion of James's earnings. As may be seen, the quoted statement, so heavily emphasized by James, was but one sentence in a lengthy recitation. We do not believe that it taints an otherwise valid exercise of discretion.

The court's explanation adequately covers the statutory grounds and considers both Terry's needs and James's ability to pay. As to the length of the award, the court explained that, given her education and job history—including her years away from the job market—and her need for education and training to achieve a desirable income level, she may "never accomplish" the goal of achieving a standard of living reasonably comparable to that she enjoyed in the marriage.

As to James's reference to the court's comment on his possible remarriage, the record indicates that the comment was made not in the context of maintenance but in the process of arriving at the conclusion that the parties' marriage was irretrievably broken.

I'll find that the marriage is irretrievably broken, that the petitioner

> is entitled to a decree of absolute divorce. There is another thing that came into my consideration here. Might just as well say it. This man is considering [marrying] a woman with three children and he knows what it takes to run a household with two adults and two children and must be able to feel that

> he can afford an additional expense along the line and so I am going to find that the marriage is irretrievably broken.

The record thus establishes that the trial court's decision was the result of a reasoned consideration of the facts of record in light of the applicable statutory criteria. A trial court's discretionary determination is not tested by some subjective standard, or even by our own sense of what might be a "right" or "wrong" decision in the case, but rather will stand unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion. ***State v. Jeske***, 197 Wis.2d 905, 913, 541 N.W.2d 225, 228 (Ct. App. 1995). That cannot be said in this case, and the court's two brief comments—the points on which the bulk of James's argument centers—do not transform what is otherwise a sustainable exercise of discretion into reversible error.

III. "Minimum" Child Support: Deviation From DHSS Guidelines

James next challenges the trial court's award of a minimum amount of child support on several grounds. He claims that, in so ruling, the court: (1) improperly deviated from the mandatory child support percentages of the Department of Health and Social Services (DHSS); (2) failed to articulate a rational justification for the award; (3) improperly found his early retirement from the Army Reserve to be "shirking"; (4) improperly considered his income in calculating the amount of the award; and (5) failed to consider the impact of his fluctuating income on his ability to pay.

The court directed James to pay child support of "twenty-five percent of gross [income] with a minimum of $185 a week," and he argues that the $185 minimum violates § 767.25, STATS., which states that support shall be determined by the application of the support standards developed by DHSS.[4]

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[4] Section 767.25, STATS., provides in part:

> (1j) Except as provided in sub. (1m), the court shall determine child support payments by using the percentage standard established by the department of health and social services ....
>
> (1m) Upon request by a party, the court may modify the amount of

The percentage for two children is twenty-five percent of the payor's gross and imputed income. WISCONSIN ADM. CODE § HSS 80.03(1)(b).

There is an exception to the rule, however. If the court finds that application of the percentage standards would be unfair to either the child or to any party, it may deviate from the stated percentages. Section 767.25(1m), STATS. And the decision to deviate is discretionary with the trial court. ***Doerr v. Doerr***, 189 Wis.2d 112, 129, 525 N.W.2d 745, 752 (Ct. App. 1994). James claims that the trial court erroneously exercised its discretion in this regard by "fail[ing] to articulate a rational reason" for the deviation.

The trial court found various facts as a predicate to setting support, including the parties' living expenses and earning capacities. As to deviating from the income guidelines to set a minimum level of support, the trial court stated that this was "reasonable and necessary in light of the conduct of [James] throughout the period of the divorce proceeding."

Terry had testified that she was asking for a minimum because of James's "frequent arrearages in pay[ing] child support throughout the divorce proceeding," his unilateral decision to retire from his part-time position in the Army Reserve, and, in light of these considerations, her need for an assured and regular amount of support to be paid on a regular basis to assist in budgeting for herself and the children. The court was also aware that James had child support arrearages of approximately $950 at the time of the divorce and had failed to make the ordered mortgage payments.

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> 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 the use of the percentage standard is unfair to the child or to any of the parties ... [t]he financial resources of the child[,] the financial resources of both parents ... [m]aintenance received by either party, [t]he needs of each party in order to support himself or herself ... [t]he physical, mental and emotional health needs of the child ... tax consequences to each party, the best interests of the child, [and] [a]ny other factors which the court in each case determines are relevant.

In ***Lendman v. Lendman***, 157 Wis.2d 606, 460 N.W.2d 781 (Ct. App. 1990), the trial court departed from the guidelines, setting a specific amount of support based on a finding that the husband's income "fluctuated," and we upheld the deviation as an appropriate exercise of discretion. ***Id***. at 618, 460 N.W.2d at 786. It is true that the trial court in ***Lendman*** also determined that "it would be in the child's best interests to have a set amount of support," ***id***., and the trial court in this case made no such specific finding. But we do not see that as fatal. The record in ***Doerr*** was similarly silent as to any finding or determination of the children's best interests. The trial court in that case said simply:

> If the court orders [the husband] to pay the percentage standards, the potential for manipulation of child support payments is substantial. The current situation—[the husband] has ceased working as a carpenter and is now pursuing a college degree, while living off the income from gifts and inheritances—is the most obvious example. An order requiring that he pay a minimum amount each month, based upon his gross annual income potential is therefore necessary.

Doerr, 189 Wis.2d at 128-29, 525 N.W.2d at 752. We upheld the trial court's action as a valid exercise of discretion, stating: "[W]hile the trial court in this case did not ... specifically find that the fixed award was `in the children's best interests,' such a determination is fairly inferred from the court's remarks." ***Id***. at 129, 525 N.W.2d at 752.

Guided by these statements—and the well-known rule that in cases where the trial court fails to adequately explain the reasons underlying a discretionary decision "we will independently review the record to determine whether it provides a reasonable basis for the trial court's ... ruling," ***State v. Clark***, 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993)—we reach a similar result here. The trial court's remarks indicate that, like the trial courts in ***Lendman*** and ***Doerr***, it was concerned with James's record of off-and-on child support payments and fluctuations in income due, in part at least, to his decision to forego his military earnings. Additionally, the court heard evidence and argument relating to the desirability of a fixed amount of minimum

support in terms of budgeting for the children's needs.[5] As in ***Doerr***, we consider that a determination that the minimum support award was in the children's best interests may be fairly inferred from the court's remarks and the evidence and arguments before it. ***Doerr***, 189 Wis.2d at 129, 525 N.W.2d at 752.

James maintains, however, that the minimum is "unjust" because the fluctuation in his income resulted from factors beyond his control, including union actions, profit sharing, holidays, and various medical problems and injuries. The determination of support "is measured by the needs of the custodial parent and children and the *then-existing* ability of the noncustodial parent to pay." ***Van Offeren v. Van Offeren***, 173 Wis.2d 482, 492, 496 N.W.2d 660, 663 (Ct. App. 1992) (emphasis added). As Terry points out, it is not based on the possibility that a spouse's "actual earnings ... might be taken away from him [or her] in the future."

Here, the trial court based the support award on the parties' 1994 tax returns and 1995 year-to-date figures. In addition, an accountant reviewed James's past and projected income from his employment at John Deere and concluded that James's annual earnings would be $55,145. James himself testified that by quitting his Army post, he would be able to spend more time working at the Deere plant and thus his gross income from all sources would remain roughly the same as before. Should the circumstances upon which the court based its support award change sometime in the future, James is, of course, free to return to court to modify the award. Section 767.32, STATS.

James also argues that the trial court erred when it considered his retirement from the Army Reserve at age forty to be "shirking" and, as a result, improperly based the minimum support award on his earning capacity, as opposed to his actual earnings.[6] First, James has not pointed us to anything in

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[5] The supreme court said in ***Hagenkord v. State***, 100 Wis.2d 452, 464, 302 N.W.2d 421, 428 (1981), that where the record indicates that the trial court, without expressly articulating a rationale for its decision, either acquiesced in or was governed by the explanations or arguments of counsel, a reviewing court will not find an erroneous exercise of discretion for the court's failure to explain its decision.

[6] "Shirking" is defined as "intentionally avoid[ing] the duty to support ... or... unreasonably diminish[ing] or terminat[ing] ... income in light of the support obligation." ***Van Offeren v. Van Offeren***, 173 Wis.2d 482, 492, 496 N.W.2d 660, 663 (Ct. App. 1992). Where a court finds that a payor is shirking, support may be based on his or her earning

the court's decision showing it looked only to his earning capacity instead of actual earnings. Indeed, as we have just discussed, the trial court considered evidence of both James's existing and projected earnings—as well as his own testimony that his income would remain relatively the same even after leaving the Army Reserve.

Second, as we noted in ***Smith v. Smith***, 177 Wis.2d 128, 137, 501 N.W.2d 850, 854 (Ct. App. 1993), regardless of the use (or nonuse) of the term "shirking," a court may base its support order on the payor's "potential" income "`[w]hen[ever] a decision to reduce income effectively deprives the child of the support to which it is reasonably entitled'" (quoted source omitted).

Finally, James argues that even if his decision to retire from the Reserve was not reasonable, or may otherwise be considered in determining support, the court erred in setting support in an amount exceeding twenty-five percent of his former Army pay, or $38.94 per week.[7] The argument appears to be based on an assertion Terry made at some point in the trial court proceedings that one of the reasons for seeking minimum support was James's resignation from the Army Reserve—assuming, apparently, that any minimum support obligation should relate solely to the Army pay.

The point escapes us. Child support is based on a parent's income from all sources, ***Gohde v. Gohde***, 181 Wis.2d 770, 775, 512 N.W.2d 199, 201 (Ct. App. 1993); WIS. ADM. CODE § HSS 80.03(1), and, as we noted above, the trial court considered James's *total* actual and projected earnings in setting support in this case. He has not persuaded us that setting the minimum level at anything above $38.94 per week exceeded the trial court's discretionary authority.

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capacity, rather than by the then-existing ability to pay. ***Id***. As may be seen below, however, a finding of shirking is not an absolute precondition to basing support on potential, rather than actual, earnings.

[7] James's argument proceeds as follows: (1) his decision to retire from the reserves "put at risk" only $8100 of his total annual income; (2) 25% of $8100 is $38.94 per week; (3) the $185 weekly minimum support figure exceeds that amount by almost five times and is therefore arbitrary and unreasonable.

IV. Modification of Child Support

James's challenge to the trial court's modification of his child support obligation is that the court "misunderstood" the bankruptcy laws and that its decision not only violates those laws, but also contravenes the Supremacy Clause of the United States Constitution. We disagree on both counts.

While acknowledging our holding in ***Eckert v. Eckert***, 144 Wis.2d 770, 779, 424 N.W.2d 759, 763 (Ct. App. 1988), that a state court "may modify a payor spouse's support obligation under sec. 767.32(1), STATS., following the payor's discharge in bankruptcy without doing major damage to the clear and substantial federal interests served by the bankruptcy code," James contends that various 1994 amendments to the Code have essentially nullified ***Eckert***. (Citation omitted.)

Prior to 1994, obligations arising from the property-division provisions of state-court divorce judgments were presumptively dischargeable in bankruptcy. In 1994, Congress added provisions to the Code, 11 U.S.C. § 523(a)(15)(A)-(B), to provide that debts *other than those relating to child support and spousal maintenance*, incurred in the course of a divorce proceeding, were not dischargeable unless the court determined that hardship or inability to pay required discharge (and even then, the court could decline to discharge the debts upon petition of the creditors). *See* 11 U.S.C. §§ 523(a)(15), (c)(1).

Even with the changes, however, the Code's pre-1994 mandate—that a debtor is not discharged "from any debt ... to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other ... property settlement agreement"—remains as before. 11 U.S.C. § 523(a)(5). We do not see the Bankruptcy Code amendments as vitiating ***Eckert***.

James next argues that a later case, ***Spankowski (Zuercher) v. Spankowski***, 172 Wis.2d 285, 493 N.W.2d 737 (Ct. App. 1992), establishes that ***Eckert*** must be limited to postbankruptcy modification of maintenance obligations and cannot be applied to child support obligations. Again, we disagree.

In ***Spankowski***, the divorce was based on a stipulation under which the husband was to pay the wife half of his retirement pension. ***Id***. at 288, 493 N.W.2d at 739. The husband subsequently discharged all his debts in bankruptcy, including the payment owed to the wife for her share of his pension. The trial court granted the wife's request to modify the property-division terms of the judgment after the bankruptcy and we reversed, holding that "modification of a property settlement after the debt was discharged in bankruptcy is a violation of the supremacy clause." ***Id***. at 298, 493 N.W.2d at 743-44. We reasoned that because property divisions, unlike support obligations, are dischargeable in bankruptcy, any postbankruptcy modification of the original property division would "recreate" the discharged debt, thus frustrating the "fresh start" objective of the Bankruptcy Code. ***Id***. at 296-97, 493 N.W.2d at 742-43.

As we noted above, however, child support and spousal maintenance are not now, and never were—at least at any time relevant to this appeal—dischargeable in bankruptcy. Such obligations are specifically exempt from discharge under 11 U.S.C. § 523(a)(5). We see nothing in the Code, and no other federal interest, that would prohibit application of the ***Eckert*** rationale to child support. We conclude, therefore, that the trial court did not contravene federal law or policy when it modified James's child support obligation.[8]

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[8] In his argument on ***Eckert***, James makes a brief reference to §§ 767.25(1j), and 767.25(1n), STATS., the provisions dealing with deviation from the DHSS standards when setting support. He neither refers to, nor argues from, the statutes imposing a similar requirement in support-modification proceedings, however; even if we were to treat this as an attempt to raise such an argument with respect to the modification, his eleven-line discussion is largely undeveloped and is devoid of any references to the record or to applicable statutory or legal authority. As a result, we do not consider it. *See* ***Fritz v. McGrath***, 146 Wis.2d 681, 686, 431 N.W.2d 751, 753 (1988) (appellate courts do not consider undeveloped arguments); ***Lechner v. Scharrer***, 145 Wis.2d 667, 676, 429 N.W.2d 491, 495 (Ct. App. 1988) (arguments unsupported by references to the record or citations to authority will not be considered).

Assuming that the provisions of 767.25(1m), STATS., and WIS. ADM. CODE, § HSS 80, are applicable in modification proceedings, *see* §§ 767.32(2) and (2m), STATS., our reading of the trial court's decision indicates that, while the explanation is minimal, the court considered appropriate factors and followed appropriate record-making requirements under §§ 767.25(1m) and (1n) in arriving at its decision—implicitly finding the prior 25% order to be unfair, at least to Terry and possibly to the children.

By the Court.—Judgment and orders affirmed.

Not recommended for publication in the official reports.