COURT OF APPEALS
DECISION
DATED AND RELEASED

May 1, 1996

No. 95-0074

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

In re the Marriage of:

SALLY A. GONNERING,

Petitioner-Respondent,

v.

DAVID L. GONNERING,

Respondent-Appellant.

APPEAL from orders of the circuit court for Kenosha County: ROBERT V. BAKER, Judge. *Affirmed in part; reversed in part and cause remanded*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. David L. Gonnering appeals from two trial court orders. The first order reduced his maintenance obligation to Sally A. Gonnering by $200 per month but declined to reduce his child support obligation. As to this order, we affirm in part, reverse in part and remand on the issue of child support and maintenance. We affirm the second order which found David in contempt for failing to pay maintenance and child support.

The parties' postdivorce disputes are making their second appearance in this court. In ***Gonnering v. Gonnering,*** No. 92-2415, unpublished slip op. (Wis. Ct. App. Sept. 1, 1993), we upheld the trial court's original determination that David pay $600 per month maintenance for three years and child support of $1500 per month based on an annual income of $72,000. In November 1994, David moved the court to terminate maintenance and reduce child support on the grounds of a substantial change in circumstances resulting from: (1) Sally's cohabitation with her fiance; (2) a substantial increase in Sally's income and decrease in David's income; and (3) David's new status as a shared-time payer. The motion was heard on April 21, 1994. The trial court issued a written decision on July 5 reducing maintenance by $200 but declining to modify child support. David seeks review of that order.

In August 1994, Sally filed an order to show cause for David's failure to pay child support and maintenance. The motion was heard on October 6, 1994. The trial court found David in contempt and sentenced him to three months in jail unless he purged his contempt by paying "a substantial amount of the arrears" within thirty days. Apparently, David paid a sufficient portion of the arrears to avoid spending time in jail. David appeals from that order as well.

David argues that the trial court erred in two respects when it declined to reduce his child support. First, the trial court erroneously based his child support obligation on his earning capacity rather than on his actual income as demonstrated at the April 21 hearing. Second, the trial court should have determined that he was a shared-time payer and reduced his child support accordingly. We affirm the trial court's determination that David is not a shared-time payer but reverse with regard to its findings regarding David's income.

David argues that the parties' placement arrangements make him a shared-time payer entitled to a reduction in his child support obligation. A "shared-time payer" is "a payer who is not the primary custodian but who provides overnight child care beyond the threshold [number of days] and assumes all variable child care costs in proportion to the number of days he or she cares for the child under the shared-time arrangement." WIS. ADM. CODE

§ HSS 80.02(22) (August 1987).[1] "Variable costs" include "payment for food, clothing, school, extracurricular activities and recreation." WIS. ADM. CODE § HSS 80.02(28) (August 1987). We need not address whether David provides overnight child care beyond the threshold because there is no evidence in the record that he has assumed "all variable child care costs in proportion to the number of days" he cares for the parties' children.

Sally testified that with the exception of one payment relating to the children's medical expenses, David has not directly assumed the cost of the children's tuition or their extracurricular activities. David did not present any evidence in this regard. Rather, he testified that he believes he contributed to the children's tuition and extracurricular activities because he pays child support.

The rules for shared-time payer status contemplate that a parent will assume variable costs over and above his or her child support obligation. Therefore, the trial court did not err in declining to treat David as a shared-time payer.[2]

We turn to David's second challenge to the trial court's refusal to reduce his child support. David argues that the trial court erroneously relied upon his earning capacity rather than considering what he terms a "substantial reduction" in his income since the divorce. The modification of child support is within the trial court's discretion. ***Luna v. Luna,*** 183 Wis.2d 20, 25, 515 N.W.2d 480, 482 (Ct. App. 1994). We will uphold a discretionary decision if it is the product of a rational reasoning process based on the facts in the record and a correct application of the proper legal standard. *See* ***Schnetzer v. Schnetzer,*** 174 Wis.2d 458, 463, 497 N.W.2d 772, 774 (Ct. App. 1993).

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[1] The definitions of "shared-time payer" and "variable costs" were modified slightly in March 1995. However, because the proceedings in this case occurred in April 1994, we use the definitions in effect at that time.

[2] Although we remand this matter for further proceedings on child support and maintenance, the question of whether David is a shared-time payer shall not be revisited because of a failure of proof on David's part at the April 21 hearing.

Child support can be modified only if there has been a substantial change in circumstances. Section 767.32(1), STATS. A change in financial circumstances of a party can qualify if the change is substantial. *See* ***Peters (Oatman) v. Peters***, 145 Wis.2d 490, 493, 427 N.W.2d 149, 151 (Ct. App. 1988). In its decision, the trial court acknowledged David's claim that his income has decreased since child support was originally set.[3] However, the court harkened back to its finding during the February 1992 divorce proceedings that "throughout these proceedings it has been difficult to ascertain what [David] earns per year." The court then continued:

> Nothing has changed this Court's mind about the capabilities of [David]. He is capable of earning more than $48,000 per year and that conclusion is based on the fact that he earned over $100,000 per year during some of the years of the marriage. As is true with many divorced husbands, they do not like to pay child support because they think the ex-wife is using it for herself rather than the children. Perhaps [David] is seeing the children more often than before, but the fact remains that the primary placement of the children is with [Sally]. Most of her expenses continue while [David] exercises his visitation. The utilities, taxes, clothing, school supplies costs all continue. Perhaps food is diminished somewhat. That is about all.

For these reasons, the trial court declined to reduce David's $1500 per month child support obligation.

David presented evidence at the April 21 hearing that his income, which was set by the trial court at $72,000 in the original child support/maintenance ruling, had decreased. He testified that his 1993 income was approximately $40,000 (not including a $7700 tax refund) and that his income for 1994 would be similar. He testified that because the new

[3] The trial court acknowledged David's contention that his construction business was "almost non-existent" and that his realty business does not generate sufficient income to allow him to pay $1500 per month in child support and support himself. The court then noted that $18,000 per year to support two children is not "out of line" based on David's alleged $4000 per month income.

construction aspect of his business had decreased, he was now focusing on selling existing real estate and had replaced almost all of his employees with independent sales associates to reduce overhead. He explained that while his 1992 income tax return reflected income of over $100,000, $60,000 of that income was a one-time partnership distribution, half of which went to Sally. He testified that the construction business lost $50,000 in the last year and that he was working at "over capacity."

We conclude that the trial court did not make sufficient findings of fact to support its conclusion that David's financial condition had not changed since the date of the divorce. David presented evidence regarding the financial condition of his business, his 1993 income and his efforts to earn income. However, the record does not reveal that the trial court employed a rational reasoning process when it rejected this evidence in favor of an earning capacity analysis and reliance on a previous year's higher income. The trial court apparently reasoned that because David's testimony at the divorce trial regarding his financial situation was not credible, his testimony on April 21 was not credible. However, the trial court was also required to consider the credibility of the evidence before it on April 21 and demonstrate on the record that it considered the evidence of David's claimed income reduction. Simply rejecting David's evidence as incredible was an erroneous exercise of discretion.

We reverse the trial court's child support determination. We remand for the court to readdress the issue, make specific findings and provide sufficient reasons for its eventual ruling. The trial court may conduct further proceedings if they would assist it in fulfilling this court's mandate.

For similar reasons, we also reverse the trial court's determination that David is not earning what he could, i.e., shirking.[4] The trial court never discussed the evidence offered by David on April 21 of the reasons for the decrease in his income or his efforts to earn income. Specific findings are

[4] Shirking is established where the child support obligor unreasonably diminishes or suppresses his or her income in light of the support obligation. *See* ***Van Offeren v. Van Offeren,*** 173 Wis.2d 482, 492, 496 N.W.2d 660, 663 (Ct. App. 1992). A parent who is shirking may be required to pay child support based on his or her earning capacity rather than actual earnings. ***Id.*** However, there must be sufficient factual findings in this area for this court to review.

required before a trial court can conclude that a parent is shirking his or her child support obligation. *See* ***Van Offeren v. Van Offeren,*** 173 Wis.2d 482, 496-97, 496 N.W.2d 660, 665 (Ct. App. 1992) (factors to be considered by trial court in assessing whether a parent is shirking).

David also complains that the trial court erred when it reduced his maintenance obligation by only $200 in the face of evidence that Sally's cohabiting fiance contributes in excess of that amount per month to the maintenance of their joint household. David also argues that his reduced income should have led the trial court to further reduce or terminate maintenance.

Maintenance may be modified upon a showing of substantial change in the parties' financial circumstances. ***Gerrits v. Gerrits,*** 167 Wis.2d 429, 437, 482 N.W.2d 134, 138 (Ct. App. 1992). A change in the actual financial condition or economic circumstances of a cohabitating maintenance recipient is a relevant consideration. *See* ***Van Gorder v. Van Gorder,*** 110 Wis.2d 188, 197, 327 N.W.2d 674, 678 (1983).

In ruling on David's maintenance modification motion, the trial court noted that it originally awarded Sally $600 monthly maintenance so that she could maintain part-time employment and spend more time with the children during the immediate postdivorce period. However, the trial court then found that circumstances had changed since the original maintenance award because in June 1993 Sally began cohabiting at her home with her fiance, Mark Heinzin.

While the trial court correctly acknowledged that cohabitation does not in and of itself require the reduction or termination of maintenance, it properly considered the impact of cohabitation on Sally's economic condition. The trial court found that Heinzin earns $44,600 per year and contributes to the cost of food, vacations and entertainment. The court found that Heinzin was contributing to Sally's support in the amount of at least $200 per month and reduced David's maintenance obligation accordingly.

David argues that the trial court should have reduced his maintenance by more than $200 per month because an exhibit Heinzin and Sally prepared indicates that Heinzin contributes at least $960 per month in financial support to the household.

We agree with David that the trial court did not state adequate reasons for its decision to reduce David's maintenance obligation by only $200 in light of evidence that Heinzin contributes $960 each month to the household. The record is devoid of the trial court's consideration of all of the relevant evidence impacting on Sally's financial condition and David's request to reduce maintenance.

We are unpersuaded by Sally's arguments in support of the trial court's decision on maintenance. Sally correctly suggests that an evaluation of Heinzin's contribution should consider which portion of his monthly contribution is solely attributable to his support and that of his children when they visit him. However, Sally has not persuaded us that the trial court's decision to reduce her maintenance by $200 is a sustainable exercise of its discretion based upon this record.

Additionally, our earlier rejection of the trial court's approach to David's allegedly reduced income applies here. In considering maintenance on remand, the trial court shall consider the evidence that David's income was reduced.[5] *See* ***Poindexter v. Poindexter,*** 142 Wis.2d 517, 531-32, 419 N.W.2d 223, 229 (1988) (in modifying maintenance, court must consider parties' income-producing abilities).

David also appeals the trial court's finding that he was in contempt for failing to pay maintenance and child support. He contends that the trial court did not allow him a meaningful opportunity to present evidence

[5] Although Sally's subsequent remarriage eliminated her entitlement to maintenance, we do not believe the maintenance issue is moot. If, on remand, the trial court concludes that maintenance should have been reduced by more than $200 per month, David would be entitled to a credit for any maintenance he paid in excess of such amount until maintenance terminated.

at the October 6, 1994, contempt hearing that he did not have the ability to pay child support and maintenance.

We need not address any of David's arguments regarding the contempt order because the matter is moot. David apparently paid a sufficient amount on the arrearage to avoid the trial court's jail sentence.[6] Because a challenge to the trial court's contempt order "cannot have a practical effect on an existing controversy," we decline to consider it. ***DeLaMatter v. DeLaMatter,*** 151 Wis.2d 576, 591, 445 N.W.2d 676, 683 (Ct. App. 1989).

Notwithstanding our refusal to reach the merits of David's appeal from the contempt order, we take this opportunity to note that ordering a party to pay "a substantial amount of the arrears" is an insufficient remedial purge condition because it does not specifically tell the contemnor what he or she must do to avoid the threatened sanction.

A term of imprisonment constitutes a remedial sanction if "the defendant stands committed unless and until he performs the affirmative act required by the court's order." ***State ex rel. N.A. v. G.S.,*** 156 Wis.2d 338, 341, 456 N.W.2d 867, 869 (Ct. App. 1990) (quoted source omitted). However, the sanction must be purgeable through compliance and "must clearly spell out what the contemnor must do to be purged, and that action must be within the power of the person." ***Id.*** at 342, 456 N.W.2d at 869. Here, the requirement that David pay "a substantial amount of the arrears" did not clearly spell out what amount he had to pay in order to avoid the sanction.

In sum, we affirm in part, reverse in part and remand. The trial court's determination that David is not a shared-time payer and its contempt finding are affirmed. The trial court's partial reduction of maintenance and refusal to reduce child support are reversed, and the cause is remanded for

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[6] Sally's respondent's brief states that David avoided spending time in jail by paying "a substantial amount (not all) of the arrears ...." David does not dispute this in his reply brief. Therefore, we assume this is what happened. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.,*** 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979).

proceedings on those two issues consistent with this opinion. No costs are allowed to either party.

By the Court.—Orders affirmed in part; reversed in part and cause remanded.

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