COURT OF APPEALS
DECISION
DATED AND FILED

January 11, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3023 **Cir. Ct. No. 93FA000040**

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

IN RE THE MARRIAGE OF:

RICHARD J. ALLEN, JR.

PETITIONER-RESPONDENT,

V.

KARI A. ALLEN, N/K/A KARI A. TENLEY,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed in part; reversed in part.*

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

¶1 PER CURIAM. Kari Tenley (f/k/a Kari Allen) appeals an order modifying Richard Allen's child support obligation and expunging his arrears. Because the circuit court found a substantial change in circumstances based on

Allen's actual earnings, we affirm that part of the order reducing Allen's child support obligation. We conclude, however, that the circuit court lacked the authority to expunge any arrears that had accrued up to January 1, 2003. We therefore reverse that part of the circuit court's order expunging Allen's arrears.

¶2 Tenley and Allen were divorced in 1993; at that time, Allen was ordered to pay 17% of his gross wages for child support. That amount was later modified to 15.8% of Allen's gross income. After a change in his employment, Allen filed motions to modify child support arguing that the increase in his income led to an absurd level of child support. Those motions were denied.

¶3 In February 2002, the State moved the family court commissioner to modify child support and determine arrears. Although Allen claimed his employment had been terminated, the family court commissioner determined Allen had an earning capacity of $12,222.73 per month based on his income from the previous twenty-nine months and, consequently, set child support at $1,931.19 per month. Allen did not seek de novo review of this order.

¶4 In January 2003, Allen filed a motion for modification of child support, arguing that his employment had been terminated in May 2002 and he became self-employed on August 1, 2002. The family court commissioner denied the modification motion, concluding that there had been no substantial change in circumstances justifying modification. On de novo review of the commissioner's decision, the circuit court reduced Allen's child support obligation and expunged any arrears that had accrued up to January 1, 2003.

¶5 On appeal, Tenley argues the circuit court erred by finding a substantial change in circumstances. We are not persuaded. Generally, we review modification of child support under the erroneous exercise of discretion standard.

Jacquart v. Jacquart, 183 Wis. 2d 372, 381, 515 N.W.2d 539 (Ct. App. 1994). A circuit court may modify child support if there has been a substantial or material change of circumstances of the parties or the children. *See* ***Poehnelt v. Poehnelt***, 94 Wis. 2d 640, 648-49, 289 N.W.2d 296 (1980). This determination is measured by the needs of the custodial parent and children and the ability of the noncustodial parent to pay. *See* ***Burger v. Burger***, 144 Wis. 2d 514, 523-24, 424 N.W.2d 691 (1988). The burden of demonstrating a substantial change in circumstances, however, is on the party seeking modification. ***Kelly v. Hougham***, 178 Wis. 2d 546, 556, 504 N.W.2d 440 (Ct. App. 1993).

¶6 Here, the family court commissioner's initial order was based on Allen's earning capacity. On de novo review of Allen's subsequent motion for child support modification, the circuit court concluded that Allen was not shirking and found a substantial change in circumstances based on Allen's actual earnings—$44,796 for income tax year 2002. Based on this substantial change in circumstances, the court properly exercised its discretion by reducing Allen's child support obligation to 17% of Allen's actual earnings, or $634 per month.

¶7 Tenley nevertheless argues the circuit court lacked the authority to retroactively expunge any arrears that had accrued up to January 1, 2003. We agree. Pursuant to WIS. STAT. § 767.32(1m),[1] "the court may not revise … an amount of arrearages in child support … that has accrued, prior to the date that notice of the action is given to the respondent except to correct errors in calculations." Tenley received notice of Allen's motion for modification on

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

January 4, 2003. Therefore, the circuit court did not have the authority to expunge arrears accruing before that date.[2]

By the Court.—Order affirmed in part; reversed in part. No costs to either party.

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

[2] To the extent Allen argues that Tenley waived this argument by failing to raise it in the circuit court, the record belies his assertion. At the hearing on Allen's modification motion, the State, on Tenley's behalf, argued that under the law, "the farthest the court can go back is the time of the filing of the current motion."