

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 18, 2002

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 Nos. 01-3121
01-3122
01-3123
01-3124
01-3125**

**Cir. Ct. No. 95-PA-2
89-PA-9
00-PA-13
92-PA-68
92-PA-85**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

No. 01-3121

**IN RE THE PATERNITY OF JARED D.B.:
BARRON COUNTY,**

PETITIONER-RESPONDENT,

MARYANNE B.,

PETITIONER,

V.

BRIAN T.,

RESPONDENT-APPELLANT.

NO. 01-3122

**IN RE THE PATERNITY OF HUNTER W.:
BARRON COUNTY,**

PETITIONER-RESPONDENT,

KAREN N.,

PETITIONER,

V.

BRIAN T.,

RESPONDENT-APPELLANT.

NO. 01-3123

**IN RE THE PATERNITY OF KIMBERLY L.N.:
BARRON COUNTY,**

PETITIONER-RESPONDENT,

LISA N.,

PETITIONER,

V.

BRIAN T.,

RESPONDENT-APPELLANT.

NO. 01-3124

IN RE THE PATERNITY OF KAYLA L.H.:
BARRON COUNTY,

PETITIONER-RESPONDENT,

SHARON B.,

PETITIONER,

V.

BRIAN T.,

RESPONDENT-APPELLANT.

NO. 01-3125

IN RE THE PATERNITY OF TANNER D.F.:
BARRON COUNTY,

PETITIONER-RESPONDENT,

BRENDA F.,

PETITIONER,

V.

BRIAN T.,

RESPONDENT-APPELLANT.

APPEALS from an order of the circuit court for Barron County:
EDWARD R. BRUNNER, Judge. *Reversed and cause remanded.*

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

¶1 PER CURIAM. Brian T. appeals an order setting the amount of child support for each of his five children. He argues that: (1) strict application of the percentage of income standards is unfair; (2) strict application of the percentage of income standards here conflicts with the Consumer Credit Protection Act; (3) the trial court erroneously exercised its discretion by strictly applying the percentage of income standards because the order leaves Brian with an income below the federal poverty level; and (4) the trial court erroneously exercised its discretion by issuing a child support order with which Brian cannot possibly comply. We conclude that the court erroneously exercised its discretion when it set a child support obligation that Brian indisputably cannot meet.¹ We therefore reverse and remand.

BACKGROUND

¶2 Brian is a thirty-six-year-old father of five children. Each child has a different mother. Brian currently is married and has no children with his present wife.

¹ Because Brian's final argument is dispositive, we decline to address his other contentions. See *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983). We are, however, troubled by the County's response to Brian's third argument. If a court cannot order income withholding for arrears plus current support that puts the payor under the federal poverty level, why can it order child support alone that achieves the same effect? It appears manifestly unfair that one order must not impoverish the payor but the other type of order may. See WIS. STAT. § 767.25(1m)(bp).

All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶3 Brian works as a long haul, over-the-road truck driver. He formerly was employed by D & E Transport and earned over \$45,000 in 2000. While employed at D & E, Brian paid one-third of the cost of his health insurance, \$160 per month.

¶4 In January 2001, Brian decided to start his own trucking company. He still received almost all of his income from D & E, operating a leased truck, but the income decreased dramatically. Brian estimated that his net disposable income would only be between \$14,000 and \$15,000 in 2001.² Brian had anticipated that he would earn \$10,000 to \$12,000 more than that his first year, but an increase in fuel prices decreased his income. Brian's wife also works for his trucking company as the office manager and earns the same amount Brian does.

¶5 In early 2001, the child support agency moved for modification of child support for two of the children. Brian filed motions to modify child support in those cases and two more. The agency then moved to consolidate a fifth case. The trial court consolidated all five matters.

¶6 At the hearing on the parties' motions, the trial court determined that Brian had secured health insurance for all of the children with a premium of \$429 per month. The court then heard evidence on the motions to modify child support pursuant to WIS. STAT. § 767.25(m). It imputed to Brian an income of \$45,402,

² At the time of the hearing, the court only had income from the first five months of 2001. Brian had net disposable income of \$325 in January, \$1,300 in February, \$975 in March, \$1,625 in April and \$1,300 in May. This totaled \$5,525 for the first five months of 2001 and was the basis for the \$14,000 to \$15,000 estimate for the year.

the income he earned in 2000 as a D & E employee. The court also ordered child support for all five children in accordance with the serial family guidelines.

¶7 The child support amounts were \$643, \$533, \$442, \$367, and \$305 per month, respectively, in chronological order of when paternity was established. These awards added up to \$2,290 per month. When the health insurance premium was added, Brian owed \$2,719 per month under the court order. Brian’s counsel pointed out that the order would equal “roughly 75 percent of his gross income, before taxes,³ and when we take out taxes, I don’t know that that’s a physical possibility” The court responded simply that it applied the guidelines to the imputed salary. Brian appeals the child support order.

DISCUSSION

¶8 Brian argues that the trial court erroneously exercised its discretion by setting a child support obligation with which, under all of the financial circumstances, it would be impossible for Brian to comply. The County argues that Brian offers no authority for the proposition that a court erroneously exercises its discretion when it makes an order that it knows is impossible to comply with under the facts in the record. Brian counters that there is no authority because the situation has never come up before.⁴ We agree with Brian that the court erroneously exercised its discretion by entering an order, compliance with which, based on the record, was a financial impossibility.

³ The County did not take issue with counsel’s calculation.

⁴ We also have not found authority directly on point.

¶9 Child support awards are relegated to the trial court's sound discretion. *Sellers v. Sellers*, 201 Wis. 2d 578, 585, 549 N.W.2d 481 (Ct. App. 1996). We uphold the court's discretionary decision if it is rational, reasoned and based on the application of the correct legal standards to the record facts. *Id.* In fact, we are obligated to search the record for facts to sustain the court's exercise of discretion. *McCleary v. State*, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971).

¶10 To some extent, a parent has "the right to choose a career path that may realize less annual income than other career paths that may be available." *Sellers*, 201 Wis. 2d at 586. However, we must limit the degree of underemployment one may elect to choose when children suffer the financial consequences of the choice and an "employment decision may be unreasonable even though it is well intended." *Id.* at 586-87. The trial court may consider earning capacity when determining child support if it finds a parent's job choice voluntary and unreasonable. *Id.* at 587.

¶11 Here, the court imputed to Brian his \$45,402 year 2000 income while employed at D & E because it found he made a change in his employment that was unreasonable given his support obligation. *See id.* Neither party contests, and we certainly do not take issue with, the court imputing income. However, it set Brian's child support obligation at an amount that, together with the health insurance premium he was required to pay, was more than he could pay, even

considering his imputed rather than his actual income.⁵ Based upon the imputed income, Brian's gross monthly income would be roughly \$3,784. When that is multiplied by .7 to estimate the income tax deduction, the result is about \$2,549. Brian's imputed net income per month is therefore less than the amount the order required him to pay.⁶

¶12 We cannot affirm an order with which it is impossible to comply. We deem it self-evident that a court erroneously exercises its discretion by entering an order that, on its own findings of fact, cannot be complied with. Such a circumstance is contrary to any sense of fundamental fairness.

¶13 The variable that made this order untenable was the \$429 per month for health insurance premiums over and above child support pursuant to the percentage guidelines.⁷ After state and federal income taxes are deducted from Brian's imputed income, the disposable earnings will not fulfill the child support

⁵ The court did not find that Brian's income was actually more than the amount imputed to him, although it appears that the court may have been concerned that Brian was in a position to manipulate his true earnings. In any event, nothing in the record suggests that Brian has income beyond that which the court imputed to him.

⁶ Brian's wife's income cannot be used to satisfy Brian's child support obligations. See WIS. STAT. § 766.55(2)(c). However, it can be considered to determine Brian's overall financial circumstances and whether Brian will be left below the federal poverty level after paying his child support obligation. See *Abitz v. Abitz*, 155 Wis. 2d 161, 175, 455 N.W.2d 609 (1990).

⁷ The County does not contend that with the imputed income Brian could comply with the support order. Rather, it argues that we should pretend that Brian's health insurance premium at his former employment—\$160—is his current health insurance obligation. However, this argument misses the point. Brian is arguing that as a matter of financial fact, he does not have the income, actual or imputed, to comply with the court's order. He contends that even if he were earning the imputed income, he could not pay taxes, the ordered child support and the actual health insurance premium.

order, plus an additional \$429 per month for health insurance premiums. This is a factual impossibility and therefore an erroneous exercise of discretion. *See Popp v. Popp*, 146 Wis. 2d 778, 786, 432 N.W.2d 600 (Ct. App. 1988) (An exercise of discretion premised upon a factual or legal error is erroneous.).

By the Court.—Order reversed and cause remanded.

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

