COURT OF APPEALS
DECISION
DATED AND FILED

April 19, 2016

Diane M. Fremgen
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 Nos. 2014AP2607
2015AP1483

Cir. Ct. No. 2002FA915

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

NO. 2014AP2607

IN RE THE MARRIAGE OF:

LORI ANN L. STEPHAN,

PETITIONER-RESPONDENT,

V.

GLENN W. KROGE,

RESPONDENT-APPELLANT.

NO. 2015AP1483

IN RE THE MARRIAGE OF:

LORI ANN L. STEPHAN P/K/A LORI ANN L. KROGE,

PETITIONER-RESPONDENT,

V.

GLENN W. KROGE,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. In appeal No. 2014AP2607, Glenn Kroge appeals an order denying his motion to modify physical placement of the parties' daughter. Kroge argues the circuit court used the wrong start date for assessing whether there was a substantial change in circumstances and, regardless, erroneously determined there was no substantial change in circumstances. We conclude the court determined the correct start date. However, we further conclude Kroge was entitled to an evidentiary hearing on the issue of whether there had been a substantial change in circumstances. Accordingly, we affirm in part, reverse in part, and remand for an evidentiary hearing to determine whether there was a substantial change in circumstances and, if so, whether modification of placement is in the child's best interests.

¶2 In appeal No. 2015AP1483, Kroge appeals an order denying his motion to modify child support. Kroge argues the circuit court erred by failing to consider the shared-placement formula, imputing income to Kroge, and arbitrarily determining Kroge's earning capacity. We reject these arguments and affirm.

I. Issues concerning physical placement (appeal No. 2014AP2607)

BACKGROUND

¶3 Kroge lost his job in November 2001, when he and Lori Ann Stephan were married and living in Green Bay. Stephan filed for divorce in August 2002, and Kroge accepted a new job in Florida in January 2003. The parties entered into a divorce mediation agreement that, among other things, provided for joint custody and resolved placement of their daughter. The agreement was incorporated into the October 2003 divorce judgment, and the daughter remained in Green Bay with Stephan, who received primary placement.

¶4 Apparently, at some point between 2005 and 2008, Kroge relocated to New Hampshire.[1] Kroge subsequently moved from New Hampshire to Green Bay, where he purchased a home. In an affidavit, Kroge explained:

> In the Fall of 2008, I relocated to Green Bay from New Hampshire with the understanding with my employer at the time that I would travel when I was not caring for my daughter. I flew extensively after relocating to Green Bay—both domestically and internationally. I flew 123,953 and 103,265 miles in 2010 and 2011, respectively, with Delta Airlines alone.

On January 9, 2012, after Kroge had moved for modification of physical placement seeking equal placement, and upon the parties' stipulation, a court order modified placement. The order changed holiday visitation and increased the daughter's placement with Kroge from two nights every other week to three nights.

[1] The parties do not explain when or why Kroge moved to New Hampshire.

¶5 Kroge lost his job several months later, and subsequently found new employment. In an affidavit, he explained:

> I lost my job with BAE Systems in May, 2012. Prior to leaving BAE, I was required to travel domestically and internationally on the days that I did not have placement of [my daughter]. Prior to May 2012, I therefore could not personally exercise additional periods of placement with [my daughter] because I was traveling for business. On October 8, 2012, Fox Valley Metal Tech offered me a sales position that did not require me to be away from home, which offer of employment I accepted.

On October 11, 2012, Kroge again moved to modify placement, asserting substantial changes of circumstances existed because (1) he had relocated from New Hampshire to Green Bay and (2) he lost his job and was no longer required to travel for work. Kroge again sought equal placement.

¶6 A guardian ad litem (GAL) was appointed for the child, and a family court commissioner ultimately held an evidentiary hearing on Kroge's motion on November 11, 2013—more than a year after it was filed. The hearing was continued in February 2014. The commissioner denied Kroge's motion to modify placement on February 24, and Kroge sought de novo review in the circuit court.

¶7 Kroge lost his job at Fox Valley Metal Tech in March 2014, after approximately 1.5 years' employment. At the first appearance before the circuit court on May 1, the court held Kroge's motion open, declaring Kroge was not entitled to an evidentiary hearing until he was employed. The transcript reflects the following:

> THE COURT: [M]y understanding of the record is that his motion to … change physical placement was based upon the fact that he had a job, and this job would allow him to spend more time with his kids. Isn't that right? Isn't that right?

> [Kroge's attorney]: It's about half right.
>
> THE COURT: Well, but, okay. But my whole point is why would I take all my time in a case that is as bitter and litigious as this when I don't know what his job is. I don't know what his time with the [daughter] is.
>
> So I'm not going to deny your motion. I'm going to just set it over, and I'll give you, like, six months. If he gets a job and then you want to come in here and explain to me what the new job is and what his time is, the guardian ad litem can understand all that, I'll listen to all this, but I don't have any intention of wasting my time in a situation in which a fact that's determinative of placement is not known.
>
> [Kroge's attorney]: Your Honor, my client would testify that he is not leaving the area, that he will—
>
> THE COURT: I don't care. I mean the whole point of his motion … for a change of circumstances was his job. Now he doesn't have a job. So there's no change of circumstances that triggers me having a hearing. That's what I'm saying.
>
> Now, I'm going to be respectful and allow him to—a window here to get a job and to get stabilized, and then if he wants to come back and then make this record that this job is a change of circumstance, I'm being respectful to him, but … I have no intention of having a hearing today, entering an order, and then have him file a motion when he gets a job saying that this new job has all new facts, all new time, all new money.

¶8 Kroge's attorney informed the court Kroge had already attended some interviews in the area and requested another hearing in sixty days. The following discussion ensued:

> THE COURT: Well, just for a status I don't mind doing that, but let's—let's also be open that what we're—that what we want to do is if he does have a job, we're also going to have to have some time to see that he holds that job so just so everybody knows where I'm going. So if we get a status and he has employment, then I may schedule you a hearing based upon that new employment sometime—whatever time I give to be sure that we don't—he doesn't start a job and they don't like him and they let

> him go in the immediate time. So just so everybody knows what my—what I'm likely to do.
>
> [Kroge's attorney]: Your Honor?
>
> THE COURT: Yes.
>
> [Kroge's attorney]: My client has been contemplating retirement. If he does retire, would you then hold a hearing?
>
> THE COURT: I wouldn't know—I would grant him a hearing, yes, because I guess the—the change of circumstance would be that he's now retired. He has this additional time or whatever it is, and then I would have to decide if that's a substantial change in circumstance, and if I did, then, yeah, I would—I would certainly look at it …. I can't promise you anything, but you asked, and I gave you a top of the head.

¶9 Shortly after the May 1, 2014 hearing, Kroge obtained a new job at Jones Sign, and a status conference was held June 16. The court ordered as follows:

> [T]here's a threshold question of whether there's been a substantial change in circumstance. So, [Kroge's attorney], what I'm going to do is I'm going to ask you to file your memorandum and facts that you allege would create a substantial change in circumstance. So what I want you to do is to note to the court the last time this issue was before the court commissioner or the court and then explain to the court what you believe has occurred since that time that would be under the law a substantial change in circumstance.

¶10 Kroge lost his job at Jones Sign on July 25 and purportedly decided to retire. In his briefs to the circuit court, Kroge asserted the following, individually or collectively, constituted a change of circumstances: (1) Stephan's failure to renegotiate placement prior to the child's fourth birthday, as required by the stipulated divorce judgment; (2) Kroge's relocation from New Hampshire to Green Bay; (3) termination of Kroge's job that required him to travel extensively;

(4) elimination or reduction of the child's prior high anxiety; (5) the changed wishes of the child to spend time equally with both parents; and (6) Kroge's retirement at age sixty-three.[2]

¶11 Kroge argued the last order, for purposes of determining whether there had been a substantial change in circumstances, was the original divorce judgment, because all subsequent orders were made without holding any evidentiary hearings. Stephan, on the other hand, argued the last order for purposes of determining whether there had been a substantial change was January 9, 2012, when Kroge's biweekly placement was increased by fifty percent.

¶12 At the next hearing on August 7, 2014, the court held:

> And the matter is before the court on a *de novo* from the court commissioner, and the first threshold question of law would be whether or not there's been a substantial change in circumstance since the last time that the court had addressed the issues that are being raised. So I'm basically relying on [WIS. STAT. §] 767.451.
>
> I've carefully reviewed the briefs of the parties. I'm satisfied to find that there has not been a substantial change of circumstance. I'm going to adopt the—basically the findings that you made, [Stephan's attorney], with regard to the period of time in which the prior order had been entered and the time that this order was requested.
>
> What I've done, and I've tried to be very fair to the respondent in this matter, is I did initially put this matter on, and then Mr. Kroge had a change of employment. I put the matter back on, but I think what needs to be appreciated is—is that probably was as demonstrative as possible of

[2] Kroge filed three briefs with the circuit court, including briefs in reply to both Stephan and the guardian ad litem. In his initial brief, he asserted only four changed circumstances. Kroge's purported retirement did not occur, however, until after his first two briefs had been filed.

> why employment shouldn't be considered a substantial change in circumstance because it is so unpredictable.

The court then addressed the parties at length regarding the importance of avoiding conflict for the child's benefit. It continued: "So I'm satisfied under the law that the—that my decision is—is supported by the facts, and so, [Stephan's attorney], I'm going to ask you to draft an order with findings, and I'll sign that order …." The hearing concluded as follows:

> [Kroge's attorney]: Your Honor, if I may be heard for a moment.
>
> THE COURT: No, because I've decided. *It was all on briefs* …. So I—I've carefully looked at everything. I believe I've been fair with regard to—to calendaring the matter and trying to attend to it, but I'm satisfied that the ruling I've given today is compelled under the law. So that concludes the matter.

(Emphasis added.)

¶13 Kroge moved for reconsideration, and the circuit court granted him a nonevidentiary hearing. At that hearing, Kroge's attorney emphasized there were multiple asserted changed circumstances and commented, "I think Mr. Kroge's retirement in [and] of itself is a substantial change of circumstances …." Counsel also reasserted as changed circumstances both the job change that ended Kroge's travel requirements and the child's reduced anxiety. The court, after recounting the two job losses during the pendency of Kroge's motion to modify placement, stated:

> But I'm only wanting the record to reflect that's part of my concern is that your employment is such a fluid thing that if the court were to allow a substantial change in circumstance to be that you—that you changed your job, potentially you could be having these hearings every 30 or 45 days in the world we live because we don't live in a world anymore where people get jobs and keep those jobs for 25 or 30 years. We're living in a world where people's

> employment is so tenuous that they may have three or four jobs in a 12-month period of time, and if the court is going to entertain the notion that we grant hearings because there's a change in circumstances every time somebody changes a job, we won't have—frankly I wouldn't have any time on my calendar to do any of the other work I have, but that's—you brought it up. That's … the state of my record ….

Kroge's counsel then further emphasized Kroge's alleged retirement, asserting Kroge had applied for social security and his pension benefits, and the court took the matter under advisement.

¶14 The court issued an order holding that the last order substantially affecting physical placement was entered on January 9, 2012. It further held there had been no substantial change of circumstances since that time. The order did not contain the court's rationale.[3] Kroge now appeals.

¶15 For ease of discussion, particularly given there was no evidentiary hearing regarding the physical placement issue, supplemental background facts concerning the child support issues are set forth separately in section two of this decision.

DISCUSSION

¶16 Kroge argues the circuit court used the wrong start date for assessing whether there was a substantial change in circumstances for purposes of modifying physical placement and, regardless, erroneously determined there was no substantial change in circumstances. Revision of physical placement, after the

[3] The court's initial order that followed the August 7, 2014 hearing contained the same substance.

initial two-year period following a final divorce judgment, is governed by WIS. STAT. § 767.451(1)(b).[4] That statute provides, in part:

> 1. [A] court may modify … an order of physical placement where the modification would substantially alter the time a parent may spend with his or her child if the court finds all of the following:
>
> a. The modification is in the best interest of the child.
>
> b. There has been a substantial change of circumstances since the entry of … the last order substantially affecting physical placement.

WIS. STAT. § 767.451(1)(b)1.a.-b.

¶17 The statute creates a "two-step process for a court to follow in determining whether to substantially modify the terms of a … placement order …." ***Greene v. Hahn***, 2004 WI App 214, ¶22, 277 Wis. 2d 473, 689 N.W.2d 657. First, as a threshold matter, the court must determine whether the moving party has shown there has been a substantial change of circumstances. ***Id.*** If that showing is made, the court then proceeds to consider whether any modification would be in the best interests of the child. ***Id.***

¶18 Whether there has been a substantial change of circumstances is a mixed question of law and fact. ***Rosplock v. Rosplock***, 217 Wis. 2d 22, 32-33, 577 N.W.2d 32 (Ct. App. 1998). The circuit court's factual findings regarding circumstances "before," at the time of the last order substantially affecting placement, and "after," at the time of the new motion, and whether when compared these facts constitute a change will not be disturbed unless they are

[4] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

clearly erroneous. ***Id.*** at 33. However, whether the change is substantial is a question of law we review de novo. ***Id.***

¶19 A substantial change in circumstances is one such that it would be unjust or inequitable to strictly hold either party to the original judgment. ***Id.*** Alternatively, we have explained:

> The term "substantial change of circumstances" is well known in family law. It focuses on the facts. It compares the facts then and now. It requires that the facts on which the prior order was based differ from the present facts, and the difference is enough to justify the court's considering whether to modify the order.

Licary v. Licary, 168 Wis. 2d 686, 692, 484 N.W.2d 371 (Ct. App. 1992) (citing ***Delchambre v. Delchambre***, 86 Wis. 2d 538, 539, 273 N.W.2d 301 (1979)).

Determination of the last order substantially affecting physical placement

¶20 Kroge first argues the circuit court erroneously determined that the January 9, 2012 order—which increased Kroge's biweekly placement by fifty percent—was the last order substantially affecting physical placement. That order was issued based on the parties' stipulation. Kroge contends an order does not count as one under WIS. STAT. § 767.451(1)(b) unless it was based on an evidentiary hearing. We do not find Kroge's argument persuasive, and we agree with the circuit court that the January 2012 order is the proper starting point for determining whether Kroge demonstrated a substantial change of circumstances.

¶21 Kroge's poorly developed argument primarily relies on a handful of cases decided four to five decades ago—predating the statute—addressing a common-law substantial-change-of-circumstances requirement. Regardless of whether those cases actually support Kroge's position, they are irrelevant to

determining the meaning of WIS. STAT. § 767.451(1)(b), which is clear on its face. *See* ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (Statutory language is given its common, ordinary, and accepted meaning.). The statute refers to "entry of … the last order substantially affecting physical placement." Quite simply, an "order" is an order, regardless of whether it was based on a stipulation or an evidentiary hearing. Kroge's argument fails to address the statutory language. Moreover, Kroge's interpretation would lead to absurd results, discouraging stipulations because any placement orders based thereon would be subject to immediate review even where the facts had not changed. *See* ***Kalal***, 271 Wis. 2d 633, ¶46 (statutes must be interpreted to avoid absurd results). Indeed, this result would run contrary to the principle of res judicata purportedly espoused in the old cases Kroge cites.[5]

¶22 Given our holding, Kroge's move from New Hampshire to Green Bay is excluded from the substantial-change-of-circumstances analysis because the move occurred prior to the January 9, 2012 order. *See* WIS. STAT. § 767.451(1)(b)1.

Whether a substantial change in circumstances existed

¶23 The circuit court decided the substantial-change-of-circumstances issue after considering only argument, briefs, and affidavits. While a physical-placement-modification determination under WIS. STAT. § 767.451(1)(b) might in

[5] Kroge also cites ***Culligan v. Cindric***, 2003 WI App 180, 266 Wis. 2d 534, 669 N.W.2d 175, in support of his argument. However, he provides an incomplete case citation, omits any pinpoint citation, and misrepresents the facts of that case. We therefore deem the argument undeveloped and do not address it further. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (we may decline to consider issue that is undeveloped in the briefs or that is not supported by citation to legal authority).

some circumstances be resolved by a party's motion to dismiss or for summary judgment, ordinarily an evidentiary hearing is necessary. WISCONSIN STAT. § 767.17 provides: "A decision of a circuit court commissioner under this chapter is reviewable under s. 757.69(8)." That statute, in turn, states:

> Any decision of a circuit court commissioner shall be reviewed by the judge of the branch of court to which the case has been assigned, upon motion of any party. Any determination, order, or ruling by a circuit court commissioner may be certified to the branch of court to which the case has been assigned, upon a motion of any party for a hearing de novo.

WIS. STAT. § 757.69(8). Under this statute, Kroge was entitled to an evidentiary hearing to demonstrate there had been a substantial change in circumstances. "[A] party who requests a 'hearing de novo' is entitled to a hearing that includes testimony from the parties and their witnesses, rather than simply a review of what occurred before the family court commissioner." ***Stuligross v. Stuligross***, 2009 WI App 25, ¶11, 316 Wis. 2d 344, 763 N.W.2d 241 (citing § 757.69(8)).

¶24 Kroge's motion and affidavits alleged he had traveled extensively for his job at BAE but was no longer required to travel for work at any time after he lost that job in May 2012, regardless of whether or where he was employed thereafter. He further asserted he retired from full-time employment on July 25, 2014.

¶25 On the other hand, Stephan asserts the historical record conflicts with Kroge's averment that he was unavailable for additional placement prior to losing his job at BAE. In Kroge's December 21, 2011 motion to modify placement, while still employed at BAE, he sought "co-equal physical placement." The court then modified placement on the parties' stipulation just weeks later on January 9, 2012, increasing Kroge's placement from two to three nights every

other week. He subsequently filed the motion at issue in this appeal only nine months later, again requesting "co-equal placement," and averred he no longer had to travel extensively out of town due to his job loss. One could speculate from these historical facts that Kroge's travel requirements at BAE did not preclude fifty-fifty placement, since he requested as much while still employed there. However, one might as easily speculate that Kroge merely employed a common negotiating tactic by initially requesting more than he sought, or that he overestimated the scheduling flexibility afforded by his employer.

¶26 On these facts, Kroge was entitled to an evidentiary hearing to demonstrate there was a substantial change of circumstances for purposes of physical placement since the January 9, 2012 order. Kroge asserted he no longer had to travel extensively and had subsequently retired. Based on either of these alleged lifestyle changes, one could reasonably conclude Kroge had substantially more time available in which he could exercise physical placement.[6] Any conclusions in this regard depend on an assessment of whatever evidence is presented at the evidentiary hearing. Kroge's employment instability following the loss of his six-plus years of employment at BAE does not alone negate Kroge's

[6] We need not address whether Kroge's additional asserted changes of circumstances entitled him to a hearing. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).

We also do not address Stephan's argument that Kroge's overzealous prosecution of the placement issue was motivated by a desire to punish her. The argument was not raised in the circuit court, is undeveloped on appeal, and Kroge should have received an evidentiary hearing in the circuit court in the first instance.

We also do not address the guardian ad litem's proposed issue, seeking clarification whether a guardian ad litem should be involved in the threshold determination of whether there has been a substantial change in circumstances. This was not an issue raised by the parties in this appeal, and we do not issue advisory opinions.

asserted changed circumstance—that he was, in fact, now available for increased placement due to the absence of a work-travel requirement, which availability did not exist at the time of the January 9, 2012 order.

¶27 Accordingly, we reverse and remand for an evidentiary hearing to determine whether there was a substantial change in circumstances and, if so, whether modification of physical placement is in the child's best interests.[7]

II. Issues concerning child support (appeal No. 2015AP1483)

ADDITIONAL BACKGROUND

¶28 As noted above, the last order affecting physical placement was filed January 9, 2012. A November 2005 stipulated order specified a negotiated amount of monthly child support, and it was the operative support order at the time of the proceedings underlying this appeal.[8] That order provided for three percent annual increases in support and, as of May 2015, Kroge's monthly payment was $1043.82.

¶29 Kroge had previously moved to revise child support together with his motion to modify physical placement. However, proceedings on that combined motion were stayed pending appeal, and Kroge filed a new motion to

[7] We note that, because any future determinations of whether there was a substantial change in circumstances would be measured from the date of any order substantially modifying placement upon remand, the circuit court will need to make its substantial-change determination as of the then-current fact situation.

[8] Additionally, the stipulated order provided that if either party challenged the child support schedule, then that person would be responsible for the other party's attorney's fees and costs. During testimony on that subject, the court interjected that it believed such agreements were forbidden under Wisconsin law. Stephan's counsel agreed.

revise child support on December 16, 2014. Kroge's motion sought support "consistent with the existing placement order and the respective income of the parties."

¶30 The circuit court held an evidentiary hearing on the child support motion on May 12, 2015. Kroge testified he had intended to retire and, did so, upon his job loss on July 25, 2014. However, Kroge stated he applied for social security but was denied benefits because he was not yet age sixty-seven. He then clarified for the court that although he could have retired at age sixty-two and received reduced benefits, he chose not retire. He later explained, "I found that my income wouldn't be substantial enough to support my daughter and myself." When Stephan's counsel responded, "Well, when you retire, you don't have any income[,]" the court told counsel, "I know what's going on. I mean I'm … following all this, and … so if you want to ask some other questions, that would be fine." Kroge reaffirmed the truthfulness of his prior representations in affidavits and court filings where he had asserted that he had retired. On redirect, Kroge agreed that his assertions of retirement in court filings were made because he "had made that decision, applied for Social Security benefits." The court interjected that the redirect testimony was not "clarifying anything. I mean I … really understand what this all is, [counsel]. … I'm getting it. … So go ahead."[9]

¶31 Kroge had fallen behind approximately $2400 in child support payments, but he paid that sum after the county placed a lien on his house and car.

[9] It does not appear the circuit court explained what, precisely, it was that it repeatedly stated it understood. However, during Kroge's testimony, the court observed, "I'm not finding any reason to believe that [Kroge is] not testifying truthfully." Later, while Kroge was being cross-examined, the court stated, "I'm assuming everything I'm hearing is true and factual."

However, he testified he was again in arrears on support because he was only receiving unemployment compensation, and half of each check was deducted for support. Kroge stated he was also living off his savings, which were about $50,000.

¶32 Kroge explained that to receive unemployment compensation he was required to submit at least four applications for employment each week. He asserted he applied for every sales job he "g[o]t wind of." He also introduced an exhibit listing eighteen companies, which he explained was a log of all the companies to which he had applied in "the last three or four weeks." Kroge surmised his lack of success obtaining new employment was due to age discrimination. He explained he was age sixty-four and stated, "I almost dread going to interviews because they're going to see me and pretty well guess how old I am …."

¶33 Kroge testified he lived in a condominium in a waterfront gated community. He purchased the condominium in 2010, paying ten percent down and financing approximately $301,000. His monthly mortgage payments were $1850 and did not include any escrow for the $6100 annual real estate taxes. His condominium fees were $275 monthly. Kroge had fallen slightly behind on his mortgage and condominium fees, but he paid the condominium fees when threatened with a lien. Kroge had not listed his condominium for sale, but he had one realtor view it.

¶34 Kroge also sought to introduce evidence showing he had over 25% court-ordered physical placement, which would allow use of the shared-placement formula for determining child support, rather than applying the simple seventeen-percent-of-income rule set forth in WISCONSIN ADMIN. CODE

§ DCF 150.03(1)(a).[10] Stephan objected that the argument was beyond the scope of Kroge's motion, and the circuit court agreed. However, the court indicated Kroge's counsel could "send me a written offer of proof, and I'll make it part of the file."[11] Kroge's subsequent offer of proof included a table listing the anticipated number of days and annual percentage of court-ordered placement for each year from 2015 through 2019.[12] The days ranged from 91 to 106 days per year, the annual percentage ranged from 25% to 29%, and the calculated averages for the five years were 100 days and 27%. However, the numbers in Kroge's exhibit included holiday and vacation placement, whereas Kroge's regular placement schedule was three overnights in every fourteen-day period, which is approximately 78 days and 21.4%.

¶35 The court questioned Kroge at the end of the hearing. After clarifying that Kroge was responding to actual job postings as opposed to blindly filing applications, the court inquired what salary the companies listed on Kroge's exhibit were offering. Kroge responded, "It's running anywhere between … 65,000 to 100,000." The court subsequently observed, "[Y]ou're clearly indicating to me in my opinion that you … have not retired because if you had

[10] WISCONSIN ADMIN. CODE § DCF 150.04(2) sets forth the shared-placement formula, which may only be used to determine the amount of child support if "[b]oth parents have court-ordered periods of placement of at least 25% or 92 days a year." This formula considers the income of both parents, as well as each parent's percentage of physical placement, in the calculation.

All references to WIS. ADMIN. CODE ch. DCF 150 are to the Nov. 2009 version.

[11] Kroge's counsel explained he had intended to introduce evidence regarding physical placement, Stephan's income, and the proposed amount of support.

[12] Kroge's posthearing offer of proof also addressed Stephan's finances, including averments that her "total income for 2011, the last year which she produced a signed tax return, is $95,290[,]" and that she owned multiple investment properties and a realty company.

been retired, you … would be committed to adjusting your lifestyle to live off your savings and your Social Security."

¶36 The court then excused Kroge as a witness and requested he provide a copy of his 2014 income tax return. Further, it stated:

> I'm going to make the following finding: I'm going to find that [Kroge] ceased his employment with Jones Sign in July of 2014, that since that time he … has secured unemployment … compensation, but … has been looking for employment but has been unsuccessful securing employment. ...
>
> I'm going to find that there has been a substantial change in circumstances and that the prior agreement [of] the parties is not binding on the court. It's against public policy.
>
> … I'm satisfied that he presently does not have a job that represents his earning capacity and that he's seeking such a job. So in order to avoid just this constant coming back and coming back, part of my task is to decide what is his earning capacity. When I pick that number, I will then apply the 17 percent to that ….
>
> … Kroge has limited income at this time but … continues to live at the lifestyle that could only be supported by a number that's between … $65,000 and $100,000, he has made a decision that in his belief … he will secure such employment to allow him to continue with that lifestyle.

¶37 Following receipt of Kroge's offer of proof and 2014 income tax filing, the court issued a written decision. The decision provides in part:

> The record before the Court suggests Kroge is in fact searching for work during a temporary period of unemployment, and that an earning capacity analysis is necessary.
>
> ….
>
> Kroge's attorney argues that the Court cannot calculate his child support based upon earning capacity because there is no evidence in the record that Kroge is "shirking." The Court disagrees. Although Kroge was involuntarily terminated from his position at Jones Sign, there was ample

> evidence offered at the … hearing to allow the Court to conclude that Kroge's actions since have been voluntary and unreasonable. Kroge maintains that he is seeking employment but has not yet secured a new position. There was also ample evidence offered of Kroge's current lifestyle. Despite his loss of employment, Kroge continues to keep a lifestyle similar to before his termination …. This lifestyle, including two mortgages on a waterfront condominium totaling over $300,000, does not suggest Kroge's circumstances have changed, regardless of Kroge losing employment. Accordingly, the Court will calculate Kroge's earning capacity to determine his child support obligations.

The court then observed the salary range of the jobs for which Kroge was applying was $65,000 to $100,000 and his 2014 income was $72,062. The court averaged those three numbers together to arrive at Kroge's annual earning capacity of $79,020.66.

¶38 The court determined seventeen percent of Kroge's earning capacity would be $1,343.35 monthly. It then held:

> Kroge's current monthly child support payment is $1,043.82. There is no motion before the Court to increase child support, so the Court declines to do so. Based upon the evidence presented at the … hearing, the Court finds that a substantial change in circumstances exists based on Kroge's loss of employment and current job search. However, for the reasons set forth above, the Court will order the continuation of child support at the previous amount of $1,043.82.

Kroge now appeals the child support order.[13]

[13] We observe that Stephan's statements of facts in both appeals are interspersed with characterizations and argument, which is unhelpful.

DISCUSSION

¶39 Kroge argues the circuit court erroneously determined child support by: (1) failing to consider the shared-placement formula; (2) imputing income to Kroge based on shirking; and (3) arbitrarily determining Kroge's earning capacity.

¶40 We first address application of the shared-placement formula. Kroge contends the court "erred as a matter of law" when it held his motion to modify child support did not encompass the issue of whether the shared-placement formula was applicable. While we tend to agree with Kroge that the issue was properly before the court, he does not explain why such an error requires reversal.

¶41 Stephan responds that even assuming, arguendo, Kroge has slightly more than the minimum physical placement giving rise to application of the shared-placement formula, a court is not required to apply the formula. Rather, she argues, the administrative code leaves the matter to a court's discretion.[14]

¶42 We agree with Stephan. WISCONSIN ADMIN. CODE § DCF 150.04 provides: "Child support *may* be determined under special circumstances as follows[.]" (Emphasis added.) In turn, § DCF 150.04(2), titled, "DETERMINING THE CHILD SUPPORT OBLIGATIONS OF SHARED-PLACEMENT PARENTS," provides:

> (a) The shared-placement formula *may* be applied when both of the following conditions are met:
>
> 1. Both parents have court-ordered periods of placement of at least 25% or 92 days a year. The period of placement for each parent shall be determined by calculating the number

[14] While Stephan declares "the trial court properly exercised its discretion in not applying the shared-placement child support formula[,]" she does not support this legal conclusion with any argument.

> of overnights or equivalent care ordered to be provided by the parent and dividing that number by 365. …
>
> ….
>
> (b) The child support obligations for parents who meet the requirements of par. (a) *may* be determined as follows: ….

(Emphasis added.) The repeated use of "may" throughout the relevant portions of § DCF 150.04 strongly indicates application of the shared-placement formula is discretionary. Kroge does dispute this interpretation.

¶43 Instead, Kroge replies that Stephan's argument "misses the point that the circuit court must consider the income of each parent and the amount of physical placement when determining a child support obligation. WIS. STAT. § 49.22(9)." Citing ***Wisconsin Citizens Concerned for Cranes and Doves v. Wisconsin DNR***, 2004 WI 40, 270 Wis. 2d 318, 677 N.W.2d 612, without discussion, he contends Stephan's argument thus fails "as a matter of law" because "the plain meaning of a statute takes precedence over all extrinsic sources and rules of construction, including agency interpretations."

¶44 It is Kroge's argument that misses the point. WISCONSIN STAT. § 49.22(9) merely directs the Department of Children and Families to "promulgate rules that provide a standard for courts to use," which rules "shall provide for consideration of the income of each parent and the amount of physical placement with each parent … in cases in which a child has substantial periods of physical placement with each parent." The Department promulgated such a rule in WIS. ADMIN. CODE § DCF 150.04, and that rule extends discretion to the circuit court.[15]

[15] Kroge does not develop any argument that WIS. ADMIN. CODE § DCF 150.04 is invalid.

¶45 For the above reasons, we deem Kroge's argument and reply inadequately developed and, in any event, wrong. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (we need not decide issues that are inadequately briefed); ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). Further, Kroge does not argue the court could not have properly exercised its discretion to not apply the shared-placement formula, and we will not develop an argument on his behalf. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) ("We cannot serve as both advocate and judge."). We note, however, that even accepting Kroge's proffered evidence, his physical placement of his daughter was only slightly above the twenty-five percent minimum to trigger a shared-placement analysis. This weighs in favor of a decision not to apply the formula.

¶46 We next address Kroge's argument that the court improperly attributed income to him based on shirking. Our supreme court has explained:

> A circuit court [will] consider a parent's earning capacity rather than the parent's actual earnings only if it has concluded that the parent has been "shirking," to use the awkward terminology of past cases. To conclude that a parent is shirking, a circuit court is not required to find that a former spouse deliberately reduced earnings to avoid support obligations or to gain some advantage over the other party. A circuit court need find only that a party's employment decision to reduce or forgo income is voluntary and unreasonable under the circumstances.

Chen v. Warner, 2005 WI 55, ¶20, 280 Wis. 2d 344, 695 N.W.2d 758. Further, "[w]hen a parent's change in financial circumstances is initially nonvolitional, there should be positive evidence of his or her bad faith in failing to recover financially unless the trial court can find that the parent's explanation or circumstances are inherently improbable or the parent's veracity is discredited."

Wallen v. Wallen, 139 Wis. 2d 217, 226, 407 N.W.2d 293 (Ct. App. 1987). The circuit court "is the ultimate arbiter of witness credibility, and where more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact." ***Id.*** at 224. The reasonableness of a parent's employment decision to reduce or forgo income is a question of law, but it is reviewed with appropriate deference to the circuit court because the legal conclusion is extensively intertwined with factual conclusions. ***Chen***, 280 Wis. 2d 344, ¶¶41-43.

¶47 The circuit court's oral and written rulings are admittedly imprecise in their rationale for imputing income to Kroge. Nonetheless, implicit in the court's written decision is that it found Kroge dilatory in obtaining new employment. The court, as fact finder, was entitled to reject Kroge's testimony that his failure to obtain gainful employment was due to age discrimination. The court also concluded, based on Kroge's lifestyle choices, that Kroge anticipated being employed in the near future. Based on these findings, the court could properly determine Kroge was intentionally receiving only unemployment compensation as income. We agree Kroge's choice was unreasonable given his historical income and exceptional resume, which is in the record. Accordingly, the court appropriately imputed income to Kroge based on shirking.

¶48 Finally, we address Kroge's argument that the circuit court arbitrarily determined his earning capacity. WISCONSIN ADMIN. CODE § DCF 150.02(14) defines earning capacity as follows:

> The amount of income that exceeds the parent's actual income and represents the parent's ability to earn, based on the parent's education, training and recent work experience, earnings during previous periods, current physical and mental health, history of child care responsibilities as the

> parent with primary physical placement, and the availability of work in or near the parent's community.

The circuit court's determination of income is a finding of fact that an appellate court will not set aside unless clearly erroneous. ***DeLaMatter v. DeLaMatter***, 151 Wis. 2d 576, 588, 445 N.W.2d 676 (Ct. App. 1989).

¶49 Kroge contends the court erred because there was no expert testimony, his earning potential decreased due to his advanced age, and the $65,000 to $100,000 salary range he offered in his testimony was mere speculation. We reject Kroge's arguments and conclude the record amply supports the court's determination.

¶50 First, Kroge provides no legal support for his contention that expert testimony was necessary to determine earning capacity. *See* ***Flynn***, 190 Wis. 2d at 39 n.2 (arguments not supported by legal authority will not be considered). Second, the court was entitled to reject Kroge's self-serving testimony that his failed job search was due to age discrimination, as opposed to a lack of diligence. Third, the record refutes Kroge's assertion that the salary range he testified to was based on speculation because he "would not know this information until he is offered a job." That was not his sworn testimony. Rather, after the court confirmed Kroge was responding to actual job postings, it inquired what salary the companies listed on Kroge's exhibit were offering. Without qualification, Kroge responded, "It's running anywhere between, you know, 65,000 to 100,000." The court did not err by accepting Kroge's own testimony.

¶51 The court requested and reviewed Kroge's most recent tax filing, which reflected only seven months' employment plus some amount of unemployment compensation. That filing indicated he earned slightly over

$72,000 in 2014 despite his partial employment. The court then factored that reduced number into the broad salary range of job opportunities it believed Kroge was qualified for, the midpoint of that range being $82,500. The court was also aware of Kroge's work history and resume, and it expressly stated during the evidentiary hearing that it considered his earning potential was likely reduced due to his age. The court also considered that Kroge had continued living the lifestyle he previously enjoyed. That fact supports a conclusion Kroge's earning potential had not significantly diminished. Considering all those factors, the court arrived at approximately $79,000. We cannot conclude that finding is clearly erroneous.

¶52 Moreover, the court did not order child support based on 17% of the $79,000 figure. Rather, it maintained support at the prior amount of $1043.82. That amount is only 15.85% of Kroge's imputed income, and equates to 17% of $73,680 annual income. Thus, to the extent Kroge would have a legitimate issue, he would need to demonstrate his earning potential was less than $73,680. Aside from his claimed age discrimination, Kroge offers no evidence to suggest his earning potential is less than that amount.

¶53 For the reasons stated above, we affirm in part and reverse in part the order denying Kroge's motion to modify physical placement and we remand for an evidentiary hearing, but we affirm the order denying Kroge's subsequent motion to modify child support. Neither party shall recover WIS. STAT. RULE 809.25(1) appellate costs in either appeal.

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

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