

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 26, 2008

David R. Schanker
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. 2007AP916

Cir. Ct. No. 2000FA814

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

PAMELA J. BRAVERMAN,

PETITIONER-RESPONDENT,

V.

MARC A. HOLM,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County:
SCOTT C. WOLDT, Judge. *Affirmed.*

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

¶1 PER CURIAM. Marc A. Holm appeals pro se from an order increasing his child support for his minor daughter who lives in Pennsylvania with her mother, Pamela Braverman. Marc challenges the circuit court's handling of his visitation travel expenses and the imputation of income from the full amount of

an inheritance and trust without accommodating his needs to pay debts, living expenses, and attorney fees. He also argues that there is no need for increased support to maintain the child's standard of living. We affirm the order of the circuit court.

¶2 In 2001 Marc was ordered to pay child support of \$54.40 per week based on an earning capacity of \$8.00 per hour. In 2006 Pamela moved to increase child support on the ground that Marc had received a large inheritance and distributions from a trust. The circuit court set child support using the percentage guideline at \$838.83 per month. The court calculated Marc's monthly income using a 4.2% rate of return on Marc's interest in the trust and the entire \$770,400 inheritance,¹ imputing income at \$10 per hour for a forty-hour work week, and deducting one-half of Marc's visitation travel expenses.

¶3 The modification of child support based on a substantial or material change of circumstances is within the discretion of the circuit court. *See Thibadeau v. Thibadeau*, 150 Wis. 2d 109, 114-15, 441 N.W.2d 281 (Ct. App. 1989). We affirm the exercise of discretion if the circuit court's decision exhibits a rational reasoning process based on the facts in the record or reasonable inferences from those facts and the correct application of the proper legal standards to those facts. *Haugen v. Haugen*, 117 Wis. 2d 200, 216, 343 N.W.2d 796 (1984). The court must consider the needs of the custodial parent and

¹ The \$777,400 inheritance is not money sitting in a bank since Marc has spent nearly the entire inheritance on his horse farm and house, three show horses, farm equipment and a horse trailer, repayment of loans, travel expenses, attorney fees, an engagement ring and down payment on a wedding, and a health insurance policy.

children and the ability of the noncustodial parent to pay. *Thibadeau*, 150 Wis. 2d at 115.

¶4 Marc does not challenge the determination that a substantial change of circumstances occurred. It is presumed that child support established pursuant to the percentage standard is fair. *Abitz v. Abitz*, 155 Wis. 2d 161, 179, 455 N.W.2d 609 (1990). Marc does not argue that application of the percentage standard was unfair to him. Rather, he complains about certain calculations made in determining his monthly income.

¶5 Marc first complains that the circuit court inaccurately determined the amount of his monthly travel expenses to be \$750 rather than \$798. The circuit court's findings of fact will not be overturned unless clearly erroneous. WIS. STAT. § 805.17(2) (2005-06).² The evidence was that Marc spent \$8,782.56 for eleven trips to Pennsylvania. However, that evidence included only an estimate of expenses for gas and tolls and appears to include expenses for Marc and his wife. Adjustments to the figures Marc advanced were appropriate. The circuit court's determination of travel expenses of \$750 is not clearly erroneous.

¶6 Marc also complains that the circuit court deducted one-half of the expenses from his monthly income rather than his child support obligation and thereby negated the available credit. The only reason Marc advances for deducting the expense directly from child support is the "substantial expenses and the history of this case." At the hearing, Marc indicated that he was no longer making monthly trips to Pennsylvania. His claim of substantial expenses falls

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

short. His reference to the history of the case is to Pamela's election to move to Pennsylvania while pregnant and without notice to Marc; Marc characterizes that as intentional conduct designed to make his parenting more difficult and expensive. Child support determinations do not compensate for alleged wrongs in the marital partnership. There is no basis to disturb the circuit court's determination of how to credit one-half of the travel expenses.

¶7 The court may consider a party's earning capacity rather than actual earnings when determining a party's obligation for maintenance and child support. *Sellers v. Sellers*, 201 Wis. 2d 578, 587, 549 N.W.2d 481 (Ct. App. 1996). Marc contends there was no reason to increase his earning capacity from \$8 to \$10 per hour. Even accepting Marc's contention that he has no other marketable skills other than horse training and no way to increase his earning capacity, there is sufficient evidence to support the \$10 per hour calculation. Marc testified that he charges \$35 an hour for riding lessons and gives between forty and fifty lessons a month. The math works out to almost \$10 an hour. Marc offered no contradictory evidence.

¶8 Marc argues that the imputation of income on the entire inheritance is unfair because it fails to accommodate his need to use that money to build his business, obtain housing, and pay off debts and attorney fees. The circuit court recognized that Marc had expended a substantial share of the inheritance on his horse farm and related expenses. The court noted that Marc has been in the horse business for twenty years and has never shown a profit from it. Thus, the court concluded that Marc invested the money in unproductive assets. In setting child support, the court may consider the earning potential of unproductive assets. *Brad L. v. Lee D.*, 210 Wis. 2d 437, 459-60, 564 N.W.2d 354 (Ct. App. 1997). Nothing suggests that the 4.2% rate of return is unreasonable; Marc's accountant confirmed

that percentage as reasonable for safe investments. We are not persuaded that the refusal to offset Marc's expenditures of the inheritance was an erroneous exercise of discretion.

¶9 Marc points out that WIS. ADMIN. CODE § DWD 40.02(15), permits the imputation of income from unproductive assets only if "income has been diverted to avoid paying child support or from which income is necessary to maintain the child or children at the standard of living they would have if they were living with both parents." Although Marc asserts he did not expend the entire inheritance for the purpose of avoiding child support and the circuit court made no explicit finding that he had that intent, the circuit court implicitly determined that Marc was avoiding child support by engaging in a business that was not profitable in twenty years. The court commented that Marc was not using his money wisely and he had failed to forego the things he wanted for the benefit of his child. The court indicated it was basing its decision on what a responsible person would have done. This was a proper consideration and basis for imputing income from unproductive assets. *See Roberts v. Roberts*, 173 Wis. 2d 406, 411-12, 496 N.W.2d 210 (Ct. App. 1992) (a parent with a support obligation has some leeway in choosing employment and may pursue his or her best opportunities even though that might mean working for a time for a lesser financial return but this rule is subject to reasonableness commensurate with the parent's obligation to his or her children).

¶10 We recognize that the circuit court did not specifically address the needs of the custodial parent and child when increasing child support. *See Thibadeau*, 150 Wis. 2d at 115. We will search the record for reasons to sustain the circuit court's exercise of discretion. *Randall v. Randall*, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. Pamela testified that the afternoon school

program for the child while in kindergarten was expensive and that she continues to incur the expense of summer camps. This is sufficient to support a finding of increased financial need and the circuit court's exercise of discretion. Marc cannot avoid his support obligation simply because Pamela earns more than he does.

By the Court.—Order affirmed.

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

