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DISTRICT IV

May 31, 2024

To:

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Circuit Court Judge
Electronic Notice

Katrina Rasmussen
Clerk of Circuit Court
Waushara County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2023AP646 In re the marriage of: Rejani Raveendran v. Darwin Donald Airola, III (L.C. # 2020FA41)

Before Graham, Nashold, and Taylor, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Darwin Airola appeals an order denying his postjudgment motion to modify child support. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition.[1] *See* WIS. STAT. RULE 809.21. We affirm.

While divorce proceedings were in progress, the parties stipulated to child support based on earnings imputed to Airola of $15 per hour. The final divorce judgment in April 2022 stated that the court did not have a basis to impute any additional earnings to Airola beyond the $15-per-hour stipulation, and therefore ongoing child support would be calculated on that basis.

In November 2022, Airola moved for a redetermination of child support on the ground that the applicable statutes and rules deprive him of his right to substantive due process. More specifically, he argued that the resulting support amount is too high compared to his actual income, which is less than the earning capacity that was used in the judgment. The circuit court rejected this claim in a written order in February 2023, and again in April 2023 on reconsideration. Airola appeals.

On appeal, Airola argues that the statute and rule allowing child support to be based on "earning capacity" and "imputed income" violate his right to substantive due process because

[1] Airola's briefs do not comply with WIS. STAT. RULE 809.19(8)(bm) (2021-22), which addresses the pagination of appellate briefs. *See* RULE 809.19(8)(bm) (providing that, when paginating briefs, parties should use "Arabic numerals with sequential numbering starting at '1' on the cover"). This rule has recently been amended, see S. CT. ORDER 20-07, 2021 WI 37, 397 Wis. 2d xiii (eff. July 1, 2021), and the reason for the amendment is that briefs are now electronically filed in PDF format, and are electronically stamped with page numbers when they are accepted for efiling. As our supreme court explained when it amended the rule, the new pagination requirements ensure that the numbers on each page of a brief "will match … the page header applied by the eFiling system, avoiding the confusion of having two different page numbers" on every page of a brief. S. CT. ORDER 20-07 cmt. at xl.

All references to the Wisconsin Statutes are to the 2021-22 version.

they are arbitrary and unreasonable. *See* WIS. STAT. § 767.511(1m)(hs); WIS. ADMIN. CODE § DCF 150.03(3).

There are several bases to reject this argument.

First, it is not readily apparent that Airola notified the attorney general, in either the circuit court or this court, of his constitutional challenge to the statute, contrary to the requirements of case law. *See* ***State ex rel. Smith v. City of Oak Creek***, 139 Wis. 2d 788, 801-02, 407 N.W.2d 901, 907 (1987).

Second, Airola appears to assume, but does not develop an argument showing, that any unconstitutionality of the statute or rule would be a basis to relieve him from his own stipulation to the earnings capacity used in the judgment.

As to the substance of the constitutional argument, it is only marginally developed. Airola does not specify, for example, whether his challenge is facial or as-applied. And he provides no meaningful discussion of any case law in the child support context that might support his argument. However, we address the arguments on the merits to the extent that we are able to identify them.

Airola notes that WIS. STAT. § 767.511(1m)(hs) does not define "earning capacity," and argues that the factors the statute provides for deciding a parent's earning capacity have "no rational relationship to the parent's actual income." This argument appears to be based on the unstated premise that a relationship to the parent's actual income is necessary for a child support determination based on earning capacity to withstand constitutional scrutiny. Airola cites no case law or statute supporting that premise, and we reject it. Earning capacity is a factor in

setting child support because some parents choose to earn actual income that is less than what the parent is capable of earning, and the legislature has determined that children should not be deprived of support if a parent makes that choice. This is not arbitrary or unreasonable, but is instead a reasonable way of encouraging parents to support their children by earning at their capacity. Airola's position is the unreasonable one, in that it ultimately implies that parents can reduce their child support obligation by choosing to reduce their earnings.

As to WIS. ADMIN. CODE § DCF 150.03(3), Airola asserts that it arbitrarily adds additional factors to be considered in setting earning capacity, such as past earnings, the parent's health, and a history of child care responsibilities, and that it is arbitrary because the statute does not define "earning capacity." We disagree that these additional factors identified in the rule are arbitrary. The rule's additional factors are reasonably related to a person's ability to earn, and are similar to those provided in the statute itself, such as the parent's education, training, and work experience, and the availability of work.

Airola also asserts that this rule adds factors that are not in the statute. This is an accurate statement, but not a legal argument. If Airola intended to argue that the rule exceeds the statutory rulemaking authority, that is not a constitutional due process argument. It is instead a different argument that is entirely undeveloped.

Finally, Airola turns to the specific income and support figures in his case and argues that "[t]here can be no justification for impoverishing the parent who is supposed to be supporting his children via child support since that puts the parent's health, welfare and ability to earn in jeopardy." We disagree, because the justification is as we explained above. And, if

circumstances have substantially changed such that a parent is unable to earn at the capacity found by the court, there is a method to seek modification of support based on that change.

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals