COURT OF APPEALS DECISION DATED AND FILED

March 19, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 97-1157

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

IN RE THE MARRIAGE OF:

PATRICIA WATHEN,

PETITIONER-RESPONDENT,

V.

ROBERT MOORE,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

EICH, C.J. Robert Moore appeals from a post-judgment order revising the amount of support he pays for the three minor children of his marriage to Patricia Wathen, which was annulled in 1992. He argues that the trial court failed to make the requisite findings when it departed from the percentage

guidelines in revising support. He also claims that because Wathen returned to school "voluntarily and unreasonably reduc[ing] her income," the court erroneously exercised its discretion by delaying the effective date of a reduction in support for several months to accommodate Wathen's reduced income.

We agree with Moore that the trial court's departure from the child support guidelines did not comport with the statutory requirements governing such deviations. We therefore reverse on that issue and remand to the trial court to permit it to reconsider its decision in light of those requirements. In all other respects, we affirm the trial court's order.

During their marriage, Wathen was employed as a molecular biologist at the University of Wisconsin, and Moore worked for the School of Pharmacy. The judgment of annulment granted primary physical placement of the children to Wathen and directed Moore to pay child support of $926.16 per month, based on the applicable percentage guidelines. By 1994, the children were spending more time with Moore—they were with him approximately 40% of the time—and his support was lowered to $700. In the summer of 1996, Moore was granted primary placement of one of the children and equal placement of the other two, and he petitioned the court to lower his support obligation accordingly.

Wathen also had petitioned the court. She sought an increase in child support because her income had been reduced to a modest rental income from a boarder and intermittent summer work. In December 1994, she had lost her job at a university laboratory that lost its federal funding. For the first six months of 1995 she received unemployment compensation while she looked for work in her field. By the fall of 1995, she registered as a full-time student in a program to obtain a teaching certificate, believing this would be in the children's and her best interest.

The trial court heard both petitions in January 1997, and shortly thereafter issued a written order granting Moore's request, but only in part. The court kept support at the existing level of $700 per month until August 31, 1997, when Wathen expected to be eligible for teaching jobs. Thereafter, Moore's support obligation would be lowered to $550 per month.[1]

Use of the child support guidelines is mandatory in both the original divorce/annulment proceedings and in postjudgment proceedings seeking to modify child support. Section 767.32(2), STATS.; ***Kelly v. Hougham***, 178 Wis.2d 546, 554, 504 N.W.2d 440, 443 (Ct. App. 1993). If requested, however, the court may deviate from the guidelines "if, after considering the factors listed in s. 767.25(1m) or 767.51(5), as appropriate, 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."[2] Section 767.32(2m).

No such findings were made in this case. The only reference to the child support guidelines in the trial court's decision is the following: "Neither party provided HSS guidelines to the court."

A trial court's determination to depart from the guidelines is discretionary, ***Nelsen v. Candee***, 205 Wis.2d 632, 641, 556 N.W.2d 784, 787 (Ct. App. 1996), and entitled to some deference on appeal. We have often said, for example, that we will not reverse a trial court's discretionary decision if the record shows that discretion was exercised and we can perceive a reasonable basis for the

[1] The court also ordered that Wathen's responsibility for the children's uninsured medical expenses be increased from 50% to 65% of the total cost.

[2] Section 767.25(1m), STATS., sets forth the general criteria the court must consider in modifying child support. Section 767.51(5), STATS., applies similarly to paternity cases.

court's ruling. ***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) (citation and footnote omitted.). Indeed, "'we generally look for reasons to sustain discretionary decisions.'" ***Id***. at 591, 478 N.W.2d at 39 (quoted source omitted).

And while the trial court must state the reasons for its decision, we have also recognized that its analysis and reasoning need not be exhaustive. It is enough that the record indicates to the reviewing court that the trial court "under[took] a reasonable inquiry and examination of the facts" and that a reasonable basis for its determination exists. ***Id.*** at 590-91, 478 N.W.2d at 39 (quoted source omitted). One of the primary reasons the law requires a trial court's discretionary rulings to be explained on the record is to ensure that those rulings are adequately and accurately reviewable. ***McCleary v. State***, 49 Wis.2d 263, 280-81, 182 N.W.2d 512, 521 (1971). It is enough, therefore, if the explanation is adequate to allow the appellate court to reasonably review the trial court's ruling. Thus, while more is required here than just a flat statement that using the guidelines would be unfair to one of the parties, ***Hubert v. Hubert***, 159 Wis.2d 803, 814, 465 N.W.2d 252, 256 (Ct. App. 1990)—and keeping in mind

that § 767.32(2m), STATS., requires consideration of various statutory criteria—we have found brief summaries to be adequate in this regard.[3]

We agree with Moore that the court's notation that it had not been provided with the guidelines—which we presume refers to the fact that neither of the parties provided the court with the necessary calculations for ascertaining support *via* the guidelines—does not constitute either the "finding" necessary to support the deviation under § 767.32(2m), STATS., or the explication of the court's reasoning required by the cases discussing a trial court's exercise of discretion. We therefore reverse and remand to the trial court to either apply the guidelines or, in a manner consistent with § 767.32(2m), set support at an amount outside this guideline.

Moore also challenges the trial court's decision to delay implementation of the "new" level of support to August 31, 1997, to accommodate the last year of Wathen's education. He argues that the court erroneously considered Wathen's actual income while attending school, rather than her earning capacity. The argument is based on his assertion that Wathen's decision to return to school after losing her job at the university was "unreasonable."

[3] *See*, *e.g.*, ***Lendman v. Lendman***, 157 Wis.2d 606, 618, 460 N.W.2d 781, 786 (Ct. App. 1990) (trial court's deviation from the guidelines because of the payor's irregular income, which would cause support to fluctuate and thus be detrimental to the child's interest in having a steady stream of support, held adequate); and ***Nelsen v. Candee***, 205 Wis.2d 632, 641, 556 N.W.2d 784, 788 (Ct. App. 1996) (trial court's finding that ex-wife's current earnings, which could be attributed to her decision to "stay at home and devote herself to the children," were not high enough to support herself, held adequate, standing alone, to support a determination that the ex-husband needed to make "more of a contribution").

As we have indicated above, the trial court found just the opposite, accepting Wathen's position that her pursuit of a teaching certificate would be best for both her and the children and specifically finding that:

> [Wathen] is currently in school full-time and will earn her teaching certificate in June of 1997. She has a doctor's degree from 1984 but has decided that working on a school year calendar is best for her and her children. *Under all the circumstances of this case her decision to go back to school is not unreasonable.*

(Emphasis added.)

It is undisputed that Wathen was laid off from her position at the university through no fault of her own. She testified that she had actively sought employment as a molecular biologist, without success, and that she decided to pursue a teaching certificate in order to obtain increased job security and vacations that would coincide with the children's. Moore argues, however, that evidence in the record suggests that jobs were "available in [Wathen's] field," but he does not describe their nature, pay or location. He also points to Wathen's acknowledgment that she "'was qualified for' a position … in her field" but chose not to apply.

The trial court heard this evidence, along with Wathen's own testimony, and decided, on the record as a whole, that her decision to return to school was reasonable. As we indicated above, we do not test a trial court's discretionary determinations by a subjective standard, or by our sense of what might be a "right" or "wrong" decision in the case. Rather, the trial court's decision will stand unless "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). In this case, the trial court explained, however briefly, its reasons for determining that Wathen's decision to

return to school to obtain a teaching certificate was reasonable under all the circumstances of the case. And Moore has not persuaded us that, under the deferential standards governing our review of such decisions, the court misused its discretion in ruling as it did.

We therefore reverse the order insofar as it sets Moore's child support obligation at $550 per month after August 31, 1997, and we remand to permit the court either to apply the percentage support guidelines to the facts of record or, should it choose to depart from those guidelines, to make the appropriate findings required by § 767.32(2) and (2m), STATS., and the cases we have discussed in this opinion. In all other respects, we affirm the order.

By the Court.–Order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

No. 97-1157(D)

DYKMAN, P.J. *(dissenting)*. There is no need to remand this case. The parties were given an opportunity to produce whatever evidence they felt was necessary to support their positions. Had the trial court felt that the financial situation was unfair to either of the parties or the children, it would have said so. The application of child support guidelines is a ministerial matter, and the guardian ad litem has applied WIS. ADM. CODE § HSS 80.04 to the facts of this case. Neither party takes issue with the guardian ad litem's mathematics. We could, as easily as the trial court, apply § HSS 80.04 and determine the appropriate child support amount. A remand requires the trial court to revisit and reacquaint itself with this case. Judicial resources are not unlimited and should not be squandered. I would reverse and adopt the guardian ad litem's mathematical computation for child support. I therefore respectfully dissent from the majority's remand.