COURT OF APPEALS
DECISION
DATED AND FILED

June 11, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1164 **Cir. Ct. No. 2006PA5089**

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

IN RE THE PATERNITY OF M.N.K.:

ANDREW J. KANEHL,

PETITIONER-APPELLANT,

V.

KATHERINE PITEL,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL J. DWYER, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Andrew J. Kanehl ("Andrew") appeals from the circuit court order establishing child support for his daughter, M.K. Andrew

contends that the circuit court erroneously exercised its discretion by: (1) not applying Andrew's reduced income and reduced child support obligation retroactively; (2) imputing income to Andrew without a finding of shirking; (3) not factoring the deprecation of Andrew's commercial real estate into its child support calculation; and (4) not deducting the principal payments Andrew made on the commercial real estate from the child support calculation. We conclude that the circuit court properly exercised its discretion. Accordingly, we affirm.

BACKGROUND

¶2 Andrew and Katherine Pitel ("Katherine")[1] are the parents of M.K., born March 8, 2005. A judgment of paternity was entered in 2007. The parties stipulated to joint custody and held open placement and child support because they were residing together.

¶3 The parties separated and subsequently filed a motion to set placement and child support. On July 24, 2007, the circuit court issued an order requiring Andrew to pay Katherine $361 per month. The following year, Katherine filed a motion to modify child support. Andrew stated that as the self-employed owner of Kanehl Fabrications, Inc., he earned $36,040 per year. In its written order, the circuit court rejected Andrew's statement of income. The circuit court found that Andrew paid his most experienced workers $21 per hour and that it was unreasonable for Andrew to pay himself less than half of that amount. The circuit court set Andrew's child support obligation at $214 per month.

¶4 On October 1, 2008, the parties appeared before the circuit court for a trial on several issues, including child support. Andrew stipulated to an income

[1] Because the briefs identify both parties by their first names, we do the same.

of $92,500 for child support purposes. Using the shared placement schedule,[2] the circuit court set Andrew's child support obligation at $605 per month, effective January 1, 2008. The circuit court ordered Andrew to pay the difference between the previously ordered $214 per month and the new order of $605 for the first nine months of 2008 in a lump sum totaling $3519. The circuit court ordered the parties to exchange tax returns and supporting documents yearly. Andrew complied with the order.

¶5 On November 11, 2010, the parties appeared before the circuit court for a review of child support obligations. Andrew stipulated that his 2009 income, still as the owner of Kanehl Fabrication, Inc., was $112,166. He stipulated to a 2010 income of $111,585. The circuit court set Andrew's child support obligation at $758 per month, effective December 1, 2010, and ordered Andrew to pay an arrearage of $2157, effective November 11, 2010.

¶6 Two months later, on January 18, 2011, Andrew filed a motion to review and revise child support. Andrew's motion requested a reduction in child support due to a substantial change in circumstances. Two hearings were held.

¶7 At the first hearing, on May 20, 2011, the circuit court stated that Andrew's substantial change in circumstance was his purchase of commercial real estate in 2009, made for the purposes of expanding his business. The parties, through counsel, told the circuit court that they disputed whether the depreciation of the real estate should be factored into a determination of Andrew's child support obligation. The circuit court framed the issues as whether "it is a

[2] *See* WIS. ADMIN. CODE § DCF 150.04(2).

reasonable business expense to buy the building, and to depreciate it on a straight-line basis over 39 years."

¶8 Both Andrew and Katherine brought accounting experts to the hearing; however, due to time constraints, only one of Katherine's experts, Michael Sattell, testified at the first hearing.

¶9 Sattell told the circuit court that he reviewed Andrew's corporate and personal tax returns to determine Andrew's sources of income. Based on his review of Andrew's tax records, Sattell determined that Andrew's income was $25,590 less because of the commercial real estate purchase. Sattell's calculation was based on "the rent that was received for the property, minus mortgage interest that was paid on the financing for the property, minus real estate taxes that were paid … and … other miscellaneous expenses related to running a property." Sattell did not include losses resulting from the purchase in his calculation of Andrew's child support obligation, however, because "unlike assets that are purchased in Kanehl Fabrication, the operating company, that lose value over time and are very unlikely to garner a real sale price, if they were to be sold down the road, a building is far different … [a]nd … will probably go up in value over time." Sattell continued, "[a]nd so if depreciation is supposed to be a measure of the wasting of that asset, there is probably no wasting that's going to be going on with the real estate property."

¶10 Both Andrew and his accounting expert, Michael Donahue, testified at the second hearing. Andrew testified that he purchased the commercial real estate because his business's original location was "beyond capacity." Andrew stated that he purchased the real estate for $950,000 with a down payment of $60,000. Andrew paid a monthly payment of $6,376.24 to the previous owners,

who maintained a deed to the property. Andrew testified that Kanehl Fabrications grossed approximately one million dollars in 2010, and approximately 1.2 million dollars in 2011, following the company's expansion to the new building.

¶11 Donahue, Andrew's personal and business accountant, told the circuit court that Andrew's business sustained a loss of $44,346 as a result of the real estate purchase. Combining this amount with Andrew's ordinary business income, the depreciation of Andrew's business buildings, monthly payments to the new building's previous owners, and multiple other expenses, Donahue initially calculated Andrew's available income for child support purposes at $5279 for the year. Donahue admitted that a few of the deductions he included in his calculation should be added back into Andrew's available income. Thus, Donahue submitted that Andrew's total available income for child support purposes was approximately $16,000 for the year.

¶12 Tracy Coenen, Katherine's second expert accountant, disputed Donahue's calculations. Using data from Andrew's personal and corporate tax returns, the cost of maintaining the business at its original building, the cost of maintaining the business at the new building, and a depreciation figure of $116,467, Coenen calculated Andrew's available annual income as $101,818. Coenen testified that Donahue reduced Andrew's income "because of this building," but that the building "might be a smart investment." Coenen acknowledged that the building has a legitimate business purpose, but stated that "putting all available cash into a building such that it then is not available for child support is not reasonable."

¶13 In an oral decision, the circuit court considered all of the testimony, financial spreadsheets submitted by both parties, and the shared-placement

formula described in WIS. ADMIN. CODE § DCF 150.04(2), to calculate Andrew's available annual income for child support purposes as $46,338, yielding a monthly child support order of $113. Noting that $113 a month would cause a "substantial negative impact on the lifestyle of the child," and taking into count Andrew's earning capacity, the circuit court ultimately found Andrew's available annual income to be $60,000. The circuit court ordered child support at $258 monthly with an effective date of December 1, 2011. The circuit court did not require Katherine to repay the gross amount of the support reduction from 2010. This appeal follows. Additional facts are included as relevant to the discussion.

DISCUSSION

¶14 Andrew argues that the circuit court erroneously: (1) refused to apply the reduced income and reduced child support retroactively; (2) imputed an income of $60,000 to Andrew without a finding of shirking; (3) refused to factor in the depreciation of Andrew's commercial real estate when calculating Andrew's available income; and (4) refused to deduct Andrew's principal payments on the commercial real estate note when calculating his available income. We address each issue.

Standard of Review

¶15 Determination of child support is committed to the sound discretion of the circuit court. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. When we review a discretionary decision, we examine the record to determine if the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. *See* ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). A circuit court's calculation of a party's income is a

factual finding that we will not reverse unless clearly erroneous. *See* ***DeLaMatter v. DeLaMatter***, 151 Wis. 2d 576, 588, 445 N.W.2d 676 (Ct. App. 1989).

Retroactive Application

¶16 Andrew argues that the circuit court should have retroactively applied the child support reduction in accordance with WIS. STAT. § 767.59(1m) (2011-12).[3] We disagree.

¶17 WISCONSIN STAT. § 767.59(1m) provides:

> PAYMENT REVISIONS PROSPECTIVE. In an action … to revise a judgment or order with respect to child support, maintenance payments, or family support payments, the court may not revise the amount of child support, maintenance payments, or family support payments due, or an amount of arrearages in child support, maintenance payments, or family support payments that has accrued, prior to the date that notice of the action is given to the respondent, except to correct previous errors in calculations.

¶18 WISCONSIN STAT. § 767.59(1m) states that revisions to child support orders cannot be made prior to the date of notice to the other party; however, the actual date of notice provided to Katherine is not at issue in this appeal. Rather, Andrew argues that the circuit court erred by not applying his reduced income and the resulting reduced child support retroactively. Any change in child support requires a showing that there has been a substantial or material change in circumstances of the parties or children. *See* ***Poehnelt v. Poehnelt***, 94 Wis. 2d 640, 648, 289 N.W.2d 296 (1980). The burden is on the party seeking modification to establish a significant change in financial or other circumstances.

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

See ***Kelly v. Hougham***, 178 Wis. 2d 546, 556, 504 N.W.2d 440 (Ct. App. 1993). We will not disturb the circuit court's findings unless clearly erroneous. *See* ***DeLaMatter***, 151 Wis. 2d at 588.

¶19 The record supports the circuit court's decision. First, the circuit court noted that Andrew filed the motion to modify child support two months after stipulating to an income of $111,585. Applying Andrew's obligation retroactively, the circuit court reasoned, would encourage continuous litigation between the parties. Specifically, the circuit court stated that the parties would have an "incentive to file a new motion after the first of the year, which is completely counter-productive for the court system, it's counter-productive for the two of you, given the costs of litigation, and … I'm trying to put a stop to it."

¶20 Second, the circuit court found that prospective application of child support was the "fairest" application because "[i]t is hard to determine the right amount of income due to the fact that we have a self-employed business person and it's really hard to adapt to changes.… That way [Andrew] pays his child support based upon the information that we have until we have different numbers."

¶21 The circuit court's reasoning reflected a consistent method of application that would minimize the negative effect of reduced finances on the child and would "even out the [i]nequalities under the[] circumstances." The circuit court logically interpreted the facts, applied the proper legal standard and used a demonstrated rational process. *See* ***Loy***, 107 Wis. 2d at 414-15. As such, the circuit court properly exercised its discretion.

Imputing Income

¶22 Andrew contends that the circuit court erroneously imputed an income of $60,000 to Andrew without making a finding of shirking. Andrew argues that the record does not support the circuit court's determination of imputed income. We disagree.

¶23 Contrary to Andrew's contention, the circuit court was not required to make a finding of shirking prior to imputing an income of $60,000 to Andrew. "Shirking is established 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 support obligation." ***Van Offeren v. Van Offeren***, 173 Wis. 2d 482, 492, 496 N.W.2d 660 (Ct. App. 1992). This case is generally distinguishable from cases in which courts have imputed income due to shirking. In shirking cases, the focus is generally on whether the paying parent intentionally reduces his or her income with the intent of avoiding child support. *See* ***id.*** Here, Andrew is a self-employed business-owner with a fluctuating income and a significant commercial real estate investment. Andrew argues that the tax deduction he is able to take for the accounting technique of depreciating the value of the commercial building should reduce his child support. However, depreciation is simply an accounting technique that attempts to calculate how much should be theoretically set aside in order to replace the building when it has exceeded its useful life. Both the amount and the length of useful life are theoretical concepts; no one can actually determine today when a building will no longer be functional or how much it will cost at that time to replace it. More to the point, a "depreciation account" does not generally actually contain real money; certainly there is no evidence in the record that cash is required by taxing authorities to be deposited in such a segregated account. Because the depreciation amount exists only in terms of the current tax

code, and generally accepted accounting principles, it was reasonable for the circuit court to ignore part or all of that theoretical cost when it set child support in an amount to provide reasonable support for Andrew's child, regardless of fluctuations in his taxable income.

¶24 Relying on WIS. ADMIN. CODE § DCF 150.03(3), Andrew contends that the circuit court was required to find that his earning capacity exceeded his current income. Section DCF 150.03(3), as relevant, provides:

> DETERMINING INCOME IMPUTED BASED ON EARNING CAPACITY. In situations where the income of a parent is less than the parent's earning capacity or is unknown, the court may impute income to the parent at an amount that represents the parent's ability to earn, based on the parent's education, training and recent work experience, earnings during previous periods, current physical and mental health, history of child care responsibilities as the parent with primary physical placement, and the availability of work in or near the parent's community.

¶25 Andrew's reliance on WIS. ADMIN. CODE § DCF 150.03(3) is misplaced. Child support is generally determined by using the percentage guidelines established by the Department of Children and Families. *See* WIS. STAT. § 767.511(1j); *see also* WIS. STAT. § 49.22(9). WISCONSIN ADMIN. CODE § DCF 150.04(2) details the percentage methodology for determining child support for shared placement parents. The court may deviate from these percentage guidelines upon request by a party. *See* § 767.511(1m).

¶26 Based on the parties' shared placement of the child, the circuit court found that Andrew's available income was $46,338. Considering spreadsheets and testimony provided by both parties, the circuit court stated:

> So I find that the way to calculate [Andrew's] income for the purposes of child support for this year is basically to take sort of a combination of the spreadsheets

> provided by the parties and to attribute undistributed business income of $41,057, officer compensation of $60,000, depreciation of $87,412, interest and dividends of $16, for a total income of [$]188,485.
>
> From that I will deduct the straight line depreciation amount that was stipulated to, [$]116,467, the rest loss, if you will, of [$]44,436, and add back the real estate depreciation of $18,756.
>
> That leaves a total income of $46,338.
>
> Now, using … [Katherine's] income, that leaves – that yields in an equal placement arrangement that yields a child support order of $113 a month.

¶27 The circuit court then decided to deviate from the shared placement guidelines and imputed an income of $60,000 to Andrew. A circuit court "may deviate from the percentage standard if it finds by the greater weight of the credible evidence that the use of the standard would be unfair to the child or the party requesting deviation. In determining unfairness, the [circuit] court must consider the factors enumerated under WIS. STAT. § 767.511(1m)." ***Ladwig v. Ladwig***, 2010 WI App 78, ¶23, 325 Wis. 2d 497, 785 N.W.2d 664 (internal citation omitted). A court need consider only those statutory factors that are relevant. *See* ***Mary L.O. v. Tommy R.B.***, 189 Wis. 2d 440, 466 n.1, 525 N.W.2d 793 (Ct. App. 1994) (Nettesheim, J., dissenting), *rev'd in part*, 199 Wis. 2d 186, 544 N.W.2d 417 (1996) (approving the analysis in J. Nettesheim's dissent). SECTION 767.511 (1m) provides as relevant:

> DEVIATION FROM STANDARD; FACTORS. Upon request by a party, the court may modify the amount of child support payments determined under sub. (1j) if, after considering the following factors, the court finds by the greater weight of the credible evidence that use of the percentage standard is unfair to the child or to any of the parties:
>
> ….
>
> (hm) The best interests of the child.

> (hs) The earning capacity of each parent, based on each parent's education, training and work experience and the availability of work in or near the parent's community.

¶28 In deciding to impute income to Andrew, the circuit court stated:

> So that takes the Court to a question of whether or not the Court ought to deviate from the guideline for any reason. One of the reasons are that the needs of the child. The fact that this child has a lifestyle that's based on child support income of [$]758 a month, and that the guideline child support would result in a reduction of that child support by 85 percent, I think allows the Court to infer that that would have a substantial negative impact on the lifestyle of the child….
>
> There's also another issue in this case which is difficult, and not argued by either of the parties, but that relates to [Andrew's] earning capacity…. [I]t is fair to ask what's your earning capacity? Now, … I know that you've been able to build a company basically from scratch to a million dollars a year, and you've grown it at a steady rate during economic hard times…. And I believe that is fair to impute some minimal amount of income to you as a floor in part because you have, you know, so much flexibility with the way you run your business and make decisions….
>
> On that front I conclude that it is fair to impute to you as a minimum income of $60,000 a year. Now that yields a child support amount of $258 a month[.]

(Some formatting altered.)

¶29 The circuit court expressly considered the child's standard of living, the best interest of the child, and the flexibility of Andrew's income. Therefore, the circuit court considered the relevant statutory standards and properly exercised its discretion by imputing a $60,000 income to Andrew.

Depreciation

¶30 Andrew argues that the circuit court erroneously failed to consider the depreciation of his commercial real estate when calculating child support.

Andrew also contends that the circuit court failed to explain its rationale. We disagree.

¶31 In determining a party's income for support purposes, a court has discretion to add back depreciation that the court finds was not reasonable for the party to deduct. *See* ***Brad Michael L. v. Lee D.***, 210 Wis. 2d 437, 458, 564 N.W.2d 354 (Ct. App. 1997).

¶32 Both Sattell and Donahue testified about the depreciation issue at the modification hearing. Sattell told the circuit court that for 2010, "the appropriate measure of income or loss would be a loss of $25,590." To arrive at that amount, Sattell evaluated Andrew's 2010 personal tax return, took the stated loss of $44,346, and added back building depreciation in the amount of $18,756. Sattell reasoned that the building itself was an investment, stating that "unlike assets that are purchased in Kanehl Fabrication, the operating company, that lose value over time … a building is far different…. [I]f depreciation is supposed to be a measure of the wasting of that asset, there is probably no wasting that's going to be going on with the real estate property." Coenen, Katherine's other accounting expert, told the circuit court that the building purchase "might be a smart investment." Donahue did not address the investment nature of the building.

¶33 The circuit court agreed that the building was an investment, stating "historically … real estate is an investment, and … it needs to be treated as an investment.… [T]here's nothing in the record that indicates that the price paid for this was too high or that the payment terms were out of line…. [T]his is clearly an asset, it's clearly in the Company's interest that the owner of the company own the building." The circuit court's decision was consistent with Sattell's testimony. The circuit court reasoned that the building was ultimately an asset to Andrew's

business and accordingly declined to deduct the building's depreciation from Andrew's income. Contrary to Andrew's contention, the circuit court stated its rationale on the record. Further, as the ultimate arbiter of credibility, the circuit court properly exercised its discretion in making findings consistent with Sattell's testimony. *See* ***Welytok v. Ziolkowski***, 2008 WI App 67, ¶28, 312 Wis. 2d 435, 752 N.W.2d 359.

Principal Payments on the Promissory Note

¶34 Finally, Andrew argues that the circuit court erroneously failed to deduct the principal payments made on the promissory note for the commercial real estate. Andrew contends that he was forced to pay child support on "phantom money" that he did not have because payments made on the note for the real estate were not deducted from his available income.

¶35 The circuit court stated its rationale for refusing to include Andrew's requested deduction:

> Now, as to the proposed deduction for principal reduction, … I think that that argument is basically nullified by the investment nature of the [asset].
>
> [Andrew's ownership of the building] will help the business make money, which will enure ultimately to [Katherine's] benefit, but she does not necessarily share in the increase in the value of the business or the increase in the value of the building.
>
> Now it's true that she might share in those increases should the realization of those increases occur during the term of child support. But since those transactions are wholly within the control of [Andrew], and since his desire to avoid paying child support on those sums is clear and compelling, it's very unlikely that she would receive any of that benefit. Therefore, allowing a discount for his principal reduction strikes me as being not appropriate.

¶36 The circuit court reasoned that Andrew's payments on the promissory note, in essence, benefit the value of Andrew's business. In considering the evidence, the circuit court discussed Andrew's skills as a business man, his complete control over the transactions involving the real estate, and the benefits to his business because he owned the building. The circuit court also acknowledged Andrew's desire to avoid paying additional child support. The circuit court's decision not to deduct the principal payments made on the promissory note from Andrew's available income, therefore, is amply supported by the record and will not be reversed.

¶37 For the foregoing reasons, we affirm the circuit court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.