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DISTRICT III

December 3, 2013

To:

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Circuit Court Judge
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Brian Mark Lantto
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You are hereby notified that the Court has entered the following opinion and order:

2012AP1029 Rachael Sue Banerdt v. Brian Mark Lantto
(L. C. No. 2010FA850)

Before Hoover, P.J., Mangerson and Stark, JJ.

Brian Lantto, pro se, appeals from a post-divorce order modifying child support. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We summarily vacate the order and remand for further proceedings. *See* WIS. STAT. RULE 809.21 (2011-12).

Brian and Rachael Banerdt were married in 2001, and had two minor children born of the marriage. At the time of the divorce in January 2009, both parties were students. As part of a marital settlement agreement, Brian was ordered to pay $70 monthly child support, and variable expenses were to be split among the parties.

On July 19, 2010, a motion was filed by the Sheboygan County Child Support Agency for a modification of child support. The court found a substantial change in circumstances did not exist at that time and denied the motion. Venue was changed to Brown County as Rachael had moved to the Green Bay area.

In April 2011, the child support agency again moved for modification of child support. A hearing was held on April 26, 2011, and the court commissioner ordered Brian to pay $150 monthly child support commencing June 1, 2011.

Brian sought de novo review, and the circuit court held a hearing on July 5, 2011. In its written order, the court vacated the court commissioner's decision. However, the court concluded:

> [A]s [Brian] now anticipates obtaining a Master's Degree at the end of the winter term of 2011, and based on the testimony provided, this Court finds that it is reasonable to impute gross income to [Brian] of $40,000 per year, as of January 1, 2012. Applying the 25% standard for these two children, it is ordered that [Brian's] child support order shall be modified to $833 per month, commencing January 1, 2012. The order is further modified such that [Brian's] responsibility for variable expenses also ceases with the commencement of this increase in child support, and [Rachael] shall be fully responsible for the variable costs from that time forward.

The circuit court also scheduled a status hearing for September 2, 2011. Brian failed to appear personally as ordered and the circuit court issued a decision and order for contempt. This appeal follows.

We find insufficient support in the record for the circuit court's modification of child support. Apparently, the court conducted in-chambers discussions off the record with the parties prior to the hearing on July 5, 2011, and as a result of those discussions imputed to Brian a

yearly income of $40,000. Sitting as factfinder, the court engaged in the dangerous practice of gathering what it considered substantial evidence from the parties in chambers. The court then characterized this off-the-record "evidence" on the record as it saw fit, which resulted in no accurate record at all. Besides potentially chilling the efforts of the pro se litigant, the practice also makes the court a potential witness to alleged in-chambers admissions.

In the absence of sworn testimony and a demonstrated application of statutory factors, we have an insufficient basis to review a finding of earning capacity. Nor can we adequately consider the court's findings regarding variable expenses, or the children's outstanding health care expenses, absent sworn testimony or other suitable evidence in the record.

Therefore, we vacate the circuit court's order and remand for further proceedings. Upon remand, the court may in its discretion consider modification nunc pro tunc to the date of the April, 2011 motion.

THEREFORE,

IT IS ORDERED that the circuit court's order is vacated and cause remanded for further proceedings.

Diane M. Fremgen
Clerk of Court of Appeals