COURT OF APPEALS
DECISION
DATED AND FILED

April 23, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-0715

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

IN RE THE PATERNITY OF SHELBY L.K.:
SHELBY L.K., BY HER GUARDIAN AD LITEM,
JOHN H. SHORT,

PETITIONER-APPELLANT,

TRACEY R.K.,

PETITIONER,

V.

STEVEN O.,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Modified and, as modified, affirmed.*

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

DEININGER, J. The trial court adjudicated Steven O. the father of Shelby L.K. and ordered him to pay past and current child support. Shelby appeals the child support order claiming the trial court erred in concluding that Steven had not been shirking his obligation to support Shelby. She asserts that the court should have based its child support order on Steven's earning capacity, or in the alternative, ordered Steven to seek suitable work and to pay past and current support based on full-time work at the minimum wage.

Steven concedes on this appeal that the order for current child support may be modified "to require him to pay 14% of his actual gross earnings or 14% of the federal minimum wage, whichever is greater." He claims, however, that we should affirm the trial court's order establishing the amount due for past support. We accept Steven's concession and direct that the order for current child support be modified to incorporate the alternative minimum payment based on full-time work at minimum wage, in lieu of $25 per month as originally ordered. Further, in light of the deference we accord a trial court's conclusion regarding the reasonableness of a payer's job choice, we affirm the order regarding Steven's obligation for past child support.

BACKGROUND

Shelby "does not take issue with the [trial] court's findings of fact" as set forth in the child support decision and order. Accordingly, we accept them as well, and set them forth below:

> 1. The child, Shelby [L.K.], was born on March 18, 1984 and currently resides in Jefferson County, Wisconsin. She resides with and is in the primary physical placement of her mother, Tracey [R.K.]. The procedural status of the case is tortured. On September 26, 1984, a paternity action was commenced by the state against Steven [O.]. The case was in a real sense, in legal limbo from 1986 to 1992, with no meaningful activity occurring. That action terminated in

November 1992 as a result of an adverse evidentiary determination to the state in 1986. In April 1994, a GAL was appointed at the request of the state. This paternity action was commenced on July 21, 1994, by that GAL.

STEVEN

2. In 1984, Steven [O.] (d/o/b 8/29/63 - now 33 years old) lived with his parents. He worked as a bartender and a band player, earning between 0 and $400.00/month.

3. In the fall of 1984, [Steven O.] moved to Florida and worked for Trader Publications and then worked in seasonal construction, earning $2,426.88 in 1984. He earned $4,051.91 in 1985.

4. [Steven O.] is a high school graduate. He has no formal vocational or post-high school education. He was an average student in high school, but liked to perform music, magic, clowning and entertainment from an early age to present.

5. [Steven O.] was married in July 1985 and remains married currently. There is one child of that marriage, Keith, born January 9, 1987.

6. In 1986, [Steven O.] continued to work construction. His testimony is that he earned approximately $6,000 in 1986.

7. [Steven O.] stayed at home to care for Keith in 1987 and claims to have earned no income that year.

8. In 1988, [Steven O.] began to pursue a career in comedy and entertainment, earning $1163.09 in taxable income, that year.

9. There are no tax records for 1989, and [Steven O.] claims to have made about the same ($1,000 to $2,000) in taxable income as he made in 1988.

10. In 1990, [Steven O.] made about $1,650 in taxable income as a comedian.

11. Actual tax records reveal the following income received as a result of his efforts, to the exclusion of all other employment, to "make it" as a comedian;

1991 - (2,951.05)
1992 - $1,860.00
1993 - $1,620.10
1994 - $2,146.90
1995 - (2,110.56)

12. [Steven O.] is a self-employed entertainer. He works and has worked as such, since 1988, on a cash-per-performance basis.

13. [Steven O.'s] wife works 54 hours per week and is the primary supporter of herself, [Steven O.], and, Keith.

14. The entertainment industry is unpredictable. For a worker in this field, who has not reached a national status, [Steven O.] is regularly employed. But, the pay at this level (regional comedian) barely covers the costs of travel, etc. associated with the work he does.

15. [Steven O.] is able-bodied and appears to the court to be of above average intelligence. [Steven O.] dedicates in excess of 40 hours/week to pursue his chosen career.

16. [Steven O.] has received 26 to 27 thousand dollars, or more, total, since 1988, from his parents to make ends meet.

17. [Steven O.'s] parents have paid his attorney's fees in the past.

18. [Steven O.] owns his own home but there is no equity. He has minimal assets and significant debt. He appears to be a candidate for bankruptcy.

19. [Steven O.'s] family income is $2,371/mo.

20. [Steven O.'s] parents continue to pay his attorney fees but have stopped sending additional support sums to him as of their retirement two years ago.

SHELBY

21. Shelby is twelve years old. She babysits at church. She earns $15/week. She has $50.00 in her savings account.

TRACEY

22. Tracey [K.] d/o/b March 24, 1965, is 31 years old, and has a high school education. She has no post-high school education or training. She is a laborer currently and has been a waitress in the past.

23. Tracey earns $9.09/hr. She works full time.

24. Tracey's family consists of herself, a daughter, Hailey, d/o/b 3/30/87, Shelby, and her son, Seth d/o/b 9/2/94. They live in a 3-bedroom apartment.

> 25. Tracey's income (including child support received for Seth) is $1910/mo.
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> 26. Tracey's reasonable household budget, including some debt reduction, is about $2500/mo.
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> 27. In 1984, Tracey was not employed and received AFDC for Shelby.
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> 28. Tracey had no work and received AFDC for Shelby in 1985 and 1986, and she worked at least part of the years from 1987 up to 1992 and received AFDC for parts of these years. Tracey has worked full time since.
>
> **STATE**
>
> 29. Although the state extended AFDC benefits to Tracey for Shelby from 1983 to 1992, in an amount of $41,481.21 the State makes no claim for reimbursement from [Steven O.] for these amounts, paid. The state instituted a prior paternity action. After receiving an adverse evidentiary ruling, the state allowed the time limits for appeal to expire. The case was ultimately dismissed.

From these facts, the trial court concluded that Steven had not been shirking, at least up until the time of the court's paternity determination, September 30, 1996. Even though the court acknowledged that Steven "may earn more doing something else" and that he had not "made the choices this court would make for his family," the court credited Steven with pursuing "what he honestly feels are his best opportunities." The court rejected Shelby's request to establish Steven's child support obligation based on his earning capacity (which Shelby argued was at least equivalent to Tracey's, given the parents' similar ages and educational backgrounds), because of "an absence of relevant facts … to impute income or to make Steven seek alternate work at this time." The court noted the lack of evidence regarding Steven's vocational abilities or the availability of alternate employment in Florida where Steven resides.

The court also considered, and rejected, a child support order based on full-time employment at the minimum wage, but indicated that it might be

inclined to make such an order in the future if Steven's income continued to be insubstantial. In making its child support order, the trial court applied the HSS 80 percentage guidelines, adjusted for a "serial family" under HSS 80.04(1)(b).[1] After reviewing the factors under § 767.51(5), STATS., the court declined to reduce Steven's child support obligation below the HSS 80 percentage standards.[2] The court ordered Steven to pay the greater of 14% of his gross income or $25 per month in current support, commencing December 31, 1996. Because 14% of Steven's earnings for the period would be a lesser amount, the trial court calculated Steven's past support obligation at $25 per month from January 1992 through November 1996, and ordered to him to make monthly payments against the arrearage.[3] Steven was also ordered to pay one-half of Shelby's medical expenses after January 1, 1997, which are not covered by insurance.

Shelby appeals the child support order with respect to both the amount of current support and past support ordered by the trial court.

ANALYSIS

A child support award is generally within the discretion of the trial court, and we will not overturn it unless the trial court has erroneously exercised its discretion. ***Wallen v. Wallen***, 139 Wis.2d 217, 223, 407 N.W.2d 293, 295 (Ct.

[1] Shelby does not challenge the court's application of the guidelines and the serial family adjustment.

[2] Steven has not cross-appealed the court's denial of his request to deviate from the HSS 80 percentage guidelines.

[3] Tracey received AFDC through December 1991. The trial court concluded that since the State did not appear and request reimbursement for AFDC payments, it was precluded from pursuing such a claim "now and forever." The State is not a party to this appeal. Shelby does not challenge on this appeal the period for which past support was awarded, nor has Steven cross-appealed the amount of past support ordered.

App. 1987). Child support awards must be based on the needs of the custodial parent and children, and on the ability of the noncustodial parent to pay. *See* ***Balaam v. Balaam***, 52 Wis.2d 20, 25, 187 N.W.2d 867, 870 (1971). A child support award in the typical paternity action should thus be based on the amount the father is earning when the award is made. ***In re R.L.M.***, 143 Wis.2d 849, 852, 422 N.W.2d 890, 892 (Ct. App. 1988). "However, in cases where the father has chosen not to fully and diligently pursue his best employment opportunities, the court may find that he is shirking his support responsibilities and may base its support award on the father's earning capacity or potential earnings." ***Id.*** "Shirking" may be found when a child support payer "intentionally avoids the duty to support" or when he or she "unreasonably diminishes or terminates his or her income in light of the support obligation." ***Van Offeren v. Van Offeren***, 173 Wis.2d 482, 492, 496 N.W.2d 660, 663 (Ct. App. 1992).

Shelby does not challenge the trial court's conclusion that Steven's career choice was "well-intended." The issue before us, therefore, is whether Steven unreasonably pursued a career as a standup comedian in lieu of finding work with more substantial current remuneration. The question is one of law, regarding which we generally need not defer to the trial court's determination. ***Id.*** 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, 496 N.W.2d at 663-64. Thus, we must pay appropriate deference to the trial court's conclusion that Steven was not shirking his child support obligation by pursuing his nascent comedic career.

Shelby argues that the trial court focused on Steven's good intentions in attempting to "make it" as an entertainer to the exclusion of a

consideration of the second prong of the shirking inquiry: whether Steven's career choice was reasonable in light of his support obligation. *See* ***Sellers v. Sellers***, 201 Wis.2d 578, 587, 549 N.W.2d 481, 484-85 (Ct. App. 1996) (employment decision may be unreasonable even if well intended). We disagree. The trial court specifically noted in its decision that it would not have made the career choice Steven made for the past nine years, but that it could not "set the standard of reasonableness upon an observation of its own personal value system." The court went on to assess the reasonableness of Steven's choice as follows:

> What is most compelling to this court in regard to its assessment of the objective reasonableness of [Steven's] choice, is his nine or ten year consistent endeavor, to the admitted financial detriment of his intact family … coupled with his achievements within the field as indicated by a few "near misses" with MTV and as a headliner at regional comedy clubs ….

Thus, the trial court did evaluate the reasonableness of Steven's choice to forego current income in return for the prospect of reaping significant future financial rewards. The court further gave Steven strong warnings that it would not necessarily accept his vocational efforts as reasonable for the balance of the child's minority. The court concluded, however, that Steven had demonstrated that his career progression to date showed at least a realistic, even if not a probable, chance of success, which would ultimately benefit Shelby as well as himself. Given the deference with which we review a trial court's conclusions in this regard, ***Van Offeren***, 173 Wis.2d at 492-93, 496 N.W.2d at 663-64, we conclude that the court's "no shirking" determination must be affirmed.

Our decision in ***In re R.L.M.***, 143 Wis.2d 849, 422 N.W.2d 890, (Ct. App. 1988), does not, as Shelby argues, mandate a different result. In ***R.L.M.***, we affirmed a trial court's order that a father, who was working only part-time while going to school, pay child support at a level commensurate with full-time income.

Our affirmance there does not mean that the trial court's conclusion and order here, on different facts, was error. A child support payer "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," subject to the additional consideration that the payer's job choice is reasonable in light of his obligations to his children. ***Balaam***, 52 Wis.2d at 28, 187 N.W.2d at 871. As we have noted above, child support determinations are generally committed to the discretion of the trial court, and

> [w]hile the results in this case may not have been the results that any member of this panel would have reached, we are persuaded that they remain within the parameters of reasonableness and represent a proper exercise of judicial discretion. The parties can demand no more than that.

Sellers, 201 Wis.2d at 595, 549 N.W.2d at 488.

Steven concedes in his brief that the order for current child support may be modified to set his current minimum obligation at 14% of forty-hour per week earnings at the federal minimum wage.[4] His concession is largely based on assertions that he obtained full-time employment soon after the entry of the child support order and that he is currently earning more than minimum wages. While these "facts" are not of record, we see no reason not to accept Steven's concession and to order his child support obligation modified accordingly, especially since this modification was among the items of relief specifically sought by Shelby on this appeal.

[4] *See* WIS. ADM. CODE § HSS 80.03(3)(b), which authorizes a court, in situations where a payer's income is less than the payer's earning capacity, to establish support by applying the percentage standard to "[t]he income a person would earn by working 40 hours per week for the federal minimum hourly wage under 29 U.S.C. § 206(a)(1)."

Further, given Steven's concession, we see no reason to remand to allow the trial court to consider the entry of a seek-work order, which Shelby has also requested. Such orders are generally most appropriate in conjunction with contempt proceedings following a failure to comply with an existing support order, or when there is a legitimate dispute as to whether a payer is capable of obtaining full-time employment. *See* ***Dennis v. State***, 117 Wis.2d 249, 257-58, 344 N.W.2d 128, 131-32 (1984). Here, Steven has not been found in contempt for failing to comply with a support order, and by virtue of his concession, he acknowledges that he is able to work full-time and earn at or above minimum wages.

Shelby argues in her reply brief that we should remand to allow the trial court to consider Steven's newly obtained employment and earnings, and what they may prove regarding his current and past earning capacity, and thus the reasonableness of his past career choices. Again, we disagree. As we have explained above, we will not disturb the trial court's conclusion regarding the reasonableness of Steven's past efforts to pursue a career as an entertainer, and we thus affirm the amount established as his obligation for Shelby's past support.

It appears Steven may have taken to heart the trial court's numerous admonitions in its decision and order that, in light of his obligation to support Shelby, Steven's time to reasonably pursue a career in the entertainment industry had just about expired. If Steven's assertions in his brief are true, Shelby is now receiving under the current order support equal to 14% of Steven's earnings. As modified by this decision, Shelby will continue to receive support under the present order at that level, or at a minimum, support based on full-time earnings at the minimum wage. The order is subject to future modifications as well, should there be a change in circumstances. *See* § 767.32, STATS.

For the foregoing reasons, we direct that the order entered December 16, 1996, be modified as follows. In paragraph "1." on page 15, the following is substituted in place of "$25/mo.": "14% of the income he would earn by working 40 hours per week for the federal minimum hourly wage." In all other respects, the order is affirmed.

By the Court.—Order modified and, as modified, affirmed.

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