

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 16, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-2076

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE PATERNITY OF CASSAR R.B.-C.,

LAURA E.B.,

PETITIONER-RESPONDENT,

v.

ROBERT M.C.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County:
JAMES P. DALEY, Judge. *Affirmed.*

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

PER CURIAM. Robert M.C. appeals from a circuit court order determining child support for Cassar R.B.-C. (a minor child), allocating the tax exemption for the child, allocating child-related expenses and awarding attorney's fees in this paternity action. Robert specifically challenges the circuit court's

rulings on child support, daycare costs and attorney's fees. Respondent Laura E.B., Cassar's mother, asks this court to affirm the circuit court's ruling. For the reasons set forth below, we affirm.

BACKGROUND

Robert agrees he is Cassar's father. Robert and Laura entered into a Partial Settlement Agreement on custody and placement issues and agreed to joint legal custody. Under this agreement, Robert keeps Cassar for forty-eight percent of the overnights during the year. However, the circuit court heard testimony that Robert actually has Cassar for forty-five percent of the overnights due to Robert's demanding work schedule.

In granting the challenged order, the circuit court considered Robert's annual salary of \$175,000 and Laura's annual salary of approximately \$36,000. The court also considered Laura's household expenses, Cassar's child-care expenses, and government statistics showing the average annual cost of raising a minor child in Cassar's situation. The court noted that, unlike Laura, Robert was eligible under IRS regulations to pay the first \$5,000 of Cassar's child care with pretax dollars, effectively reducing the total out-of-pocket expenses for Cassar's care.

ANALYSIS

Standard of Review

The amount of child support awarded is within the circuit court's discretion, as is the decision whether to award attorney's fees. *Sellers v. Sellers*, 201 Wis. 2d 578, 585, 549 N.W. 2d 481, 484 (Ct. App. 1996); *Bussewitz v. Bussewitz*, 75 Wis. 2d 78, 89, 248 N.W. 2d 417, 424 (1977). A discretionary

decision will be reviewed to determine whether it is the “product of a rational mental process whereby the facts of record and the law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.” *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981). If so, we will sustain the circuit court’s determination. *Molstad v. Molstad*, 193 Wis. 2d 602, 607, 535 N.W. 2d 63, 64 (Ct. App. 1995).

Child Support and Daycare Costs

The court ordered Robert to pay child support of \$300 per week to Laura through the clerk of the circuit court, plus \$5,000 annually in child care directly to the child-care provider,¹ for a total of approximately \$20,600 per year. The court determined that Robert should not pay a straight 17% of his gross income, because this would result in child support of almost \$30,000 per year, a figure the court determined was too high for the actual expense of raising Cassar. A 17% order would therefore be unfair to Robert.

Robert argues that the circuit court erred in failing to consider the shared-time formula promulgated in WIS. ADM. CODE § HSS 80.04(2)(c). We reject this argument. The court began with a shared-time calculation which resulted in a determination that Robert’s initial obligation would be approximately \$15,000.² The court then subtracted the figure for Laura’s shared-time obligation

¹ Because Robert can pay child care with pretax dollars, his actual out-of-pocket expenses for child care is substantially less than \$5,000.

² Based on the evidence it heard, the court found a *de facto* 45% (Robert) - 55% (Laura) shared-time split. The court obtained the approximate \$15,000 figure by specifically applying to Robert’s salary, the 50.05% adjustment (.5005) listed in WIS. ADM. CODE § 80.04(2)(c) for a 45% shared-time split.

of approximately \$1,000,³ leaving Robert's obligation at approximately \$14,000. To that sum, the court added an additional figure of approximately \$1,200 to include the actual child-care expenses in excess of the \$5,000 permitted by IRS regulations to be paid with pretax dollars, leaving Robert's total obligation at \$300 per week (\$15,200 per year), in addition to \$5,000 per year child-care expenses. Stated otherwise, the court began with the shared-time formula, and altered it to order Robert to pay all the child-care expenses.⁴

Given the disparity of incomes between the parties, given Cassar's actual child care expenses, and given that Cassar is in child care for substantial hours each day,⁵ we cannot say that the circuit court misused its discretion in requiring Robert to pay all of Cassar's child-care costs. Contrary to Robert's implication, WIS. ADM. CODE § HSS 80.04(2) is discretionary. WISCONSIN ADM. CODE § 80.03(7) specifically anticipates that courts may deviate from the percentage standards listed, as does § 767.51(5), STATS. *See also Molstad*, 193 Wis.2d at 606, 535 N.W.2d at 64. The court here complied with statutory and case law requirements, and gave reasons on the record for its deviation. *See, e.g., Hartung*, 102 Wis.2d at 66, 306 N.W.2d at 20-21.

In addition, the circuit court mitigated the effect of Robert's having to pay more than what he would have had to under a shared-time formula. First,

³ The court specifically applied to Laura's salary the 16.75% adjustment (.1675) listed in WIS. ADM. CODE § 80.04(2)(c) for a 55% shared-time split.

⁴ In effect, the order requires Robert to pay \$5,000 directly to the child-care provider, and an additional \$1,200 in child-care expenses to Laura, who passes them through to the child-care provider.

⁵ Both parents work, and Cassar remains in child care until approximately 4:30 or 6:00 p.m., depending whether Laura or Robert, respectively, will pick Cassar up.

the court granted Robert the dependent tax deduction for Cassar. Second, the court specifically ordered that Laura pay all of Cassar's variable expenses out of the child support, and that Robert make no further payment obligation to Cassar beyond the child support paid. Stated otherwise, the court did not allocate the variable expenses between the shared-time parents, but instructed Laura to pay them from the support received from Robert. The court properly exercised its discretion, and we therefore affirm.

Attorney's Fees

The circuit court ordered Robert to contribute towards Laura's attorney's fees. We do not understand Robert to object to the reasonableness of Laura's fees. Rather, his objection appears to be to the requirement for contribution.

A trial court may award attorney's fees if a party shows a need for a contribution, the other party has the ability to pay, and the fees are reasonable. *Van Offeren v. Van Offeren*, 173 Wis.2d 482, 499, 496 N.W.2d 660 (Ct. App. 1992). The court considered the parties' relative earning capacity and assets, as well as their expenses. The court specifically noted that Laura had net negative assets, and was unable to pay her attorney's fees, while noting Robert had the ability to pay (he had an amount substantially greater than Laura's fees in his checking account). Because the circuit court clearly stated the basis for its discretionary decision on the record, and because the decision is the "product of a rational mental process whereby the facts of record and the law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination," we must affirm. *Hartung*, 102 Wis.2d at 66, 306 N.W.2d at 20-21 (1981).

By the Court.—Order affirmed.

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

