

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 14, 2006

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP883

Cir. Ct. No. 2004FA25

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

KATHY JO JOHNSON,

PETITIONER-RESPONDENT,

v.

MICHAEL J. JOHNSON,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
SHELLY J. GAYLORD, Judge. *Affirmed.*

Before Lundsten, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Michael Johnson appeals from the family support component of his divorce judgment. We affirm for the reasons discussed below.

BACKGROUND

¶2 The parties were married for about twenty-two years, were both in their mid-forties, and had two minor children at the time of the divorce. They reached an agreement on the property settlement and physical placement of the children, but litigated the issue of family support payments. The trial court ultimately ordered Michael to pay Kathy \$4,000 per month until he reached the age of sixty-five. We will discuss more detailed facts relevant to each issue raised on appeal in conjunction with that issue.

DISCUSSION

Michael's Income

¶3 Michael first challenges the trial court's finding that his monthly income was \$11,921. We will uphold the factual findings of the trial court unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2003-04).¹

¶4 Michael was a self-employed insurance agent. He submitted an exhibit showing that his average annual net income after expenses between 2002 and 2005 was \$142,462.34. The trial court disallowed \$6,170 of Michael's claimed expenses on the grounds that they were not clearly necessary for the business, but then deducted \$5,580 to compensate for the fact that Michael had to make both employer and employee FICA contributions, resulting in an annual income of \$143,052 or \$11,921 per month.

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶5 Michael complains that the trial court's calculations ignore unrefuted evidence that Michael's commission rates from American Family had significantly decreased over the past year, which he claims would reduce his income by \$5,000 to \$10,000 per year. The record does not support Michael's contention that the trial court ignored the decrease in his commissions. Rather, the court found that, because Michael had "seldom worked more than 20-30 hours per week when [he] ran the business" with his wife, he could offset the decrease in commissions by increasing the number of hours he worked. The court explained that, "given the decrease in commissions, the husband will be working an average of 40 hours a week."

¶6 Michael similarly complains that the trial court ignored testimony that the last two months of the year are typically the worst of the year for commissions, and therefore overestimated Michael's 2005 income by \$4,600 by simply assuming that the last two months of the year would be on track with the first ten months. Aside from the fact that Michael presented the same purported overestimation in his own Exhibit 13, we see no reason why the trial court was required to speculate as to how much Michael's commissions might decrease in the last two months of the year. It was not clearly erroneous for the court to project Michael's annual income for 2005 based on his actual income for the first ten months of the year, particularly in light of the court's comments that Michael could increase the hours he was working.

¶7 Michael next claims it was clearly erroneous for the trial court to exclude 1/3 of the \$7,249 in annual automobile expenses he had claimed should be deducted from his business income, resulting in overestimating his monthly income by \$201. He argues that, since the \$7,249 figure was based upon tax

returns, and there was no showing that the tax returns were fraudulent, the court had no basis to reduce the claimed expense. We are not persuaded.

¶18 First of all, WIS. ADMIN. CODE § DWD 40.02(16) (Dec. 2003) permits reduction of income for child support purposes for only those “business expenses that the court determines are reasonably necessary for the production of that income or operation of the business and that may differ from the determination of allowable business expenses for tax purposes.” Since allowable business deductions for child support purposes may differ from allowable business deductions for tax purposes, tax returns are not necessarily dispositive. It remains the burden of the party attempting to reduce his or her income for child support purposes to convince the court that any claimed business expenses were in fact “reasonably necessary.”

¶19 Here, Michael presented an exhibit showing that he averaged \$7,249 in annual automobile expenses taken as a business deduction. He testified that that figure included insurance, maintenance, and business mileage, but no personal mileage. However, Michael also presented a financial disclosure statement which listed a monthly income amount from which it appears that business deductions had already been taken, and then listed \$565 in monthly transportation costs and automobile insurance as a budget item, which would amount to \$6,780 annually.

¶10 If the \$6,780 budget figure was meant to include both personal and business automobile expenses (notwithstanding the double counting problem that would present), it would present an obvious conflict with Michael’s testimony that he had \$7,249 in business automobile expenses alone. That is, under this scenario the amount of Michael’s claimed business automobile expenses would have exceeded the amount of his claimed budget transportation expenses, leaving

nothing for personal automobile expenses. Since, as the court noted, Michael had only one car which was used for both personal and business purposes, it would be entirely reasonable for the court to assign a certain amount of the budgeted automobile expenses to personal use.

¶11 Alternatively, if the \$6,780 budget figure was meant to represent only personal automobile usage, that would mean that Michael was claiming to have \$14,029 in combined personal and business automobile expenses. The court could reasonably question the credibility of such a high amount, particularly when, as it noted, Michael did not present any further explanation or documentation as to how the business expense for the car was calculated. In sum, whether due to conflicts between the exhibits or the inherently questionable nature of unexplained high expenses, the court was not required to accept all of Michael's claimed automobile expenses as being reasonably necessary for business purposes. It could instead find the claimed amount lacked credibility and reduce it accordingly; and we defer to such a credibility determination. *See State v. Oswald*, 2000 WI App 3, ¶ 47, 232 Wis. 2d 103, 606 N.W.2d 238.

Kathy's Earning Capacity

¶12 The trial court found that Kathy was earning \$14,148 per year working for the Middleton-Cross Plains school district, plus \$1,285 per year from a summer job, for an average of \$1,286 per month. The court imputed an additional \$107 per month to Kathy's income, resulting in an earning capacity of \$1,393, based on a finding that she should reasonably be working more hours during the summer. Michael contends the trial court erroneously exercised its discretion by refusing to find Kathy's career choice unreasonable and to impute more income to her.

¶13 A court should use a party's earning capacity in lieu of actual income for the purpose of determining a support obligation only after finding the party has been "shirking" — that is, that the party's "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. Although a question of reasonableness is ordinarily one of law, we will give deference to a court's shirking determination because it is so intertwined with the underlying factual findings. *Id.*, ¶41.

¶14 Michael's vocational expert testified that Kathy was underemployed from an income capacity perspective and could be earning \$15 to \$17 per hour as an administrative assistant in the Dane County market, which would translate to \$31,200 to \$35,360 per year. Kathy testified that she did not want to be an administrative assistant, and liked her current job because she had benefits and her hours coincided with her daughter's school hours, allowing her to spend more time with both of the children.

¶15 The court determined that it was reasonable for Kathy to keep a job that she enjoyed, given the age and actual earnings of both parties, Kathy's work history, and the fact that both parties had chosen jobs that allowed them to be available for the children during the marriage. The court further noted that it cost Michael about \$17,000 a year to hire replacement administrative help shortly after Kathy took the job at the school and stopped providing unpaid administrative help for his business. The court determined that the \$17,000 figure was a better representation of Kathy's actual earning capacity as an administrative assistant than the figures suggested by the vocational expert. In other words, the trial court found as a factual matter that Kathy was forgoing far less in income than Michael asserted.

¶16 Given the trial court’s factual findings and its discussion of the relevant factors, we agree with its legal determination that Kathy was not shirking by working for the school district instead of seeking employment as an administrative assistant. We are therefore satisfied that the court properly used Kathy’s actual income for the school year, rather than imputing additional income to her based on what she could earn as an administrative assistant.

¶17 Michael also claims that the trial court should have found that Kathy could have increased her income after the children reached adulthood. This argument rests heavily on the figures presented by his vocational expert, which the court rejected. Given the court’s finding that Kathy would likely earn about \$17,000 per year as an administrative assistant, while she was already earning \$15,433 per year between her two jobs and could increase her summer earnings, there was no factual basis for determining that she could substantially increase her income after the children were adults by switching jobs at that time.

Length of Award

¶18 Finally, Michael claims the trial court erroneously exercised its discretion in ruling that family support would continue until Michael reached the “typical retirement age” of sixty-five. Michael points out that there was no evidence in the record as to when he actually planned to retire. However, the court left open a possible modification to the award should the facts so justify, which would encompass an earlier or later retirement. We see no misuse of discretion in this regard.

By the Court.—Judgment affirmed.

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

