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DISTRICT II

October 15, 2025

To:

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Circuit Court Judge
Electronic Notice

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
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John Anthony Ward
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You are hereby notified that the Court has entered the following opinion and order:

2024AP2037 Anthony Ronald Simonovich v. Rachel Ann Simonovich (L.C. #2023FA14)

Before Gundrum, Grogan, and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Rachel Ann Simonovich appeals from an order modifying child support and setting the rate of support at $94 per month. She argues that the circuit court first erred when it increased her imputed income from the amount established by the parties' marital settlement agreement in the absence of any evidence supporting that alteration and then subsequently erred when it used that figure as part of the basis for reducing her ex-husband's child support obligation. Based upon our review of the briefs and Record, we conclude at conference that this case is appropriate

for summary disposition. *See* WIS. STAT. RULE 809.21 (2023-24).[1] We affirm in part, reverse in part, and remand with directions.

Pursuant to a prior divorce action, Rachel and her ex-husband, Anthony, entered into a marital settlement agreement. The agreement provided, *inter alia*, that Rachel and Anthony would have joint custody of their two minor children and that Anthony would make biweekly child support payments to Rachel in the amount of $428.31, which was based upon Anthony's $70,000.00 annual income and Rachel's imputed $18,720 annual income. Because Rachel was a full-time graduate student at the time, the agreement also provided that "Rachel's graduation from her course of higher education will result in a review of Anthony's child support obligation." The circuit court entered a judgment of divorce incorporating the entirety of the marital settlement agreement.

Approximately six months later, Anthony filed a motion for modification of child support in which he requested that the circuit court suspend his child support payments due to a "significant change in circumstances[,]" namely, that he had been laid off from his employment and his "income ha[d] been substantially reduced." Notably, the motion did not request that the court alter Rachel's imputed income from the amount dictated by the martial settlement agreement. At the August 2024 hearing on Anthony's motion, and prior to any testimony being taken, Anthony's counsel explained that Anthony lost the job he held during the pendency of the divorce and that, consequently, Anthony's yearly income fell from $70,000 "to roughly around $36,000." Counsel then presented the court a new proposed calculation—despite the motion

[1] All references to the Wisconsin Statutes are to the 2023-24 version.

only having requested *suspension* of Anthony's payment obligation—to modify child support payments and the following exchange occurred:

> [COUNSEL FOR ANTHONY]: If you impute [Rachel's] income at $30,000, which I believe she is capable of making given the fact that even McDonald's is offering positions now for $15 an hour. That's a 40-hour workweek at $15 an hour.
>
> THE COURT: So is Wal-Mart. And I know plenty of high school kids working at Woodman's making at least $18 an hour.
>
> [COUNSEL FOR ANTHONY]: Right. So I impute her income at 30,000. I have his income at 36,000. That calculates out to a … monthly child support of $94 given the placement schedule.

Following this exchange, the court stated it would "feel more comfortable" if testimony was provided prior to it rendering a decision. Accordingly, Anthony testified that at the time of the divorce, he "was working for Accurity Consolidated" doing "[r]eal estate appraisals" and that in that role he had an annual salary of $70,000. He explained that due to "a nationwide mass layoff[,]" he was terminated along with "[p]retty much all of [Accurity's] salaried employees[.]" During cross-examination, it was revealed that Anthony loaned money to his brother despite being behind on child support payments. With respect to Rachel's work experience, Anthony confirmed only that Rachel had essentially been a stay-at-home mom during the course of their marriage and that he had been "the primary breadwinner," and he also confirmed that Rachel had gone back to school during their marriage and that she had not yet completed her education at the time the parties divorced. Rachel did not testify.

At the conclusion of testimony, the circuit court heard argument from counsel. Rachel's attorney referenced the marital settlement agreement's provision dictating Rachel's imputed income and argued that opposing counsel "ha[d] provided absolutely zero evidence today to substantiate any contrary change to the contractual agreement the parties made[.]" Rachel's

counsel also opposed the proposed modification to Anthony's imputed income and argued that Anthony's "attempts to become employed at the same amount that he earned at the time of the divorce [were] inadequate[.]"

The circuit court granted Anthony's motion, finding that Anthony "lost his job due to a mass layoff" and that he made sufficient attempts to find other work. The court admonished Anthony for making loans to family members while behind on his own child support obligations and reminded him that he could "go to jail for not paying [his] child support." The court also granted counsel's request—made for the first time at the hearing—to "impute about $30,000 per year" to Rachel, stating it had "heard no testimony that she is incapable of making that amount of money."[2] The court again referenced its anecdotal knowledge that "neighbors" and other individuals make comparable wages at "Woodman's, Wal-Mart, [and] places like that" and concluded that Rachel "is more than capable of making that" and that "say[ing] that she can't is diminishing her power, her abilities, and I'm not going to do that." Accordingly, the court found that Anthony's proposed child support modification request was reasonable and ordered that Anthony's child support obligation be set at $94 per month. Rachel's counsel then asked the court if it was "making any findings of [Rachel]'s change of circumstances since the entry of Judgment of Divorce" in which Rachel's imputed income was set at $18,720. The court responded only that it had "made [its] decision." Rachel timely appealed.

Rachel first asserts that the circuit "[c]ourt did not appropriately determine whether [Anthony's] decision to become self-employed [was] reasonable." While she does not contest

[2] Interestingly, the circuit court also heard no testimony that Rachel *could* do so.

that Anthony experienced a substantial change in circumstances when he was laid off from his prior employment and that he has therefore satisfied WIS. STAT. § 767.59(1f)(a)'s initial requirement for modification of child support, she argues that Anthony's decision "to become self-employed earning far less than what he was earning at the time of divorce [wa]s unreasonable."

A determination of an award of child support is made by "measur[ing] … the needs of the custodial parent and children and the then-existing ability of the noncustodial parent to pay." ***Van Offeren v. Van Offeren***, 173 Wis. 2d 482, 492, 496 N.W.2d 660 (Ct. App. 1992). However, a "shirking" exception applies "where the obligor intentionally avoids the duty to support or where the obligor unreasonably diminishes or terminates his or her income in light of the [child] support obligation[,]" and where the exception applies, "it is proper to examine the noncustodial parent's earning capacity rather than actual earnings." ***Id.*** Whether an action is reasonable presents "a question of law; however, because the trial court's legal conclusion as to reasonableness is so intertwined with the factual findings supporting that conclusion, an appellate court should give weight to the trial court's reasonableness conclusion." ***Id.*** at 492-93.

We conclude that the circuit court appropriately exercised its discretion when it determined that Anthony's decision to become self-employed was reasonable. Anthony lost his job due to a layoff and testified that as a requirement of receiving unemployment payments, he applied to several jobs per week for several months. Despite these applications and despite "numerous job interviews[,]" Anthony testified that he "could not get a job with anything that was in [his] line of work" and that even after "branch[ing] outside of [his] line of work to insurance jobs," he still could not find similar employment. He further testified that he still "look[s] for appraisal jobs almost on a daily basis."

These facts are easily distinguishable from those in ***Van Offeren***, where the appellant-husband made a *voluntary* decision to terminate the employment he held at the time of divorce despite assurances from his employer that he could remain "with the company as long as his job performance remained acceptable" and chose to instead open a business which he did not expect to turn a profit for approximately one year. ***Van Offeren***, 173 Wis. 2d at 490, 493. While "assuming that [his] decision to leave [his employer] was well intended," the circuit court there determined it was "unreasonable" for Van Offeren to terminate his employment "without first securing a comparable source of income and to instead pursue a livelihood that would generate zero income the first year." ***Id.*** at 491. The court therefore "imputed to [Van Offeren] the income he would have earned at [his prior employment]" and ordered him to pay the amount of child support "required under the divorce judgment." ***Id.*** We affirmed on appeal, concluding that Van Offeren's voluntary decision to terminate his employment, coupled with his knowledge that his new endeavor would not generate comparable income for several years, was unreasonable and constituted shirking of his child support obligations. ***Id.*** at 497.

Unlike in ***Van Offeren***, the circuit court here found that Anthony did not voluntarily terminate the employment he held at the time of divorce. In reaching this decision, the court relied on Anthony's testimony that his termination was the result of a mass company layoff, that he had made several unsuccessful attempts to secure like employment, and that he had unsuccessfully attempted to secure employment outside of his immediate line of work. Based on this testimony, the court did not erroneously exercise its discretion by finding that Anthony's termination was involuntary and that he had made reasonable efforts to find comparable employment. Nor did the court err in concluding that Anthony's reduction in income was reasonable in light of these facts.

Rachel also asserts that the circuit court erred when it imputed to her an income of $30,000 per year, as this "amount of imputed income … is unreasonable and not supported by any facts or evidence." She also argues that the court "erred by using [its] own personal experiences as a basis for imputing [her] income[.]" We agree. WISCONSIN STAT. § 767.511(1g) allows circuit courts the discretion to "consider all relevant financial information or other information relevant to the parent's earning capacity" when determining child support obligations. However, a court only "consider[s] a parent's earning capacity rather than the parent's actual earnings … if it has concluded that the parent has been 'shirking[.]'" ***Chen v. Warner***, 2005 WI 55, ¶20, 280 Wis. 2d 344, 695 N.W.2d 758. As previously noted, a parent "shirks" when the employment decision that has resulted in reduction of "income is voluntary and unreasonable under the circumstances." ***Id.***

Here, the parties had previously entered into a contractual agreement—the marital settlement agreement—stating that Rachel's imputed annual income would remain at $18,720 until "graduation from her course of higher education[.]" The settlement further provided that her graduation would "result in a review of Anthony's child support obligation." Despite this agreement, despite the fact that Anthony provided no evidence that would suggest, let alone establish, that Rachel was shirking, despite the fact that Anthony failed to submit any evidence that would allow the court to determine Rachel's actual earning capacity, and despite the fact that Anthony's written motion did not provide Rachel notice that he would be requesting a modification of *her* child support obligation at the hearing, the court nevertheless imputed to Rachel an income of $30,000 per year. In delivering its oral ruling, the court based this imputation on its anecdotal knowledge of friends and neighbors making "$18 an hour working at Woodman's, Wal-Mart, places like that."

By assuming Rachel could earn an income of $30,000 per year working for Woodman's, Wal-Mart, or another similar employer—and seemingly without any consideration of or acknowledgment that Rachel was apparently a full-time student at the time—the circuit court improperly "establish[ed] as an adjudicative fact that which is known to the judge as an individual." *See* ***State v. Peterson***, 222 Wis. 2d 449, 457, 588 N.W.2d 84 (Ct. App. 1998). This fact, or rather, the set of facts that would be required to make such a showing, were "'neither part of the evidence nor … generally known.'" *See* ***id.*** at 458 (citation omitted). There was no evidence to establish that Rachel had concluded her graduate studies, which would result in a reconsideration of her wages pursuant to the martial agreement, nor was there any evidence establishing that Rachel would be capable of managing a full-time job while simultaneously pursuing full-time graduate studies and sharing joint custody of her children. Similarly, there was neither any evidence regarding the availability of employment at any of the referenced companies nor was there evidence establishing the rate at which those companies would pay Rachel in any potential role. It is therefore clear that the court erred in modifying Rachel's imputed income in the absence of *any* evidence whatsoever and in contradiction to the parties' marital settlement agreement.

As a final matter, we note that Anthony argues that Rachel waived her argument that the circuit court's imputation of income to her was unsupported by the evidence when she failed to "object to the Court using its knowledge of the hourly rate and jobs available in the community." He also notes that since Rachel "chose not to testify[,]" "the court had to base its decision on the information it had." We disagree. First, Rachel had no reason to object to the court and opposing counsel's conversation regarding the availability and pay rate of various positions in the community, as this off-the-cuff exchange occurred prior to any testimony being taken.

Second, Anthony, the moving party, failed to introduce any evidence to support that information at the hearing, meaning there was no evidence to which Rachel could have—or should have—objected since it was never introduced in the first instance.[3] Put simply, it was *Anthony*—not Rachel—who filed the motion and made the request at the hearing that the court reconsider Rachel's imputed income, and it was therefore *Anthony*'s burden to present evidence supporting his request to reduce the amount of his child support obligation by both his change in employment and *also* a revision to the amount of income imputed to Rachel. *See* ***Rottscheit v. Dumler***, 2003 WI 62, ¶11, 262 Wis. 2d 292, 664 N.W.2d 525 ("The burden of showing that there has been a change in circumstances sufficient to justify a modification falls to the party seeking modification."). Anthony cannot now complain that Rachel waived her ability to appeal this issue.

Based on the foregoing, we conclude that although the circuit court did not err in finding that Anthony had experienced a change in circumstances warranting a revision to his child support obligation, it nevertheless *did* erroneously exercise its discretion in imputing to Rachel a modified income unsupported by the evidence and in using that imputation as a part of the basis for ordering a modification of Anthony's child support obligation. On remand, the court is therefore instructed to recalculate Anthony's child support obligation based on Anthony's new income and the income imputed to Rachel in the parties' marital settlement agreement.

[3] This also means there was no evidence or information upon which the circuit court could have made a decision regarding an imputed income for Rachel other than as provided in the marital settlement agreement despite Anthony's contention that the court simply made a "decision [based] on the information it had" because in reality, the court had *no admissible information before it at all* in that regard.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed in part, reversed in part, and remanded with directions. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals