

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 19, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-2155

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

STACY L. GIRAUD,

PETITIONER-RESPONDENT,

V.

TODD R. GIRAUD,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Monroe County:
STEVEN L. ABBOTT, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

PER CURIAM. Todd Giraud appeals a postjudgment order that: (1) denied his motion to reduce maintenance and child support; (2) held him in contempt of court for nonpayment of maintenance; and (3) compelled him to pay the attorney fees of his former wife, Stacy Giraud, for the court proceedings. In

the July 21, 1997 judgment of divorce, the trial court set monthly maintenance at \$500 for thirty-six months. In an October 28, 1997 postjudgment order, because Todd had lost his job and had started a new business as a Sears Roebuck & Co. franchisee, the trial court granted Todd a maintenance suspension until April 1, 1998, to give him a chance in a self-employment venture. The trial court found that Todd had a \$30,000/year earning capacity, and Todd conceded as much. Todd expected, however, to earn more from his self-employment arrangement with Sears.

When the maintenance suspension expired, Todd did not pay maintenance for April and May 1998. Stacy moved the trial court to hold Todd in contempt, and Todd moved the court to reduce maintenance and child support. The trial court held Todd in contempt because he had the capacity to earn \$30,000 per year and he had not used that capacity to pay the maintenance. The trial court also cited the same earning capacity as the basis for declining to lower maintenance and child support. Todd makes three basic arguments on appeal: (1) his limited income from his new self-employment merited a reduction in maintenance and child support; (2) the trial court wrongly based its ruling on Todd's earning capacity without also finding that he was "shirking" his maintenance duty; and (3) Todd lacked the ability to pay maintenance for April and May 1998. We reject these arguments and affirm the postjudgment order.

A trial court may decrease maintenance or child support for a substantial change in circumstances. *See Anderson v. Anderson*, 72 Wis.2d 631, 649, 242 N.W.2d 165, 174 (1976). The decision is a discretionary decision, *see Sellers v. Sellers*, 201 Wis.2d 578, 585, 549 N.W.2d 481, 484, (Ct. App. 1996); *see also Abitz v. Abitz*, 155 Wis.2d 161, 174, 455 N.W.2d 609, 614 (1990), which must have a reasonable basis in the record. *See Littmann v. Littmann*, 57 Wis.2d

238, 250, 203 N.W.2d 901, 907 (1973). Here, the trial court gave Todd a chance to earn a living through self-employment. Although Todd was unsuccessful in self-employment, he had the capacity to earn \$30,000 per year through other employment. Because Todd had the capacity to earn \$30,000 per year, the trial court did not erroneously exercise its discretion.

We also see no erroneous exercise of discretion in the trial court's failure to make an express finding that Todd was "shirking" his maintenance payments. The trial court had found that Todd had the capacity to earn \$30,000 yearly, as shown by two job offers in that amount. As the moving party, Todd had the burden of proof to show he did not have the ability to meet the support obligations that the court had established. *Cf. Rosplock v. Rosplock*, 217 Wis.2d 22, 34, 577 N.W.2d 32, 38 (Ct. App. 1998). The trial court concluded that Todd had no right to stay in an economically unprofitable self-employment venture on a long-term basis. Under the circumstances, the trial court's findings were the equivalent of a "shirking" finding and warranted the continuation of the maintenance payments set on the date of divorce.

Additionally, the trial court had a factual basis to find Todd in contempt and to require him to pay Stacy's attorney fees for the motion to hold him in contempt. A trial court may hold a payor spouse in contempt if there is a failure to pay maintenance coupled with an ability to pay. *See Burger v. Burger*, 144 Wis.2d 514, 528, 424 N.W.2d 691, 697 (1988). We must uphold the findings of the trial court unless they are clearly erroneous. *See Noll v. Dimiceli's, Inc.*, 115 Wis.2d 641, 643-44, 340 N.W.2d 575, 577 (Ct. App. 1983). Under the circumstances, the trial court reasonably ruled that Todd had the ability to pay and failed to exercise that ability. Remedial contempt and attorney fees were appropriate under these facts.

By the Court—Order affirmed.

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

