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DISTRICT II

January 15, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP1213 In re the custody and support of K. C. C. W.: Edward B. Wisman v. Tammy J. Wisnefski (L.C. # 2001FA516)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Edward B. Wisman appeals from an order increasing his child support obligation to $252, biweekly. Edward argues that in calculating his support amount using a shared payor formula, the trial court should have imputed higher than minimum wage to Tammy J. Wisnefski, based on her income in 2003. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

In 2001, the unmarried parties entered into an agreement concerning the custody, placement, and support of their minor child, born in 1998. The parties shared custody and placement of the child and Edward was ordered to pay $92.60 per month in child support. At the time, Edward earned $4268.33 per month, and Tammy's monthly income was $2637.53. Tammy eventually married, had three more children, and in 2003, left her job in order to care for her four children. In 2004, Edward's support obligation was increased to $130, biweekly.[2] Eight years later, Tammy moved to revise child support. The court commissioner found that the expiration of more than thirty-three months since the last support order constituted a substantial change in circumstances under WIS. STAT. § 767.59 (1f)(a) and (b)(2), imputed a minimum wage income to Tammy, and increased Edward's support order.

At the de novo hearing, the trial court reminded the parties that they could present evidence. Neither party asked to present additional evidence and instead made legal arguments based on materially undisputed facts.[3] These facts included that Edward was earning $5373 per month and that Tammy had four minor children, worked a series of part-time jobs, attended college full time at night, and earned about $247 per month, an amount less than her imputed income. Edward argued that because Tammy voluntarily left her job in 2003, the court should

[2] Nothing in the record establishes how this number was determined, though the parties insinuate that the amount was set pursuant to their stipulation. There are no findings concerning the parties' income or earning capacity, and no order signed either by a court commissioner or the trial court.

[3] We summarily reject Edward's argument raised for the first time on appeal that there was no substantial change in circumstances warranting modification. The court commissioner determined that a substantial change occurred and no one challenged that finding before the trial court. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (arguments raised for the first time on appeal generally deemed forfeited). We also reject his contention that because the trial court did not take evidence, reversal and remand for an evidentiary hearing is required. In the absence of any evidentiary request or objection, it was proper for the trial court to presume that the relevant facts were uncontested and that no further testimony was desired or necessary. *See* ***id.***

impute to her a higher income commensurate with her last period of full-time employment.[4] After considering all of the circumstances, the trial court determined that Tammy's choice to provide full-time child care, work part time, and further her education to increase her earning capacity was reasonable. It calculated Edward's support obligation using the shared payor formula, imputing minimum wage to Tammy.

The central issue in this case is whether Tammy's voluntary decision to forgo full-time employment outside the home in order to provide full-time child care and attend college is reasonable under all of the circumstances. ***Chen v. Warner***, 2005 WI 55, ¶20, 280 Wis. 2d 344, 695 N.W.2d 758. In making this determination, a court "must weigh the right of a parent to make such a choice, while keeping in mind the public's interests that children be adequately cared for, that the financial needs of the children be met, and that the financial burdens of child care be apportioned fairly between the parents." ***Id.***, 280 Wis. 2d 344, ¶47. If it is determined that a parent's voluntary decision to reduce or forego income is unreasonable, "a court can impose an obligation on that parent to support a child by imputing income to the parent based on that parent's earning capacity." ***Id***., ¶48. While "reasonableness" is ordinarily a question of law, here we give weight to the trial court's ruling because its legal conclusion is "extensively intertwined with factual conclusions[.]" ***Id.***, ¶¶34, 43.

Giving weight to the trial court's decision, we conclude that Tammy's decision to forego full-time employment is reasonable under all the circumstances. We note that while ***Chen*** enumerates a partial list of permissible considerations, "there is no list of factors that

[4] It was undisputed that when Tammy left her job in 2003 to be a stay-at-home parent, she was earning about $31,000 annually, and that that was her last full-time job.

automatically proves decisive in shirking determinations." ***Id.***, ¶¶49-50. Though Edward suggests that we direct our inquiry to the circumstances as they existed in 2003, when Tammy left her full-time job, the issue in this case is whether in the year 2013, it is a reasonable choice for Tammy to remain partially employed in order to attend school and care for her four minor children. It is not appropriate to attempt to artificially recreate a stale set of circumstances or retroactively reconstruct what position the parties might presently occupy had Tammy remained with her previous employer. Though Edward contends that he is unreasonably forced to subsidize Tammy's decisions, Tammy's parental availability has benefited their child for a decade, her education is pursued in furtherance of their child's best interest, and a full-time minimum wage income is imputed to Tammy, though she earns much less.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals