COURT OF APPEALS
DECISION
DATED AND FILED

November 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3683

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

MARIALYCE B. DORMAN,

PETITIONER-APPELLANT,

V.

ROBERT S. HOOVER,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Reversed and cause remanded with directions.*

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

¶1 PER CURIAM. Marialyce Dorman appeals from that portion of a final order decreasing the child support obligation of Dorman's former husband, Robert Hoover. Specifically, Dorman argues that the trial court erred by determining child support based on a retrospective analysis of her earning capacity

rather than her present earning capacity. Because the circuit court erroneously determined Dorman's earning capacity based on speculation as to what she would now be earning had she made certain employment choices five years earlier, we reverse the order and remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 The facts are undisputed. Dorman and Hoover were married in December 1976, and divorced in December 1992. Three children were born of the marriage: Shannon, Shane and Shelley. At the time of the divorce, the parties shared custody of the children—Hoover had primary physical placement during the school year, transferring them to Dorman during the summer months.

¶3 In February 1994, Dorman remarried and subsequently gave birth to two children with her new husband. Due to Hoover's military duty, Shane and Shelley lived with Dorman full time from December 1995 to August 1997. Shannon has lived with Dorman since June of 1996.[1] Pursuant to this change in placement, Hoover sought an order setting child support based on Dorman's earning capacity.

¶4 After a hearing in December 1997, a family court commissioner imputed to Dorman an earning capacity of $1,826 per month, or $21,912 per year,

[1] All three children remained with Dorman until August 1997, when the Outagamie County circuit court ordered them returned to Hoover's custody, consistent with the original marital settlement agreement. That order was subsequently amended by stipulation to allow Shannon to return to Dorman in September of 1997.

resulting in a monthly child support payment of $561.50 from Hoover to Dorman.[2] Hoover appealed the commissioner's order. At a hearing before the circuit court, two vocational experts testified regarding Dorman's earning capacity. Dorman's testimony, along with the reports and testimony of the experts, outlined Dorman's educational and vocational history.

¶5 In 1980, Dorman received a bachelor of science degree from the University of Hawaii-Chaminade, majoring in behavioral sciences. From 1980 to 1983, she was engaged in active military duty, entering active reserve duty in 1983, the year Shannon was born. From January through September of 1991, Dorman was called to active duty during the Gulf War, during which time she earned approximately $30,000. She was thereafter involuntarily returned to the active reserves and subsequently entered the individual ready reserves. Dorman currently holds the rank of major.

¶6 During her tours of active military duty, Dorman worked primarily in the area of patient administration. After the Gulf War and concurrent with her activities in the active reserves, Dorman worked as a data entry operator between

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[2] The court commissioner found that Hoover earned a monthly gross income of approximately $5,990. The percentage standards under WIS. ADM. CODE § HSS 80.03, as contemplated by §§ 46.25(9)(a) and 767.25, STATS., determine a noncustodial parent's child support obligation to be 17% for one child and 25% for two children. Accordingly, the commissioner applied 25% of Dorman's imputed monthly income ($456.50) against 17% of Hoover's monthly income ($1,018) to reach a monthly child support payment of $561.50 from Hoover to Dorman.

Chapter HSS 80 has since been renumbered ch. DWD 40 by emergency rule; ch. HSS 80 as it existed on July 31, 1999 was renumbered ch. DWD 40, Register, July 1999, No. 523, eff. 8-1-99.

Section 46.25, STATS., has been renumbered in part and repealed in part by 1995 Wis. Act 404, §§ 39 to 48, eff. July 1, 1996. 1995 Wis. Act 404 renumbered and amended subsecs. (8), (9)(a) and (b) as § 49.22(8) and (9) and § 46.247, STATS., respectively.

February 1992 and June 1993, earning approximately $8 per hour. In July of 1993, she completed training through the Potomac Massage Therapy Institute and began working as a self-employed massage therapist in Virginia. After her second marriage and subsequent move to Wisconsin, Dorman worked as a massage therapist on a part-time basis at an Appleton salon from June through November of 1995, thereafter working part-time as a self-employed massage therapist from December of 1995 until March of 1997. Dorman has worked as a full-time homemaker since March 1997. She has no disabilities preventing her from working outside the home, and concedes that she has made a conscious choice to pursue the duties of a full-time homemaker. Dorman additionally testified, however, that since relocating to Appleton, she had made several attempts to obtain employment in the active reserves, but was precluded from doing so because of the scarcity of positions for individuals with her particular experience and rank.

¶7 One of the vocational experts, Kevin Schutz, determined that Dorman's skills were transferable to three main occupational areas and that her earning capacity and employability were dependant upon which area she chose to pursue. First, Schutz determined her most lucrative employment option to be active military duty and further determined that her earning potential with the military was approximately $63,000 to 64,000 per year. Next, Schutz conceded that Dorman did not have the necessary accreditation to obtain a private sector position as a medical records technician or administrator; however, he testified that her acquired skills were transferable to other general supervisory or administrative positions in the private sector and consequently determined her entry level earning potential to be in the low to mid $30,000 range per year, with the potential for additional income of $4,000 to $5,000, should Dorman return to

active reserve status. With regard to this private sector employment, Schutz additionally noted that if Dorman were aggressive in terms of acquiring a job at that level, her income would likely escalate to the low $60,000 range within one to three years. Finally, Schutz determined that if Dorman worked as a massage therapist, her annual earning capacity would be $20,000 to $25,000.

¶8 Contrary to Schutz's testimony, vocational expert John Birder determined that Dorman had not acquired significant transferable skills from her military experience that would allow her to find comparable employment in the private sector. Birder consequently determined Dorman's earning capacity to be between $18,000 and $22,000 per year.

¶9 After hearing testimony from both parties and their respective vocational experts, the circuit court, based on its determination of Dorman's earning capacity, imputed income to her in the amount of $50,000. This appeal followed.

ANALYSIS

¶10 Child support awards are addressed to the sound discretion of the trial court. *See* ***Sellers v. Sellers***, 201 Wis.2d 578, 585, 549 N.W.2d 481, 484 (Ct. App. 1996). We will affirm the trial court's exercise of discretion if it has reached a "rational, reasoned decision based on the application of the correct legal standards to the record facts." ***Id***. Further, a trial court's findings of fact will be affirmed unless clearly erroneous. *See* ***id***. at 586, 549 N.W.2d at 484; *see also* § 805.17(2), STATS.

¶11 Initially, we conclude that the circuit court's decision to impute to Dorman a yearly income of $50,000 is unsupported by the facts of record. Schutz

determined Dorman's entry level earning potential to be in the low to mid $30,000 range per year, with the potential for additional income of $4,000 to $5,000 should Dorman return to active reserve status. However, the circuit court found "to the extent that supplemental part-time reserve status is suggested as a supplement to income, it is not established by the greater weight of the evidence that such an opportunity is available to Miss Dorman at this time." Accordingly, the record does not support the court's determination that $37,000 was the low end of Dorman's imputed income range were she now to pursue a supervisory or administrative position in the private sector. Further, Schutz's testimony did not establish that the high end of Dorman's pay range scale would have been possible without additional training and promotions. As such, the circuit court erred by choosing the midpoint of an income range wherein the low and high end were unsupported by the evidence.

¶12 Beyond its error regarding the pay range, the circuit court, while recognizing the appropriate principles to apply when determining one's earning capacity, nevertheless engaged in unsupported speculation when it determined Dorman's earning capacity. We recognize that Dorman is afforded leeway in choosing employment and although "divorced [parents] should be allowed a fair choice of a means of livelihood and to pursue what [they] honestly [feel] are [their] best opportunities … [their decision] is … subject to reasonableness commensurate with [their] obligations to [their] children and … former [spouse]." ***Roberts v. Roberts***, 173 Wis.2d 406, 411-12, 496 N.W.2d 210, 213 (Ct. App. 1992) (quoting ***Balaam v. Balaam***, 52 Wis.2d 20, 28, 187 N.W.2d 867, 871 (1971)). Where, as here, a party has decided to pursue the duties of a full-time homemaker, the trial court may consider that person's earning capacity, rather than her actual income, when determining a child support obligation. *See* ***Sellers***,

201 Wis.2d at 587, 549 N.W.2d at 484.[3] Consistent with ***Sellers***, neither party here disputes the court's ability to impute income to Dorman based on her earning capacity, rather than her actual income. Dorman argues, however, that the circuit court erred in its determination of her earning capacity. We agree.

¶13 In its oral decision, the circuit court rejected Hoover's asserted position that Dorman's earning capacity could be determined using her option of reentering the military with a rank of major and earning within the estimated range of $60,000 to $70,000 per year. The circuit court additionally rejected Dorman's position that her earning level should be limited to what she would earn at an entry level position. Rather, the court focused on Schutz's testimony regarding the transferability of Dorman's acquired skills in the area of medical records administration and concluded that Schutz had established an annual salary range of $37,000 to $63,000.[4] The court then determined that "given the time, a matter

[3] In ***Sellers v. Sellers***, 201 Wis.2d 578, 587, 549 N.W.2d 481, 484 (Ct. App. 1996), this court held that a trial court "may consider earning capacity when determining a support … obligation if it finds a spouse's job choice voluntary and unreasonable." We must stress that an "employment decision may be unreasonable even though it is well intended." ***Id***. Although the determination of whether a job choice is unreasonable presents a question of law that we determine de novo, *see* ***id***., neither party in the instant case has challenged the trial court's authority to determine Dorman's earning capacity under these facts.

[4] The court rejected Birder's testimony regarding the non-transferability of skills that Dorman had acquired in the military and, consistent with Schutz's testimony, found: "[T]his broad occupational area is entirely consistent with [Dorman's] background and aptitudes which include importantly her college degree and rather high attainment there and military experience which is sustained and tested over time to just prior [to] the divorce." "The credibility of the witnesses and the weight of the evidence is for the trier of fact." ***State v. Poellinger***, 153 Wis.2d 493, 504, 451 N.W.2d 752, 756 (1990) (quoting ***Johnson v. State***, 55 Wis.2d 144, 147, 197 N.W.2d 760, 762 (1972)). A trial court's credibility assessments will not be overturned on appeal unless they are inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. *See* ***Chapman v. State***, 69 Wis.2d 581, 583, 230 N.W.2d 824, 825 (1975).

of several years, imputed to the diligent attainment of a career opportunity," it was "reasonable to pick a midpoint of compensation in the area of endeavor."

¶14 The circuit court reasoned that although Dorman was free to choose to have a new family and be a homemaker, she was "not free to adopt a lesser obligation of support for her children of her prior marriage than her former spouse." The court further noted that the parties' shared support obligation entailed "mutual responsibility to be diligent, conscientious about providing support consistent with their respective earning capacities," and found it to be unfair for a spouse with a custody obligation to choose not to work and "forever be imputed with an entry level earning capacity that is in fact progressively compromised by voluntary absence from the work force." We agree. Despite the court's correct articulation of these principles, however, it did not apply them. Instead, it chose to speculate as to what Dorman's earning capacity would be had she vigorously pursued private sector employment from the time of her 1992 divorce to the present.

¶15 In determining child support payments, circuit courts "calculate the appropriate award by using the Department of Health and Social Services standards unless a party requests a deviation and the court finds, by the greater weight of the credible evidence, that the standards are unfair to the child or any party." ***Ayres v. Ayres***, No. 98-3450, slip op. at 8 (Wis. Ct. App. Sept. 8, 1999, ordered published Oct. 25, 1999), *see also* § 767.25(1j) and (1m), STATS. Under WIS. ADM. CODE § HSS 80.03(3)(a), a court may determine a support obligation based on earning capacity by considering a payer's "ability to earn, based on the payer's education, training and work experience, and the availability of work in or

near the payer's community."[5] Accordingly, the circuit court, when determining Dorman's earning capacity, as contemplated under § HSS 80.03(3)(a), should not have speculated as to what education, training and experience she might have gained had she vigorously pursued private sector employment in 1992. The circuit court's speculation necessarily assumed pay raises, promotions, and other

[5] Under WIS. ADM. CODE § HSS 80.03(3)(b), a person's earning capacity for purposes of his or her support obligation may be based on a 40-hour work week at the federal minimum hourly wage. In ***Roberts v. Roberts***, 173 Wis.2d 406, 408, 496 N.W.2d 210, 211 (Ct. App. 1992), a woman elected to forego employment for the benefit of a child born from her second marriage. Physical placement of the two children from her prior marriage had transferred to her ex-husband and consistent with § HSS 80.03, she was expected to pay child support in the amount of 25% of her base pay. *See* ***id***. The issue in ***Roberts*** was whether, absent evidence of shirking, the woman's child support payment should have been based on her actual income rather than her earning capacity. *See* ***id***. Although the issue in ***Roberts*** is irrelevant to the issue before this court, the determination of the woman's earning capacity in ***Roberts*** is noteworthy. Although she had left a job earning $7 per hour, the circuit court imputed to her an income commensurate with the minimum wage—at that time, $4.25 per hour. *See* ***id***. It did not speculate as to what she could have earned had she vigorously pursued employment outside the home.

favorable market conditions. We will not affirm the circuit court's decision when that decision is unsupported by the facts of record and based on multiple layers of speculation.[6]

By the Court.—Order reversed and cause remanded for further proceedings consistent with this opinion.

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

[6] Although Dorman argues alternative grounds for reversing the circuit court's order, our resolution of the issue presented is dispositive of the appeal. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).