COURT OF APPEALS
DECISION
DATED AND FILED

February 6, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1186 **Cir. Ct. No. 2009FA2421**

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

SANDRA I. KOCH,

PETITIONER-APPELLANT,

V.

JONATHAN E. KOCH,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed*.

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

¶1 HIGGINBOTHAM, J. Sandra Koch appeals a circuit court order setting Jonathan Koch's child support obligation and the denial of her motion for reconsideration. Sandra and Jonathan, who never married, are parents of three minor children and lived together until the relationship ended. A petition was filed

seeking child support from Jonathan. A hearing on the petition was commenced on one day and continued to a later date. In a written decision, the court set Jonathan's monthly child support payments at a rate lower than would have been set by the applicable percentage standard guidelines established by the Wisconsin Department of Children and Families (FCF) for high income earners. Sandra filed a motion for reconsideration and the court heard oral arguments. However, the court did not render a decision within ninety days after judgment was entered in this case on December 7, 2010. Accordingly, by operation of WIS. STAT. § 805.17(3) (2011-12),[1] the motion for reconsideration was deemed denied. Nevertheless, on June 3, 2011, and before the record of this case was transmitted to the clerk of court for the court of appeals, the court issued a written decision and order denying Sandra's motion.

¶2 Sandra raises four arguments on appeal, to the effect that the circuit court erroneously exercised its discretion in setting child support because: (1) the circuit court did not properly apply the percentage standard when setting child support by failing to consider child care costs and the best interests of the children, as required by WIS. STAT. § 767.511(1m)(e), (hm); (2) the court did not explain its reasons for the amount of the deviation from the high income payer percentage standard and the basis for the deviation, which § 767.511(1n) requires; (3) the court failed to consider "the fact that the percentage standard makes adjustments for high-income parents"; and (4) the court's finding that Jonathan overcame the presumption that applying the percentage standard to him was fair is not supported by the record.

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

¶3 For the reasons that follow, we reject all of Sandra's arguments and affirm.

BACKGROUND

¶4 Sandra Koch and Jonathan Koch are parents of three minor children. Although the parties share the same last name, they were never married. The parties and the children resided in New York City until 2007 when they moved to Madison. Several months after moving to Madison, the parties ended their relationship. Jonathan moved back to New York City, and Sandra and the three children stayed in Madison.

¶5 In November 2009, the Dane County Child Support Agency filed a petition in the circuit court seeking an order requiring Jonathan to pay child support to Sandra. Pending a hearing before the family court commissioner, the parties stipulated, and the court commissioner ordered, that Jonathan pay $2,036.50 per month in child support. The hearing before the family court commissioner was continued to another date. Following that hearing, the court commissioner set Jonathan's child support obligation at $4570 per month, based on the percentage standard set for high income earners. *See* WIS. ADMIN. CODE § DCF 150.04(5). Jonathan sought a de novo hearing, and asked the court to deviate from the applicable percentage standard.

¶6 Following the de novo hearing, the circuit court determined that use of the percentage standard would be unfair to Jonathan under the "unique financial circumstance[s]" of the parents. The court reasoned that Sandra lived beyond her means, and that use of the percentage standard would in effect award Sandra maintenance and "subsidize [Sandra's] lifestyle," even though she is not entitled to maintenance because she was never married to Jonathan. The court explained that

Sandra's request that it follow the child support guidelines for high income payers "avoids any scrutiny of [Sandra's] budget and ignores her testimony about living beyond her means." The court set Jonathan's child support obligation at $3000 per month, retroactive to August 1, 2010, which is $1570 less than the amount Jonathan would have been required to pay under the percentage standard.

¶7 Sandra moved for reconsideration. As we have indicated, the circuit court did not issue a decision within ninety days of entry of judgment in this case, resulting in an automatic denial of the motion for reconsideration by operation of WIS. STAT. § 805.17(3). However, several months after the motion was deemed denied, the court issued a written decision and order denying Sandra's motion for reconsideration. The court again expressed the view that "using the percentage standard is unfair to [Jonathan] because it calls for him to pay de facto maintenance due to the inability of [Sandra] to live within her means." In addition, the court made specific findings regarding the financial needs of the children and summarized its position regarding each of the fourteen factors listed in WIS. STAT. § 767.511(1m). The court reaffirmed its original order setting child support at $3000 per month during the school year, but modified that order by setting child support at $3400 for June, July, and August based on "increased summer day care cost[s]" incurred by Sandra.

DISCUSSION

¶8 Our review of the circuit court's determination of child support is guided by the following standards.

> The determination of appropriate child support is committed to the sound discretion of the circuit court. Whether the trial court properly exercised its discretion is a question of law. An appellate court will sustain a discretionary act if it finds that 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.

Luciani v. Montemurro-Luciani, 199 Wis. 2d 280, 294, 544 N.W.2d 561 (1996) (citing other sources and quoting another source). "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.

¶9 The statutory framework governing child support requires the court to begin with a presumption that it will apply the standards established by DCF when setting child support. WIS. STAT. § 767.511(1j); ***Luciani***, 199 Wis. 2d at 294. In general, the standards by which child support is established are based on the number of children that are subject to the particular guidelines. *See* WIS. ADMIN. CODE § DCF 150.03(1). The percentage standard under which a payer pays child support for three children is 29%. § DCF 150.03(1)(c). In addition, there are other standards for "special circumstances," which reduce the amount of child support required by the general standard, one of which applies to high-income payers. § DCF 150.04(5).

¶10 The amount of child support that a high-income parent pays is presumptively determined by the formula set forth in WIS. ADMIN. CODE § DCF 150.04(5). First, a court shall establish the percentages set forth in WIS. ADMIN. CODE § DCF 150.03(1), the percentage standards, applicable to a payer's monthly income that is less than $7000. § DCF 150.04(5)(b). The court then applies enumerated percentages to that part of a payer's monthly income that is greater than or equal to $7000 and less than or equal to $12,500. § DCF 150.04(5)(c).

The court may also apply enumerated percentages to the portion of a payer's monthly income greater than $12,500. § DCF 150.04(5)(d).

¶11 It is presumed that child support established according to the percentage standards in WIS. ADMIN. CODE § DCF 150 and mandated by WIS. STAT. § 767.511(1j) are fair. *See* ***Ladwig v. Ladwig***, 2010 WI App 78, ¶23, 325 Wis. 2d 497, 785 N.W.2d 664. A court may deviate from the percentage standard only after it considers the applicable statutory factors set forth in § 767.511(1m)(a)-(i) and finds by the greater weight of the credible evidence that use of the percentage standard is unfair to the child or to the party seeking deviation. ***Id.***; § 767.511(1m).[2] The party requesting a deviation has the burden to

[2] WISCONSIN STAT. § 767.511(1m) reads as follows:

> 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.
>
> (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 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.

(continued)

prove that applying the percentage standard would be unfair to the child or to the requesting party. ***Raz v. Brown***, 213 Wis. 2d 296, 303, 570 N.W.2d 605 (Ct. App. 1997).

¶12 If the court determines that use of the percentage standard is unfair to the child or to one of the parties,

> the court 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 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).

¶13 We begin by addressing a threshold issue, which affects our analysis below. Most of Sandra's arguments on appeal rest on her position that the circuit court's written decision denying Sandra's motion for reconsideration is "void,"

> (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.

and, as a result, she focuses her arguments only on the court's original decision. In support, Sandra relies on WIS. STAT. § 805.17(3), concerning motions for reconsideration. Under § 805.17(3), a motion for reconsideration is deemed denied if the court does not decide the motion within ninety days after entry of judgment on the original matter. Sandra points out that that is the case here and therefore the court's June 3, 2011 decision and order on Sandra's motion for reconsideration is "void." We disagree. We understand Sandra to be arguing that the circuit court lost competency to issue the June 3 written decision. This issue is decided by WIS. STAT. § 808.075(3), which expressly states that a "circuit court retains the power to act on all issues until the record has been transmitted to the court of appeals." It is undisputed that the record in this case had not been transmitted to this court at the time the circuit court issued its June 3 decision and order denying Sandra's motion for reconsideration. Therefore, the June 3 decision and order is properly before this court in all respects.

¶14 Having decided that the circuit court's decision and order denying Sandra's motion for reconsideration is properly before this court, we briefly address and reject several of Sandra's contentions of court error. Sandra contends that the circuit court's calculation, in its original order, of the amount of child support Jonathan would be required to pay under the high income payer percentage standard was incorrect. Sandra is correct insofar as it goes. In its original decision and order, the court calculated that Jonathan would be required to pay $4150 under the percentage standard, whereas the correct amount is $4570. However, the court admitted its error in the June 3, 2011 decision and order and acknowledged that the correct amount of child support payments under the percentage standard is $4570. Sandra's contention that the court also failed to state the amount of deviation from the percentage standard is rejected on the same

basis. In its June 3 decision and order, the court stated that the amount of the deviation from the percentage standard was $1570.

¶15 We now turn our attention to Sandra's more substantive arguments.[3] Sandra contends the circuit court erroneously exercised is discretion in ordering Jonathan to pay $3000 of his gross monthly income of $20,000 in child support for his three children rather than the amount Jonathan would have paid under the high income payer percentage standard, $4570. Specifically, Sandra argues that the court committed the following errors: (1) the court did not consider child care costs and the best interests of the children in deciding to deviate from the applicable percentage standard as required by WIS. STAT. § 767.511(1m)(e), (hm); (2) the court did not explain its reasons for the amount of the deviation from the percentage standard and the basis for the deviation; (3) the court failed to consider "the fact that the percentage standard makes adjustments for high-income parents;" and (4) the record does not support the court's finding that Jonathan overcame the presumption that the percentage standard is fair. We address and reject each argument in turn.

[3] Sandra also challenges the circuit court's order setting child support on the ground that that the court erred in failing to consider the effect that its order would have on the standard of living the children would have had if their parents had not terminated their relationship. Sandra asserts that the legislative history of WIS. STAT. § 767.511(1m)(c) supports her position that the court is required to consider the children's standard of living. Sandra cites no authority in support of her position. We agree with Jonathan that § 767.511(1m)(c) plainly applies only when the parties were married. We do not suggest, however, that the court may not, in the reasonable exercise of its discretion, ever consider the children's standard of living when the parents were unmarried. We observe that § 767.511(1m) contains a catchall provision, specifically subsection (i), that permits the court to consider "[a]ny other factors which the court in each case determines are relevant." In any case, however, the court here was not required to consider the children's standard of living had their parents not terminated their relationship as a factor under § 767.511(1m).

A. Child Care Costs and the Best Interests of the Children

¶16 Sandra first argues the circuit court erred in failing to consider and address the cost of child care when, as here, the custodian works outside the home, one of the statutory factors that a court must consider in deciding whether use of the percentage standard in setting child support is unfair to a parent or a child. *See* WIS. STAT. § 767.511(1m)(e). Specifically, Sandra maintains that the court failed to consider her child care costs of $2862 per month in deviating from the percentage standard. In response, Jonathan maintains that the court considered and specifically discussed several of the § 767.511(1m) factors. Jonathan goes on to argue, however, that the circuit court is not required to consider each statutory factor set forth in § 767.511(1m). We agree with Jonathan that the court is not required to consider each of the § 767.511(1m) factors. *See* ***Ladwig***, 325 Wis. 2d 497, ¶26 (a court need only consider the relevant factors). We also agree with Jonathan that the court here did consider Sandra's child care costs.

¶17 In its original order, the circuit court did not mention Sandra's child care costs as one of the factors it considered in reaching its decision to deviate from the percentage standard. Sandra brought that fact to the court's attention in her motion for reconsideration and, in its subsequent decision, the court briefly walked through the factors under WIS. STAT. § 767.511(1m), including child care costs. With regard to child care costs, the court stated:

> (e) The cost of child care if the custodian works outside the home. The children of this relationship are 10, 8 and almost 6. Hence, they are in school full-time and child care becomes a factor during the summer months. There is an adult daughter who presumably helps with child care but is not obligated to care for the children during the summer break….

The court then referred to Sandra's evidence regarding increased child care needs during the summer months, and stated that the court would take this evidence into "account in setting the new child support figure." Thus, as we can see, the court did consider and explicitly addressed child care costs.

¶18 Sandra also contends that the circuit court improperly failed to consider the best interests of the children as required under WIS. STAT. § 767.511(1m)(hm). Sandra accurately points out that the court deviated from the percentage standard on the ground that it would be unfair to Jonathan to require him to subsidize Sandra's lifestyle, in light of the children's "actual needs." The problem with this reasoning, according to Sandra, is that the court did not make any findings as to the needs of the children and did not address how reducing child support from the percentage standard of $4570 to $3000-$3400 per month was in the children's best interests. Sandra also argues that the court ignored Sandra's "unrefuted" evidence that her total child-related expenses were $9682 per month and failed to consider whether eliminating some of the child-related expenses were in the children's best interests. The child-related expenses Sandra contends the court ignored are the $2862 monthly child day care costs, the children's share of the housing expenses, travel and vacation expenses, and contributions to the children's education account.

¶19 However, as we have noted, the circuit court made a specific finding on this point, explicitly taking into account relevant evidence: "The claim of child[-]related expenses at the $4,120.00 figure is a reasonable figure." In addition, the court said it would factor in the cost of additional child care needs during the summer.

¶20 As for Sandra's assertion that the circuit court failed to consider the best interests of the children in determining whether use of the percentage standard was unfair to Jonathan, it may appear at first glance that the record supports Sandra's assertion. However, Sandra ignores that, in its decision denying Sandra's motion for reconsideration, the court briefly discussed the best interests of the children factor, stating that the "children [were] uniquely fortunate in that both parents have extraordinary income ability and obviously [the children] benefit from that fact." A reasonable inference from this explanation is that both parents are financially able to provide for the children and that deviating from the percentage standard will not unreasonably affect Sandra's ability to continue to provide for the children. We also infer from the court's more general discussion in both its original decision and in its decision on the motion for reconsideration that the court found Sandra's expenses for the children's share of the housing expenses, their vacation and travel expenses, and deposits into an account for the children's education to be unreasonable. Although a reasonable judge could have reached a different decision regarding the reasonableness of these expenses, we cannot say that excluding these expenses in determining whether it would be unfair to Jonathan to apply the percentage standard in light of Sandra's income and other expenses applies an improper standard of law or was not reached as part of a demonstrated rational process.

B. Failure to Explain Reasons for the Deviation

¶21 Sandra appears to argue that the circuit court erred in failing to explain its reasons for the amount of the deviation and to adequately explain the basis for the amount of the deviation. A careful reading of Sandra's argument on these issues reveals that what Sandra is actually challenging is the court's stated reason for deviating from the percentage standard that it would be unfair to

Jonathan to subsidize Sandra's lifestyle in light of the "actual needs" of the children and Sandra's concession during her testimony that "she is living beyond her income." Sandra argues that the court's reasoning is flawed because the court failed to find what the needs of the children were, which, according to Sandra, is a necessary prerequisite to determining whether child support at the percentage standard would unreasonably exceed the children's needs. We have already addressed and rejected this argument. As we discussed earlier, the court found that the children's needs equated to $4120 per month. Thus, the court had a proper point of reference in determining whether child support at the percentage standard would exceed the children's needs. Regardless, Sandra does not fully develop this argument and therefore we do not consider it any further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

C. Court's Failure to Consider Percentage Standard's Adjustments for High Income Parents

¶22 Sandra contends the circuit court erroneously exercised its discretion by finding that applying the percentage standard to Jonathan was unfair. We understand Sandra to be making two arguments in support of her contention, neither of which is well developed. First, Sandra seems to argue that the court should have applied the percentage standard, rather than deviate, because this standard already incorporates the legislature's view of the proper amount of child support a high income payer should pay under certain applicable circumstances, such as in this case. Sandra ignores WIS. STAT. § 767.511(1m), which permits a court to deviate from the percentage standard after considering the statutory factors enumerated in that statute. A circuit court is not obliged to apply the percentage standard in a "robotistic" manner. *See* ***Hubert v. Hubert***, 159 Wis. 2d 803, 814, 465 N.W.2d 252 (Ct. App. 1990) (cautioning against the "robotistic" use

of the percentage standards, especially in high-income cases.) Rather, the court is afforded the discretion to tailor a child support order based on the facts of the case before it, following the approach set forth in WIS. STAT. § 767.115(1n).

¶23 Sandra also appears to argue that this case is guided by the facts in ***Mary L.O. v. Tommy R.B.***, 199 Wis. 2d 186, 194-96, 544 N.W.2d 417 (1996), where the Wisconsin Supreme Court affirmed a circuit court's use of the percentage standard to determine support to be paid by a professional football player with substantial income. In that case, the circuit court found that use of the percentage standard was not unfair to the non-custodial father because the father could pay 17% of his income without hardship, although the use of the percentage standard would result in child support payments that far exceeded the needs of the children, and the father's income would be high only for a limited number of years. ***Id.*** at 190, 195-96. The court approved the creation of a trust fund with the funds for the child's benefit. ***Id.*** at 191-92. In this case, as in ***Mary L.O.***, Sandra asserts that Jonathan's high earnings are limited because his employment is not guaranteed and that, according to Jonathan, he might retire in five to eight years from the date of the hearing. The facts in this case do not resemble the facts in ***Mary L.O.*** in any meaningful way.

¶24 In ***Mary L.O.*** , the father was a professional football player and the court focused on the fact that a football player's career is limited by age because of the physical nature of the sport. Jonathan, however, has substantial experience in the world of finance consulting. There is no evidence in the record that Jonathan's career in finance is limited solely by his age and that Jonathan will likely be unemployed in the next ten years because of his career choice, regardless of testimony by Jonathan that the court could have reasonably interpreted as mere speculation that he might retire in five to eight years.

D. The Record Does Not Support the Court's Finding that Jonathan Overcame The Presumption of Fairness

¶25 Sandra contends that the circuit court erroneously exercised its discretion in finding that Jonathan had provided sufficient proof to overcome the presumption that use of the percentage standard in setting Jonathan's child support payments was fair.[4] We understand Sandra to be arguing that the court ignored evidence which, if properly considered, should have resulted in a child support judgment entered in her favor and ignored the fact that Jonathan offered no evidence in support of his deviation request. In support, Sandra argues that the record shows that: (1) Jonathan can afford to pay the percentage standard; (2) Jonathan pays less of the children's expenses than most non-custodial parents, whereby Sandra pays most of the children's expenses and their variable costs because she has substantial primary placement; (3) Jonathan's budget is less reasonable than Sandra's budget; and (4) Jonathan presented no evidence regarding the children's budgetary needs and the evidence he did present was speculative and not credible. We address and reject each argument.

¶26 When reviewing a challenge to the sufficiency of the evidence to support the trial court's findings, we apply a highly deferential standard of review. ***Jacobson v. American Tool Cos., Inc.***, 222 Wis. 2d 384, 389, 588 N.W.2d 67 (Ct. App. 1998). We uphold the trial court's findings of fact unless they are clearly erroneous. ***Id.*** at 389-90. Moreover, "the fact finder's determination and

[4] In her brief on appeal, Sandra frames the issue here as whether "Jonathan failed to overcome the presumption that use of the percentage standard is fair." We think the more accurate way to frame the issue is whether the record supports the circuit court's finding that Jonathan had overcome the presumption that using the percentage standard was fair and in deviating from the percentage standard on that basis. Our analysis on this topic applies this framework.

judgment will not be disturbed if more than one inference can be drawn from the evidence." ***Id.*** at 389.

¶27 Turning first to Sandra's argument that the evidence shows that Jonathan can afford to pay child support at the percentage standard, we note that the circuit court, in reaching its child support order, considered that both Jonathan and Sandra have high incomes and "the ability to provide a wonderful lifestyle for the children." However, the circuit court did not rely on Jonathan's alleged ability to pay according to the percentage standard as a basis for finding that applying the percentage standard to Jonathan would be unfair.

¶28 Next, Sandra does not direct our attention to anything in the record to support her assertion that Jonathan pays less of the children's expenses than most non-custodial parents. Even if she had, it is not clear how that evidence would have any bearing on whether it would be unfair to apply the percentage standard to Jonathan. Sandra does not explain why it matters to the court's decision if Jonathan in fact pays fewer expenses for the children than some or most other non-custodial parents. The point of reference here is not how Jonathan might stack up against some or most other non-custodial parents, but whether it would be unfair to Jonathan to use the percentage standard under the particular facts of this case.

¶29 Sandra next argues that the record shows that Jonathan's budget is more "extravagant" than hers. Assuming without deciding that the record would bear this out, Sandra does not explain how that relates to the circuit court's unfairness finding. In any event, this argument is not fully developed and we therefore do not consider it. *See* ***Pettit***, 171 Wis. 2d at 646-47.

¶30 Finally, Sandra argues that Jonathan offered no evidence on the children's budgetary needs and that his testimony regarding the reasonableness of the children's monthly expenses as reported by Sandra was speculative "at best." Sandra also argues that Jonathan's testimony was not credible. We understand Sandra to be arguing that the court should have given little or no weight to Jonathan's testimony regarding the children's needs and the reasonableness of their monthly expenses because Jonathan's testimony was not supported by any facts and his testimony was not credible. Sandra's arguments miss the mark.

¶31 We acknowledge that Jonathan offered no concrete evidence of the children's budgetary needs, only conclusory generalities. However, Sandra ignores evidence she introduced of the children's needs as reflected on her financial disclosure statement, which the circuit court relied on in finding the extent of the children's budgetary needs and in finding $4120 of child-related expenses to be reasonable. In addition, Sandra has failed to demonstrate that the circuit court's findings regarding Jonathan's credibility were clearly erroneous. *See* ***Kersten v. H.C. Prange Co.***, 186 Wis. 2d 49, 56, 520 N.W.2d 99 (Ct. App. 1994) (When the trial court sits as the fact finder, it is the ultimate arbiter of the witnesses' credibility, and we must uphold its factual findings unless they are clearly erroneous.).

CONCLUSION

¶32 Based on the reasons we have explained, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.