COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP499 **Cir. Ct. No. 2010FA1816**

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

IN RE THE MARRIAGE OF:

JOHN MAASCH,

PETITIONER-APPELLANT,

V.

LORI ANDERSON F/K/A LORI MAASCH,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: ELLEN K. BERZ, Judge. *Affirmed in part, reversed in part, and cause remanded for further proceedings*.

Before Sherman, Kloppenburg and Fitzpatrick, JJ.

¶1 PER CURIAM. John Maasch appeals an order of the circuit court increasing his family support payments to his ex-wife, Lori Anderson.[1] John argues that the circuit court erred as a matter of law in concluding that a substantial change of circumstances occurred that warrants a modification of the payments. We disagree and affirm the circuit court's decision in that regard. John also argues that the circuit court erroneously exercised its discretion in setting the amount of the increased family support payments. Because we cannot discern the basis for the circuit court's decision concerning the amount of the increase, we agree with John, reverse the circuit court's order, and remand this matter for further proceedings.

BACKGROUND

¶2 There is no dispute as to the following facts. John and Lori divorced in 2011 after a twenty-two-year marriage. At the time of the divorce, John worked full-time earning both a base salary and commissions. He also worked part-time at a fire department where he earned an additional, relatively small, wage. Lori was not working outside the home at the time of the divorce. John is presently employed in the same capacities that he was at the time of the divorce, and Lori has since found employment.

¶3 Also at the time of their divorce, three of the couple's five children, Jeffery, Jacob, and Aimee, were minors. The parties agreed at that time that physical placement of the three minor children would be on a schedule of 43% of the time with John, and 57% of the time with Lori.

[1] For clarity, we will now refer to the parties by their first names.

¶4 One of the written agreements of the parties incorporated into the judgment of divorce was the Partial Marital Settlement Agreement on Financial Matters (PMSA).[2] Pursuant to the terms of the PMSA, John agreed to make payments to Lori which consisted of three separate components denominated as: "child support," "family support," and "additional family support." Child support and family support were tied to John's "base salary" as defined in the PMSA. The additional family support was calculated as a percentage of John's commissions.

¶5 A few months after the divorce was granted, John brought a motion to amend his payments to Lori. The basis for the motion was that John's base salary at his employment was reduced which, in turn, caused John's income to be dependent more on commissions as opposed to salary. The parties agreed to arbitrate that motion before Allan Koritzinsky and, relevant to our discussion, the arbitrator ordered a reduction of the family support component of John's payments because of the reduction of John's base salary. That reduction of the amount of family support had the intended effect of increasing the additional family support component of the payments in light of John's increased dependency on commission income at his place of employment. The circuit court confirmed the arbitrator's decision in January 2012.

¶6 In January 2013, Lori filed a motion to modify certain aspects of physical placement and the support payments. In October 2013, John filed a motion to suspend family support payments based on John's contention that Lori was in a "marriage-like" relationship. The family court commissioner denied the parties' motions. John and Lori requested de novo review of the family court

[2] The circuit court commented that the terms of the PMSA are "complicated." We agree but will relate only pertinent provisions of that agreement.

commissioner's decisions in the circuit court and, for various reasons due almost exclusively to the parties, a hearing regarding the de novo requests was not held for some time.[3]

¶7 In February 2015, and again in September 2016, the circuit court held a de novo hearing on Lori's motion. The circuit court entered a Decision and Order, and John moved for reconsideration of that decision due to perceived miscalculations by the circuit court.

¶8 In December 2016, the circuit court vacated its previous decision and issued a Reconsidered Decision and Order. Therein, the circuit court concluded that a substantial change in circumstances had occurred since the most recent support order and an increase in support payments from John to Lori was warranted. The circuit court increased the family support component of John's payments and, apparently, the circuit court eliminated the separate child support component of John's payments. John appeals.

¶9 We will state further details about the parties' circumstances and the relevant orders in the context of the discussion below.

DISCUSSION

¶10 John makes two primary arguments on appeal. First, he contends that the circuit court erred when it concluded that a substantial change in circumstance occurred which warranted modification of the family support award. Second, John argues that the circuit court erroneously exercised its discretion in

[3] John's motion to suspend family support payments is not a subject of this appeal and will not be mentioned further.

determining the amount of the increase of his family support obligation. We address each argument in turn.[4]

I. The Circuit Court Correctly Concluded That There Was A Substantial Change In Circumstances That Warranted Modification Of The Family Support Award.

A. Applicable Authorities.

¶11 We first consider whether there was a substantial change in circumstances that warranted modification of John's family support payments to Lori. Pursuant to WIS. STAT. § 767.59(1f)(a)[5], "a revision … of a judgment or order as to the amount of child or family support may be made only upon a finding of a substantial change in circumstances." The statute lists situations that qualify as a substantial change in circumstances, including a change in the payer's income since the last order, a change in the needs of a child, or any other fact that the court determines is relevant to justify a revision of the support order. Sec. 767.59(1f)(c). The party seeking modification must show that the substantial change in circumstances warrants the proposed modification. ***Rohde-Giovanni v. Baumgart***, 2004 WI 27, ¶30, 269 Wis. 2d 598, 676 N.W.2d 452.

¶12 Whether there has been a substantial change in circumstances is a determination of law that is reviewed de novo. ***Jalovec v. Jalovec***, 2007 WI App 206, ¶22, 305 Wis. 2d 467, 739 N.W.2d 834. But, findings of fact made by the

[4] In this court, Lori filed a motion to strike certain attachments to John's reply brief that pertained to tax calculations on the ground that those attachments were not presented to the circuit court. We have not considered those attachments and, as a result, deny the motion to strike as moot.

[5] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

circuit court regarding what changes have occurred in the parties' circumstances will not be disturbed unless those findings are clearly erroneous. ***Benn v. Benn***, 230 Wis. 2d 301, 307, 602 N.W.2d 65 (Ct. App. 1999). We conclude that the circuit court properly determined that a substantial change in circumstances of the parties warranted modification of the family support award.

B. The Circuit Court's Findings of Fact.

¶13 In its Reconsidered Decision and Order entered in December 2016, the circuit court made findings of fact relevant to whether there was a substantial change in circumstances since the most recent support order entered in January 2012. The circuit court found that two of the parties' children, Jeffery and Jacob, were no longer minors and that Aimee was the only minor child of the parties.[6] The court also found that Aimee spent over 75% overnight placement with Lori starting in 2015 and that Jacob was placed with Lori 100% of the time since the divorce. This was a change from the 43% of time the minor children were to spend with John as was previously ordered. Further, the circuit court found that the parties' incomes had increased.[7] Specifically, the court found the following:

> i. [John's] income in 2013 was $205,044 ($86,888 Veridian base + $111,674 Veridian bonus/commission + $6,482 fire dept. income). His income in 2014 was $254,661 ($85,243 Veridian base + $162,538 Veridian bonus/commission + $6,880 fire dept. income). His income in 2015 was

[6] The circuit court found that Jeffery turned eighteen in August 2012, and Jacob turned eighteen in December 2013 but continued his high school education until April 2014.

[7] In the January 2012 arbitration order, there was no finding regarding John's income at that time. However, less than six months earlier, John represented to the circuit court that his gross income was about $185,000 per year. The arbitration order imputed $25,000 of income to Lori.

> $229,408 ($87,542 Veridian base + $142,866 Veridian bonus/commission + $6,620 fire dept. income).[8]
>
> ii. [Lori's] income in 2013 was $27,740. Her income in 2014 was $30,001. Her income in 2015 was $28,991.

¶14 John does not dispute the circuit court's findings of fact regarding a change of circumstances. Rather, he asserts that those findings do not, as a matter of law, lead to the conclusion that a substantial change in circumstances has occurred which warrants an increase of the support award. We conclude that the circuit court's decision was correct for several reasons.

C. John's Increased Income.

¶15 John's increased income constitutes a substantial change in circumstances based on the language of WIS. STAT. § 767.59(1f)(c)1. Statutory interpretation begins with the plain meaning of the statute. ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. Where the meaning of the statute is unambiguous, we stop our inquiry. ***Id.*** Section 767.59(1f)(c)1. explicitly states that the payer's increased income may constitute a substantial change in circumstances. Because the circuit court found that John's income increased since the most recent support order, and John does not dispute that finding, the circuit court properly concluded that there was a substantial change in circumstances that warrants modification of the support order.

¶16 John argues that a change in his income was contemplated because the "additional family support" is based on a percentage of his income and,

[8] We are aware that the circuit court's finding regarding John's 2015 income contains an error in that the three sources of income noted do not total $229,408.

therefore, the change in his income does not constitute a substantial change in circumstances. John points to no authority to support that contention. Moreover, in the arbitration order confirmed in January 2012, it was ordered that "[e]ither party is free to file a Motion at a later time seeking a modification [in support] based upon a substantial change in circumstances." John did not object to that order, and the arbitrator's order does not limit in any way the definition of "substantial change in circumstances." Consequently, we reject John's argument that his increased income does not constitute a substantial change in circumstances.

D. Changes in Physical Placement.

¶17 The circuit court also properly concluded that there was a substantial change in circumstances based on the changes in physical placement. John does not dispute that Jacob was placed with Lori 100% of the time since the divorce and that Aimee began living with Lori more than 75% of the time beginning in 2015. Although at the time of the divorce the parties anticipated splitting these responsibilities, 43% with John and 57% with Lori, the responsibilities have largely fallen to Lori. This increase in actual placement time with Lori necessarily affected the related costs and resources that Lori expended, and expends, caring for those children. WISCONSIN STAT. § 767.59(1f)(c)2. requires the circuit court to contemplate the needs of the children in determining if there is a substantial change in circumstances. The changes in actual placement clearly falls into that category of the statute.

¶18 John makes two arguments that the changes in actual placement do not constitute a substantial change in circumstances that warrants modification of his support obligations. First, he asserts that the circuit court did not consider that Jeffery had "aged out" and was no longer a minor subject to support payments. This argument is without merit. One of the circuit court's findings of fact was that

Jeffery turned eighteen in August 2012 and that he was no longer a subject of the child support payments. This leads to the conclusion that Jeffery's status was a contributing factor in the circuit court's decision. Second, John contends that changes in physical placement, alone, cannot justify a child or family support modification. In making this argument, John relies on ***State v. Beaudoin***, 2001 WI App 42,¶4, 241 Wis. 2d 350, 625 N.W.2d 619, in which a mother sought a child support modification after her former husband's failure to exercise physical placement of the child for four out of the court-ordered 148 days. There, we rejected the claim that the very short lapse constituted a substantial change in circumstances. ***Id.***, ¶12. However, "we did not hold that a change in placement could never amount to a substantial change in circumstances." ***Motte v. Motte***, 2007 WI App 111, ¶18 n.4, 300 Wis. 2d 621, 731 N.W.2d 294. This case is distinguishable from ***Beaudoin*** because the changes in actual placement are far more substantial.

¶19 For those reasons, we reject John's arguments and affirm the circuit court's conclusion that a substantial change in circumstances occurred that warranted modification of the family support order. We now consider whether the circuit court erroneously exercised its discretion by increasing John's family support obligation to the amount ordered.

II. The Circuit Court Erroneously Exercised Its Discretion In Determining The Increase In John's Family Support Payment.

¶20 John argues that the circuit court erroneously exercised its discretion in determining the amount of the family support payment increase. For the reasons noted below, we agree.

A. Standard of Review.

¶21 We will not disturb a circuit court's decision regarding family support unless there was an erroneous exercise of discretion. ***Vlies v. Brookman***, 2005 WI App 158, ¶13, 285 Wis. 2d 411, 701 N.W.2d 642. A circuit court engages in an erroneous exercise of discretion if it fails to consider relevant factors. ***Rohde-Giovanni***, 269 Wis. 2d 598, ¶18. "Moreover, '(a) discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.'" ***Id.*** (quoting ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981)).

¶22 Even when a circuit court makes detailed findings in the family support context, the court "erroneously exercises its discretion if it neglects to provide a rational explanation of how its findings lead to the support award." ***Vlies***, 285 Wis. 2d 411, ¶19. Similarly, a circuit court erroneously exercises its discretion if there is "no connection between the evidence and the amount of family support ordered," or if the circuit court makes no findings as to the need and ability to pay as factual bases for the exercise of its discretion. ***Id.***

¶23 When a circuit court does not explain its reason for a discretionary decision in a family law context, we may search the record to determine if the record supports the circuit court's decision. ***Finley v. Finley***, 2002 WI App 144, ¶19, 256 Wis. 2d 508, 648 N.W.2d 536. But, if the circuit court's likely rationale is not readily apparent, we decline to assume that any given rationale is the court's basis for the decision without some explanation by the circuit court. ***Id.***, ¶¶22, 26-27.

B. Family Support.

¶24 Wisconsin law provides circuit courts the option to award family support as an alternative to child support and maintenance. ***Vlies***, 285 Wis. 2d 411, ¶8. "The family support alternative, therefore, encompasses the support objectives of its component parts, child support and maintenance, in a single obligation." ***Id.*** There are no statutory factors enumerated for calculating family support, but the legislature "did not envision an unfettered exercise of discretion by the circuit court." ***Id.***,¶14. Instead, the legislature determined that an award of family support should be based on the same criteria used to fashion child support and maintenance orders. ***Id.***, ¶14 and ¶23.

¶25 The legislature created the family support option to allow parties to take advantage of federal income tax advantages. ***Id.***, ¶19. An award of family support operates for tax purposes like maintenance, deductible to the payer and taxable to the recipient. ***Id.***, ¶10. In the PMSA, the parties agreed to this tax effect of the family support, and additional family support, payments.[9]

¶26 The circuit court is to determine the amount of maintenance as a portion of the family support awarded. The statutory factors regarding an award of maintenance "are designed to further two distinct goals."[10] ***Rohde-Giovanni***,

[9] Recent changes to federal income tax law may, or may not, change the tax effect of family support payments. The parties have not mentioned these changes to us, and we express no opinion on the matter.

[10] The factors regarding maintenance set forth in WIS. STAT. § 767.56(1c) are:

(a) The length of the marriage.

(b) The age and physical and emotional health of the parties.

(c) The division of property made under s. 767.61.

(continued)

269 Wis. 2d 598, ¶29. First, maintenance is designed to support the recipient spouse in accordance with the needs and earning capacities of both former spouses. Second, a maintenance award must ensure that there is a fair and equitable financial arrangement between the parties. ***Id.*** When there is a change of circumstances and an amendment to a maintenance award, both of those objectives must be considered in amending the previous order. ***Id.***, ¶31.

C. The January 2012 Order.

¶27 There is no dispute that the most recent previous order regarding child support, family support, and additional family support was the arbitration

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> (d) The educational level of each party at the time of marriage and at the time the action is commenced.
>
> (e) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
>
> (f) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.
>
> (g) The tax consequences to each party.
>
> (h) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, if the repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.
>
> (i) The contribution by one party to the education, training or increased earning power of the other.
>
> (j) Such other factors as the court may in each individual case determine to be relevant.

order confirmed in January 2012. That order, in general, followed the PMSA outline of how the payments from John to Lori were to be calculated. However, the arbitration order made a change based on the reduction of John's base salary at his place of employment. In the PMSA approved at the time of the divorce, the child support and family support components of John's payments were determined with the assumption of a "base salary" for John of $142,000. The additional family support component was calculated as a percentage of John's income from commissions above the $142,000 base salary. By the time of the arbitration order, John's base salary was reduced from $142,000 to $97,200 and any income John received above that $97,200 base salary was in the form of commissions, from which the additional family support component continued to be calculated.

¶28 With that in mind, the arbitrator ordered that John was to continue to pay Lori $300 per month in child support, and ordered that John pay Lori $2,698 per month in family support. Those two amounts were tied to John's new base salary of $97,200. Additional family support paid from John to Lori was calculated using a formula agreed to in the PMSA based on the income John earned through commissions above his base salary of $97,200.

D. The December 2016 Reconsidered Decision and Order.

¶29 In its Reconsidered Decision and Order, the circuit court made findings of fact, many of which we have already discussed.[11] The circuit court's

[11] Before reviewing the circuit court's Reconsidered Decision and Order, we note a point for context. While not explicit in that order, we conclude that the circuit court eliminated the $300 per month child support payment required by the PMSA and the January 2012 arbitration order. There is no "child support" payment separate from child support as a portion of family support mentioned in the circuit court's Reconsidered Decision and Order, and that order does not adopt any previous child support order.

amendments to the 2012 arbitration order were contained in a chart prepared by the circuit court which we reproduce here (the circuit court's footnotes to the chart are not reproduced).

	A	B	C	D	E
	Year	Monthly Family Support Not Including Child Support	Monthly Child Support Portion	Total Monthly Family Support (Column B + Column C)	Additional Annual Family Support
1	2013	$2,698	$1,581	$4,279	$45,612
2	January 1 through March 31, 2014	$2,698	$1,546	$4,244	$67,761
3	April 1 through December 31, 2014	$2,698	$824	$3,582	(shown in E2)
4	January 1 through August 31, 2015	$2,698	$884	$3,582	$62,922
5	September 1 through December 31, 2015	$2,698	$1,344	$4,042	(shown in E4)
6	2016 through July 2022	$2,698	Imputed to be the same ad C5	Imputed to be the same as D5	45% of Dad's total earned income above $97,200, and subtracting 45% of Mom's income above $45,000

We conclude that the circuit court ordered a substantial increase in the maintenance portion of John's family support obligation as mentioned in column B of the chart, but there is no discernable reasoning behind that increase. We will now consider portions of the Reconsidered Decision and Order that are pertinent to our discussion.

¶30 We begin with column C of the chart entitled, "Monthly Child Support Portion." Footnote 3 to the chart contains yet another chart (not reproduced here) that summarizes the calculations made by the circuit court to construct column C.[12] Footnote 3 states that those calculations "[u]sed standard guidelines." Although the Reconsidered Decision and Order does not mention WIS. ADMIN. CODE § DCF 150 (through May 2018), we construe that language in footnote 3 to evidence the circuit court's intent to use the standards in § DCF 150 to calculate the "child support portion" of family support set forth in column C. However, the Reconsidered Decision and Order does not state whether the circuit court's calculations used the percentage standards in WIS. ADMIN. CODE § DCF 150.03(1), the shared placement guidelines detailed in § DCF 150.04(2), the high-income payer guidelines in § DCF 150.04(5), or some combination of those portions of § DCF 150. From our review of the calculations, we cannot discern which portions of § DCF 150 were used by the circuit court in calculating amounts in column C.[13]

¶31 Next, and while not stated in the Reconsidered Decision and Order, we conclude that the structure of the circuit court's order and the calculations show that the circuit court intended to continue payments of family support (tied to John's base salary and with the same tax effect as maintenance) as

[12] There are also footnotes referenced in the chart prepared by the circuit court concerning how the amounts in column E were calculated. Because Column E regarding Additional Annual Family Support is not in dispute, we will not discuss the underlying calculations regarding column E.

[13] We note that the 2012 arbitration order states that John's "base salary" of $97,200 per year will be used to calculate the family support component of John's payments. In calculating the "Monthly Child Support Portion" in column C, the circuit court, for the years 2013 and 2014, used a base salary for John several thousand dollars below $97,200. However, no reason for this difference is mentioned in the circuit court's Reconsidered Decision and Order.

contemplated in the PMSA and the 2012 arbitration order. In other words, the circuit court did not make one order for child support and a separate order for maintenance.

¶32 We also conclude that the "Total Monthly Family Support" mentioned in column D necessarily consists of both child support and maintenance. That much is clear from Wisconsin law. *See* ***Vlies***, 285 Wis. 2d 411, ¶8. In addition, the PMSA, in paragraph II. D., is explicit that the family support payments from John to Lori (based on John's base salary) consist of both maintenance and child support. In fact, paragraph II. D. details that such child support portion of the family support payments was, until December 31, 2014, to be approximately 51% of the family support payments. There is nothing in the January 2012 arbitration order which signaled a change in that percentage when the arbitrator reduced the family support order to $2,698 per month. As a result, we conclude that the family support payment from John to Lori consists of both maintenance and child support.

¶33 Finally, the circuit court's chart, in column B, refers to $2,698 as the "Monthly Family Support Not Including Child Support." While the Reconsidered Decision and Order does not say as much, we conclude, for reasons already stated, that column B is the maintenance portion of family support tied to John's base salary. We recognize that the $2,698 amount in column B is the same amount mentioned in the January 2012 arbitration order for the entire family support obligation with *both* a maintenance and child support portion. For that reason we do not consider the use of that number in column B to be coincidence. We conclude that the circuit court, in its Reconsidered Decision and Order, changed the $2,698 amount from both child support and maintenance to only the maintenance portion of family support.

¶34 In coming to its decision which increased the maintenance portion of John's family support payment to Lori, the circuit court did not mention any conclusions of law or any reasoning as support for that increase. There is no discussion in the Reconsidered Decision and Order regarding statutory factors concerning maintenance, the objectives of maintenance (fairness and support), why Lori needed more maintenance from John, or why that amount that was awarded. The Reconsidered Decision and Order contains findings of facts (but none concerning an increased need for maintenance to Lori) and then states how much John is to pay to Lori. But, there is no connection between the substantial increase in the maintenance portion of the family support owed and the circuit court's findings.

¶35 We acknowledge that the parties entered into an overly complicated process to determine child support, family support, and what the parties termed "additional family support." We recognize that the process of deciding Lori's motion was made more difficult for the circuit court by the parties' delays in litigating the matter. As a result, the circuit court had to determine family support payments for several different years with varying facts regarding income, how many children were minors, and how much time each child was spending with John. We are also acutely aware of the pressure on circuit courts to decide cases expeditiously because of their heavy workloads. However, after careful review, we cannot discern from the record how the circuit court arrived at the amount of either the maintenance portion or the child support portion of the family support ordered. Therefore, we set aside the family support award and remand the matter to the circuit court for an analysis in conformity with the methodology required under Wisconsin law.

¶36 Our focus on the family support component of the payments from John to Lori should not be construed as a constraint on the circuit court's exercise of discretion on remand regarding the categorization of payments (child support, maintenance, or family support) and the amount of any such order. In addition, the circuit court may on remand use the payment scheme set forth in the PMSA, retain that scheme in part, or discard it entirely in its discretion.

CONCLUSION

¶37 For those reasons, we affirm the circuit court's decision that there was a substantial change in circumstances that warranted modification of the family support payments from John to Lori. We reverse the circuit court's amendment of the family support payment from John to Lori, and remand this matter for further proceedings consistent with this opinion.

By the Court.—Order affirmed in part, reversed in part, and cause remanded for further proceedings.

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