COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

Nos. 96-2486
96-2689

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

96-2486
IN RE THE PATERNITY OF ROBERT SCOTT J.:

FRANKLIN M.O.,

PETITIONER-RESPONDENT,

V.

SARA LEE J.,

RESPONDENT-APPELLANT.

96-2689
IN RE THE PATERNITY OF ROBERT SCOTT J.:

FRANKLIN M.O.,

PETITIONER-RESPONDENT,

V.

SARA LEE J.,

RESPONDENT-RESPONDENT,

THERESE M. HENKE, AS GUARDIAN AD LITEM FOR ROBERT SCOTT J.,

APPELLANT.

APPEALS from a judgment of the circuit court for Ozaukee County: FREDERICK P. KESSLER, Judge. *Affirmed and cause remanded for proceedings consistent with this opinion.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. In appeal no. 96-2486, Sara Lee J. appeals from a judgment which awards periods of unsupervised physical placement of the parties' minor child to Franklin M.O. and requires Franklin to pay $206 per month in child support. In appeal no. 96-2689, the guardian ad litem challenges the judgment's child support provisions and various pretrial and trial rulings. We affirm the circuit court in both appeals.

The child was born in 1988. Franklin commenced a paternity action in 1994 and was adjudicated the child's father in 1995. In February 1996, a court commissioner established periods of unsupervised placement and child support. Sara contested the court commissioner's order which resulted in further proceedings in the circuit court in 1996 to address placement and child support. Sara and the guardian ad litem appeal from the judgment arising out of these proceedings.

We address Sara's appeal first. She challenges the court's limitation on information provided to the court-appointed psychologist, its determination that Franklin is not shirking his child support obligation, its $206 per month child

support award and its placement decision. She also raises due process and equal protection claims. The trial on visitation and child support began on July 1, 1996. On that date, Sara appeared in court and made numerous objections to the proceeding. After stating her objections, she advised that she did not intend to participate and left the courtroom.

A party's failure to attend and participate at a hearing waives his or her right to challenge the outcome of that hearing, and the party will not be heard to complain about the order or judgment emanating from that hearing. *See* ***Herlache v. Blackhawk Collision Repair, Inc.***, 215 Wis.2d 99, 102, 572 N.W.2d 121, 122 (Ct. App. 1997). Sara has waived her issues on appeal.[1]

We also conclude that Sara's appeal no. 96-2486 is frivolous. Sara waived her issues by her conduct in the circuit court and she should have known that her appeal "was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." Sara was required to participate in the circuit court in order to preserve her claims on appeal. Accordingly, we remand this matter to the circuit court for a determination of Franklin's reasonable attorney's fees and costs relating to appeal no. 96-2486.[2]

[1] We so hold even as to those issues which were raised prior to the hearing from which Sara absented herself. Sara's decision to depart from the trial deprived the court of the opportunity to hear her arguments in the context of the hearing. Sara abandoned the court proceedings and thereby abandoned her opportunity to argue her cause based on the evidence presented to the court and to influence the presentation of the evidence.

[2] This ruling is limited only to Sara's appeal no. 96-2486 and does not encompass any portion of the guardian ad litem's appeal no. 96-2689.

We turn to the guardian ad litem's appeal no. 96-2689. The guardian first challenges the trial court's conclusion that Franklin was not shirking his child support obligation. Because Franklin's consulting and parachute tour businesses are not yet profitable and he could be employed in a retail setting at approximately $7.00 per hour, Franklin stipulated that the court could attribute $14,500 annual income to him based upon this wage. The court then applied the child support percentage guidelines to that income and required Franklin to pay $206 per month in child support. The guardian argues that Franklin is shirking his child support obligation because he has voluntarily and unreasonably reduced his income and that the trial court should have imputed a higher income to him based upon his professional qualifications and experience.

Franklin testified that he offers consulting and counseling in the area of child abuse and operates parachute adventure trips for current and retired members of the military. He testified that his ability to earn a living as a professor and author was damaged by allegations that he had abused women and by Sara's alleged threats to a publisher to protest a book he co-authored. The threats diminished the publisher's interest in the book. He testified that his wife pays his child support and living expenses but that he is fully and diligently pursuing employment opportunities in his chosen fields. However, Franklin, age sixty, considers himself semi-retired.

Based upon this testimony, the court ruled that Franklin is pursuing income-generating opportunities even if they are not yet profitable. The court cited the gross receipts of the parachute adventure tour business as evidence that Franklin is sincerely attempting to develop this business. The court acknowledged the difficulty in starting a new career after age fifty, particularly when the individual's professional reputation has been the subject of negative publicity.

The guardian argues that the trial court should have attributed more income to Franklin. The trial court may consider earning capacity when a parent is shirking his or her child support obligations. *See* ***Van Offeren v. Van Offeren,*** 173 Wis.2d 482, 496, 496 N.W.2d 660, 665 (Ct. App. 1992). Shirking does not require a finding that the parent deliberately reduced his or her earnings to avoid support obligations. *See* ***id.*** The trial court may find shirking if it finds that the child support obligor's employment decision was both voluntary and unreasonable under the circumstances. *See* ***id.*** Whether the employment decision is unreasonable presents a question of law. *See* ***id.*** at 492, 496 N.W.2d at 663. However, because the trial court's legal conclusion is intertwined with factual findings supporting that conclusion, we will give the trial court appropriate deference. *See* ***id.*** at 492-93, 496 N.W.2d at 663-64.

Here, the trial court deemed credible Franklin's testimony relating to his income-producing endeavors and found that he was making the best effort to generate income through his consulting and tour businesses given his age and the negative publicity relating to the abuse allegations. Credibility determinations are for the trial court when it acts as the finder of fact. *See* ***Micro-Managers, Inc. v. Gregory***, 147 Wis.2d 500, 512, 434 N.W.2d 97, 102 (Ct. App. 1988). We will not overturn the trial court's findings unless they are clearly erroneous. *See* ***id.*** Based on the testimony at trial, we conclude that the findings are not clearly erroneous and therefore the evidence necessary for a shirking determination was not present. While the guardian reaches a different conclusion based on the evidence, we are bound by the inferences and findings of the trial court because they are not clearly erroneous.

We reject the guardian's suggestion that the trial court implicitly found Franklin was shirking because it attributed income to Franklin and set child support on that basis. Having concluded that Franklin was not shirking, the trial court could

have declined to award child support altogether. However, in light of Franklin's stipulation to an annual income of $14,500 from hypothetical retail employment, the court did not err in basing child support on that stipulated income. *See* ***Sellers v. Sellers,*** 201 Wis.2d 578, 585, 549 N.W.2d 481, 484 (Ct. App. 1996) (child support is discretionary with trial court).

Having upheld the court's determination that Franklin was not shirking, we need not address the guardian's related argument that the court should have imputed income to Franklin and set child support based upon his earning capacity. Imputing income is a remedy which redresses shirking. *See* ***id.*** at 587, 549 N.W.2d at 484-85.

The guardian argues that the trial court should have considered the gross receipts of Franklin's tour business in calculating his gross income. While Franklin's tax returns indicated that he had gross tour receipts of $211,099 in 1993, $118,446 in 1994 and $60,867 in 1995, he operated at a loss in each of those years due to the deductions he claimed. Franklin's accountant testified that he prepared the tax returns based on information provided by Franklin and his wife and that the taxing authorities had not challenged any of the deductions claimed for the tour business. The accountant testified that if he had concerns about the deductions, he would have questioned Franklin. He did not recall doing so. Franklin's wife, an attorney, testified that the deductions were appropriate and that she prepared the information relating to those deductions for the accountant using Franklin's business records.

The guardian argued below that the court should impute more income to Franklin; she did not argue that the deductions from the gross tour receipts should be disregarded. The trial court found that the tour business does

not currently generate income. This finding is not clearly erroneous based upon the evidence before the court. The guardian's related argument that the businesses' incomes should be considered is undercut by the trial court's finding that the businesses do not currently generate income in light of the reported losses.

The guardian complains that the trial court failed to consider the income of Franklin's wife since she has been paying Franklin's child support. The court correctly considered Franklin's wife's income as part of the totality of the circumstances and Franklin's ability to pay child support.[3] *See* ***Brad Michael L. v. Lee D.,*** 210 Wis.2d 438, 457, 564 N.W.2d 354, 361-62 (Ct. App. 1997) (citing ***Abitz v. Abitz,*** 155 Wis.2d 161, 172, 455 N.W.2d 609, 614 (1990)). However, Franklin's wife's income cannot be used to set Franklin's child support. *See* ***id.*** at 457, 564 N.W.2d at 361.

The guardian also argues that the court erred in not setting child support at a higher amount in light of pretrial support payments Franklin made which exceeded the amount ultimately ordered by the court. The guardian does not cite any authority for this proposition. Accordingly, we do not consider the argument. *See* ***Post v. Schwall,*** 157 Wis.2d 652, 657, 460 N.W.2d 794, 796 (Ct. App. 1990).

The guardian argues that the trial court erroneously permitted Franklin's accountant, whom the guardian had subpoenaed for trial, to testify by telephone. Franklin asked that the accountant be able to testify by telephone to avoid travel time and because the accountant did not feel that his testimony would

[3] The court reviewed in camera tax returns disclosing Franklin's wife's income.

offer much to the court. The court granted the request over the guardian's objection that telephone testimony would be less compelling for the court.

The guardian now contends that her ability to question the accountant was hindered by his telephonic appearance. We have reviewed the record and there is no indication that the guardian was hampered in her examination of the accountant. At no point did the guardian indicate that she could not proceed once the examination started. Furthermore, the guardian had possession of the accountant's records prior to trial. Therefore, we fail to see how the guardian was prejudiced by the accountant's telephonic appearance. *See* § 805.18, STATS.

The guardian relies upon ***Town of Geneva v. Tills***, 129 Wis.2d 167, 384 N.W.2d 701 (1986), in support of her argument that the trial court erred in permitting the accountant to testify by telephone. ***Tills*** is distinguishable. There, a telephonic appearance frustrated cross-examination because the expert relied upon materials that the parties had not seen. *See* ***id.*** at 173-74, 384 N.W.2d at 704. Here, the parties had pretrial access to the same documents from which the accountant testified.

Finally, we note that the guardian's argument on appeal differs from that offered to the trial court in support of her objection to the accountant's telephonic appearance. At trial, the guardian stated that a "live" witness would be more effective than a telephonic witness. On appeal, the guardian argues that had the accountant appeared pursuant to the subpoena duces tecum, he would have had his entire file with him and the parties would have been able to delve into the business deductions and other information. However, the guardian did not make this argument in the trial court. The accountant testified that he received a

questionnaire prepared by Franklin's wife and that he did not receive any supporting documents for the deductions claimed. Franklin's wife testified that she did not provide receipts or other back-up information to the accountant. We conclude that no substantive right was affected because there was no evidence that documents other than what the accountant had previously produced were necessary for trial.[4]

The guardian challenges the trial court's refusal to permit the court-appointed psychologist, Dr. Joseph Collins, to review a document compiled by Sara ("the profile") as part of his psychological evaluation of the parties for purposes of custody and placement. The profile is Sara's compilation of materials which she contends demonstrates that Franklin is a threat to the child and to her because he abused Sara and other women and committed other criminal acts. The court concluded that the profile was self-serving and ordered it sealed. The psychologist ultimately recommended unsupervised placement with Franklin. The guardian argued that even though the psychologist did not have access to the profile, which she conceded had questionable relevance, she would acquiesce if the court decided to adopt the psychologist's recommendation regarding placement. Because the guardian does not challenge the psychologist's recommendation and did not provide a transcript of the psychologist's testimony, we do not address this issue further.

The guardian argues that the trial court failed to make specific findings regarding placement when it adopted the psychologist's recommendation.

[4] We acknowledge that it was only at trial that the guardian first saw unredacted tax returns which reported Franklin's wife's income. However, because the trial court conducted an in camera review of those returns, we conclude that there was no prejudice to the guardian in not having the accountant on the witness stand.

We conclude that if this was error, *see* § 767.24(6)(a), STATS., it was harmless in light of the guardian's acquiescence to the psychologist's recommendation. Furthermore, the guardian does not present an appellate issue relating to the substance of the placement decision. Therefore, we do not remand for the trial court to make further findings because the placement arrangements themselves are not challenged on appeal.

Franklin moves this court to deem the guardian's appeal frivolous under RULE 809.25(3), STATS. We decline to do so because we do not view the guardian's appellate issues as frivolous. The guardian made good faith arguments on appeal.[5]

By the Court.—Judgment affirmed and cause remanded for proceedings consistent with this opinion.

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

[5] To the extent that the court does not address an argument made on appeal, the argument is deemed rejected. *See* ***State v. Waste Management, Inc.,*** 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1977).