

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 30, 2003

Cornelia G. Clark
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 No. 03-1316-FT
STATE OF WISCONSIN**

Cir. Ct. No. 01-FA-0718

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

SUSAN A. WISEMAN,

PETITIONER-RESPONDENT,

v.

KEVIN R. WISEMAN,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Reversed and cause remanded with directions.*

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

¶1 PER CURIAM. Kevin and Susan Wiseman were divorced on December 18, 2002.¹ Among other things, the trial court found that Kevin's earning capacity was \$55,222 for purposes of child support; that, in addition to child support, he must contribute toward the children's daycare costs; and that he must pay half of a debt to Susan's father. Kevin appeals these issues, arguing the trial court erroneously exercised its discretion by (1) setting child support in excess of his current income without a finding that he was shirking; (2) ordering him to contribute to daycare costs on top of child support; and (3) ordering him to pay on a moral obligation without determining whether it was also a legal obligation. We agree and reverse the judgment.

BACKGROUND

¶2 Kevin and Susan were married on July 12, 1991. They have two minor children. On November 5, 2001, Susan filed for divorce. At that time, Kevin was vice-president of sales at Ariens Corporation and earned \$7,650 per month, plus bonuses. Susan worked part time at the YMCA and made \$117 per month. By the time the divorce was finalized, Susan was membership director at the YMCA and made \$2,500 per month. In November 2002, Kevin was terminated from his job due to economic factors at Ariens.

¶3 A hearing was held on December 18, 2002. As part of the property division, Susan offered evidence of debts the couple owed to her father. One was for \$2,575 and the other \$2,200. Susan's father testified that the Wisemans had

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

made no payments on the first debt and had paid a total of \$300 on the second debt. He stated he never demanded payment from them.

¶4 The court ordered Kevin to pay child support of \$882.69 bi-weekly until February 18, 2003, when another hearing would take place. The court suspended maintenance payments and held issues of daycare and property division under advisement until the February hearing. The court asked that Kevin present testimony at that hearing regarding his job search.

¶5 At the February 18 hearing, Kevin testified that he had sent resumes all over the country, amounting to just over one hundred in three months. He stated he was offered only one job, at Home Depot in Jacksonville, Florida, that would have paid \$15 per hour. By this time, Kevin's severance package was used up and unemployment compensation of \$325 per week would begin on February 20.

¶6 The court found that Kevin had an earning capacity of \$55,222 per year for purposes of child support. The court arrived at this figure by averaging Kevin's income from the previous nine years, excluding 2002 because his income that year was much greater than previous years. Child support was set at \$1,150 per month, which represents 25% pursuant to the percentage standards. Because Kevin was out of work, the court ordered him to pay \$650 per month with the balance accruing an arrearage. The court made no finding that Kevin shirked his responsibilities or that he did not actively search for employment. The court also ordered Kevin to pay half the children's daycare costs. Finally, the court determined that the money borrowed from Susan's father was a "moral obligation" and would be included in the property division. Kevin appeals.

DISCUSSION

A. Child Support

¶7 The determination of appropriate child support is committed to the sound discretion of the circuit court. *Weidner v. W.G.N.*, 131 Wis. 2d 301, 315, 388 N.W.2d 615 (1986). Whether the trial court properly exercised its discretion is a question of law which we review independently. *Seep v. State Personnel Comm'n*, 140 Wis. 2d 32, 38, 409 N.W.2d 142 (Ct. App. 1987). We will sustain a discretionary act if we conclude that the trial court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995).

¶8 Kevin argues the trial court erroneously exercised its discretion by setting child support in excess of his income without finding that he was shirking his responsibilities. However, Susan maintains that child support may be based on Kevin's earning capacity even if he is not actually earning that amount.

¶9 To base a child support award on capacity to earn rather than actual earnings there should be a finding based on evidence that the parent was failing to exercise his or her capacity to earn because of a disregard of his or her support obligations. *Balaam v. Balaam*, 52 Wis. 2d 20, 28, 187 N.W.2d 867 (1971). A trial court's consideration of earning capacity rather than actual earnings is improper absent a finding that the parent was not "fairly or diligently working at the occupation which he [was] best suited for, [or] that he [was] willfully accepting employment and resultant lower compensation for the purpose of reducing his ability to pay ... support money." *Edwards v. Edwards*, 97 Wis. 2d 111, 119, 293 N.W.2d 160 (1980) (quoting *Balaam*, 52 Wis. 2d at 28-29).

¶10 In *Wallen v. Wallen*, 139 Wis. 2d 217, 225-26, 407 N.W.2d 293 (Ct. App. 1987), we determined that “perhaps the most common factor accompanying [a finding of shirking] is a voluntary or self-inflicted change in financial circumstances.” 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.” *Id.* at 226.

¶11 Susan cites two cases where the parent was earning below earning potential. However, neither case lends her support. First, she cites *Sellers v. Sellers*, 201 Wis. 2d 578, 584-85, 549 N.W.2d 481 (Ct. App. 1996), where the husband left a job paying \$25,000 to \$30,000 per year to take a job paying only \$13,000 per year. We upheld the trial court’s determination that the husband’s earning capacity was \$40,000 and that his child support obligations would be based on that amount rather than the \$13,000 he was actually earning. *Id.* at 588-89. However, Kevin’s situation is distinguishable because his unemployment was involuntary.

¶12 Second, Susan cites *Forester v. Forester*, 174 Wis. 2d 78, 83, 496 N.W.2d 771 (Ct. App. 1993), where the wife voluntarily left one job for a lower-paying one. We determined that support could be based on the earning capacity of the job she left. *Id.* at 97. Again, unlike Kevin, the wife in *Forester* left the higher-paying job voluntarily.

¶13 Here, the court made no finding that Kevin was shirking his responsibilities. Kevin’s unemployment was involuntary. He lost his job due to economic circumstances. Additionally, there is no evidence of bad faith in his

attempts to secure new employment. Kevin testified that he had applied for approximately one hundred jobs in less than three months. He has not turned down any reasonable offer. In fact, the only offer he had was for a \$15 per hour job in Florida. The court therefore erroneously exercised its discretion by setting child support in excess of Kevin's actual earnings.

B. Daycare Costs

¶14 In ordering child support, the trial court applied the percentage standards set by the Department of Health and Family Services. WIS. STAT. § 767.25(1j). However, in addition, the court ordered Kevin to pay half the daycare expenses.

¶15 There is no provision in WIS. STAT. § 767.25 for ordering child care costs, such as daycare expenses, beyond child support payments. A trial court may only depart from the percentage standards "if, after considering the factors listed in § 767.25(1m) ... the court finds, by the greater weight of the credible evidence, that the use of the percentage standard is unfair to the child or to any of the parties." *Kjelstrup v. Kjelstrup*, 181 Wis. 2d 973, 975, 512 N.W.2d 264 (Ct. App. 1994); *see also* § 767.25(1m).

¶16 Here, the trial court did, in fact, deviate from the child support guidelines by ordering payment of daycare expenses in addition to child support. Thus, the trial court was required under WIS. STAT. § 767.25 to explain its deviation from the guidelines. It did not do so.

¶17 We recently addressed this issue in *McLaren v. McLaren*, 2003 WI App 125, 665 N.W.2d 405. There, the trial court awarded daycare costs in addition to child support. *Id.*, ¶15. The court did not discuss any of the factors

required for deviation, and we determined it erroneously exercised its discretion as a result. *Id.*, ¶¶16-17.

¶18 Here, similarly, the trial court did not discuss any of the factors required for deviation. Consequently, the court erroneously exercised its discretion by awarding daycare expenses in addition to child support.

¶19 Susan argues that *McLaren* had not yet been decided at the time of the trial court's determination in this case. Therefore, she maintains the court was not on notice that it had to specifically state the reason for deviating from the statutory guidelines. However, *McLaren* did not create new law, but was stating what the law already was. Even before *McLaren*, courts were statutorily required to state their reasons for deviation from the guidelines.

C. Debt Owed to Susan's Father

¶20 The trial court determined that “[i]t's a moral obligation to repay parents because of the relationship and the trust, even if in fact it's not a legal obligation.” The court then ordered Kevin to pay half the debt. Kevin argues that the court did not find that the debt was a legal obligation and he therefore cannot be required to pay it.

¶21 “The law deals only with enforceable rights, and if such a right be changed to a mere moral obligation, in a legal sense it no longer exists at all.” *Haase v. Sawicki*, 20 Wis. 2d 308, 313, 121 N.W.2d 876 (1963). We are unclear what the trial court meant by “even if in fact it's not a legal obligation.” We cannot tell whether the court assumed it was a legal obligation or that it was not. We therefore remand for a determination whether the debt is a legal obligation. If it concludes that the debt is a legal obligation it may be considered in the property

division. If it is not a legal obligation, then it may not be considered in the property division and the trial court must make an appropriate adjustment to the property division.

By the Court.—Judgment reversed and cause remanded with instructions.

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

