

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 29, 2009

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. 2008AP1836

Cir. Ct. No. 2006FA211

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

DANA L. MICHALSKI,

PETITIONER-APPELLANT,

V.

KEVIN T. MICHALSKI,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Wood County:
GREGORY J. POTTER, Judge. *Reversed and cause remanded.*

Before Dykman, P.J., Higginbotham and Bridge, JJ.

¶1 PER CURIAM. Dana Michalski appeals from an order modifying the child support provision in the judgment divorcing her from Kevin Michalski.

The order reduced Kevin's child support obligation from \$650 per month to \$191.53 per month. The court reduced support based on its finding that circumstances beyond Kevin's control caused him to lose the business that supplied him with sufficient income to pay \$650 per month.¹ We conclude that Kevin did not present sufficient evidence showing that his loss of income occurred due to circumstances outside his control. We therefore reverse, and remand for a redetermination of the issue.

¶2 Kevin moved to reduce child support after he lost his tavern business, and started a new career with minimal earnings. In August 2007 he testified at the divorce hearing that he earned about \$60,000 per year from the tavern, he expected the business to continue, and he expected to continue supporting himself by operating it. Based on his expectations, he stipulated to pay \$650 per month in support. However, Kevin operated the tavern on rented premises and within two months of the divorce hearing he stopped paying his \$2400 per month tavern rent. Eventually, he was evicted and lost the business.

¶3 Kevin blamed the Town of McMillan for his rent default and eviction. He testified that in the summer or fall of 2007 his landlord erected a recreational building adjacent to the tavern. Kevin hoped to use the building for special events such as weddings or comedy shows. In late 2007 or early 2008 the Town of McMillan denied permits to use the new recreational building for anything but volleyball. He testified that it was the town's permit decision that ruined his business.

¹ The court calculated the modified award of \$191.53 per month by applying the percentage child support guidelines to the monthly gross income of a full-time minimum wage earner, as Kevin was essentially starting over in a new career, with minimal initial earnings.

¶4 The relief Kevin sought was a reduction in child support to a minimal level until his new business as an insurance salesman got off the ground. The trial court granted Kevin's motion on its finding that the eviction from his tavern business was not shirking because it was neither Kevin's choice nor his fault. The court stated that "it was the Town of McMillan that made the decision that he was not able to have any additional activities in this building, which obviously reduced his income. As such his lease was terminated."

¶5 A person seeking to modify a child support obligation based on reduced income bears the burden of proving the reasonableness of the reduction in income. See *Kelly v. Hougham*, 178 Wis. 2d 546, 555, 504 N.W.2d 440 (Ct. App. 1993). If the moving party fails to meet that burden, or in other words is determined to be "shirking," it is appropriate to consider the party's earning capacity instead of his or her actual earnings in determining support. See *Van Offeren v. Van Offeren*, 173 Wis. 2d 482, 492, 496 N.W.2d 660 (Ct. App. 1992). Shirking does not require a finding that a party deliberately reduced earnings to avoid support obligations. "Shirking can be found even when the party reducing his or her income acts with the best intentions." *Chen v. Warner*, 2005 WI 55, ¶54, 280 Wis. 2d 344, 695 N.W.2d 758. "A circuit court need find only that a party's employment decision to reduce or forgo income is voluntary and unreasonable under the circumstances." *Id.*, ¶20. The reasonableness of the decision to reduce income is a question of law, subject to independent review in this court, but with appropriate deference given to the trial court's ruling. *Scheuer v. Scheuer*, 2006 WI App 38, ¶9, 290 Wis. 2d 250, 711 N.W.2d 698.

¶6 Kevin failed to show that he lost the tavern business, and his income from it, due to circumstances beyond his control. In August 2007 he testified that the business was operating successfully and he expected to continue supporting

himself through it. Within two months, however, he was in default on his rent. The sole reason he gave for his rent defaults and subsequent eviction was the town's decision limiting his use of the new building his landlord built adjacent to his tavern. However, Kevin's testimony was vague as to when the town denied the permit, and there is no evidence that it occurred before he defaulted. Additionally, he failed to explain how the permit decision reduced the income he previously received from the tavern, before the recreational building even existed. As he described it, the town's decision merely limited the opportunity to expand his business. He did not testify that it drove away any former customers, and he did not provide any financial records to show declining income or increased expenses prior to the default, that might have made it necessary for him to expand. Therefore, we can only speculate as to why, in October 2007, Kevin stopped paying his tavern rent. Because we are left with speculation, Kevin did not meet his burden of proving the reasonable and involuntary nature of his default and subsequent loss of the business.

¶7 We therefore reverse and remand for a redetermination of Kevin's child support obligation. The circuit court may, in its discretion, take additional evidence on the matter if deemed appropriate.

By the Court.—Order reversed and cause remanded.

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

