COURT OF APPEALS
DECISION
DATED AND FILED

March 2, 2000

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

No. 99-1492

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

IN RE THE MARRIAGE OF:

CAROL MARIE BANNIGAN F/K/A CAROL MARIE JOHNSON,

PETITIONER-APPELLANT,

V.

JEFFREY HAROLD JOHNSON,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Rock County: RICHARD T. WERNER, Judge. *Affirmed.*

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

¶1 DEININGER, J. Carol Bannigan appeals an order which amended a judgment of divorce and obligates her to pay child support. Bannigan contends that the circuit court erroneously exercised its discretion when it based child

support on her earning capacity rather than her actual earnings. According to Bannigan, the circuit court may only consider her earning capacity if it determines that she intentionally reduced her income for the purpose of avoiding her support obligation. We conclude, however, that a court may base a child support award on earning capacity whenever the court determines that the party from whom support is sought has voluntarily and unreasonably reduced his or her income. We further conclude that the circuit court did not err when it implicitly determined that Bannigan had unreasonably reduced her income, and when it established her support obligation accordingly. We therefore affirm the circuit court's order.

BACKGROUND

¶2 Carol Bannigan and Jeffrey Johnson were divorced in 1990 and were awarded joint custody of their two sons, ages nine and seven. At the time of the divorce, Carol was awarded primary physical placement of both children. Four years later, the circuit court modified the divorce judgment to provide Jeffrey with "substantially equal physical placement."[1] In early 1998, the younger son moved into Johnson's home to live primarily with his father. At the same time, the older son moved into Bannigan's home to live primarily with his mother.

¶3 In February 1999, Johnson moved the circuit court to again modify the divorce judgment, alleging a "substantial change of circumstance." He informed the court that the older son would soon be graduating from high school and that the parties' legal obligation to support that child would therefore soon cease. Johnson also informed the court that Bannigan had recently quit her full-

[1] In January 1994, the circuit court amended the divorce judgment and ordered the parties to alternate physical placement every three days. In May 1994, the court again amended the judgment and ordered the parties to alternate physical placement "on a week-to-week basis."

time job at a factory and had begun to work twenty-five hours per week as a courier for Federal Express. Johnson asked the court to order Bannigan to pay child support for the younger son, who remained placed primarily with his father.

¶4 After hearing testimony from both parties, the court stated in an oral ruling:

> The court does not believe that Miss Bannigan changed jobs as a result of a desire to be a shirker or to shirk any obligation … to pay child support; that she did so because work at [the factory] was stressful to her…. The court does not believe that she's shirking. That she's doing something that is good for her health and is still producing income. That she would be working full-time if the opportunity arose at Fed Ex.
>
> ….
>
> As far as the support itself is concerned … the court feels that it is appropriate to impute 40 hours to Miss Bannigan and will enter an order imposing support at 17 percent of her gross, or $75.66 per [week], whichever is greater…. I am imputing 40 hours because, although the court does not find Miss Bannigan to be a shirker, she did have a 40 hour job before and has taken a job—albeit she can't take a full-time, 40 hour job at Fed Ex, but in any event the court feels it's appropriate. She jumped from a 40 hour responsibility to a 25 hour responsibility.

The court subsequently entered an order and written findings consistent with its oral decision. Included was a finding that Bannigan's "health and disposition have improved since the change of employment," and that she "is willing to work full-time at Federal Express Corporation when that full-time employment is available to her."

¶5 Bannigan appeals the circuit court's order imposing a child support obligation based on imputed earnings for forty-hour-per-week employment.

ANALYSIS

¶6 A circuit court's child support determination is discretionary and we will not set it aside unless we conclude that the court erroneously exercised its discretion. *See* ***Roellig v. Roellig***, 146 Wis. 2d 652, 655, 431 N.W.2d 759 (Ct. App. 1988). As long as the circuit court reaches a rational, reasoned decision and applies the correct legal standards to the facts of record, its exercise of discretion will be upheld on appeal. *See* ***Smith v. Smith***, 177 Wis. 2d 128, 133, 501 N.W.2d 850 (Ct. App. 1993). In determining the appropriate level of child support, the circuit court must consider the needs of the custodial parent and the children, as well as the ability of the noncustodial parent to pay. *See* ***Edwards v. Edwards***, 97 Wis. 2d 111, 116, 293 N.W.2d 160 (1980).

¶7 Ordinarily, a court will base a child support award primarily on the amount of income a noncustodial parent is earning at the time the award is made. *See* ***State v. T.J.W.***, 143 Wis. 2d 849, 852, 422 N.W.2d 890 (Ct. App. 1988), *overruled on other grounds by* ***Kelly v. Hougham***, 178 Wis. 2d 546, 504 N.W.2d 440 (Ct. App. 1993). If the court determines that the noncustodial parent has "shirked" his or her support responsibilities, however, the court may look beyond actual earnings and consider that parent's capacity to earn. *See* ***id.*** Bannigan contends that the circuit court erred when it based the child support award on her earning capacity after explicitly finding that she "did not change employers to shirk her obligation to work or to avoid paying child support." Bannigan asserts that a court can only find shirking if it determines that the noncustodial parent intentionally reduced his or her earnings for the purpose of avoiding a child support obligation. We disagree.

¶8 It is well established that shirking does not require a finding that the noncustodial parent "deliberately reduced his [or her] earnings to avoid support obligations." *See* ***Sellers v. Sellers***, 201 Wis. 2d 578, 587, 549 N.W.2d 481 (Ct. App. 1996); *see also* ***Smith v. Smith***, 177 Wis. 2d 128, 136-37, 501 N.W.2d 850 (Ct. App. 1993); ***Van Offeren v. Van Offeren***, 173 Wis. 2d 482, 495-97, 496 N.W.2d 660 (Ct. App. 1992).[2] Shirking can be established in one of two ways: (1) by proving that a parent reduced his or her income to intentionally avoid a duty of support, or (2) by proving that a parent's reduction in income was both voluntary and unreasonable under the circumstances. *See* ***Van Offeren***, 173 Wis. 2d at 496 (holding that "even where the obligated person's voluntary reduction in income is well intended … it is proper … to assess the reasonableness of that decision in light of the person's support or maintenance obligations").[3]

[2] It is not entirely clear from our past discussions of the issue whether a voluntary and unreasonable reduction in income should be deemed to be a second justification, in addition to "shirking," for awarding earning-capacity-based child support, or if it should be regarded as simply another form of shirking. *See, e.g.*, ***Van Offeren v. Van Offeren***, 173 Wis. 2d 482, 492, 496 N.W.2d 660 (Ct. App. 1992) (implying that "shirking" can consist of either the intentional avoidance of a support obligation *or* an unreasonable diminution in income); ***Smith v. Smith***, 177 Wis. 2d 128, 136-38, 501 N.W.2d 850 (Ct. App. 1993) (noting that historically, "shirking" was meant to refer to intentional avoidance of a support obligation, but that the definition or use of the term is not dispositive; that capacity-based child support can be ordered whenever a payor's reduced earnings are voluntary and unreasonable). Our most recent pronouncement on the issue implies that "shirking" includes both circumstances, and we will accept that premise for the purpose of our present analysis. *See* ***Sellers v. Sellers***, 201 Wis. 2d 578, 587, 549 N.W.2d 481 (Ct. App. 1996).

[3] The "second" form of shirking derives from ***Balaam v. Balaam***, 52 Wis. 2d 20, 28, 187 N.W.2d 867 (1971), where the supreme court said that "[a] divorced husband should be allowed a fair choice of a means of livelihood and to pursue what he honestly feels are his best opportunities…. *This rule is, of course, subject to reasonableness commensurate with his obligations to his children and his former wife*" (emphasis added). *See* ***Van Offeren***, 173 Wis. 2d at 495-96.

(continued)

¶9 Bannigan points to the circuit court's finding that she "did not change employers to shirk her obligation to work or to avoid paying child support," and argues that the court intended to include both forms of shirking in this finding. We conclude, however, that the court meant only that Bannigan did not reduce her income for the purpose of avoiding child support; that is, she did not engage in the first form of shirking, intentional avoidance of a support obligation. Implicit in the court's comments that (1) Bannigan "jumped from a 40 hour responsibility to a 25 hour responsibility," and (2) "it is appropriate to impute 40 hours," is its conclusion that Bannigan's decision to change jobs and reduce her work hours was "voluntary and unreasonable under the circumstances." *See* ***Sellers***, 201 Wis. 2d at 587.

¶10 We thus proceed to inquire whether the trial court erred in concluding that it was unreasonable for Bannigan to voluntarily reduce her income by changing jobs and decreasing her work hours. The issue of the reasonableness of a payor's reduction in earnings is a question of law, which we generally review de novo. *See* ***Van Offeren***, 173 Wis. 2d at 492. A circuit court's legal conclusion as to reasonableness is closely intertwined with its factual findings, however, and we will thus give weight to the circuit court's conclusion. *See* ***id.*** at 492-93. We therefore pay "appropriate deference" to the circuit court's implicit determination that Bannigan's reduction in income was unreasonable. *See* ***id***.

The dissent takes us to task for not following what it concludes are binding supreme court precedents confining capacity-based child support to cases where a parent has reduced his or her income intentionally to avoid a duty of support. The dissent obviously believes that ***Sellers, Smith*** and ***Van Offeren*** were wrongly decided. Our analyses in those three opinions expressly cite and discuss the very precedents on which the dissent relies. We are as bound by our prior holdings as we are by those of the supreme court. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). In the absence of an opinion of the supreme court declaring that ***Sellers, Smith*** and ***Van Offeren*** are not the law, we, unlike the dissent, consider ourselves bound by ***Cook*** to follow our prior holdings.

¶11 Bannigan testified that she switched jobs because her position at the factory had become "stressful" and "harmful to [her] mental health and physical health…." She sought the position with Federal Express because it was a "better job" with "different opportunities," and she was aware at the time she was hired that all of the company's "new hires" start at part-time. Bannigan admitted that she pursued the job at Federal Express almost exclusively and made few attempts to secure full-time work comparable to her factory job.

¶12 A parent "should be allowed a fair choice of a means of livelihood and to pursue what he [or she] honestly feels are his [or her] best opportunities…." ***Balaam v. Balaam***, 52 Wis. 2d 20, 28, 187 N.W.2d 867 (1971). However, it is also true that a parent remains obligated to make reasonable choices that will not deprive his or her children of the support to which they are entitled. *See* ***T.J.W.***, 143 Wis. 2d at 853. The trial court did not fault Bannigan for changing jobs, but for reducing her hours instead of seeking full-time employment. Given that we must give "appropriate deference" to the trial court's implicit determination that Bannigan's actions were unreasonable in light of her support obligation, we cannot conclude that the trial court erred in this regard.[4]

¶13 Accordingly, we conclude that the trial court correctly applied the law to the relevant facts, and that it did not erroneously exercise its discretion in ordering Bannigan to pay child support based on imputed earnings for full-time employment.

[4] We note that Bannigan's voluntary reduction in earnings occurred at a time prior to her having incurred any court-ordered obligation to pay support. While this fact must be taken into account when considering the reasonableness of her decision to work less hours, it is not determinative of the issue. *See* ***Sellers***, 201 Wis. 2d at 587-88 (noting that a past decision to earn less than one's capacity may become unreasonable when circumstances change).

CONCLUSION

¶14 For the reasons discussed above, we affirm the order of the circuit court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

¶15 DYKMAN, P.J. *(dissenting).* The majority does not explain how it squares its conclusion that, "It is well established that shirking does not require a finding that the noncustodial parent 'deliberately reduced his [or her] earnings to avoid support obligations,'" Majority at ¶8, with the following from the supreme court's opinion in ***Edwards v. Edwards***, 97 Wis. 2d 111, 118-119, 293 N.W.2d 160 (1980) (citations omitted):

> The argument accepted by the court of appeals in favor of the trial court's support decision and which is urged again on this review is that the amount was properly based on Robert Edwards' potential earning capacity rather than on his actual earnings. This argument is based on a misreading of ***Balaam v. Balaam***, wherein we discussed the limited context within which it is proper to examine the non-custodial parent's potential earning capacity. We stated that:
>
> > A divorced husband should be allowed a fair choice of a means of livelihood and to pursue what he honestly feels are his best opportunities even though he might for the present, at least, be working for a lesser financial return. This rule is, of course, subject to reasonableness commensurate with his obligations to his children and his former wife. We adopt the language of the North Carolina court as set forth in ***Conrad v. Conrad***:
> >
> > "The award should be based on the amount which defendant is earning when alimony is sought and the award made, if the husband is honestly engaged in a business to which he is properly adapted and is in fact seeking to operate his business profitably....
> >
> > "To base an award on capacity to earn rather than actual earnings, there should be a finding based on evidence that the husband was failing to exercise his capacity

> to earn because of a disregard of his marital obligation to provide reasonable support for his wife....
>
> "...." If they are to exceed [the amount justified by actual earnings], there should be specific findings that defendant is not fairly and diligently conducting the business which he has selected as appropriate to earn a livelihood for himself and his wife."
>
> ***Balaam*** presented the more common question[3] of whether the husband was intentionally shirking his marital-support obligations where it appeared that he was earning less at the time of the divorce hearing than he had earned in previous years.

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[3] *See*, *e.g.*, ***Knutson v. Knutson***, 15 Wis.2d 115, 111 N.W.2d 905 (1961) (husband left his well-paid medical practice for the express purpose of decreasing his earnings at the time of the divorce hearing in order to deflate the alimony award); *Annot.—Child Support Award—Excessiveness*, 1 ALR3d sec. 12 at 406.

The majority must be aware of the rule that the court of appeals is bound by prior decisions of the supreme court. *See* ***State v. Lossman***, 118 Wis. 2d 526, 533, 348 N.W.2d 159 (1984); *see also* ***Platz v. United States Fidelity & Guar. Co.***, 195 Wis. 2d 775, 783 n.1, 537 N.W.2d 397 (Ct. App. 1995) (Fine, J., dissenting). Yet, except for a citation to a previous method of setting child support, the majority does not cite or discuss ***Edwards***. To my knowledge, neither ***Edwards*** nor ***Balaam v. Balaam***, 52 Wis. 2d 20, 187 N.W.2d 867 (1971), the case upon which ***Edwards*** relies, have been overruled, unless one assumes that those cases were overruled by ***Sellers v. Sellers***, 201 Wis. 2d 578, 587, 549 N.W.2d 481 (Ct. App. 1996), ***Smith v. Smith***, 177 Wis. 2d 128, 136, 501 N.W.2d 850 (Ct. App. 1993), or ***Van Offeren v. Van Offeren***, 173 Wis. 2d 482, 495-97, 496 N.W.2d 660 (Ct. App. 1992).

¶16 Perhaps, calling the rose named "shirking" by another name is a method of avoiding the rules of ***Edwards*** and ***Balaam***. Superficially, this might

be appealing, but the difficulty with renaming the problem is that the supreme court has defined the rule by a concept, not a word. The supreme court wrote:

> We held in ***Balaam*** that the trial court's consideration of the husband's earning capacity, rather than his actual earnings, was improper because there was no finding—nor even a basis for a possible finding—that the husband was not "fairly or diligently working at the occupation which he [was] best suited for, nor that he [was] willfully accepting employment and resultant lower compensation for the purpose of reducing his ability to pay alimony and support money."

Edwards, 97 Wis. 2d at 119. The supreme court did not use the word "shirking" to define this concept.

¶17 Putting aside my concern with the law, I next consider the majority's application of that law to the facts of this case. As to the reasonableness of Bannigan's job switch, the trial court stated:

> The court does not believe that Miss Bannigan changed jobs as a result of a desire to be a shirker or to shirk any obligation to her—or shirk any obligation to pay child support; that she did so because work at Hufcor was stressful for her, and that she made inquiries into other employment before Adam had decided to move with his father. The timing just happened to be such that the test coincided closely with his move, but the actual employment hiring took about eight or nine months thereafter. The court does not believe that she's shirking. That she's doing something that is good for her health and is still producing income. That she would be working full-time if the opportunity arose at [her new employment].

The majority has concluded that the trial court did not mean what it said, but instead meant that Bannigan's decision to change jobs and reduce her work hours was unreasonable. The trial court's words should not be interpreted to mean something they do not.

¶18 The trial court's findings of fact correspond with its comments at the hearing:

> 5. Petitioner looked for a change of employment due to physical and mental stress that she experienced while employed at Hufcor.
>
> ....
>
> 10. Petitioner's health and disposition have improved since the change of employment. She is willing to work full-time at Federal Express Corporation when that full-time employment is available to her.

The trial court did not pull its findings out of thin air. Bannigan testified:

> Q: Okay. Why did you feel that it was better for you to take the Fed Ex job in November of '98 than to continue your employment at Hufcor in November of '98?
>
> A: I wanted to get out of the factory setting. I wanted to get sleep. It's just working that job it's just years of not getting sleep. The stress level was lower. I just wanted to move on and create a better job for myself. This job gives me different opportunities. They have an employee reimbursement if you want to go on to college, and being part-time that's an option for me. It's a good company to work for. You just have to put in a little bit of time and work your way up.

Earlier in the hearing, she also testified:

> Q: Would you explain to the judge why that was, why you concluded that for your health you had to change employers?
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> A: Well, I had gotten hurt numerous times, and they have a safety committee, and they look at why you get hurt. I got my thumb pinched between two rollers, and they try to change—change things so that doesn't happen again. They didn't change it, so I left that job. So then I took another job, and that was just physically impossible. I had—
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> Q: Why was it physically impossible?

A: It was heavy. They had men and women working side by side all the same class but doing different jobs, but technically we can do—all do everything the same. They had the men in the easy jobs and the women doing all the heavy lifting. I complained to the management, complained to my foremans; they did nothing about it.

Bannigan's present husband testified:

Q: Over the course of your marriage and while she was employed at Hufcor, did you observe in her changes in her mental and physical health that were job related?

A: Yes

....

Q: What did she attribute those problems to?

A: Job stress.

Q: So tell me what did you observe and—and when did you make these observations?

A: The observations were almost daily. Every night we would come home from work—we work the same hours, so we would ride to work together, come home together.

Q: What did you observe in her?

A: Anger

Q: What was that anger directed at?

A: I think it was attributed to a lack of sleep and just job stress.

Q: And since she changed jobs, have you noticed any changes in her mental or physical health?

A: Greatly, yes.

Q: Can you describe the changes that you have observed?

A: Her emotional upbeat is just so much better now. It's like being married to a new person again. I can't really describe it. It's just the whole outlook on life is better.

Q: Now, what do you attribute the change to?

A: Less pressure, less stress, having a job that she enjoys.

¶19 The trial court did not make a finding that Bannigan's decision to change jobs was unreasonable. Indeed, the trial judge will be surprised that the majority has put that word in his mouth. But it is only by interpreting the trial court's actual finding as a finding that Bannigan made an unreasonable change in employment that the majority can conclude that the trial court properly based its support award on Bannigan's potential earning capacity. I cannot do that.[5]

¶20 I find it difficult to decide a case such as this one without discussing the joint issues in the case we decide today and ***Balaam*** and ***Edwards.*** I recognize that ***Sellers, Smith*** and ***Van Offeren*** have avoided following ***Balaam*** and ***Edwards*** by defining the problem in another way. But when the supreme court sets out a test for using "potential earning capacity" instead of actual earnings, I conclude that it is only subterfuge to avoid that test by inventing another. I would use the test set out in ***Balaam*** and ***Edwards***. Using that test, or even the test relied upon by the majority, and accepting the trial court's conclusion that Bannigan did not change employers to avoid paying child support, the conclusion is unavoidable that the trial court erred in deciding to impute to Bannigan the income of a forty-hour work week. Because the trial court said that Bannigan did not reduce her income for the purpose of avoiding child support, but did so for health reasons, I cannot conclude that what the trial court meant to say was that Bannigan's decision to change jobs was unreasonable. Accordingly, I would reverse and remand for a support order based upon Bannigan's actual earnings.

[5] In a way, the majority's attribution to the trial court of a non-existent conclusion that Bannigan's job change was unreasonable raises a question of standard of review. Reasonableness is a question of law. *See* ***Wassenaar v. Panos***, 111 Wis. 2d 518, 525, 331 N.W.2d 357 (1983). Nonetheless, we are to give weight to a reasonableness determination because a trial court's conclusion as to reasonableness is intertwined with the factual findings supporting that conclusion. *See* ***id.*** I cannot determine, however, how we should review a conclusion of unreasonableness not made by the trial court but imputed to it.