COURT OF APPEALS
DECISION
DATED AND FILED

February 17, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 98-3234

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

IN RE THE MARRIAGE OF:

DEBRA A. VOIGT,

PETITIONER-RESPONDENT,

V.

DANIEL J. VOIGT,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed.*

Before Eich, Roggensack and Deininger, JJ.

¶1 ROGGENSACK, J. Daniel Voigt appeals from a judgment of divorce raising several issues regarding child support and property division. He contends that the circuit court erred in basing the child support order on his

earning capacity without first finding that he was "shirking" his obligation. He also contends that it was error for the circuit court to retroactively modify a family court commissioner's temporary order, which initially set child support at twenty-nine percent of his gross income, to a fixed dollar amount that equaled twenty-nine percent of his earning capacity. Finally, he claims that the circuit court erroneously exercised its discretion when it did not divide the marital estate equally, but awarded Debra a larger share. We conclude that the circuit court did not erroneously exercise its discretion in basing child support on Daniel's earning capacity. We also conclude that under the facts of this case, the court did not erroneously exercise its discretion when it revised the family court commissioner's temporary order for child support and made an unequal division of property.

BACKGROUND

¶2 Daniel and Debra Voigt were married on August 20, 1983. In April of 1997, Daniel was arrested and charged with solicitation to commit homicide.[1] Shortly after his arrest, on June 6, 1997, Debra filed for divorce. On the same date, she also filed a notice of motion and motion for child support and other temporary relief.

¶3 Both parties seem to agree that the family court commissioner entered a temporary order[2] giving Debra primary placement of the couple's three children and temporary occupancy of the residence on Brentwood Lane. This

[1] The target of the solicitation was an unrelated party.

[2] The record does not contain this temporary order and neither party has provided it in an appendix; however, as there is no dispute about what it covers, we accept that such an order was issued.

temporary order apparently did not address the issue of child support, even though Debra had requested it.

¶4 On September 10, 1997, Debra once again moved the family court commissioner for child support. In response, Daniel stipulated to pay the percentage guidelines for child support and the commissioner ordered twenty-nine percent of Daniel's gross income be paid for the support of his three children. On March 16, 1998, Debra moved the court commissioner to determine whether Daniel had paid the correct amount of child support. The court commissioner "continued" her motion until the divorce. In April 1998, Daniel pled no contest to solicitation to commit homicide and was sentenced to six years in prison.

¶5 On June 30, 1998, a divorce trial was held. In regard to Daniel's earning capacity, past, present and future, the circuit court adopted the opinion of Leslie H. Goldsmith, a vocational expert, who opined that Daniel had a past earning capacity of thirty to fifty thousand dollars per year, in the real estate development business; a present earning capacity as a salesman of twenty to thirty thousand per year; and an earning capacity of thirty to forty thousand dollars per year after two or three years as a salesman.

¶6 The court found that "[i]mputation of income at his earning capacity level [of $30,000 was] appropriate for the initial setting of child support." It recognized that Daniel's "commission of a felony" would continue to affect his gross income, but that he should not be relieved of his support obligations because of it. Therefore, the court ordered twenty-nine percent of his $30,000 earning capacity, as a fixed amount of support—$725/month. The court made the support order effective retroactive to July 1, 1997, the first day of the first month after Debra first moved for child support.

¶7 With respect to the Brentwood property, the circuit court determined that because it was acquired with proceeds of inherited property, it retained its character and identity as Daniel's inherited property. As a result, the court concluded that the Brentwood property was not marital property and awarded it to Daniel. However, the court included so much of the value of the Brentwood property as divisible property as it determined was necessary in order to prevent the hardship to Debra which would occur if she had to make a balancing payment to Daniel of approximately $38,000, in order to effect a fifty-fifty property division. The court also found that based upon Daniel's award of substantial assets which were not subject to property division, Debra's substantial child custody responsibilities resulting from Daniel's incarceration, and the limitations on Debra's ability to increase her earning capacity, an unequal division of the marital estate was appropriate. Daniel appeals from the child support and property division provisions of the judgment.

DISCUSSION

Standard of Review.

¶8 Matters concerning the division of a marital estate and a determination of the amount of child support are committed to the circuit court's discretion. *See* ***Sellers v. Sellers***, 201 Wis. 2d 578, 585, 549 N.W.2d 481, 484 (Ct. App. 1996). We affirm a circuit court's discretionary decision if the court makes a rational, reasoned decision and applies the correct legal standard to the facts of record. *See* ***id.*** We accept all findings of fact made by a circuit court unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2) (1997-98).[3] Whether a circuit

[3] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

court applied the correct legal standard is a question of law, which this court reviews *de novo*. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 172, 560 N.W.2d 246, 249 (1997).

Incarceration and Earning Capacity.

¶9 Daniel argues that the circuit court erred in considering his incarceration as a factor in its decision to base child support on his earning capacity rather than on a percentage of his gross income. He contends that a circuit court cannot base child support on earning capacity, without first making a finding of "shirking." He also argues that because he was current on child support at the time of the trial, the circuit court could not find, as a matter of law, that he was shirking; and therefore, it erred when it used his earning capacity as the support base. We disagree and conclude that the circuit court was not obligated to undertake a shirking analysis before setting child support based on Daniel's earning capacity.

¶10 In ***Smith v. Smith***, 177 Wis. 2d 128, 501 N.W.2d 850 (Ct. App. 1993), we rejected the argument that a finding of shirking was necessary before a circuit court could base a support award on earning capacity. We noted our reasoning in ***Van Offeren*** that "even if the obligor's voluntary reduction in income is well intended, if the decision was unreasonable in light of the person's support or maintenance obligations, the court may base the child support obligation on the obligor's earning capacity rather than actual earnings." ***Id.*** at 136, 501 N.W.2d at 854 (citing ***Van Offeren v. Van Offeren***, 173 Wis. 2d 482, 495-97, 496 N.W.2d 660, 664-65 (Ct. App. 1992)). We also stated that the circuit court's use of the word "shirking" was not dispositive because "[i]t makes no difference to his child whether the court elects to call [an obligor's] failure to meet his child support

obligations 'shirking' or gives it some other name," the result is to deprive the child of financial support. ***Id.*** at 137-38, 501 N.W.2d at 854 (quoting ***State v. T.J.W.***, 143 Wis. 2d 849, 853-54, 422 N.W.2d 890, 892 (Ct. App. 1988)). We concluded that a payor's earning capacity may be considered when the payor's reduction in income is voluntary and unreasonable. *See* ***id.*** at 138, 501 N.W.2d at 854.

¶11 Here, the circuit court did not make a finding that Daniel was shirking his child support obligation. However, such a finding was not necessary. The circuit court needed to determine only that Daniel's reduction in income was voluntary and unreasonable. The circuit court's memorandum decision makes it clear that the court made both of these findings.

¶12 In regard to the relevance of Daniel's incarceration, neither Debra nor Daniel cite to any Wisconsin case law in which a court considered a party's incarceration in setting an initial child support award; nor can we identify any such law. However, two cases address the circuit court's consideration of whether incarceration can be a substantial change in circumstances warranting modification of an existing child support award. *See* ***Parker v. Parker***, 152 Wis. 2d 1, 447 N.W.2d 64 (Ct. App. 1989); ***Voecks v. Voecks***, 171 Wis. 2d 184, 491 N.W.2d 107 (Ct. App. 1992).

¶13 In ***Parker***, Wayne Parker was ordered to pay forty dollars per week for child support. *See* ***Parker***, 152 Wis. 2d at 3, 447 N.W.2d at 64. Twelve years after the divorce, Parker was convicted of theft; his prison sentence was stayed and he was placed on probation. Later, Parker's probation was revoked and he was sent to prison. *See* ***id.*** He petitioned for a suspension of his support obligation during his incarceration. The circuit court denied relief on the grounds that

Parker's voluntary and intentional acts caused his predicament. *See* ***id.*** at 3, 447 N.W.2d at 64-65.

¶14 We held that whether to terminate or suspend a child support order calls for the exercise of a circuit court's discretion. *See* ***id.*** at 6, 447 N.W.2d at 66. We agreed with the circuit court that Wayne did not have to be excused from his obligation because of "a willful act that resulted in his imprisonment." *See* ***id.*** at 5, 447 N.W.2d at 65. We noted that "Parker certainly could have anticipated that his unlawful activity and subsequent probation violation might result in imprisonment." ***Id.*** In upholding the circuit court's decision, we stated that a circuit court should consider the intentional nature of the crime, the likelihood of future income, and other relevant evidence when deciding whether to adjust child support because of incarceration. *See* ***id.*** at 6, 447 N.W.2d at 66. We recognized that the needs of Parker's children did not diminish while he was in prison. *See* ***id.***

¶15 Similarly, in ***Voecks***, we also upheld the circuit court's exercise of discretion. There, however, the circuit court determined that William Voecks' incarceration demonstrated a substantial change in circumstances sufficient to warrant a reduction in child support. *See* ***Voecks***, 171 Wis. 2d at 186, 491 N.W.2d at 108. Cheryl Voecks argued that the circuit court did not have the authority to modify child support because William's reduction in income was a voluntary, self-inflicted change in financial circumstances. *See* ***id.*** at 187, 491 N.W.2d at 109. We stated that we could not conclude, as a matter of law, that incarceration can never be the basis for a reduction in child support. *See* ***id.*** at 188, 491 N.W.2d at 109. Rather, we concluded that "incarceration is a factor that the court may consider when determining whether it should exercise its discretion to modify child support." ***Id.*** After examining the analysis of the circuit court, we upheld its

exercise of discretion in reducing child support. *See* ***id.*** at 190-91, 491 N.W.2d at 110.

¶16 While both ***Voecks*** and ***Parker*** are modification cases, we find their reasoning instructive on whether a circuit court may consider a party's incarceration in determining an initial award of support. We conclude that incarceration is also a valid factor for a circuit court's consideration in setting the initial level of child support because of the impact it has on the payor's employability due to what may be voluntary and unreasonable acts. In exercising its discretion in this regard, a circuit court should consider whether the crime was of an intentional nature, the likelihood of its effect on the payor's future income, the assets of the payor, how the needs of the children will be met during the payor's incarceration and any other factors which are relevant to the case at hand.

¶17 Here, the circuit court made a reasoned consideration of the appropriate factors relating to Daniel's incarceration. Therefore, it did not err in concluding that his incarceration should affect how the court set his support obligation.

Retroactive Modification of the Temporary Order.

¶18 Daniel argues that the circuit court may not retroactively modify a court commissioner's temporary order unless a party petitions the court for a *de novo* review of that order. Because neither he nor Debra did so, Daniel contends that the court had no authority to retroactively modify the temporary order by changing it from twenty-nine percent of his gross income to a fixed amount, which represents twenty-nine percent of the earning capacity the court found he had. We disagree with Daniel's factual predicate and with his legal

conclusion that the circuit court did not have the power to modify the court commissioner's order.

¶19 In ***Milwaukee County v. Louise M.***, 205 Wis. 2d 162, 555 N.W.2d 807 (1996), the supreme court considered whether the circuit court had the authority to review a probable cause determination made by a court commissioner under the Mental Health Act. The court began its analysis by noting that circuit courts have original jurisdiction in all civil and criminal matters under the state constitution. *See* ***id.*** at 173, 555 N.W.2d at 811. It then determined that circuit courts retain their original jurisdiction even when they delegate their authority to court commissioners. *See* ***id.*** The court reasoned that circuit courts would be less inclined to delegate their authority to court commissioners if, in doing so, they would strip themselves of their original jurisdictions; therefore, logic dictated that circuit courts lose none of their power through delegation. *See* ***id.***

¶20 Applying this reasoning to a probable cause determination under ch. 51, the court held that because a circuit court retains its original jurisdiction, it may, in its discretion, review a finding of probable cause made by a court commissioner. *See* ***id.*** at 174, 555 N.W.2d at 811. The court identified several policy arguments that favored allowing a circuit court the discretion to review a commissioner's order. Initially, the court recognized that a court commissioner's order was not a final order. *See* ***id.*** at 176, 555 N.W.2d at 812. Then, analogizing to the discretion of the court of appeals to grant leave to review nonfinal orders, the court stated that similarly, "the circuit court's authority to review nonfinal orders of court commissioners should be discretionary." *See* ***id.*** The court also reasoned that because judges are elected and court commissioners are not "[t]here is a need for judges to be able to review decisions of the court commissioners …." ***Id.***

¶21 The reasoning in ***Milwaukee County***, persuades us that circuit courts have discretion to revise court commissioners' temporary orders in the context of a family law case, so long as there is pre-hearing notice that they may do so. Additionally, because the circuit court's decision to modify the court commissioner's order is a discretionary one, we may search the record for facts sufficient to sustain its exercise of discretion. *See* ***Schmid v. Olsen***, 111 Wis. 2d 228, 237, 330 N.W.2d 547, 552 (1983).

¶22 Here, Daniel stipulated to a temporary order for twenty-nine percent of his gross income as child support. The court commissioner made no finding of his income prior to trial, so there is no record of what Debra or the court commissioner believed was his gross income. When Daniel's payments were meager, Debra moved the court commissioner to reconcile them with Daniel's earnings. The court commissioner did not do so, but rather, "continued" that issue to the circuit court. At trial, when the circuit court examined the lack of adequate child support under the court commissioner's initial order, it found that Daniel then had an earning capacity of $30,000 per year. It also found that "imputation of income at his earning capacity level [was] appropriate for the *initial* setting of child support." (Emphasis added.) That finding is not clearly erroneous as it is based on the report (exhibit 7) of Leslie H. Goldsmith, a well qualified vocational expert, who stated in his report that Daniel had a past earning capacity of more than $30,000. After it made those findings, the circuit court retroactively modified the court commissioner's temporary order by changing a percentage based child support order to a fixed amount order, based on the same percentage used earlier, but applied to Daniel's earning capacity, rather than his actual income. The circuit court also reasoned that if it did not set that initial child support order based on Daniel's earning capacity, it would be permitting Daniel to be relieved of his

support obligation by "the willful commission of a felony." We find no error in the circuit court's identification and use of those factors relevant to Daniel's support obligation. Therefore, we conclude that under the facts of this case, the court did not erroneously exercise its discretion when it modified the family court commissioner's temporary order for child support.

¶23 Additionally, we do not agree with Daniel's contention that either WIS. STAT. § 767.13(6)[4] or our prior decisions such as ***Whitwam v. Whitwam***, 87 Wis. 2d 22, 273 N.W.2d 366 (Ct. App. 1978), and ***Strawser v. Strawser***, 126 Wis. 2d 485, 377 N.W.2d 196 (Ct. App. 1985), prohibit a circuit court from retroactively modifying a court commissioner's temporary order establishing child support under circumstances such as those presented here.

¶24 We note, as an initial matter, that a temporary order for child support does not obligate a circuit court to make a finding of a substantial change in circumstances in order to set a different level of support at the time of divorce. Additionally, while WIS. STAT. § 767.13(6) requires a circuit court to review a court commissioner's order when requested to do so by a party, it does not prohibit a court from doing so when there has been no request for a *de novo* review. Here, the record reflects that Debra was concerned by the level of support she was receiving under the temporary order and she brought that concern to the court commissioner, who deferred it to the circuit court. Therefore, this is not a

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[4] WISCONSIN STAT. § 767.13(6) states:

> Upon the motion of any party any decision of the family court commissioner shall be reviewed by the judge of the branch of the court to which the case has been assigned. Upon the motion of any party any such review shall include a new hearing on the subject of the decision, order or ruling.

case where the payor had no notice that there was a problem with the amount of support he was paying.

¶25 Furthermore, even though ***Whitwam*** and ***Strawser***, cited by Daniel, state that a circuit court has "no authority" to make an order directing the retroactive increase of support payments, *see* ***Whitwam***, 87 Wis. 2d at 30, 273 N.W.2d at 370; ***Strawser***, 126 Wis. 2d at 489, 377 N.W.2d at 198, both cases arose as actions to revise judgments, not temporary orders, even though the backdating in ***Strawser*** included a period covered by a temporary order. Additionally, in ***Strawser***, where the court made a retroactive award of maintenance, it directed it to be paid prior to the date on which the payee had requested it. *See* ***id.*** at 488, 377 N.W.2d at 198. Here, the court set the initial support to commence on a date *after* Debra had moved for child support. Furthermore, ***Whitwam*** addressed the local welfare department's right to receive maintenance, which it may do when the dependent spouse had received public assistance and was under a court order to receive maintenance but refused to proceed against the payor or when it operated under an assignment from the payee. Because neither condition for the welfare department's receipt of maintenance was met, we concluded a post-judgment order conditioning maintenance on the receipt of public assistance was invalid. ***Whitwam***, 87 Wis. 2d at 29, 273 N.W.2d at 369. And finally, while a circuit court's ability to retroactively revise a judgment of divorce is limited by WIS. STAT. § 767.32(1m), that statute does not apply to revisions of temporary orders at the time of divorce.

Property Division.

¶26 Daniel claims that the circuit court erred because it improperly divided an inherited marital asset. He contends that although the court found as

one of its findings of fact that the residence retained its character and identity as inherited property, nevertheless, the court included a significant portion of the value of that property in the marital estate for division contrary to WIS. STAT. § 767.255(2).

¶27 Daniel is correct that WIS. STAT. § 767.255(2) generally excludes from property division any property acquired by bequest or inheritance, and § 767.255(3) provides that the court shall presume that all property included within the marital estate should be divided equally between the parties. However, § 767.255(3) also states that the court may alter the fifty-fifty division after considering certain factors.

¶28 The circuit court determined that the Brentwood property which the family had occupied during the marriage was Daniel's inherited property and it awarded that asset to him. The circuit court also found that an equal division of the marital estate would have required Debra to pay Daniel approximately $38,000 as a balancing payment and that to do so would cause hardship to Debra and the children. The court then concluded that it was appropriate to alter the presumption of a fifty-fifty property division. It listed its reasons for doing so in the Findings of Fact, Conclusions of Law, and Judgment of Divorce, which stated:

> 17. The following factors have been relied on by the court in departing from an equal division of the divisible marital estate:
>
> (a) Daniel is awarded substantial assets not subject to property division by the court. (§767.255(3)(c) Wis. Stats.)
>
> (b) Debra has substantial custodial responsibilities for the children resulting from Daniel's incarceration. (§767.255(3)(g) Wis. Stats.; §767.255(3)(m) Wis. Stats.)

> (c) Debra's earning capacity and economic circumstances render her unable to pay cash to balance to effect an equal property division of the marital estate. (§767.255(3)(j) Wis. Stats.)

And, it listed additional reasons in a *sua sponte* Amendment which states:

> The court will ensure, by this order, that the parties' children receive the benefit of actual, undepleted support by both the custodial and noncustodial parent by including that portion of the Brentwood property in the division of marital property herein, necessary to prevent hardship to Debra and the children.
>
> …
>
> This will avoid economic deprivation to Debra and avoid deprivation to the children by permitting them to have the benefit of the full earnings and assets of Debra as well as the support of Daniel called for herein. This is necessary and in the best interests of the children. If Brentwood is not included in the property division as the court orders herein, deprivation will occur because Debra will have to divert income and assets otherwise available for the benefit of the children, to accomplish a 50/50 property division.

¶29 Given the facts of this case, we conclude that the circuit court's exercise of discretion was not erroneous. The court's decision to alter the division of the marital estate allows the children to enjoy the full benefit of Debra's earnings and assets rather than forcing her to divert income and assets from the children to Daniel as a balancing payment. We also note that the circuit court's finding that Debra would have difficulty increasing her earning capacity supports the unequal property division.

¶30 Further, the court relied on Debra's increased custodial responsibilities of caring for the children as a basis to divide the estate unevenly. Wisconsin's child support percentage standards presume that in addition to paying support, a non-custodial parent will exercise some physical placement as well. Due to Daniel's incarceration, Debra will need to care for the children twenty-four

hours per day, seven days per week. Daniel will be unable to provide any periods of physical placement. We think this is a relevant factor that a court may, in its discretion, consider under the catchall provision in WIS. STAT. § 767.255(3)(m). Therefore, we conclude there was no erroneous exercise of discretion in the circuit court's uneven division of the marital estate.

CONCLUSION

¶31 We conclude that the circuit court did not erroneously exercise its discretion in basing child support on Daniel's earning capacity. We also conclude that under the facts of this case, the court did not erroneously exercise its discretion when it revised the family court commissioner's temporary order for child support and made an unequal division of property.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

¶32 DEININGER, J. *(concurring).* I concur in the result reached by the majority, and with its reasoning on all issues except the retroactive modification of the temporary child support order. On that issue, I believe the majority opinion improperly distinguishes precedents which preclude the retroactive modification of support orders, and further, it relies on a precedent which has no bearing on the present facts. I would, however, affirm the capacity-based support order's July 1, 1997 effective date, because Daniel did not oppose Debra's request at trial that the final child support order be made retroactive to that date, and he did not object to the date in his post-judgment motions. Daniel thus forfeited his opportunity to raise the issue in this appeal.

¶33 The majority distinguishes ***Whitwam v. Whitwam***, 87 Wis. 2d 22, 273 N.W.2d 366 (Ct. App. 1978) and ***Strawser v. Strawser***, 126 Wis. 2d 485, 377 N.W.2d 196 (Ct. App. 1985) because "both cases arose as actions to revise judgments, not temporary orders…." Majority opinion at ¶25. In ***Whitwam***, however, at issue was whether it was proper for a final divorce judgment to impose an arrearage stemming from the shortfall between public assistance received by the custodial parent during the divorce, and the $20 per week in temporary child support which the noncustodial parent was ordered to pay during the pendency. We recognized that the provision in the divorce judgment "amounts to a judgment requiring retroactive support" over and above the amount set forth in the temporary order. *See* ***Whitwam***, 87 Wis. 2d at 30. We concluded that the trial court had erred by including an order to pay the arrearage in the final

judgment because "a family trial court in Wisconsin has no authority to make an order directing the retroactive increase of support payments." *See* ***id***.

¶34 Although ***Whitwam*** was in fact an appeal from the denial of a post-judgment motion to delete the erroneous arrearage-payment provision from the final judgment, the substance of the dispute was identical to the one before us. *See* ***id***. at 27. The same is true in ***Strawser***, where the issue was the circuit court's authority to retroactively order temporary maintenance, when the family court commissioner had not done so, and the recipient had not requested the court to review the commissioner's order. *See* ***Strawser***, 126 Wis. 2d at 488. We again stated the prohibition against orders "directing the retroactive increase of support payments," and we concluded that the court could not reach back in time to order what it concluded the payor "should have been ordered to pay" during the pendency of the divorce. *See* ***id***. at 489-90.

¶35 A party who is dissatisfied with a court commissioner's temporary child support order may move to have the matter reviewed, or even decided de novo, by the circuit court. *See* WIS. STAT. §§ 767.23(1n) and 767.13(6) (1997-98). Debra did not do so. In fact, she had stipulated to the entry of the percentage-of-income order entered by the family court commissioner. In her brief to this court, she claims that this was a "tactical choice to agree to accept 29% of whatever income Daniel may or may not earn while the action was pending, in order to get some support flowing from Daniel to his children…." Having made this "tactical choice," Debra must live with its consequences rather than being permitted to undo them retroactively. When it became apparent that Daniel was earning too little income during the pendency of the divorce to generate sufficient child support to meet the children's needs, Debra should have moved to amend the temporary support order or sought review of the issue in the

circuit court.[5] Just as we did not permit the trial court in ***Strawser*** to enter a retroactive order for temporary maintenance because "it should have been ordered" by the family court commissioner months earlier, we should not here endorse a trial court's authority to retroactively increase the amount of temporary child support ordered by the court commissioner.

¶36 In addition to improperly distinguishing the two opinions which I believe to be controlling on the issue at hand, the majority reaches out for its holding to a precedent which I believe has no relevance to the present facts. Neither party to this appeal has cited or discussed ***Milwaukee County v. Louise M.***, 205 Wis. 2d 162, 555 N.W.2d 807 (1996), and for good reason. In that opinion, the supreme court concluded that a circuit court has "the authority to review a court commissioner's order finding probable cause" in WIS. STAT. ch. 51 commitment proceedings. *See* ***id***. at 178. In both of the cases before the court in ***Louise M.***, the respondents had requested but were denied de novo hearings before the circuit court after court commissioners had found probable cause. *See* ***id***. at 168-69.

¶37 The majority states that "[t]he reasoning in [***Louise M.***] persuades us that circuit courts have discretion to revise court commissioners' temporary orders

[5] Debra at one point did move the family court commissioner for an order "reconciling child support records to determine whether the correct appropriate amount of child support was paid by respondent to petitioner under the terms of the percentage-based child support temporary order." The parties stipulated, however, that the motion could be continued to the time of trial. Debra points to this motion and stipulation, and to the fact that the court commissioner cited "Child Support (earning capacity)" as an issue for trial, as evidence that she had made known her dissatisfaction with the temporary support order and her desire that an earning-capacity-based order be entered. The items Debra points to, however, show only that she believed that Daniel had not paid the amount of child support he was obligated to under the percentage-based temporary order, and that she would be seeking to have permanent child support ordered on the basis of Daniel's earning capacity. The items are not a substitute for a timely motion under WIS. STAT. § 767.13(6) (1997-98) to review the temporary support order.

in the context of a family law case." Majority opinion at ¶21. Of course they do, WIS. STAT. ch. 767 explicitly says so. *See* WIS. STAT. §§ 767.23(1n) and 767.13(6) (1997-98). The problem before the court in ***Louise M.*** was that there were no similar statutory review provisions in ch. 51. The court concluded that a circuit court nonetheless retains its "original jurisdiction" to decide probable cause notwithstanding the delegation of that authority to a court commissioner. *See* ***Louise M.***, 205 Wis. 2d at 173. The supreme court did not overrule (or even discuss) ***Whitwam*** or ***Strawser***, and I fail to see how its narrow holding in ***Louise M.*** can be construed as supporting the proposition that, when deciding contested issues following a final divorce hearing, a family court can retroactively increase the amount of temporary child support ordered by a court commissioner, when review of the commissioner's order was not timely sought by the support recipient.

¶38 Although I am unwilling to endorse the majority's reasoning in affirming the retroactively amended temporary support order, I concur in the result because Daniel failed to preserve the issue for appeal. In both her trial court brief on contested issues and in her oral argument at the conclusion of the final divorce hearing, Debra clearly requested the trial court to enter a capacity-based support order effective as of July 1997.[6] Daniel points to no place in the record, and I was unable to locate one, where he objected to this request or refuted in any way the court's alleged authority to retroactively modify the amount of temporary child support ordered during the pendency of the action.

[6] In her trial brief, Debra requested "child support of $967 per month beginning on July 1, 1997, the first day of the first month following service of the summons…." Later, in argument at the conclusion of the bench trial, Debra's counsel told the court, "I want to re-emphasize, I'm also asking that the child support be set back under the authority that you do have. It's discretionary, but you have authority to set child [support] back to 6-9-97."

¶39 Daniel, however, claims in his reply brief to have been surprised that the trial court "would enter an order beyond the scope of its authority," because "at the conclusion of the trial, there was no mention of the court's inclination to enter its child support order *nunc pro tunc*…." It may well be that the court did not disclose its "inclination," but as I have noted (see footnote 2), Debra had clearly requested such an order, both orally and in writing. Moreover, Daniel filed an objection to the proposed findings and judgment, as well as two post-judgment motions, none of which cited the retroactive child support order as problematic.

¶40 Accordingly, I would conclude that Daniel forfeited the right to claim error by his failure to oppose Debra's request that the final child support order be made retroactive to the commencement of the divorce, coupled with his subsequent failure to seek relief from the provision in post-judgment proceedings in the trial court. *See* ***State v. Rogers***, 196 Wis. 2d 817, 827, 829, 539 N.W.2d 897 (Ct. App. 1995) ("We will not … blindside trial courts with reversals based on theories which did not originate in their forum"; "the appellant [must] articulate each of [his or her] theories to the trial court to preserve [his or her] right to appeal."). For this reason, I concur in the result the majority reaches on the issue I have addressed, but not its rationale.