COURT OF APPEALS
DECISION
DATED AND FILED

April 19, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-3107-FT

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

IN RE THE MARRIAGE OF:

BARBARA L. DAVIS,

PETITIONER-RESPONDENT,

v.

JAMES G. DAVIS,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Juneau County: JOHN W. BRADY, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. James Davis appeals from a judgment of divorce. He challenges the trial court's decision setting child support and determining custody and physical placement. Pursuant to our order of December 8, 2000, this

appeal was expedited pursuant to WIS. STAT. RULE 809.17 (1999-2000).[1] We affirm.

¶2 James and Barbara Davis were divorced after eighteen years of marriage. They have one daughter, Mikala, who was born on October 20, 1995. After considering lengthy testimony by James, Barbara, and Dr. Beverly Bliss, a psychologist, and after hearing the recommendation of the guardian ad litem, the trial court awarded Barbara sole legal custody of Mikala. The court granted James physical placement with Mikala every other weekend, with holidays divided between James and Barbara. Finally, the trial court ordered James to pay child support of $200 per week, or 17% of his gross income if that is higher.

¶3 James first argues that the trial court erred in setting child support because at the time of the trial he had closed his trucking business, substantially reducing his income.

¶4 Although a parent has a right to choose employment that may be less financially lucrative than other employment available, "[t]his rule is, of course, subject to reasonableness …." ***Smith v. Smith***, 177 Wis. 2d 128, 136, 501 N.W.2d 850 (Ct. App. 1993) (citation and emphasis omitted). "[A]n unreasonable intentional change of occupation that results in a reduced ability to pay permits the court to look to the payor's earning capacity rather than actual earnings, even if there is no intent to defeat a support obligation." ***Id.*** A child support determination is committed to the sound discretion of the trial court. ***State v. Wall***, 215 Wis. 2d 595, 599, 573 N.W.2d 862 (Ct. App. 1997).

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

¶5 The trial court did not explain its decision setting child support, but the record provides ample evidence to support the decision. When a trial court fails to adequately set forth its reasoning, we may independently review the record to determine whether there is a basis for the trial court's exercise of discretion. ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983). James had been paying $200 per week as child support under the terms of a temporary order prior to the divorce. He testified that he voluntarily shut down his trucking business the week before the divorce trial and decided to seek other employment because his business was failing and he wanted to be more available for his daughter. However, James did not present any evidence other than his own testimony that his business was doing poorly. Moreover, James provided testimony that supports the opposite conclusion. He testified that he would have a tax obligation of approximately $17,000 for the year 2000. In order to have such a substantial tax burden, his business would have to be producing a substantial profit, as it had been during the many years prior to the divorce. Because the record supports the conclusion that James's intentional choice to close his trucking business was unreasonable, especially since he did not first find a new job, the trial court properly exercised its discretion in setting child support based on James's established earning capacity. ***Smith***, 177 Wis. 2d at 136.

¶6 James next argues that the trial court should have awarded joint legal custody. Custody and placement decisions are also committed to the discretion of the trial court. ***Jocius v. Jocius***, 218 Wis. 2d 103, 110-11, 580 N.W.2d 708 (Ct. App. 1998). The trial court may not award joint legal custody if it finds that the parents "will not be able to cooperate in the future decision making required under an award of joint legal custody." WIS. STAT. § 767.24(2)(b)2.c.

¶7 Although the trial court believed that both James and Barbara were fit parents, the court concluded that they would not be able to adequately cooperate to have joint legal custody. The extensive history of acrimony between them more than supports this conclusion. They are prohibited from talking to one another because Barbara has a restraining order against James. The trial court ordered them to communicate about Mikala in writing by using a logbook kept for Mikala's benefit. It would be nearly impossible to communicate well enough to share in the decision-making required to exercise joint legal custody when these restrictions are coupled with the prior history of conflict and misunderstanding. The trial court properly exercised its discretion in concluding that joint legal custody was not appropriate.

¶8 James next argues that the trial court erred in not awarding him equal physical placement. Again, the trial court did not explain its decision in any detail, but the record supports its exercise of discretion. The same concerns that dictated sole legal custody have bearing on placement too. Although the psychologist recommended more equally divided placement of the child, the trial court could have reasonably concluded, based upon the animosity between James and Barbara, that the communication necessary for such an arrangement was highly unlikely.

By the Court.—Judgment affirmed.

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