COURT OF APPEALS
DECISION
DATED AND FILED

November 7, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0715

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

IN RE THE MARRIAGE OF:

LYNN P. ADRIAN, F/K/A LYNN P. IMMEL,

PETITIONER-APPELLANT,

V.

GARY E. IMMEL,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Brown County: PETER J. NAZE, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Lynn Adrian appeals an order amending her divorce judgment to provide child support for her daughter in the sum of $1,000 per month. She contends that the trial court erroneously exercised its discretion

because it failed to apply the 17% statutory standard to her former husband's gross income and erroneously concluded that the statutory standard would have been unfair. Because the trial court reasonably exercised its discretion by deciding that the percentage standard would be unfair, we affirm the order.

¶2 In 1991, Adrian and Gary Immel were divorced after fifteen years of marriage. They had three children who were minors at the time, and they agreed to equally share primary placement. They also agreed that Immel would pay $400 per month child support. Adrian was awarded thirty-six months' limited term maintenance.[1]

¶3 In 1995 and 1997, Adrian brought proceedings to modify the divorce judgment to provide for an increase in child support. As a result, a stipulated order provided that effective June 1, 1998, when the second youngest child turned eighteen, child support would be set at $650 per month for the parties' youngest daughter.

¶4 In 1999, Adrian brought a motion before the family court commissioner to modify child support based upon the change in circumstances that their youngest daughter resided with Adrian 100% of the time. The motion requested that the court apply the 17% standard to Immel's gross income. The family court commissioner denied the request, but increased Immel's monthly child support obligation to $1,000.

¶5 Adrian sought review in the circuit court. After an evidentiary hearing, the circuit court affirmed the court commissioner's decision, finding that

[1] When the 36 months expired, Adrian did not seek an extension of maintenance.

the application of the percentage standard would be unfair to Immel. Adrian appeals the order.

¶6 Determining child support obligations is addressed to the circuit court's discretion. *See* ***Evenson v. Evenson***, 228 Wis. 2d 676, 687, 598 N.W.2d 232 (Ct. App. 1999). We sustain a discretionary decision if the trial court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *See* ***id.***

¶7 "The trial court is required to calculate the appropriate award of child support by using the DHSS percentage standards unless a party requests a deviation and the court finds that the percentage standards are unfair to the child or any party." ***Id.*** at 687-88. "When a party challenges the application of the percentage standards, the trial court shall exercise its discretion by considering the statutory factors set forth in § 767.25(1m)[2] and by articulating the basis for its

[2] WISCONSIN STAT. § 767.25(1m) reads:

> 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 as determined under s. 767.255.
> (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 U.S.C. § 9902 (2).
> (bz) The needs of any person, other than the child, whom either party is legally obligated to support.
> (c) 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.

(continued)

decision to either remain within the guidelines or allow a modification." ***Id.*** at 688 (footnote omitted).

¶8 The record demonstrates a proper exercise of discretion. The circuit court explained in detail the factors under WIS. STAT. § 767.25(1m) upon which it relied and its reasons for departing from the percentage standards. With respect to the parties' needs, the court found that Adrian's monthly budget of $6,453 for herself and her child was "terribly inflated" and lacked credibility. It observed that in 1997, Adrian had submitted a budget of $3,309, "[a]nd there's really been no evidence to suggest that … anything has changed that would cause that drastic increase." It noted that Adrian's budget included business expenses and $500 per month for support of other dependents. The monthly budget also contained a

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> (e) The cost of day 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.
> (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. 767.24.
> (f) The physical, mental and emotional health needs of the child, including any costs for health insurance as provided for under sub. (4m).
> (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.

All statutory references are to the 1997-98 version.

$1,440 auto expense, which included a $439 per month car expense solely for the parties' sixteen-year-old daughter.

¶9 The court also considered the parties' financial resources. The court found that Immel's 1998 earnings were $176,000, comprised of a $100,000 salary plus bonuses. It also found that Adrian earned $34,000 per year, and noted that she drew $70,000 from her pension. Nonetheless, the court stated that even if it would base child support on Immel's $100,000 salary and include the daughter's entertainment and expenses for her horse, Adrian's budget failed to show a need for child support "anywhere near 17%."

¶10 The court found that "if there were going to be child support in excess of what is needed for the child [to] have money to throw around … certainly that would be of concern." The court determined that the child's best interests would be served with a budget that adequately meets her needs. The court also explained:

> [W]hat I see in Ms. Adrian's budget and from her testimony [is that] she wants Mr. Immel to provide her with maintenance. That's really what we're here for. She can't meet her budget, $6,453, obviously, based on her present income. …
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> … Whatever portion of that Mr. Immel would provide would obviously be in excess [of] what is needed for the child, [and] where is it going to go? It's going to go to Ms. Adrian so it becomes a disguised form of maintenance. And I think that's what's unfair about it.

¶11 With respect to the child's standard of living, had the marriage not ended in divorce, the court noted that in 1997, the parties stipulated that $650 per month was sufficient when they shared placement of their daughter. The court found that there was no evidence of day care expense or other extraordinary

expense associated with one parent having full placement. The court took into account certain expenses, such as food and entertainment, that Adrian had indicated would increase because of the additional time her daughter spent with her.

¶12 Concerning the parties' earning capacities, the court found that "given the incomes that are included in the tax returns there is ample income here to adequately support the child." It also concluded, however, that "[j]ust because someone enjoys significantly greater income than we ordinarily see doesn't mean that the child is going to have money far above … what is needed for support and the other factors that I've considered." The court found that $918.50 per month would adequately meet the needs of the child taking into account the budget that was submitted. The court determined that if it added a reasonable amount for vacations, $1,000 per month would be fair to both the child and the parties.

¶13 On review, we will overturn the court's discretionary determination only when it appears that no discretion was exercised or that discretion was exercised without underpinnings of an explained judicial reasoning process. *See* ***Evenson***, 228 Wis. 2d at 687. The record demonstrates that the court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. Because the court properly exercised its discretion, we do not overturn its decision on appeal.

¶14 Adrian complains, nonetheless, that the trial court failed to place sufficient weight on the parties' "disparate incomes" and the financial effects of their daughter's 100% placement with her mother. Adrian's argument misperceives our role in reviewing a discretionary determination. In performing a

discretionary function, giving consideration to various factors involves a weighing and balancing operation, but the weight to be given a particular factor in a particular case is for the trial court, not the appellate court to determine. *See* ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

¶15 Next, Adrian argues that the trial court erred when it miscalculated income. She claims that Immel's 1998 gross income was $291,921. She further contends that the court erroneously included her pension withdrawal of $70,640 in determining her income. We disagree. The record demonstrates that the trial court had a firm grasp of the parties' financial circumstances. The court found that Immel's earnings were far beyond what was required to exceed the child's needs. Therefore, income from sources other than his salary would not have altered the court's reasoning. Similarly, the court's mention of Adrian's pension withdrawal was made in context of its observation of the ample resources available to the parties. The court's findings and conclusions are not erroneous.

¶16 Finally, Adrian contends that the trial court erred by failing to scrutinize Immel's 1997 monthly budget of $5,822 to determine whether it too was inflated. Again, we disagree. Because Immel is not claiming he has insufficient resources to meet his needs, whether his expenses were reasonable or extravagant is not a consideration. Therefore, Immel's budget had no bearing on the court's reasoning. Because the record demonstrates that the trial court reasonably exercised its discretion, we do not overturn its decision on appeal.

By the Court.—Order affirmed.

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