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DISTRICT II

June 17, 2015

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

2014AP1868 Carla J. Dillman v. Jeffrey A. Dillman (L.C. # 2005FA190)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Jeffrey A. Dillman appeals from an order on the ground that the circuit court erroneously exercised its discretion when it ordered him to pay child support on an imputed income of $50,000. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. § 809.21 (2013-14).[1] We affirm.

Jeffrey and Carla Dillman were married for nine years and have two children together. They divorced in July 2006. On October 11, 2013, Jeffrey filed a motion to change child support and physical placement because he had moved to Superior, Wisconsin, and had taken a new job

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

that paid less than his old job. For the years 2009 to 2011, Jeffrey earned $51,272, $40,937 and $50,496, respectively. In 2012, as a store manager at Tires Plus in Oshkosh, Wisconsin, Jeffrey made $76,000. At his new job at Five Star Automotive in Superior, Wisconsin, Jeffrey makes $24,000 per year as general manager.

Jeffrey's store manager job at Tires Plus was very stressful, and he was diagnosed with various psychological and physical stress-related health problems, which both Jeffrey and his doctor testified were related to Jeffrey's job. Jeffrey took a medical leave from May 10, 2013, through May 29, 2013, and also took a demotion to service manager, paying $16.80 per hour, in an attempt to relieve his stress. Ultimately, Jeffrey could not take the stress at Tires Plus. He applied and interviewed for a job at Bergstrom Automotive, but was not offered the job. He quit Tires Plus and took the new job as general manager at Five Star Automotive, a business owned by one of his best friends.

At the hearing de novo, Jeffrey did not testify that he looked thoroughly for a job for any significant period of time before accepting the job at Five Star Automotive, much less provide any details or facts of an effort to find a comparable source of income to his service manager job. He said, "I looked. I looked. Like I said, online. Pretty excited about even going back to Bergstrom and at least making a decent wage." Jeffrey testified that people were cutting back on personnel. Bryan Fritz, a former coworker, when asked about jobs in his field, testified that "[t]here's not much in this area." On the other hand, Carla testified that in the twenty-four years she has known Jeffrey he has never had trouble finding a job locally.

Jeffrey moved to change child support and physical placement. A family court commissioner heard Jeffrey's motion and ordered that Jeffrey pay child support on an imputed

income of $50,000 and that Jeffrey should receive a downward deviation of $100 for travel. The family court commissioner also ordered a modified placement schedule. Jeffrey moved for a de novo hearing on the child support issue. The circuit court heard the matter and issued a ruling confirming the family court commissioner's imputation of income to Jeffrey. Jeffrey appeals the circuit court's order.

Whether a child support judgment should be modified is a decision within the circuit court's discretion. ***Rottscheit v. Dumler***, 2003 WI 62, ¶11, 262 Wis. 2d 292, 664 N.W.2d 525. A modification to the amount of child support to be paid may be made "only upon a finding of a substantial change in circumstances." WIS. STAT. §767.59(1f)(a). One factor that the court may consider in determining whether there has been such a change in circumstances is whether the payer's income has changed. Sec. §767.59(1f)(c)1. The burden of showing that there has been a change in circumstances that warrants a modification of child support is on the party seeking modification. ***Rottscheit***, 262 Wis. 2d 292, ¶11.

If the court finds that a modification in child support is warranted, it must base the new payment on the payer's actual earnings unless the court concludes that the payer has been shirking. ***Chen v. Warner***, 2005 WI 55, ¶20, 280 Wis. 2d 344, 695 N.W.2d 758.

> To conclude that a parent is shirking, a circuit court is not required to find that a former spouse deliberately reduced earnings to avoid support obligations or to gain some advantage over the other party. A circuit court need find only that a party's employment decision to reduce or forego income is voluntary and unreasonable under the circumstances.

Id. If the court finds the payer is shirking, it may impute income to the payer based on his or her earning capacity. ***Id.*** Whether the evidence supports imputing income rests within the circuit

court's discretion. *See* ***Daniel R.C. v. Waukesha Cnty.***, 181 Wis. 2d 146, 155, 510 N.W.2d 746 (Ct. App. 1993). And, while the determination of reasonableness is a question of law, because the question is so intertwined with the facts, we do not review the question independently but rather take an intermediate standard of review and determine reasonableness with deference to the circuit court's ruling. ***Chen***, 280 Wis. 2d 344, ¶¶41-44. The determination of reasonableness is made considering all the circumstances in the particular case. ***Id.***, ¶25 & n.9.

After hearing testimony, the circuit court made the following findings. Jeffrey could not function at his previous job. Jeffrey presented credible testimony about his physical illness. Jeffrey does have medical conditions that impact his ability to earn income in a supervisory capacity in the same area in which he was employed. "Mr. Dillman is not shirking his responsibility to make an income in the exact area that he was working, that due to the stress of the type of job … and the stress of the management … that he's not able to work in that same capacity, and make the $76,000." The court continued, "But in the same vein, I don't think you're working to your full potential and making the appropriate amount of money that's necessary to maintain your child." The court further found that it is "not reasonable that you just chose to move up north, and chose to make this amount of money." "And because of that, I find that you're not working to your full potential and … shirking in that degree." The court further concluded:

> I don't think this is the best you can do based upon your age, your experience, and your connections. So I am going to impute to you some earnings, and order that that child support be paid at that amount. Again, it would be much more helpful ... to have an expert here come and testify about what's out there and what could be made.
>
> I do note that there was a previous agreement for some time period, that $50,000 was doable…. So, again, considering your

> years of experience, your age, your health, some of the connections you may or may not have, this Court is going to impute income to you in the amount of $50,000 a year.

"All that is required for us to affirm a trial court's exercise of discretion is a demonstration that the court examined the evidence before it, applied the proper legal standards and reached a reasoned conclusion." ***Rottscheit***, 262 Wis. 2d 292, ¶11 (citation omitted). Here, the record demonstrates an appropriate exercise of discretion. After finding that Jeffrey was unable, due to his health problems, to continue working in his store manager job, the court found that Jeffrey was not shirking in leaving that job. However, Jeffrey's decision to move up north and make $24,000 was not reasonable. *See* ***Becker v. Becker***, 2014 WI App 76, ¶20, 355 Wis. 2d 529, 851 N.W.2d 816 (when termination is involuntary, reasonableness inquiry focuses on employment decision subsequent to termination). The court referred to this career move as Jeffrey's "choice," from which we can infer a finding of voluntariness in the move to the new job at Five Star Automotive. The court concluded that Jeffrey was shirking. The record supports this conclusion, and we defer to the circuit court's decision that Jeffrey's employment decision to reduce his income by taking the job at Five Star Automotive was not reasonable under the circumstances.

The court's decision to set the income to impute at $50,000 is also supported by the record. The court indicated that it based that figure on several factors, including the parties' past agreement, Jeffrey's twenty-six years of experience and work history in the field, his age, his health, and connections he might have in the industry given his experience. Although the court did not so indicate, it may also have relied on Carla's testimony that in the twenty-four years she has known Jeffrey he has been able to find work in the automotive field. Further, we note that Jeffrey did not provide the court with any indication that he had conducted a thorough job search

in the area. The court appropriately balanced Jeffrey's decision to reduce his income with the needs of his minor children and protection of their interests in considering the equities of the case.

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