COURT OF APPEALS
DECISION
DATED AND RELEASED

October 26, 1995

NOTICE

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.

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No. 94-1605

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

BRYAN R. THOMPSON,

Petitioner-Appellant,

v.

CHERI THOMPSON,

Respondent-Respondent.

APPEAL from an order of the circuit court for Monroe County: JAMES W. RICE, Judge. *Affirmed in part; reversed in part and cause remanded*.

Before Gartzke, P.J., Sundby and Vergeront, JJ.

VERGERONT, J. Bryan Thompson appeals from an order increasing the amount of his child support payments and directing the payment of support arrearages. He contends the trial court erred by: (1) imputing $1,000 to his 1993 income adjusted for child support; (2) disallowing a business depreciation expense in calculating his 1993 income adjusted for child support; (3) applying the split custody formula under WIS. ADM. CODE § HSS 80.04(3) (August 1987) using twenty-five percent; and (4) not giving him more time to

pay his support arrearages. We conclude that the trial court erred in applying the split custody formula under WIS. ADM. CODE § HSS 80.04 (August 1987) and therefore reverse that portion of the order. We reject Bryan's remaining contentions.

Bryan and Cheri Thompson were married on August 27, 1988, and divorced on December 13, 1991. Pursuant to a marital settlement agreement, the parties agreed to joint legal custody of their two minor daughters, Nicole and Jessie, and to physical placement of both children with one parent one week and the other parent the next week. The agreement also provided that Bryan would have primary placement of Nicole and that Cheri would have primary placement of Jessie. The parties' agreement was later amended so that each parent has placement of both children for two weeks at a time instead of one week.

The agreement further provided that Cheri would not be required to pay child support and that Bryan would pay child support by way of a wage assignment. The wage assignment order required Bryan to contribute 14.11 percent of his gross income per pay period to Cheri's household. At the time of the divorce, Cheri was not employed. Bryan was employed at Fort McCoy and received occasional income from his wood pulping business.

On February 18, 1994, Bryan filed a motion to change the child support order. He argued that since the parties were sharing placement of the children equally, the support order unfairly required that he pay 14.11 percent of his gross income in child support. According to Bryan, the reason he was initially ordered to contribute 14.11 percent of his gross income to Cheri was because she was then unemployed, and now that Cheri was gainfully employed, his support obligation should be reduced, if not eliminated.

Cheri, in turn, filed a motion for remedial contempt alleging that Bryan had failed to pay 14.11 percent of his gross income for child support and was in arrears. In her affidavit, Cheri stated that, upon information and belief, Bryan worked as a wood pulper in addition to his employment at Fort McCoy. According to Cheri, Bryan earned substantial sums of money as a wood pulper and had not reported any of the income from this business. Cheri averred that

while she was married to Bryan, Bryan earned between $350 and $400 per week at his wood pulping business.

At the hearing on the motions, the parties agreed that the children spend an equal amount of time with each parent during the year. Bryan testified that he pays 14.11 percent of his gross income in child support.[1] Cheri testified that she did not pay support. Bryan stated that he provided for the health insurance for the children at a cost of approximately $90 per month. Bryan further testified that he earned $11.29 per hour from his work as a warehouser at Fort McCoy and that his 1993 income from Fort McCoy was $22,742.

Bryan also testified regarding his wood pulping business. His tax returns for 1993 show a wood pulping income of $5,218, which was offset by business expenses of $5,297, for a net loss of $79.

The trial court asked Bryan a series of questions regarding a depreciation expense Bryan claimed on a tractor he had purchased in December, 1993:

THE COURT: I guess I can't figure out this depreciation. You have a $4,000 Case tractor. And you took $1,500 worth of depreciation on it. How old is that tractor?

THE WITNESS: Probably 1960.

THE COURT: How long have you had it?

THE WITNESS: Last December.

THE COURT: How much did you pay for it?

THE WITNESS: Four thousand.

[1] Bryan also testified that since late 1993, he has paid eleven percent of his gross income for child support for a child born to another woman.

....

THE COURT: December of '93. And you took a whole year's depreciation on it?

THE WITNESS: It's been acting up and something by, you know - - It's going to be junk when I get done with it.

Cheri testified that she is employed by F.A.S.T. Corporation and earns $5.50 per hour. She stated that she has been employed at F.A.S.T. for almost two years and works between thirty-two and thirty-six hours per week. She stated that she would be agreeable to offsetting child support at twenty-five percent of Bryan's income against twenty-five percent of her income. Cheri also testified that during the marriage Bryan had earned $250 per week in profit from his wood pulping business, that Bryan did not report this income, and that she did not think Bryan was reporting this income now.

When confronted with some of Bryan's tax returns indicating that Bryan had reported income from his wood pulping business during the years they were married, as well as in 1993, Cheri responded:

It's a bunch of crap. It's not true.... A good tax person can get you out of a lot of tax or money that you have.

Cheri testified that she had not been receiving child support payments in a timely manner and that she depended on the child support for groceries. Cheri requested a set amount of child support, rather than a percentage, so that she could budget her expenses every week.

When Cheri was through testifying, the trial court asked whether Bryan paid cash for the tractor in December. Bryan answered yes.

In its oral decision, the trial court determined that $1,000 should be imputed to Bryan as income for 1993 from his wood pulping business. It also disallowed the $1,500 Bryan had claimed as a depreciation expense on the tractor. Adding $1,000 of imputed income from Bryan's wood pulping business

to the $1,500 of disallowed business depreciation expense, and subtracting the $79 loss from his tax returns, the trial court determined that Bryan's income from his wood pulping business in 1993 was $2,421. The trial court ordered Bryan to pay 14.11 percent of this sum to Cheri.

In determining Bryan's support obligation, the trial court concluded that Bryan's base child support payment would remain at $273.05 per month, with an additional $50 per month, making his total monthly payment $325 per month, effective March 1, 1994.

Bryan filed a motion to reconsider on March 18, 1994. After the hearing on April 8, 1994, the trial court affirmed its earlier ruling setting child support at $325 per month effective March 1, 1994. In its written order entered on April 8, 1994, the trial court ordered Bryan to pay 14.11 percent of the imputed income of $2,421 for 1993 within sixty-five days. It also ordered that the arrearages since March 1, 1994, were to be paid within fifteen days.

The establishment and modification of child support lies within the trial court's discretion. ***Roberts v. Roberts***, 173 Wis.2d 406, 408, 496 N.W.2d 210, 211 (Ct. App. 1992). We will affirm the trial court's exercise of discretion where the decision reflects a reasoning process based on facts in the record and conclusions based on the proper legal standards. ***Id.***

Bryan argues that there are no facts in the record to support the trial court's decision to impute $1,000 in income to him for the year 1993.[2] We disagree.

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[2] At the time of the motion, WIS. ADM. CODE § HSS 80.05 (August 1987) provided:

> **Determining imputed income for child support.** For a payer with assets, a reasonable earning potential may be attributed to the assets as follows:
>
> (1) Determine the payer's gross income;
>
> (2) If the court finds that the payer has underproductive assets or has diverted income into assets to avoid paying child support or that income from the payer's assets is necessary to maintain

Cheri testified that during their marriage, Bryan did not accurately report his income from the wood pulping business and that Bryan had earned approximately $250 per week in profit from this business. Cheri also testified that Bryan had lied on one occasion in court regarding whether or not he was earning money from his wood pulping business. Further, Bryan testified that he paid $4,000 in cash for the tractor and did not detail the source of these funds.[3] The trial court drew the inference that the source of the funds used to purchase the tractor was income from his wood pulping business. This is a reasonable inference. The trial court's decision to impute $1,000 of the $4,000 was based on facts in the record and was reasonable.

We also reject Bryan's contention that the trial court erred in disallowing the $1,500 as a depreciation expense he claimed for the tractor. WISCONSIN ADMINISTRATIVE CODE § HSS 80.02(13) (August 1987), in effect at the time of the motion, defined "gross income adjusted for child support" as including:

> [T]he business assets depreciation allowance under 26 USC 179 and the excess of accelerated depreciation as determined under 26 USC 167, and 26 USC 168 over straight-line depreciation allowable under 26 USC 167.

(..continued)

> the child or children at the economic level they would enjoy if they and their parents were living together, identifying those assets and then impute income to them by multiplying the total net value of the assets by the current 6-month treasury bill rate or any other rate that the court determines is reasonable; and
>
> (3) Subtract the actual earnings of the assets from the imputed income from the assets to determine the imputed income for child support.

[3] In his reply brief, Bryan attached a photocopy of an automobile insurance check which, according to Bryan, "could be one explanation for the source of the $4,000 Bryan used to purchase the tractor." This document was not presented to the trial court, is not part of the record and, consequently, we do not consider it. *See* ***State v. Smith***, 55 Wis.2d 451, 459, 198 N.W.2d 588, 593 (1972).

At the hearing, Bryan testified that he purchased the tractor in December 1993 for $4,000. His income tax return for 1993 shows that he claimed $1,500 on his taxes as a depreciation expense for the tractor under 26 U.S.C. § 179.[4] Under WIS. ADM. CODE § HSS 80.02(13) (August 1987), the trial court could properly add the $1,500 Bryan claimed as depreciation under 26 U.S.C. § 179 in calculating his 1993 gross income adjusted for child support.

Bryan next argues that the trial court erroneously applied the split custody formula of WIS. ADM. CODE § HSS 80.04(3) (August 1987) in arriving at the amount of child support he was ordered to pay. A split custody payer is "a payer who has 2 or more children and who has physical custody of one or more but not all of the children." WISCONSIN ADMINISTRATIVE CODE § HSS 80.02(23) (August 1987). The formula for determining the child support obligation of a split custody payer involves determining the appropriate support for each parent using the percentage guidelines for the number of children each parent has in his or her physical custody and subtracting the smaller child support obligation from the larger support obligation to determine the reduced amount of child support owed by the parent with the larger support obligation. WISCONSIN ADMINISTRATIVE CODE § HSS 80.04(3) (August 1987). According to Bryan, the trial court should have determined that each parent had physical custody of one child, computed seventeen percent of his gross income and seventeen percent of Cheri's gross income, and ordered him to pay the difference to her for child support.

It is not clear to us how the court first arrived at the $325 figure. The court stated that it was adding $50 per month to the support Cheri was then receiving, which the court stated was $273.05. However, the court did not explain why it was adding $50.[5] In his motion for reconsideration, Bryan

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[4] 26 U.S.C. § 179 provides in part:

> ELECTION TO EXPENSE CERTAIN DEPRECIABLE BUSINESS ASSETS. (a) TREATMENT AS EXPENSES. A taxpayer may elect to treat the cost of any section 179 property as an expense which is not chargeable to capital account. Any cost so treated shall be allowed as a deduction for the taxable year in which the section 179 property is placed in service.

[5] Fifty dollars is approximately twenty-five percent of the additional income attributed by the trial court to Bryan, both through imputing income and adding in the depreciation. But the existing support obligation was 14.11 percent of his income, and presumably the

assumed the trial court had used the split custody formula in arriving at this figure but had used twenty-five percent rather than seventeen percent in calculating the support obligation of each parent. At the hearing on the motion for reconsideration, Bryan argued that this was incorrect because, under the marital settlement agreement, each parent has primary placement of one child.

Cheri argued in reply that the split custody formula did not apply at all because each parent has physical custody of each child for an equal amount of time and WIS. ADM. CODE ch. HSS 80 did not provide a formula for child support when each parent has physical custody of both children for fifty percent of the time. In Cheri's view, the trial court had the discretion to set support without using any formula, and could reasonably add $50 because of the additional income.

The trial court articulated its reason for affirming the $325 figure at the hearing on the motion for reconsideration in this way:

> At first -- I know, at first glance, it looks as though I am inconsistent because, in other split custody cases, I have -- if one is given one and another is given one, or whatever it is, I follow the guidelines.
>
> However, this is not the usual split custody case because, in those cases, what happens is that one person goes -- one child goes to the husband and the other child goes to the wife. And then they meet for visitation purposes on weekends.
>
> So one child spends a week or five days, whatever it might be, with one parent and the other -- and five days with the other. And then they spend time together on the weekends.

(..continued)
$273.05 Cheri was receiving was 14.11 percent of his gross monthly income from his employment.

> This is different because each child goes to each household for two weeks and then goes to the other household for two weeks.
>
> This is different enough so that I feel it gives me the discretion of using the twenty-five percent rule, which I did, rather than the seventeen percent rule.
>
> I do this in total recognition of paragraph "E" of the matter, which says that primary physical placement of Jessie and Nicole be with the parent named in that paragraph.
>
> I recognize, also, as Mr. Eglash pointed out in his argument -- or in his letter, I guess, that that was for the purpose of income taxes.

We understand from this statement that the trial court intended to use twenty-five percent, rather than seventeen percent, in applying the split custody formula.[6]

A trial court need not apply the mathematical formulas for child support contained in the administrative code. ***Molstad v. Molstad***, 193 Wis.2d 602, 607, 535 N.W.2d 63, 64 (Ct. App. 1995). However, if it does decide to apply a formula, it must do so correctly. ***Id.***

We conclude that the trial court was correct in declining to apply the split custody formula using seventeen percent. Bryan is not a split custody

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[6] Cheri points out in her brief that twenty-five percent of her gross wages subtracted from twenty-five percent of Bryan's gross wages would result in a child support obligation of $284.44 per month. She notes that if twenty-five percent of Bryan's additional imputed income is added to this sum, his monthly support obligation would be $334.88. She then asserts that the trial court rounded this sum down to $325 per month, but she provides no support for this in the record. We have reviewed the record and cannot determine from it that the trial court made or considered the computation Cheri describes. But we assume from the court's statements at the hearing on the motion for reconsideration that application of the split custody formula using twenty-five percent was the basis on which it affirmed the $325 figure.

payer because he does not have physical placement of only one of the two children. The split custody formula using seventeen percent would be applicable, and the court could choose to apply it, if Bryan had primary physical placement of one of the children and Cheri had primary physical placement of the other child. But, although the martial property agreement provides for that, that is not the actual physical placement of the children. Both children are with each parent exactly half the time.

Bryan argues that having two children half the time is the same as having one child most or all of the time. But he points to no facts of record that would support this conclusion. The trial court implicitly rejected this argument, and it was within its discretion to do so.

However, we conclude that the trial court erred in applying the split custody formula using twenty-five percent. We understand that the trial court was attempting to take into account that having physical placement of two children half the time involves greater expenses than having one child most or all of the time. However, applying this formula using twenty-five percent results in a child support payment that is intended to be appropriate when there are four children--two primarily residing with one parent and two with the other. Applying the formula in this way to this case is a misapplication of the formula and, therefore, an erroneous exercise of discretion. ***Prosser v. Cook***, 185 Wis.2d 745, 751, 519 N.W.2d 649, 651 (Ct. App. 1994).

Cheri is correct that at the time this matter was before the trial court, there was no formula in WIS. ADM. CODE ch. HSS 80 that expressly addressed the situation in which a child resides with each parent one-half the time.[7] In the absence of an applicable formula--indeed, even if one is applicable,

[7] The formula for a "shared-time payer," then in effect, defined a shared-time payer as a payer "who is not the primary custodian but who provides overnight care beyond the threshold [30% of a year or 109.5 out of every 365 days] and assumes all variable child care costs in proportion to the number of days he or she cares for the child under the shared-time arrangement." WISCONSIN ADMINISTRATIVE CODE § HSS 80.02(22) and (25) (August 1987). Whether and how that formula applied was not clear when each parent had equal physical placement. *See, e.g.,* ***Prosser v. Cook***, 185 Wis.2d 745, 752, 519 N.W.2d 649, 651-52 (Ct. App. 1994) (Shared-time formula assumes child is with payer thirty percent of the time and reduces support obligation for time in excess of thirty percent; therefore, reduction of formula result by fifty percent for payer who has child fifty percent of time is misapplication of formula, although reduction by twenty percent might be appropriate).

see ***Prosser***, 185 Wis.2d at 751, 519 N.W.2d at 651--the trial court has the discretion to set a revised child support obligation by taking into account the pertinent statutory factors. Section 767.25(1m)(i), STATS.; ***Molstad***, 193 Wis.2d at 607, 535 N.W.2d at 64. We have searched the record and do not find a basis for a monthly support obligation of $325 a month, other than the court's stated decision to apply the split custody formula using twenty-five percent. For example, there is no evidence of the needs of the children from which we might determine that, given Bryan's greater income, there is a reasonable basis to order that he pay $325 monthly even though the children are with him half the time. We must therefore reverse that portion of the order determining the amount of child support and remand for further proceedings.

Finally, Bryan argues that the trial court erred in its April 8, 1994 order when it set the dates by which he had to pay the arrearages because his remaining income was below the poverty line in violation of § 767.265(1), STATS.[8] Cheri states in her brief that Bryan has paid his arrearages. Bryan does not dispute this in his reply brief. Because this issue appears to be moot, we do not address it. *See* ***DeLaMatter v. DeLaMatter***, 151 Wis.2d 576, 591, 445 N.W.2d 676, 683 (Ct. App. 1989).[9] Even if the issue is not moot, Bryan's argument is undeveloped. A reviewing court will not consider undeveloped arguments. ***State v. Gulrud***, 140 Wis.2d 721, 730, 412 N.W.2d 139, 142-43 (Ct. App. 1987).

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

Not recommended for publication in the official reports.

(..continued)
Recent revisions to WIS. ADM. CODE ch. HSS 80 remove from the definition of "shared-time payer" the requirement that the payer not be the primary custodian and also provide a formula for child support when each parent has a child fifty percent of the time. WISCONSIN ADMINISTRATIVE CODE §§ HSS 80.02(25) and 80.04(2)(c) (June 1995).

[8] Section 767.265(1), STATS., provides that a wage assignment shall be for an amount sufficient to ensure payment of the support order, as well as any arrearages, so long as the addition of the amount toward arrearages does not leave the party at an income level below the poverty line established under 42 U.S.C. § 9902(2).

[9] Bryan also raises an argument with respect to a contempt order but he did not appeal from that order. Consequently, we do not address this argument.