COURT OF APPEALS
DECISION
DATED AND FILED

June 22, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0272-FT

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

IN RE THE MARRIAGE OF:

SANDRA M. DREES GOKEY,

PETITIONER-RESPONDENT,

v.

DENNIS J. DREES,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Marinette County: TIM A. DUKET, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

CANE, C.J. Dennis Drees appeals an order increasing his child support obligation for his thirteen-year-old son from $45 per week to $70 per

week.[1] His principal argument is that the circuit court erroneously exercised its discretion when it elected to forego the percentage standard and then failed to consider the factors listed in § 767.25(1m), STATS., or make the findings § 767.25(1n), STATS., requires. He also contends that the circuit court "usurp[ed] the [agency's] prosecutorial function" and interfered with the hearing's "adversarial process" when it called the child's mother, Sandra, as a witness at the modification hearing and then questioned her. *See* §§ 906.14(1) and (2), STATS.

We first conclude that the circuit court properly modified Dennis' child support obligation based on his earning capacity rather than his actual income. Contrary to Dennis' characterization of the circuit court's rationale, the record discloses that the circuit court did not deviate from the percentage standard; instead, it found that Dennis was shirking, and based on that finding, properly based its percentage calculation on Dennis' earning capacity rather than his actual income. Second, because we discern no partiality in the circuit court's calling and questioning Sandra, we reject Dennis' contention that the circuit court interfered with the hearing's adversarial process. Accordingly, we affirm the order modifying Dennis' child support obligation.

I. FACTS

In 1990, Dennis began paying $45 per week child support for his then five-year-old son. In 1998, when the child was a thirteen-year-old eighth grader, the agency sought modification of the child support order. At the modification hearing, Sandra requested a child support increase from $45 to $70 per week based on a cost of living increase and the child's increased needs such as

[1] This is an expedited appeal under RULE 809.17, STATS.

food, clothes, and extracurricular activities. Because the $45 weekly child support payment is two dollars more per week than 17% of his actual income, Dennis feels that he should not be required to pay $70 per week.

Dennis testified that he resides and works on his father's 700-acre dairy farm. He earns $250 per week and pays his father $250 per month for room and board. Significantly, Dennis' father has not increased Dennis' salary in fifteen years, and Dennis foresees a pay increase only if they "can expand our operation." Dennis is not seeking new employment. When asked why he is willing to work for $12,500 per year at the farm, Dennis replied that he and his brother are hoping to inherit the farm from their parents.

In modifying the order and increasing Dennis' child support obligation, the circuit court expressed its concern that child support had not increased for eight years but that the cost of raising the child had increased. Further, the court stated that Dennis was healthy and capable of finding other work, such as a full-time factory job earning ten dollars an hour, and commented: "Not everybody wants to work in a factory, but … there clearly are jobs out there. Mr. [Drees] looks like he's capable, healthy of earning … where if he chose to, not that he has to."

The circuit court concluded that Dennis is foregoing a higher paying position off the farm in hopes of later inheriting the farm from his parents:

> What he's building is sweat equity. He's positioning himself to inherit the farm. I suspect that it's going to be a substantial inheritance, not that we have anything in the record here as to what the place was worth, but it seems to be a substantial operation with a substantial acreage, looks like he and his brother are working on the farm to ultimately be in a position to inherit the wealth of the farm, *and I don't think the building of equity through expected*

> *inheritance should be done at the expense of his 13-year-old son.*
>
> ….
>
> … [A]fter eight years certainly the needs of the child dictates an increase and … even though we don't have a half day's testimony in here as to the health on the operation at the farm, and I think inferentially I can conclude that he can afford to make the increased payments. (Emphasis added.)

Dennis then filed this appeal.

II. ANALYSIS

Dennis points out that to modify child support, the circuit court must use the department of health and family services' percentage standards, s*ee* § 767.32(2), STATS, unless it considers the factors under § 767.25(1m), STATS., and determines that applying the percentage standard is unfair to the child or the requesting party. Section 767.32(2m), STATS. He notes that under the circuit court's modification order, he is paying approximately 28% of his gross income, which is greater than the 17% standard.[2] *See* WIS. ADM. CODE § HSS 80.03(1). Thus, Dennis urges us to reverse the modification order because the circuit court deviated from the percentage standard and failed to make the statutorily required findings.

At the outset, we reject Dennis' characterization of the issue because it is based on his erroneous contention that the circuit court deviated from the percentage standard and failed to follow §§ 767.25(1m) and (1n), STATS. We are

[2] Dennis contends that his weekly gross income is $250. Seventy dollars is approximately 28% of $250.

not bound by the manner in which Dennis frames the appellate issues. *See* ***State v. Waste Management***, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978). Dennis misconstrues the record when he argues that the circuit court deviated from the percentage standard but failed to consider the statutory factors. Contrary to Dennis' reading, we conclude that the modification hearing transcript reveals that the circuit court found that Dennis was shirking, and based on that determination, applied the appropriate percentage standard under § HSS 80.03(1) to his earning capacity rather than his actual income.

We recognize, as Dennis notes, that the circuit court did not explicitly make a shirking determination, but a circuit court is not required to use the "magic words" in effectuating its adjudication. *See* ***Michael A.P. v. Solsrud***, 178 Wis.2d 137, 151, 502 N.W.2d 918, 924 (Ct. App. 1993). The circuit court found that in light of his child support obligation, Dennis unreasonably continues to work at the farm for $250 per week, as he has for fifteen years, hoping to inherit it, but that this "sweat equity" was gained at the child's expense. While the circuit court's decision does not use the magic words, we conclude that its decision constitutes a shirking determination. After noting that Dennis is capable of finding other employment, such as a ten-dollar-per-hour factory position, the circuit court ordered that Dennis pay $70 per week, which is approximately 17% of $400 dollars per week. In so doing, the court based its percentage calculation on Dennis' earning capacity, not his actual earnings.

Thus, because the court did not deviate from the percentage standard, but instead followed the percentage standard using Dennis' earning capacity, the issue is not, as Dennis maintains, whether the circuit court complied with § 767.25(1m) and (1n), STATS., in deviating from the percentage standard. Rather, we conclude that the issue is whether the circuit court properly found that

Dennis was shirking and thus correctly used Dennis' earning capacity to calculate his child support obligation. *See* ***Roellig v. Roellig***, 146 Wis.2d 652, 657-59, 431 N.W.2d 759, 761-62 (Ct. App. 1988).

1. Earning Capacity

Generally, we review modification of child support under the erroneous exercise of discretion standard. ***Jacquart v. Jacquart***, 183 Wis.2d 372, 381, 515 N.W.2d 539, 542 (Ct. App. 1994). A circuit court may modify child support if there has been a substantial or material change of circumstances of the parties or the children. *See* ***Poehnelt v. Poehnelt***, 94 Wis.2d 640, 648-49, 289 N.W.2d 296, 300 (1980). This determination is measured by the needs of the custodial parent and children, which Dennis does not contest on appeal, and the ability of the noncustodial parent to pay. *See* ***Burger v. Burger***, 144 Wis.2d 514, 523-24, 424 N.W.2d 691, 695 (1988).

The general rule that a court must consider the noncustodial parent's ability to pay is subject to a shirking exception. *See* ***Roellig***, 146 Wis.2d at 657, 431 N.W.2d at 761. If the shirking exception applies, the court may properly examine the payor's earning capacity rather than the payor's actual earnings. *See* ***id***. at 657-58, 431 N.W.2d at 761-62. Dennis insists that the record contains no evidence to support a finding that he was shirking. We are not persuaded.

Shirking is established when the obligor: (1) intentionally avoids the duty to support; (2) unreasonably diminishes his or her income in light of the support obligation, *see* ***Van Offeren v. Van Offeren***, 173 Wis.2d 482, 492, 496 N.W.2d 660, 663 (Ct. App. 1992), or put another way, decreases his ability to pay because he voluntarily fails to exercise his full capacity to earn. *See* ***Roellig***, 146 Wis.2d at 658-59, 431 N.W.2d at 762. Here, there is no evidence that Dennis

seeks to intentionally avoid his support obligations. The only question, therefore, is whether Dennis' decision to remain at the farm for $250 per week without any foreseeable pay increase is unreasonable under the circumstances.

Whether a party's employment decision is unreasonable presents a question of law. ***Van Offeren***, 173 Wis.2d at 492, 496 N.W.2d at 663. However, because the circuit court's legal conclusion is intertwined with factual findings supporting that conclusion, we will give the circuit court appropriate deference. ***Id***. at 492-93, 496 N.W.2d at 663. We therefore review the circuit court's ruling as a question of law, but one to which we must pay the appropriate deference. *See* ***id***. at 493, 496 N.W.2d at 663-64.

We agree with the circuit court that Dennis' employment decision is unreasonable under the circumstances here. Dennis is not sacrificing his present earnings to develop his career opportunities, *see* ***Van Offeren***, 173 Wis.2d at 498, 496 N.W.2d at 666, but as he admits, is putting "sweat equity" in his inheritance. It is unreasonable for him to forego opportunities outside the farm to build equity in the family farm at the expense of his thirteen-year-old child. The circuit court found that Dennis is capable of obtaining other higher paying work, but Dennis is not seeking new employment even though his salary has remained unchanged for fifteen years. His decision not to exercise his full capacity to earn is unreasonable in light of his child support obligations. Because his employment decision is unreasonable, we conclude that the circuit court properly found that Dennis is shirking and therefore properly based its percentage calculation on his earning capacity.

2. Calling and Questioning Sandra

Dennis also maintains that the circuit court "improperly assumed an adversarial role in a non-partisan manner" when it called Sandra to testify and conducted a direct examination. *See* ***State v. Garner***, 54 Wis.2d 100, 104, 194 N.W.2d 649, 651 (1972). The agency responds that the circuit court judge showed no partiality in calling Sandra to testify and conducting a rather routine examination of basic facts. We agree with the agency.

A circuit court judge may call witnesses to the stand and interrogate them, *see* § 906.14(1) and (2), STATS., but the judge must act impartially. *See* ***State v. Asfoor***, 75 Wis.2d 411, 437, 249 N.W.2d 529, 540- 41 (1977). The judge is "more than a mere referee" and has a right to clarify questions and answers and make inquiries when the parties ignore or inadequately cover important evidentiary matters. ***Id***. at 437, 249 N.W.2d at 540-41. Although the judge may question any witness, he or she must be careful not to function as partisan or advocate. *See* ***Garner***, 54 Wis.2d at 104, 194 N.W.2d at 651.

The circuit court judge's questions here disclose no partiality. Rather, the motion hearing transcript reveals that the judge asked appropriate questions of a preliminary nature in an impartial manner. The judge questioned Sandra regarding her employment, her son's age and needs, the child support amount, and her knowledge of Dennis' employment. After the circuit court judge questioned Sandra, both parties questioned her. The record does not establish that the judge functioned as a partisan or took an improper, active role in trying the

case for either party, particularly when, as here, the circuit court, not a jury, acted as the finder of fact.[3] Thus, Dennis' argument fails.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[3] Additionally, under § 906.14(3), STATS., "[o]bjections to the calling of witnesses by the judge or to interrogation by the judge may be made at the time or at the next available opportunity when the jury is not present." Dennis failed to object and arguably, although not contended by the agency, waived this argument.