COURT OF APPEALS
DECISION
DATED AND FILED

September 22, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP521-FT **Cir. Ct. No. 2000FA16**

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

IN RE THE MARRIAGE OF:

KIRSTEN DENISE KUPSCH, N/K/A KIRSTEN DENISE OLSON,

JOINT-PETITIONER-APPELLANT,

V.

LYNN WAYNE KUPSCH,

JOINT-PETITIONER-RESPONDENT.

APPEAL from an order of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM.[1] Kirsten Olson appeals an order to pay child support to her ex-husband Lynn Kupsch. She argues the monthly support amount is inflated because the circuit court failed to include all of Kupsch's business income when determining his gross income. We reject Olson's arguments and affirm.

BACKGROUND

¶2 Kupsch moved for a change of custody in June 2007. The parties settled the custody and placement issues in a September 26, 2008 stipulation and order. However, the stipulation left the determination of child support to the child support agency, with the caveat that either party could request a hearing if the agency's calculation was not agreeable. After Kim Galen, a child support specialist, forwarded the agency's calculations, Olson requested a hearing. Olson did not submit any written arguments. At the December 22, 2008 hearing, Olson called both Galen and Kupsch to testify.

¶3 Galen confirmed the agency relied solely on Kupsch's 2007 income tax return to determine Kupsch's income. The testimony further established that Kupsch originally owned a sixty percent share in Lynn's Honeywagon, with his father owning the remaining share. In 2007, Kupsch transferred half of his share to his current wife, leaving him with thirty percent. In 2008, however, Kupsch purchased his father's forty percent share. Kupsch's 2007 tax return was based on a thirty percent share in Lynn's Honeywagon.

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 Kupsch also owned a five percent share of Tracker Solutions in 2007, with his ownership changing to fifty percent in 2008. Galen testified the agency omitted the Tracker Solutions income from its calculations because she and her supervisor did not "kn[o]w how to use it." Kupsch testified he received approximately fifteen dollars from that business in 2007.

¶5 Olson argued the agency should have factored in Kupsch's increased percentage ownership in the two businesses, should have disallowed the business expenses and depreciation claimed for Lynn's Honeywagon, and should have concluded Kupsch was shirking when he transferred half of his sixty percent share of Lynn's Honeywagon to his wife.

¶6 The circuit court rejected Olson's arguments and adopted the agency's calculations. The court also ordered the parties to provide copies of their annual tax filings by March 15 each year, allowing either party to request a review hearing to adjust the support payments. The court's oral rulings were memorialized in a December 31, 2008 order. Olson now appeals.

DISCUSSION

¶7 Olson presents three distinct arguments in support of her overriding assertion that the circuit court failed to attribute enough business income to Kupsch's gross income for the purpose of determining child support. We will address the arguments in turn. However, we first observe that the circuit court commenced the child support hearing stating, "Folks, I'm not sure what we're doing here today. I note I signed an order that seemed to have resolved all this September 26. Somebody requested a hearing for today." Prior to the hearing, the court had not been notified the child support agency had made its calculations,

much less received them. These observations underscore Olson's failure to file a written motion or brief setting forth her legal arguments prior to the hearing.

¶8 The determination of child support is committed to the sound discretion of the circuit court. ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. We will affirm the decision if the circuit court examined the relevant facts, applied the correct standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Id.***

¶9 We first address Olson's argument that the court should have factored in Kupsch's increased percentage ownership in both Lynn's Honeywagon and Tracker Solutions.[2] She asserts the court should have multiplied the 2007 income by a factor equal to Kupsch's increased share in the companies to estimate his current 2008 income. She would also attribute, on the same basis, an additional guaranteed payment from Tracker Solutions that was paid to the prior majority owner in 2007.

¶10 The circuit court acknowledged the changes in Kupsch's business holdings in its oral decision. The court then stated, "Having that in mind, it's difficult to extrapolate 2007 numbers from [the partnerships] into a bona fide number that the Court can rely upon." The court also noted the downturn in the economy. Kupsch testified the companies had suffered an estimated twenty to twenty-five percent decline in business due to the economic recession. Kupsch

[2] We do not interpret Olson to be arguing the failure to include the fifteen dollars received from Tracker Solutions in 2007 would have affected the support determination. In any event, we would regard any such error as de minimis.

further testified his accountant did not have the 2008 numbers compiled yet. Thus, it was not unreasonable for the court to rely on the 2007 tax return rather than speculate what the 2008 income might be. The 2007 return was simply the best available evidence of Kupsch's current income. Further, the court explicitly provided an opportunity to revisit the child support calculations after the parties' 2008 tax filings were available.

¶11 We turn next to Olson's contention that the circuit court should have disallowed the business expenses and depreciation claimed for Lynn's Honeywagon, and apportioned those amounts directly to Kupsch's gross income. The court concluded that Olson failed to provide sufficient evidence to persuade it that the expenses and depreciation were not reasonably necessary. This is a classic case of judging credibility and weighing the evidence. Olson, however, citing WIS. ADMIN. CODE § DCF 150.03(2) (Feb. 2009), and ***Chen v. Warner***, 2005 WI 55, ¶107, 280 Wis. 2d 344, 695 N.W.2d 758 (Butler, J., dissenting), contends it was Kupsch's burden to prove reasonable necessity. We reject Olson's argument.

¶12 Olson's citation to ***Chen*** is inappropriate and misleading. That case does not address business expenses, depreciation, or WIS. ADMIN. CODE § DCF 150.03(2), much less affirmatively state the proposition for which Olson cites it.[3] Thus, ***Chen*** provides no support for Olson's position. Olson also fails to develop any argument based on the administrative code. We will not develop her argument for her. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994). Regardless, § DCF 150.03(2) uses discretionary language,

[3] Olson's citation also fails to note it is referring to a dissenting opinion and it omits the public domain citation.

stating the court "may adjust a parent's gross income as follows ...." The provision does not *require* the circuit court to increase or reduce a parent's gross income.

¶13 Additionally, while Olson faults Kupsch for testifying merely that he leaves the determination of business expenses and depreciation to his accountant, Olson failed to provide any notice she would be addressing those issues at the hearing. Thus, Kupsch can hardly be blamed for either his ignorance in that regard or the accountant's absence at the hearing.

¶14 Finally, we reject Olson's argument that the circuit court should have found Kupsch was shirking when he transferred half of his sixty percent share of Lynn's Honeywagon to his wife. Citing WIS. ADMIN. CODE § DCF 150.03(1), Olson argues: "The Code mandates courts add 'income imputed based on earning capacity' to gross income." Once again, Olson misrepresents the law. The cited provision simply states imputed income is to be added "if applicable." WIS. ADMIN. CODE § DCF 150.03(1). The relevant provision, § DCF 150.03(3), also contains permissive language, stating "the court may impute income …." WISCONSIN ADMIN. CODE § DCF 150.03 contains eleven subsections, every one of which sets forth something a court either may or shall do in determining child support using the percentage standard. If the agency intended § DCF 150.03(3) to be mandatory, it would have used the term shall. *See* ***State v. Sprosty***, 227 Wis. 2d 316, ¶13, 595 N.W.2d 692 (1999) (when legislature uses both "shall" and "may" in a particular statutory section, we assume it is aware of the words' distinct meanings).

¶15 Olson is correct that the burden is generally on the parent accused of shirking to demonstrate that a voluntary loss of income was reasonable.[4] But here, the court was not satisfied the evidence of shirking was substantial enough to apply the permissive code provision. Again, Kupsch cannot be blamed for his inability to explain why the ownership of Lynn's Honeywagon was shared equally with his wife. Kupsch testified the change was made because his accountant told him it would be beneficial to do so. There is nothing inherently unreasonable in following an accountant's advice. Presumably, that advice was intended to increase Kupsch's income. Had Olson provided advance notice of her position, Kupsch might have inquired further of his accountant. Again, Olson did not secure the accountant's presence at the hearing for direct questioning. Therefore, the court properly exercised its discretion when it declined to find that Kupsch was shirking.

By the Court.—Order affirmed.

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

[4] We note shirking usually refers to a decision to reduce or forego income. That is not truly the situation here, because any "lost" income simply accrued to Kupsch's current wife.