COURT OF APPEALS
DECISION
DATED AND FILED

March 17, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 97-3193
98-0295

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

IN RE THE MARRIAGE OF:

HEIDI LYN CVICKER,

PETITIONER-RESPONDENT,

V.

STEPHEN DONALD CVICKER,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Reversed and cause remanded.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Stephen Donald Cvicker appeals from an order denying his motion to reduce child support and from an order finding him in contempt for failing to pay the full amount of child support. We conclude that the

circuit court erred in determining that Stephen made an unreasonable job choice and in imputing $75,000 income to Stephen. We reverse the orders and remand for further consideration of Stephen's motion to modify child support.

Stephen and Heidi Lyn Cvicker were divorced in December 1995. Stephen was then employed at Pyramid Concrete Products, Inc., a landscape concrete business. He earned $75,000 per year. Child support for the parties' son was set at $1062 a month.

On March 1, 1996, Stephen was terminated from Pyramid Concrete. He obtained employment with Hardscapes, Inc. at a yearly salary of $75,000. On July 1, 1996, Stephen was laid off by Hardscapes. He received unemployment compensation of $274 a week. Stephen learned in September 1996 that he would not be called back to work at Hardscapes. He filed a motion to reduce child support based upon a substantial reduction in his income.

Although Stephen was considered for two jobs that paid $40,000 annually, he chose to do odd jobs for no compensation for a business he had started with his girlfriend, Michelle Salter. S.R. Hardscapes, Inc., a corporation in which Stephen owns a fifty-percent interest, commenced operations in March 1996. It is a landscape-concrete-aggregate business. Salter holds the remaining fifty-percent interest. Salter went on S.R.'s payroll in September 1996. Not until January 1997 did Stephen begin to draw a weekly paycheck of $400 from the corporation.

Hearings were held before the family court commissioner on Stephen's motion for a reduction in child support. Stephen then sought a de novo hearing before the circuit court. *See* § 767.13(6), STATS. After the circuit court's decision refusing to reduce child support, Heidi filed a contempt motion for

Stephen's failure to pay the full amount of child support. Stephen was found in contempt and ordered to pay past child support in the amount of $9829.93. The appeal from the contempt order is consolidated with the appeal from the order denying Stephen's motion to reduce child support.

The circuit court found that Stephen was shirking because he had voluntarily reduced his income and did not fully and diligently pursue his best employment opportunities. *See* ***State v. T.J.W.***, 143 Wis.2d 849, 852, 422 N.W.2d 890, 892 (Ct. App. 1988) (shirking does not require a finding that the obligor reduced his or her earnings for the purpose of avoiding support obligations, but may be found where the obligor has chosen not to fully and diligently pursue the best employment opportunities). It found that Stephen's choice to work for his own business at a "fraction of what he is worth" was unreasonable. Stephen's earning capacity was found to remain at $75,000 a year.

A circuit court's decision to modify child support after divorce is discretionary and will not be overturned absent an erroneous exercise of discretion. *See* ***Smith v. Smith***, 177 Wis.2d 128, 133, 501 N.W.2d 850, 852 (Ct. App. 1993). The circuit court may modify child support payments when there has been a substantial or material change in circumstances of the parties or children. *See* ***Thibadeau v. Thibadeau***, 150 Wis.2d 109, 114, 441 N.W.2d 281, 283 (Ct. App. 1989).

Here, there is no question that a substantial change of circumstances exists because of Stephen's reduced income. *See* ***Kelly v. Hougham***, 178 Wis.2d 546, 556, 504 N.W.2d 440, 444 (Ct. App. 1993) (as a matter of law the parties' financial circumstances have changed substantially). However, Stephen must justify his decision to not pursue a higher paying position in light of his obligation

to support his child. *See* ***id.*** Child support may be based on earning capacity where the court finds the employment decision both voluntary and unreasonable under the circumstances. *See* ***Sellers v. Sellers***, 201 Wis.2d 578, 587, 549 N.W.2d 481, 484 (Ct. App. 1996). "The employment decision may be unreasonable even though it is well intended." ***Id.*** at 587, 549 N.W.2d at 485. While the issue of whether Stephen's choice is unreasonable presents a question of law, we will give appropriate deference to the circuit court's determination because it is intertwined with factual findings. *See* ***id.***

Even in light of the deference we accord the circuit court's determination, we conclude that Stephen's choice was reasonable. Stephen lost jobs that paid him $75,000 a year through no fault of his own. The two job offers at $40,000 year were not intended to start until April or May of 1997. As of January 1997, Stephen was earning at least $20,000 a year with his business and had the prospect of earning more. The disparity between $40,000 and $20,000, although affecting the level of child support, is not so great as in cases where a very lucrative job is abandoned in favor of little to no income. *See, e.g.,* ***Forester v. Forester***, 174 Wis.2d 78, 496 N.W.2d 771 (Ct. App. 1993); ***Van Offeren v. Van Offeren***, 173 Wis.2d 482, 496 N.W.2d 660 (Ct. App. 1992).

Additionally, there is evidence that the reduction in Stephen's income is expected to be temporary, with potential for increased future earnings. *See* ***Kelly***, 178 Wis.2d at 557, 504 N.W.2d at 444. Stephen testified that he hoped to earn $30,0000 per year by July 1997. He also explained that because of the seasonal nature of the landscape-concrete-aggregate business, the duration of the jobs he was offered was uncertain. Stephen believed his business would provide him with steady, year-round income. The future benefits of the business should be balanced against the temporary income reduction. *See* ***id.*** (an obligor may make a

career decision which, in some instances, diminishes the income, and such a decision may be the more prudent career decision over the long term, despite its immediate disadvantage to both the obligor and the obligee).

The circuit court found that Stephen's corporation could function without his presence as it had done for the months before he was placed on the payroll. This finding ignores the evidence that the nature of the business changed in September 1996. Prior to September, the business entailed paper shuffling for a mere brokerage operation and Salter was able to handle the work load. In September, the business went into the manufacturing of bagging landscape aggregate products. This requires a more hands-on operation which Stephen helps to manage.

The circuit court would require Stephen to work for some other business engaged in the landscape-concrete-aggregate business until his business grows to the point where it can afford him a generous salary. It is unreasonable to expect Stephen to work for a competing business simultaneously with the market development of his business. It would breach Stephen's duty of good faith to his employer and business partner.

We recognize that the circuit court was suspicious of Stephen's claim that his business could not afford to pay him more. Although the circuit court conducted its own examination of Salter regarding the itemization of S.R.'s expenses, there was no countervailing evidence suggesting that the amounts were unreasonable or fraudulent. Indeed, the circuit court speculated from its own experience on how corporate income could be manipulated to reflect a desired income or loss status. This is not a case where there was "positive evidence of [the payor's] bad faith in failing to recover financially" and that the

"circumstances are inherently improbable." ***Wallen v. Wallen***, 139 Wis.2d 217, 226, 407 N.W.2d 293, 296 (Ct. App. 1987). The record here does not support any suggestion that the inability of Stephen's company to pay him more was a mere illusion. Further, the circuit court's finding that Stephen had complete control over the business and that he could decide to pay himself $6000 a month is clearly erroneous. Not only would Stephen need the approval of the additional corporate owner in order to receive a higher salary, but the business was constrained by obligations to the bank which held a security interest in the accounts receivables.

We reverse the circuit court's determination that Stephen's employment choice is not reasonable and the finding that his earning capacity remains at $75,000 year. Even if we rejected Stephen's employment choice, we would reverse for the additional reason that the circuit court's decision is inconsistent. The court found that Stephen should have accepted one of the $40,000 a year jobs. Yet, it set his imputed income at $75,000 based on a job he no longer had. At most, Stephen's imputed income was $40,000. The circuit court erroneously exercised its discretion in denying Stephen's motion for a reduction of child support because the decision was based on incorrect findings. *See* ***Smith***, 177 Wis.2d at 133, 501 N.W.2d at 852. Imputing income at a higher level was inconsistent with the circuit court's finding.

By necessity, the order finding Stephen in contempt must be reversed since it is based on a level of child support that was in error. On remand, the circuit court shall further consider Stephen's motion for a reduction in child support. It is within the circuit court's discretion to permit additional discovery and a new evidentiary hearing to determine Stephen's actual earnings in pursuit of the employment which we have held to be a reasonable choice.

By the Court.—Orders reversed and cause remanded.

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