COURT OF APPEALS
DECISION
DATED AND RELEASED

November 30, 1995

NOTICE

No. 95-0173

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

IN RE THE MARRIAGE OF:

FAITH OLSON,

Petitioner-Appellant,

v.

TERRY OLSON,

Respondent-Respondent.

APPEAL from an order of the circuit court for Clark County: MICHAEL W. BRENNAN, Judge. *Affirmed*.

Before Eich, C.J., Sundby and Vergeront, JJ.

PER CURIAM. Faith Olson appeals from an order requiring her to pay to Terry Olson twenty-five percent of her gross income or twenty-five percent of gross income at minimum wage, whichever is greater, for the support of their two minor children. She contends that the trial court erroneously exercised its discretion by considering her earning capacity, instead

of her actual income, when setting the amount of child support. Faith also argues that the trial court erroneously exercised its discretion by failing to find that the statutory percentage standard was unfair to her under § 767.32(2m), STATS. We reject Faith's arguments and affirm.

Faith and Terry Olson were married in 1980 in Withee, Wisconsin. They have two children, Selena Marie, born June 17, 1981, and Angela Sue, born January 5, 1983. The couple divorced in 1986 and Faith was awarded primary physical custody of the children. Terry was ordered to pay child support. In 1989, Faith and the children moved to Eau Claire, Wisconsin to reside with James Newell. At the time of the move, Faith was employed with the Clark County Health Care Center. She terminated that employment after the move to Eau Claire and has not worked outside the home since. Faith and Mr. Newell have two children together. These children are ages four and two.

In August of 1994, the parties stipulated that primary physical placement of Terry and Faith's two minor children would be transferred to Terry and that the parties would share legal custody. Terry and Faith also agreed that Terry's child support obligation would cease, but they could not agree on the amount of support that Faith would pay to Terry. After a hearing, the trial court ordered Faith to pay twenty-five percent of her gross income, or an amount equal to twenty-five percent of a full-time minimum wage job, whichever was greater. The trial court based its determination on Faith's earning capacity, not on her actual current earnings (which are zero).

The establishment and revision of child support is committed to the discretion of the trial court. *See* ***Edwards v. Edwards***, 97 Wis.2d 111, 116, 293 N.W.2d 160, 163 (1980). This court will affirm the trial court's exercise of discretion where the decision reflects a "reasoning process dependent on facts in, or reasonable inferences from, the record and a conclusion based on proper legal standards." ***Abitz v. Abitz***, 155 Wis.2d 161, 174, 455 N.W.2d 609, 615 (1990) (quoting ***Ashraf v. Ashraf***, 134 Wis.2d 336, 340-41, 397 N.W.2d 128, 130 (Ct. App. 1986)).

When a court determines child support based on a parent's earning capacity, instead of actual earnings, it must consider the voluntariness of the actions that have reduced the parent's ability to pay child support, and

the reasonableness of those actions in light of the parent's child support obligations. ***Smith v. Smith***, 177 Wis.2d 128, 138, 501 N.W.2d 850, 854 (Ct. App. 1993).

Faith argues that her decision to quit her job at the health care center was not voluntary and was not unreasonable in light of the child support obligations she had at that time. She contends that the trial court applied an incorrect legal standard because it did not look at the reasonableness of her decision to terminate her employment in light of her support obligations as they existed in 1989. Faith's position is that if the decision to quit her job in 1989 was reasonable in light of the support obligations she had in 1989, then the court cannot consider her earning capacity to determine her current support obligation, regardless of whether it is reasonable for her to seek employment under her current circumstances.

In ***Smith***, we held that a court may consider a parent's earning capacity, as opposed to actual earnings, only if the decisions that have reduced the parent's ability to pay child support were voluntary and unreasonable in light of the parent's existing child support obligations. ***Id.*** at 138, 501 N.W.2d at 854. Faith's argument assumes that the 1989 decision to quit her employment reduces her current ability to pay child support. But Faith does not argue that she is unable to find work now because she quit working in 1989. Indeed, she testified that she does not want to find employment now because she wants to remain at home with her two youngest children. The decision that is reducing Faith's ability to pay child support is her unwillingness to secure employment now, not the fact that she quit her job in 1989. The trial court correctly considered the reasonableness of her decision not to work now, rather than her decision not to work in 1989.[1]

Faith's desire to stay at home with her two younger children must be balanced with her current obligation as a non-custodial parent to financially support her two older children. The facts presented here are nearly identical to those in ***Roberts v. Roberts***, 173 Wis.2d 406, 496 N.W.2d 210 (Ct. App. 1992). In ***Roberts***, we upheld the trial court's determination to base the child support

[1] We therefore do not decide whether it was reasonable for her to terminate her employment in 1989.

obligation on the parent's earning capacity, rather than actual earnings, where the parent had chosen to stay home to care for her younger child. We recognized that a parent with a support obligation has some leeway in choosing employment and may pursue his or her best opportunities even though that might mean working for a time for a lesser financial return. ***Id.*** at 412, 496 N.W.2d at 213. But we noted that this rule is subject to reasonableness commensurate with the parent's obligation to his or her children. ***Id.*** "[The parent's] election to forego employment for the benefit of her most recent child operates to the detriment of her other children—whose needs for support are certainly no less." ***Id.***

The trial court had before it evidence concerning Faith's prior employment, limitations on current employment opportunities, estimates on the cost of child care if she were to work, the income of her younger children's father, the income of Terry and his wife, and the parties' general economic circumstances. The trial court could reasonably decide that Faith's support obligation to her older children outweighs her desire to remain at home with her two younger children. We conclude the court properly exercised its discretion in considering Faith's earning capacity, rather than her actual income, in setting child support.

Faith also contends that the trial court erroneously exercised its discretion in failing to find that the statutory percentage standard is unfair to her. Sections 767.32(2m) and 767.25(1m), STATS., allow the trial court to deviate from the percentage standards established by the Wisconsin Department of Health and Social Services only if the court finds, by the greater weight of the credible evidence, that the use of the percentage standard is unfair to the child or to any of the parties. ***Kjelstrup v. Kjelstrup***, 181 Wis.2d 973, 975, 512 N.W.2d 264, 265 (Ct. App. 1994). Faith claims that the trial court did not properly take into account the "extraordinary travel expenses" she incurs in exercising her visitation rights, § 767.25(1m)(em), STATS., and the needs of other persons Faith is legally obligated to support, § 767.25(1m)(bz), that is, her two younger children.

The trial court heard Faith's testimony on the expenses she incurred in traveling to pick up her two older children to take them back to her home, which is 160 miles round trip. The court ordered that transportation responsibilities be divided equally between Faith and Terry. The court

implicitly determined that it was not unfair to Faith to pay child support based on the percentage standard in addition to paying one-half of the transportation expenses. We cannot say this is an unreasonable conclusion based on the record. Faith did not present evidence that she will be unable to meet her own expenses, assuming she obtains minimum wage employment as the court found she was able to do.

The trial court also heard Faith's testimony on daycare costs for her two younger children if she works. This was the only evidence on specific expenses for her younger children, although the trial court was certainly aware of her obligation to support them. But there was also evidence that James Newell, who has a legal obligation to support Faith's two younger children, has an annual income of at least $60,000. The court could reasonably conclude it was not unfair to Faith or to her two younger children to apply the percentage standard.

By the Court.—Order affirmed.

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