

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 2, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP2488

Cir. Ct. No. 2000PA5589

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE PATERNITY OF M.W.P.:

DAWN M. PASNIAK,

PETITIONER-RESPONDENT,

v.

DAVID E. BIELINSKI,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
DOMINIC S. AMATO, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

Before Wedemeyer, Fine and Kessler, JJ.

¶1 WEDEMEYER, J. David E. Bielinski appeals from a post-judgment child support order increasing his monthly child support obligation and requiring him to pay 100% of all attorney fees and costs for the current litigation. Bielinski claims the trial court erroneously exercised its discretion in determining his income, in setting the amount of child support and in imposing upon him all of the litigation expenses. Because the trial court did not erroneously exercise its discretion in determining Bielinski's income or in its decision on litigation expenses, we affirm that portion of the order. Because, however, the trial court failed to set forth its reasons for deviating from the percentage guidelines as to child support, we remand to the trial court with directions to do so. We retain jurisdiction of this appeal during the remand.

BACKGROUND

¶2 Bielinski and Dawn Pasniak lived together for a period of time in 2000 and 2001 and have a son, Mason, born January 12, 2001. Bielinski admitted he was the father, and was adjudicated the father on March 8, 2001. The two never married and eventually broke up. After the break-up, Bielinski paid for an apartment for Pasniak. Pasniak was also supported by Bielinski's parents, Harry and Sue Bielinski. A paternity judgment ordered Bielinski to pay \$500 per month child support from March 1, 2001 through August 3, 2006.

¶3 On June 25, 2002, Bielinski filed a motion seeking modification of physical placement, alleging that Pasniak was denying him regular placement. He also alleged that Pasniak had a drinking problem. On August 12, 2002, the parties entered into a stipulation and temporary order agreeing to physical placement. A mediation session was unsuccessful. Eventually on April 18, 2003, after several

settlement meetings, Bielinski and Pasniak entered into a stipulation and order on physical placement.

¶4 On June 3, 2004, Bielinski filed a motion for modification of physical placement and asked for equal placement. Bielinski asserted that Pasniak was being inflexible with the placement schedule. The case was ordered to proceed to mediation, which was unsuccessful. A guardian ad litem, Attorney Dana L. Winger, was appointed.¹ On November 18, 2004, Pasniak filed a counter motion seeking to modify the child support payments.

¶5 Subsequently, on November 21, 2005, the parties reached a stipulation as to physical placement time, which was entered on the record. The financial issue was not resolved and was to proceed to mediation for resolution. That did not occur. On June 27 and 28, 2006, the case proceeded to trial on Pasniak's child support modification motion. Bielinski testified with respect to his income, his employment and the assistance he receives from his parents. The court also heard testimony from Pasniak's expert witness accountant, Everett Stone, two accountants called by Bielinski including the Bielinski's family accountant, Bryan Pautsch, and Bielinski's business accountant, Mike Ronk. Pasniak and Sue Bielinski also testified.

¶6 At the conclusion of the trial, the court rendered its oral decision. It found, based on the facts and evidence presented, that Bielinski's testimony was incredible, that based on his lifestyle, he was hiding his income, and that there was the intent on the part of David and Sue Bielinski to manipulate the situation to

¹ We commend the guardian ad litem for participating in this appeal and setting forth a clear and concise analysis as to the issues in this case.

avoid having any child support obligation. The trial court also found Pasniak's expert witness, Stone, to be credible, and Bielinski's expert to be incredible.

¶7 A written order was entered on August 3, 2006. Additional post-order proceedings not relevant to this appeal took place. Bielinski now appeals from the order.

DISCUSSION

A. Income Determination

¶8 Bielinski's first contention is that the trial court erroneously exercised its discretion in determining his income. We are not convinced.

¶9 Resolution of this issue requires this court to review the trial court's findings with respect to Bielinski's income. Accordingly, we apply the clearly erroneous standard of review. WIS. STAT. § 805.17(2) (2005-06).² Here, the trial court found that Bielinski had monthly expenses of about \$5,240 plus monthly debt payments of about \$5,000. Based on that, with the assistance of an accountant witness, the trial court found that Bielinski needed \$150,000 annual income to cover expenses. The trial court also found that Bielinski was hiding his income and manipulating the facts to try to avoid paying child support. In addition, there was testimony from accountant Stone that Bielinski's annual income was \$157,000. Although there was testimony suggesting a much lower annual income, the trial court has the discretion to accept the testimony of one witness over another. See *Lellman v. Mott*, 204 Wis. 2d 166, 172, 554 N.W.2d

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

525 (Ct. App. 1996). Here, the trial court found that Bielinski's testimony was not credible. There is evidence in the record to support the trial court's findings. Accordingly, we are not convinced that the trial court erroneously exercised its discretion in finding Bielinski's income.³

B. Child Support

¶10 Bielinski next argues that the trial court erroneously exercised its discretion in setting child support at 17% of \$157,000. He contends that the trial court failed to apply the WIS. ADMIN CODE DWD § 40.04(2) shared-placement parents formula in determining child support.

¶11 The calculation of child support is within the sound discretion of the trial court and will not be disturbed on appeal unless the trial court erroneously exercises its discretion. *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We will not overturn a discretionary determination if the trial court examined the pertinent facts, applied the correct law and reached a reasonable determination. *Id.*

¶12 Here, Bielinski points out that based on the placement schedule, Mason lived with Pasniak for 227 overnights per year (62%) and with Bielinski for 138 overnights per year (38%). Bielinski points out that the facts called for application of the equivalent care formula defined in WIS. ADMIN. CODE DWD

³ We are also not persuaded by Bielinski's complaint that the trial court utilized an erroneous accounting method in assessing his business income. As noted by the guardian ad litem, this issue is not pertinent to our review as the trial court ultimately did not use the income producing capacity of Bielinski's business to determine his income. Rather, the trial court accepted the testimony of expert witness accountant Stone as to the streams of income in and out of lending institutions to show Bielinski was averaging \$157,000 per year.

§ 40.02(10), and that the guardian ad litem had recommended that the shared-placement parents formula be applied to determine child support. The trial court stated that it was “not going to apply the DWD standard.” However, the trial court failed to give a specific explanation on the record or in writing with respect to that decision.

¶13 As noted by the guardian ad litem, if the trial court deviates from the DWD standards with regard to child support, WIS. STAT. § 767.25(1n) requires the trial court to:

state in writing or on the record the amount of support that would be required by using the percentage standard, the amount by which the court’s order deviates from that amount, its reasons for finding that use of the percentage standard is unfair to the child or the party, its reasons for the amount of the modification and the basis for the modification.

¶14 The trial court deviated from the DWD standards, but failed to comply with WIS. STAT. § 767.25(1n). Accordingly, we reverse the child support order and remand this matter to the trial court with directions to set forth its reasons for not following DWD standards as required by § 767.25(1n). We retain jurisdiction of this appeal.

C. Costs

¶15 Bielinski’s last issue is that the trial court erroneously exercised its discretion when it ordered him to pay 100% of all costs associated with this litigation. He argues that Pasniak never requested this result, that Pasniak stipulated to pay half of some of the litigation costs and there was never any contention that Bielinski’s motions were frivolous. In reviewing a court’s cost determination, our standard of review is whether the trial court erroneously

exercised its discretion. *Randall v. Randall*, 2005 WI App 98, ¶22, 235 Wis. 2d 1, 612 N.W.2d 737.

¶16 Here, the trial court determined, based on all the facts and circumstances, that Bielinski should pay 100% of the litigation costs. We cannot say that this decision constituted an erroneous exercise of discretion. WISCONSIN STAT. § 767.262(1)(a) requires the trial court to consider the financial resources of both parties. Having considered those resources, the trial court may “[o]rder either party to pay a reasonable amount for the cost to the other party of maintaining or responding to an action affecting the family and for attorney fees to either party.” *Id.*

¶17 The record reflects that the trial court did consider the financial resources of both parties and concluded that under the circumstances, having Pasniak pay half of the costs would put a burden on her and take away the income she had to take care of Mason and her other children. The trial court’s decision was based on the pertinent facts, the correct law and a reasonable determination. Although we can understand Bielinski’s frustration with the decision for the factors referenced above, the trial court is not bound by parties’ stipulations as to cost. Accordingly, we see no erroneous exercise of discretion with respect to the trial court’s determination that Bielinski pay 100% of all costs associated with this litigation. We affirm that portion of the order.

CONCLUSION

¶18 In sum, we affirm the trial court’s decision on the amount of Bielinski’s income and the order that he pay 100% of the litigation costs. We reverse and remand on the issue with respect to the child support obligation. We retain jurisdiction of this matter, but direct the trial court upon remand to review

the facts and circumstances and, as required by WIS. STAT. § 767.25(1n), to set forth its specific reasons for failing to apply the DWD guidelines with respect to child support for shared parent placement within ninety days of this opinion. After the trial court has done so, the matter shall be returned to this court for final resolution on the child support issue.

By the Court.—Orders affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

