COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1833

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

IN RE THE MARRIAGE OF:

KELLY S. LEE, F/K/A KELLY S. KENT,

PETITIONER-RESPONDENT,

v.

JAMES M. KENT,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. James M. Kent appeals pro se from a postdivorce order setting his child support at $300 per month. He argues that in applying WIS.

ADMIN. CODE § DWD 40.04(2), the circuit court erred by not imputing income to his former wife, Kelly Lee. He also claims that it was error to assess a portion of variable expenses to him and that the circuit court failed to consider his obligation to provide health insurance. We conclude that the real controversy is whether Kelly is working full or part time as a massage therapist and that the issue was not fully tried. In the interest of justice, we reverse and remand that portion of the support order based on the application of WIS. ADMIN. CODE § DWD 40.04(2). *See* WIS. STAT. § 752.35 (1999-2000).[1] We affirm the circuit court's allocation of variable expenses.

¶2 James and Kelly were divorced in Kenosha county in 1991 when their daughter was twenty-one months old. The parties stipulated that Kelly would have primary physical placement of their daughter and that James would pay child support in the amount of 17% of his gross income. In 1992, Kelly and the child moved and now reside in Mondovi, Wisconsin. In September 1999, James moved for modification of child support because he relocated to Mondovi and began equal sharing of primary placement. He alleged that he and Kelly have equal earning capacities. It is undisputed that James earns $50,000 a year. Kelly is self-employed. She submitted her 1999 tax return which reflects that her net income for 1999 was $10,828. James asked the circuit court to consider Kelly's earning capacity rather than actual earnings because she is not working full time.[2]

[1] All statutory references are to the 1999-2000 version unless otherwise noted.

[2] James acknowledged that Kelly's choice to work part time was reasonable prior to when their daughter started attending school. He urged the court to consider that Kelly could now work full time because their daughter was in school most of the day.

¶3 The circuit court accepted Kelly's calculation under WIS. ADMIN. CODE § DWD 40.04(2) that James's support obligation, as a shared-time payer, is $185.35 per month. That calculation used $10,828 as Kelly's annual income. The court then determined that one-half of the child's total variable expenses equaled $114.12 per month. Adding the figures together, and rounding up for ease, the circuit court set James's support obligation at $300 per month.

¶4 The determination of child support is within the circuit court's discretion. ***Wallen v. Wallen***, 139 Wis. 2d 217, 223, 407 N.W.2d 293 (Ct. App. 1987). We will not set aside a discretionary determination unless we conclude that the court erroneously exercised its discretion. *See* ***Roellig v. Roellig***, 146 Wis. 2d 652, 655, 431 N.W.2d 759 (Ct. App. 1988). Here, the circuit court exercised its discretion in favor of setting child support using WIS. ADMIN. CODE § DWD 40.04(2), the alternative formula for calculating child support awards when the obligated parent is a shared-time payer. The income of each parent is used in the formula and becomes a critical factual issue.

¶5 James sought to have income imputed to Kelly because she works less than full time. He questioned whether it was reasonable to permit Kelly to work less than full time. *See* ***Sellers v. Sellers***, 201 Wis. 2d 578, 586-87, 549 N.W.2d 481 (Ct. App. 1996) (the degree of underemployment one may elect to choose must be reasonable). Kelly responded that income cannot be imputed to her absent a finding that she reduced her income to intentionally avoid a duty of support, or that her reduced income is both voluntary and unreasonable under the circumstances. *See* ***Balaam v. Balaam***, 52 Wis. 2d 20, 27-28, 187 N.W.2d 867

(1971). We need not engage in the "shirking" analysis because the threshold determination of whether Kelly is working full or part time was not resolved.[3]

¶6 James exhibited that Kelly charges $45 for a one-hour massage and that she works three days a week from 9:00 a.m. to 4:00 p.m.[4] Information that James presented from the American Massage Therapy Association (AMTA) indicates that a part-time therapist is defined as a person performing an average of six to ten sessions per week. A full-time therapist performs sixteen to twenty massages per week, plus performing administrative duties. Based on this evidence, James argued that Kelly should have a gross income of $46,800.

¶7 Kelly did not dispute the AMTA definition and in fact embraced it in representing to the court that she is "working full-time by massage therapist standards" and that her "income is within the range of what full-time massage therapists do." Yet the evidence Kelly presented on her actual income contradicted her representations that she works full time. Although Kelly maintains office hours of twenty-one hours per week, her administrative duties prevent her from performing a massage every hour of each workday.[5] That means that Kelly's work hours cannot be directly equated with the performance of sixteen to twenty massages per week, AMTA's full-time standard. Kelly's gross income

[3] The circuit court approached the "shirking" question but did not resolve it. The court commented to Kelly, "It doesn't seem like you are working enough hours per year, per month, per week here." Later it said, "I think there is a disparity in terms of work here. I don't think Ms. Kent can sit back, as I've indicated, and with the ability to earn more money, and there is no indication she couldn't earn more money, that she hasn't and depends on the father here to provide for what was claimed."

[4] No testimony was taken at the de novo review hearing conducted by the circuit court. The matter was decided on the documents submitted by the parties.

[5] Kelly represented that she spends time on administrative duties like bookwork, washing towels, and making appointments.

in 1999 was $17,180, well below what she should have earned as a full-time therapist, even at her 1999 rate of $35 for a one-hour massage. As James pointed out to the circuit court, Kelly's gross income from 1999 reflects that she performed nine to ten massages a week, a level that constitutes only part-time employment.[6]

¶8 The distinction between hours worked and actual massages performed per week was blurred. This prevented the real controversy—whether Kelly is employed on a full- or part-time basis—from being fully tried. Reversal is appropriate when a significant legal or factual issue is not properly tried to the court or when the record is deemed incomplete or insufficient. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 20-21, 456 N.W.2d 797 (1990). We conclude that this is such a case because the issue of whether Kelly is appropriately employed was raised but not determined, and it bears directly on her income and the calculation of child support. On remand the circuit court shall conduct such proceedings necessary to resolve the issue.

¶9 Quoting at length from ***Randall v. Randall***, 2000 WI App 98, ¶17, ¶19, 235 Wis. 2d 1, 612 N.W.2d 737, James argues that it was an erroneous exercise of discretion to increase his child support obligation by an assessment for variable expenses paid by Kelly for the child's extracurricular activities. In ***Randall***, the circuit court refused to apply the shared-time payer formula in the absence of proof from the father that he indeed paid a proportionate share of the children's variable expenses. This court reversed the circuit court and confirmed

[6] James calculated that at $35 an hour, Kelly's 1999 gross income meant that she worked nine and one-half hours a week. Because Kelly has administrative duties associated with her employment, it is appropriate to equate her gross income to actual massage sessions performed.

that the "assumption underlying the shared-time payer formula is that parents who have physical placement for a substantial number of overnights or the equivalent generally assume the variable costs for the children when the children are with them." ***Id.*** at ¶18. ***Randall*** merely determined that a parent need not demonstrate the assumption of proportional variable costs as a condition precedent to application of the shared-time payer formula. ***Id.*** at ¶19.

¶10 This is not a ***Randall*** case. Rather, the circuit court found that James was a shared-time payer and applied the formula. The assessment made for the child's variable costs was based on past practice demonstrating that James did not pay for a share of the child's extracurricular activities. This is consistent with ***Randall*** which recognized that it would be proper to consider the payer's past practice as evidence that he or she would not be assuming proportional costs. ***Id.*** at ¶20.

¶11 The record supports the circuit court's exercise of discretion in allocating one-half the child's extracurricular expenses to James. James acknowledged that he did not provide money for a weekly allowance, music camp, piano lessons, dance lessons, and school hot lunch. Past practice was established. The circuit court was not required to accept James's assurance that he was willing, in the future, to split the expenses. Moreover, the court was persuaded that a "war of receipts" would ensue if the expenses were not split by court order. While James argues that many of the expenses Kelly demonstrated were "petty" and included family recreational activities, the need to avoid further litigation supports the circuit court's exercise of discretion in accepting Kelly's figures.

¶12 James argues that the circuit court failed to rule on his request that it consider that he pays for health insurance for the child. The record does not

reflect any request by James for reconsideration of his obligation to provide or pay for health insurance.[7] We generally will not review an issue which is raised for the first time on appeal. *See* ***Evjen v. Evjen***, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992) (it is the party's responsibility to direct the family court's attention to issues that are being submitted for determination). The issue requires factual determinations to be made about the expense, if any, James incurs in providing the child with health insurance. We do not address it because of the unresolved factual questions not brought to the circuit court's attention. ***Id.***

¶13 No costs to either party on appeal.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

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

[7] The mere inclusion of a health insurance cost on an exhibit referring to variable expenses is not sufficient to put the circuit court on notice that an issue about health insurance existed. ***Evjen v. Evjen***, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992).