COURT OF APPEALS
DECISION
DATED AND FILED

October 8, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP187 **Cir. Ct. No. 2007FA84**

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

IN RE THE MARRIAGE OF:

KRISTIN L. ROEKLE F/K/A KRISTIN L. VIRNOCHE,

PETITIONER-APPELLANT,

V.

ANTHONY V. VIRNOCHE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Manitowoc County: MARK ROHRER, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Kristin Roekle, f/k/a Kristin Virnoche, appeals an order modifying child support. She contends the trial court erred when it concluded that she is shirking and that child support therefore should be based on her earning capacity. We affirm the order.

¶2 Kristin and Anthony Virnoche divorced in 2007 when their two sons were in kindergarten and third grade. The parties had shared physical placement; Kristin's home was the boys' primary residence. In 2012, Kristin and Anthony stipulated to modify the placement schedule to equal placement but could not agree on the amount of child support Anthony should pay. Using the parties' actual earnings, a family court commissioner set child support at $804.76 per month. Anthony sought de novo review.

¶3 At the ensuing evidentiary hearing, Kristin testified to the following. She has a bachelor's degree in marketing. In the 1990's, she earned between $24,000 and $28,000 a year. Since shortly before the divorce, she worked as a secretary for the Manitowoc Public School System, Monday through Friday 8:00 a.m. to 3:30 p.m., ten months a year. Besides the benefits, particularly insurance, the work schedule made the position attractive because it worked well with the children's school hours and after-school and summer activities. She also works three hours a week year-round as a YMCA fitness instructor, earning $8.36 an hour. Her 2012 combined income was $19,206.53.

¶4 For a few years after the divorce, Kristin also did payroll and end-of-month billing at Assist 2 Transport, a business her current husband owns. The $8,000 to $10,000 she earned in 2009 fell to $2,800 in 2010 when her job there ended. Since that time, she has helped out very occasionally without pay. Her income from the three sources was $28,713 in 2009 and $21,376 in 2010.

¶5 Anthony testified that in 2012 he earned $72,500 a year at his place of employment. A competitive archer, he also has a home-based business involving an archery software program he developed. His business realized a loss in 2012 and likely would again in 2013. He conceded that the roughly $2,200 loss in 2012 reflected depreciation expenses of about $6,300 and he writes off as business expenses archery competitions where he tries to sell the software program. He did not object to Kristin taking the school secretary position because it worked out well for the children.

¶6 Using the parties' actual 2012 incomes, the trial court calculated that Anthony would owe monthly child support of $832.69 under the Child Support Guidelines. It concluded, however, that Kristen's failure to seek to replace her lost Assist 2 Transport income was voluntary, was unreasonable under the circumstances, thus constituting shirking, and so justified using her earning capacity. *See* ***Van Offeren v. Van Offeren***, 173 Wis. 2d 482, 492, 496 N.W.2d 660 (Ct. App. 1992). The court used $25,040—the average of her 2009 and 2010 incomes—to recalculate child support. The new calculation cut Anthony's monthly obligation to $742. Kristin appeals.

¶7 Shirking does not require a finding of a deliberate income reduction to avoid support obligations. ***Sellers v. Sellers***, 201 Wis. 2d 578, 587, 549 N.W.2d 481 (Ct. App. 1996). The trial court "need find only that a party's employment decision to reduce or forego income is voluntary and unreasonable under the circumstances." ***Chen v. Warner***, 2005 WI 55, ¶20, 280 Wis. 2d 344, 695 N.W.2d 758. The question of reasonableness ordinarily is a question of law, but as the trial court's legal conclusion is so intertwined with the factual findings necessary to support it, we pay the trial court's ruling "appropriate," but somewhat less, deference than the erroneous exercise of discretion standard. ***Id.***, ¶¶38, 43-44.

Deference is appropriate when the trial court is better positioned to decide an issue than is an appellate court because it is "closer to the evidence, sees and hears the witnesses, and decides more cases on the issue." ***Id.***, ¶40.

¶8 Although the end of Kristen's employment at Assist 2 Transport may have been out of her control, the trial court found that her *income reduction* was voluntary because she demonstrated no effort to remedy it. We agree. Kristen produced no evidence that she sought, or sought but was unsuccessful in finding, some way to replace the lost income, or that she faced any limitations that prevented her from securing additional income.

¶9 The court next concluded that Kristen's voluntary failure, or decision not, to supplement her income was unreasonable under the circumstances. Kristen protests that it cannot be reasonable and would be bad public policy to require a parent to work a full-time job plus two part-time jobs in addition to the responsibility of caring for two children. She also argues there was no evidence that her decision not to obtain a third part-time job left any of the children's financial needs unmet.

¶10 First, Kristen misconstrues the trial court's holding. The court explained that "[i]t's not the number of jobs, it's the earning capacity." It found that Kristen could have tried to attain her prior income level by, for example, "maybe los[ing] the job at the YMCA" and supplementing her school district income with a second job that offers more hours or better pay. Further, the parties' equal placement reduces Kristen's direct child-care obligations, the children no longer need daycare or babysitters, and Anthony also ferries the boys to appointments and sporting and musical events. Even though the trial court accepted that Kristen's position with the school district was beneficial to the

children in a number ways, its decision that her overall employment decisions are unreasonable is sustainable. "Shirking can be found even when the party reducing his or her income acts with the best intentions." ***Id.***, ¶54. Indeed, Anthony does not allege that Kristen acted with an improper motive. Kristen did not meet the burden of justifying the reasonableness of her decision. *See* ***Kelly v. Hougham***, 178 Wis. 2d 546, 556, 504 N.W.2d 440 (Ct. App. 1993).

¶11 Second, the children's financial welfare is not the sole concern. A court also must consider that the financial burdens of child care are apportioned fairly between the parents. ***Chen***, 280 Wis. 2d 344, ¶47. There is a limit to one parent's underemployment choice when the other is "presented the bill for the financial consequences" of it. ***Sellers***, 201 Wis. 2d at 586.

¶12 As they should, the parties strive to analogize this case to and distinguish it from ***Chen***, ***Sellers***, and ***Van Offeren***. Yet "no two fact situations are alike." ***Chen***, 280 Wis. 2d 344, ¶40. The trial court here carefully examined the facts, used the correct legal framework, and "reached a conclusion that a reasonable court could reach based on the record before [it]." ***Id.***, ¶35. Accordingly, we must give its ruling appropriate deference.

By the Court.—Order affirmed.

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