COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2289 **Cir. Ct. No. 2007FA636**

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

IN RE THE MARRIAGE OF:

ROXANNE BRECKE, F/K/A ROXANNE BIELEN,

PETITIONER-RESPONDENT,

V.

ALAN L. BIELEN,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Marathon County: PATRICK M. BRADY, Judge. *Affirmed*.

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

¶1 PER CURIAM. Alan Bielen appeals an order that modified his divorce judgment by requiring him to pay child support to his ex-wife, Roxanne Brecke. Bielen argues the circuit court erred by: (1) finding that a substantial

change in circumstances warranted a change in child support; (2) taking judicial notice of the fact that very few members of Brecke's profession work five days per week; and (3) calculating child support using Brecke's actual income instead of her earning capacity. We reject Bielen's arguments and affirm.

BACKGROUND

¶2 Bielen and Brecke were married in 1992. At the time of their divorce on April 22, 2008, they had three minor children. A marital settlement agreement, which was incorporated into the divorce judgment, provided that Bielen and Brecke would have joint legal custody and equal physical placement of the children. The agreement also provided that neither party would pay child support to the other. Additionally, the parties bore equal responsibility for the children's variable expenses.

¶3 On February 22, 2010, Brecke moved to modify the divorce judgment, seeking, among other things, primary physical placement of the couple's oldest child and a modification of child support. Brecke also alleged that Bielen had refused to pay for certain variable expenses and sought a clarification of "what constitutes variable expenses" under the divorce judgment. On March 30, 2010, Bielen also moved to clarify the divorce judgment's variable expense provision.

¶4 The court held a hearing on the parties' motions on December 8, 2010. At the hearing, the parties informed the court they had settled their physical placement dispute with respect to the oldest child. Under the settlement, the parties would continue to share equal physical placement of their two younger children, but their oldest child would reside with Brecke sixty-four percent of the

time. The court adopted the settlement and incorporated it as an amendment to the divorce judgment.

¶5 The court then turned to the issue of child support. The evidence presented by the parties focused on their respective incomes and earning capacities. Bielen testified his gross income was $4,149 per month. Brecke did not dispute this figure, and the court accepted it as Bielen's income for purposes of calculating child support.

¶6 Bielen, however, argued the court should use Brecke's earning capacity, rather than her actual income, to calculate child support. Brecke testified that she worked three days per week as a dental hygienist at Skutak Dental and that her monthly gross income was $2,839. Bielen argued that, because Brecke had the capacity to work full-time, the court should attribute to her an earning capacity based on a five-day work week.

¶7 In response, Brecke contended her three-day work week was reasonable. In support of her argument, she introduced a letter from her employer, Dr. Lisa Skutak, who confirmed that Brecke had been employed at Skutak Dental since the practice opened in May 2005 and had worked three days per week during that time. Dr. Skutak explained that, because the practice was still growing, it did not have enough business for Brecke to work more than three days per week. However, Dr. Skutak stated Brecke occasionally worked additional hours and was "very willing to work whatever additional hours we have to offer her."

¶8 Additionally, Brecke testified she had worked only three days per week for the last fifteen years. According to Brecke, after she and Bielen had their first child, they agreed Brecke would work only three days per week so that she could spend more time with the children and take them to necessary appointments.

Bielen did not dispute Brecke's assertion that she worked only three days per week during their marriage, nor did he dispute her assertion that he had agreed to her part-time work schedule.

¶9 On cross-examination, Brecke admitted that, sometime after the divorce, she contacted another dentist about taking on additional part-time hygienist work. However, that dentist wanted Brecke to work days that would have conflicted with her employment at Skutak Dental. Brecke conceded that, since the divorce, she had not contacted any other dentists about obtaining part-time hygienist work. However, she also testified she was being treated for neck pain, which dated back to at least 2005. Brecke testified her neck pain would make it difficult for her to work additional hours on a regular basis.

¶10 At the close of the hearing, the court determined it would use Brecke's actual monthly income to calculate child support, rather than her earning capacity. The court stated, "I accept the arguments advanced by Mrs. Brecke that her pattern has been a three[-]day work week. In fact from all of the dental [hygienist] cases this Court has seen there are very few dental [hygienists] in this county that work five days a week." The court then applied the formula set forth in WIS. ADMIN. CODE § DCF 150.04(6)(b) (Nov. 2009) and ordered Bielen to pay Brecke $285 per month in child support until August 31, 2011, and $427 per month thereafter. The court stated the modification in child support was justified by a substantial change in circumstances—specifically, the change in the oldest child's physical placement and the parties' "dispute on the variable expenses."[1]

[1] The court also clarified the divorce judgment's variable expense provision and ordered that, beginning at the start of the 2011-2012 school year, Brecke would be responsible for sixty-four percent of the oldest child's variable expenses.

¶11 Bielen subsequently filed a motion for reconsideration of the court's decision on child support, arguing that, instead of using Brecke's actual income, the court should have imputed income to her based on a four- or five-day work week. At the June 15, 2011 motion hearing, Bielen argued that, contrary to Brecke's prior testimony, Brecke had sometimes worked more than three days per week during their marriage. In support of his argument, he introduced Brecke's W-2s from 1992 through 2010 and contended that Brecke could not have earned the income she reported in 1998, 2001, and 2002 if she had only worked three days per week during those years. Brecke responded that Bielen's argument did not take into account bonuses she received while working for her previous employer, Midwest Dental. Brecke testified she had worked at Midwest Dental until 2005, and during that time she worked an average of three days per week. She testified Midwest Dental paid office bonuses, which would have increased her gross income.

¶12 On cross-examination, Brecke conceded she had "checked into" open positions with Midwest Dental following the divorce, but she stated her current employment schedule prevented her from pursuing a part-time position with Midwest Dental. She also conceded she was aware Midwest Dental had full-time positions available, but she did not apply for those positions.

¶13 Based on Brecke's testimony that she consistently worked three days per week before the divorce, the court found that Brecke's postdivorce decision to continue working three days per week was reasonable. The court refused to calculate child support using Brecke's earning capacity, based on a four- or five-day work week, instead of her actual income. It therefore denied Bielen's motion for reconsideration.

DISCUSSION

I. Substantial change in circumstances

¶14 On appeal, Bielen first contends the circuit court erred by determining that a substantial change in circumstances occurred, justifying a modification of his child support obligation.[2] *See* WIS. STAT. § 767.59(1f)(a) (court may modify child support only upon finding a "substantial change in circumstances"). However, Bielen never argued in the circuit court that a substantial change in circumstances had not taken place. Instead, when arguing against a modification of child support, he focused on the issue of Brecke's earning capacity. He could have raised his substantial change in circumstances argument during the December 8, 2010 hearing, the June 15, 2011 hearing, or in his motion for reconsideration, but he failed to do so. Accordingly, Bielen has forfeited his right to raise the argument on appeal, and we will not address it further. *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).

II. Judicial notice

¶15 Bielen next contends the circuit court erred by "taking judicial notice of an alleged fact not in the record." He takes issue with the court's statement

[2] In the argument section of his brief, Bielen cites an unpublished opinion from 2008, as well as an unpublished, per curiam opinion from 2010. Both of these citations violate WIS. STAT. RULE 809.23(3), which prohibits citation to unpublished opinions, except for authored opinions issued after July 1, 2009, which may be cited for their persuasive value. *See* WIS. STAT. RULE 809.23(3)(a)-(b).

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

during the December 8, 2010 hearing that, "from all of the dental [hygienist] cases this Court has seen there are very few dental [hygienists] in this county that work five days a week." Bielen argues the court must have taken judicial notice of this fact, based on its own personal knowledge, because there was no evidence in the record about local hygienists' typical work schedules. Again, though, Bielen failed to raise this argument in the circuit court, and we therefore deem it forfeited. *See* ***id.***

III. Brecke's earning capacity

¶16 Lastly, Bielen argues the court erred in using Brecke's actual monthly income to calculate the parties' child support obligations. He contends the court should have instead used Brecke's earning capacity, based on a four- or five-day work week.

¶17 When calculating child support, a court may consider a parent's earning capacity, rather than the parent's actual income, only if the court concludes the parent 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, the court need not find that the parent deliberately reduced his or her earnings to avoid support obligations. ***Id.*** Instead, the court must find that the parent's decision to reduce or forego income was both voluntary and unreasonable under the circumstances. ***Id.***

¶18 Bielen and Brecke dispute whether Brecke's decision to work only three days per week was reasonable. The reasonableness of a parent's decision to forego income presents a question of law that we review independently. ***Id.***, ¶¶41, 77; ***Sellers v. Sellers***, 201 Wis. 2d 578, 587, 549 N.W.2d 481 (Ct. App. 1996). However, because the reasonableness determination is closely intertwined with

factual findings, we give appropriate deference to the circuit court's decision, taking care not to usurp the circuit court's role as fact finder. ***Chen***, 280 Wis. 2d 344, ¶¶41, 43-44, 77; *see also* ***Sellers***, 201 Wis. 2d at 587. We will not set aside the circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2).[3]

¶19 We agree with the circuit court that Brecke's decision to work only three days per week was reasonable under the circumstances. The court found that Brecke's decision was consistent with her longstanding "pattern" of working only three days per week. That finding is not clearly erroneous. *See* ***id.*** Brecke testified she had worked an average of three days per week for the past fifteen years, ever since she and Bielen had their first child. She testified that, until 2005, she worked three days per week at Midwest Dental, and from 2005 on she worked three days per week at Skutak Dental. Doctor Skutak confirmed that Brecke had worked a three-day-per-week schedule since May 2005. Thus, evidence supports the circuit court's conclusion that Brecke had a pattern of working only three days per week, even before the divorce.

¶20 At the June 15, 2011 hearing, Bielen asserted that, during certain years of their marriage, Brecke worked more than three days per week. Specifically, he contended Brecke must have worked more than three days per

[3] Brecke correctly notes that, for purposes of calculating child support and maintenance, the circuit court's determination of a party's income is a finding of fact that we review under the clearly erroneous standard. *See* ***Covelli v. Covelli***, 2006 WI App 121, ¶¶13, 24, 293 Wis. 2d 707, 718 N.W.2d 260; ***DeLaMatter v. DeLaMatter***, 151 Wis. 2d 576, 588, 445 N.W.2d 676 (Ct. App. 1989). However, the proper *amount* of Brecke's income is not at issue in this case; instead, the parties dispute whether the court should have used Brecke's earning capacity to calculate child support rather than her actual income. This is a question of law that we review under the standard set forth in ***Chen v. Warner***, 2005 WI 55, 280 Wis. 2d 344, 695 N.W.2d 758, and ***Sellers v. Sellers***, 201 Wis. 2d 578, 549 N.W.2d 481 (Ct. App. 1996).

week during 1998, 2001, and 2002 to earn the income reflected on her W-2s from those years. However, Bielen did not introduce any evidence of what Brecke's hourly pay rate was during those years, making it impossible to calculate the number of hours she worked per week. Furthermore, as Brecke pointed out, Bielen's argument did not take into account bonuses she earned while working at Midwest Dental, which would have increased her yearly income. Thus, the circuit court was entitled to reject Bielen's argument and instead accept Brecke's testimony that, for the past fifteen years, she had only worked three days per week. Moreover, even assuming Brecke worked more than three days per week during 1998, 2001, and 2002, undisputed evidence showed that Brecke had worked only three days per week since at least May 2005—about three years before the divorce. Accordingly, the court's finding that Brecke had a "pattern" of working only three days per week was not clearly erroneous.

¶21 Additionally, Brecke testified that she and Bielen had agreed she would only work three days per week so that she could spend more time with their children. Bielen never disputed Brecke's assertion that he agreed she should work part-time. Moreover, Brecke testified her chronic neck pain would make it difficult for her to work additional hours.

¶22 Under these circumstances, Brecke's postdivorce decision to continue working only three days per week was reasonable. The evidence established that, for up to fifteen years—and at least for the three years preceding the divorce—Brecke had a pattern of working only three days per week. Brecke adopted this schedule to spend more time with her children, and Bielen apparently agreed to the arrangement. Brecke did not reduce her employment after the divorce. Instead, she continued working the same number of hours she had

worked during the marriage. Her decision to do so was not unreasonable, under the circumstances.

¶23 Bielen argues this case is like ***Roberts v. Roberts***, 173 Wis. 2d 406, 496 N.W.2d 210 (Ct. App. 1992). There, a husband and wife with two minor children divorced, and the wife subsequently remarried and had another child. ***Id.*** at 407. She and her new husband decided she should quit her job to stay home with their baby. ***Id.*** at 408. We concluded the wife's decision to forego employment for the benefit of her most recent child operated to the detriment of her older children. ***Id.*** at 412. We therefore affirmed the circuit court, which had ordered the wife to pay child support and had calculated her obligation using her earning capacity, instead of her actual income. ***Id.*** at 407-08.

¶24 Bielen argues that, "[l]ike the mother in the ***Roberts*** case, Brecke made a decision to work only three days per week, rather than four or five." We disagree. The mother in ***Roberts*** was employed during the marriage but quit her job after the divorce to stay home and care for a new baby. We determined her decision was unreasonable because it worked to the detriment of her older children, whom she was still obligated to support. In contrast, after Bielen and Brecke divorced, Brecke continued working the same number of hours she had worked during the marriage. Unlike the mother in ***Roberts***, she did not reduce her work schedule to the detriment of her older children. Thus, ***Roberts*** does not compel a conclusion that Brecke's decision to continue working only three days per week was unreasonable.

By the Court.—Order affirmed.

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