

custody of the children and the respondent was ordered to pay \$400 every two weeks in child support.

¶ 4 In November 2007, the respondent filed for custody of the children. On December 5, 2007, the court awarded custody of the children to the respondent and suspended his obligation to pay child support. On March 7, 2008, the respondent filed a motion to establish child support. A hearing was held on August 12, 2009, during which the court was presented with the following evidence.

¶ 5 The petitioner's Rend Lake College transcripts show that she was enrolled from 1992 until 1997, when she earned her practical nursing license. She reenrolled as a full-time student in the fall 2006 semester. In the six semesters between 2006 and 2009, the petitioner completed only a fraction of her classes. Only once did she complete all of the classes in which she enrolled. Generally, she signed up for a full course load and would drop two or three of the classes during the semester.

¶ 6 The petitioner's financial affidavit showed that her only source of income in 2009 was a \$5,990 per year educational grant. It also showed that she owned two homes free of indebtedness, a truck, and a pontoon boat.

¶ 7 The petitioner was licensed as a practical nurse (LPN) on May 27, 1997. The petitioner's LPN license lapsed on January 31, 2007, due to nonpayment of the annual renewal fee. The court was presented with a copy of the United States Bureau of Labor Statistics report that the annual mean wage for a licensed practical nurse in nonmetropolitan southern Illinois in 2008 was \$30,260. The court was also presented with evidence that the only requirement to renew an LPN's license which had been expired for less than five years was the payment of \$30 fee for each year that the license had been expired. 68 Ill. Adm. Code § 1300.48(a) (2006); 68 Ill. Adm. Code § 1300.15(b) (2006).

¶ 8 At the August 12, 2009, hearing, the court found that the petitioner had failed to

comply with numerous requests to produce financial documents, in violation of Supreme Court Rule 237 (eff. July 1, 2005). As a consequence of this violation, the petitioner was prohibited from testifying about her finances. Ill. S. Ct. R. 219(c)(iv) (eff. July 1, 2002).

¶ 9 On October 15, 2009, the court ordered the petitioner to pay child support in the amount of \$423.64 per month. In so setting the child support, the court found that the petitioner had the ability to attend school part-time and imputed 60% of the income of an LPN to the petitioner.

¶ 10 Shortly thereafter, during the fall 2009 semester, the petitioner ceased attending classes at Rend Lake College. She did not enroll for spring 2010 classes.

¶ 11 On February 23, 2010, the respondent filed a motion to modify child support. He argued that a substantial change in circumstances occurred when the petitioner ceased attending school. The respondent argued that the petitioner's child support obligation should be based on her full-time earning capacity and, as such, 100% of an LPN's income should be imputed to the petitioner.

¶ 12 On March 10, 2010, the petitioner started working at Walmart in Marion, Illinois. On March 17, 2010, the petitioner filed a counterpetition to modify child support. She stated that because she was unemployed when the original child support order was entered, her employment at Walmart constituted a substantial change in circumstances. She argued that her child support obligation should be based on her current income, not an imputed one.

¶ 13 A hearing was held on the motions to modify child support on May 12, 2010. In addition to the previously admitted exhibits, the respondent also offered the petitioner's discovery deposition and portions of her testimony from a January 30, 2007, hearing.

¶ 14 The petitioner worked from 1997 to 2005 as an educational technologist for the Franklin-Jefferson Regional Special Education District. She took this job, instead of a nursing position, because she and the respondent agreed that it was best for their family for

her to work days while he was working nights. Occasionally, however, the petitioner worked as an LPN, filling in at her children's pediatrician's office approximately two days per week during summer and Christmas breaks. The last time she worked as an LPN was for approximately two days in 2004. The petitioner stated that it was her choice to let her LPN license expire, that she refused to renew the license, and that she had taken no action to renew the license and had "no desire to nurse." She also stated that she did not believe that she had the skills or experience necessary to renew her license.

¶ 15 As to her education, the petitioner stated that she had not declared a major at Rend Lake College but that her goal was to obtain a master's degree in educational psychology. The highest degree offered by Rend Lake College is an associate's degree. She stated that she had withdrawn from every class in the fall 2009 semester because she had been sick. She also stated that she had not signed up for any classes in the spring 2010 semester. She could not state when, if ever, she would reenroll in school.

¶ 16 The petitioner testified that she applied for jobs at Walmart, Aisen, Walgreens, General Henry Biscuit Company, Rea Clinic, Menards, and Kroger after being ordered to pay child support. She took the job at Walmart because they offered her a job. The petitioner testified that she started working at Walmart on March 10, 2010, and that her weekly hours ranged from 31 to 45. The petitioner testified that she did her best in finding a job but that she did not apply for any nursing jobs.

¶ 17 On June 30, 2010, in a docket entry order, the court decreased the petitioner's child support obligation to \$286.22 per month. The court stated that there was a substantial change in circumstances and the child support should be based on the petitioner's current income.

¶ 18 The respondent filed a motion to reconsider on July 26, 2010, arguing that the court did not specify what the change of circumstances was and that the court did not make findings of fact on which it based its decision. The court denied the motion to reconsider on

December 8, 2010. In upholding the reduction of child support, the court stated that it found that a substantial change of circumstances occurred "due to the new employment which [the petitioner] had achieved and the ending of her educational pursuits." The court stated that it did not find the petitioner to be voluntarily underemployed, attempting to evade a support obligation, or that she had unreasonably failed to take advantage of an employment opportunity. The court noted that it initially set child support at \$423.64 per month because of the limited information presented at the August 12, 2009, hearing.

¶ 19 On February 1, 2011, the circuit court set permanent child support at \$286.22 per month. It is from this order that the respondent appeals. On appeal, the respondent argues that the petitioner is voluntarily underemployed and that child support should be based on her earning capacity.

¶ 20 Both parties argued, and the court agreed, that a change of circumstances occurred when the petitioner ceased attending classes at Rend Lake College and obtained employment at Walmart. Because a substantial change of circumstances occurred, thus permitting the modification of child support (*In re Marriage of Sweet*, 316 Ill. App. 3d 101, 105 (2000)), we turn to the amount of the modification. The setting or modification of child support is within the trial court's discretion and will not be reversed absent an abuse of that discretion. *Sweet*, 316 Ill. App. 3d at 105. An abuse of discretion occurs when the circuit court's ruling is arbitrary, fanciful or unreasonable or where no reasonable person would take the view adopted by the court. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001).

¶ 21 It is well-settled law that supporting a child is the joint responsibility of both parents. *Sweet*, 316 Ill. App. 3d at 108. Appellate courts have developed three primary factors to consider in determining when it is proper to impute income to a noncustodial parent. In order to impute income, a court must find that one of the following factors applies: (1) the payor is voluntarily underemployed, (2) the payor is attempting to evade a support obligation, or

(3) the payor has unreasonably failed to take advantage of an employment opportunity. *In re Marriage of Gosney*, 394 Ill. App. 3d 1073, 1077 (2009). In the instant case, the issue is whether the petitioner is voluntarily underemployed.

¶ 22 In the case of *In re Marriage of Sweet*, 316 Ill. App. 3d 101 (2000), a circuit court imputed income to a child support obligor who was voluntarily underemployed as a self-employed exterminator. The circuit court set the obligor's child support obligation at a level commensurate with his ability, but noted that it could not force the obligor to work at a particular job or in a particular field. 316 Ill. App. 3d at 104. The reviewing court in *Sweet* looked to the Minnesota case of *In re Marriage of Resch*, 381 N.W.2d 460 (Minn. Ct. App. 1986), for direction. In *In re Marriage of Resch*, the husband-obligor quit a machinist job and worked as a self-employed carpenter. 381 N.W.2d at 462. He testified that he would have no trouble finding work as a machinist. 381 N.W.2d at 462. In directing him to pay child support at a rate based on his earning capacity as a machinist, the Minnesota court stated that it was within its province to direct "a person to pay support commensurate with a wage he could earn if he sought employment in an occupation for which he is trained and has the present ability to perform." 381 N.W.2d at 462. The *In re Marriage of Sweet* court ultimately held that "if a court finds that a party is not making a good-faith effort to earn sufficient income, the court may set or continue that party's support obligation at a higher level appropriate to the party's skills and experience." 316 Ill. App. 3d at 107. The *In re Marriage of Sweet* court noted that the obligor was not being forced to abandon his self-employment; instead, he was being required to pay an amount of child support based on his earning capacity. 316 Ill. App. 3d at 105. How the obligor chose to meet this burden was up to him. 316 Ill. App. 3d at 105.

¶ 23 We now turn to the issue of the petitioner's voluntary underemployment. The petitioner earned her LPN license in 1997. The unrefuted evidence before the court was that

the average mean income for an LPN in nonmetropolitan southern Illinois in 2008 was \$30,260. The petitioner currently earns \$8 per hour at Walmart. No evidence was presented that the petitioner could not obtain employment as an LPN or that LPN positions were unavailable. Because the petitioner has the capacity, skills, and opportunity to earn more money, but chooses not to, she is underemployed.

¶ 24 We next address whether her underemployment is voluntary. The petitioner clearly stated that she chose not to renew her LPN license in 2007, that she chose to not look for employment as an LPN, and that she continues to choose to not renew her LPN license. She also clearly stated that she has no desire to work as an LPN. The petitioner provided no evidence that LPN jobs were not available, that she was not qualified to work as an LPN, that she could not renew her license, or that she was otherwise unable from being employed as an LPN. Thus, the petitioner's failure to obtain employment as an LPN is nothing if not voluntary.

¶ 25 Like the machinist in *In re Marriage of Resch*, the petitioner is trained in a skill and has the ability to perform that skill; the only factor missing is the desire to be so employed. As held by *In re Marriage of Sweet*, an obligor's desire to work in a particular field is not determinative for child support purposes. While the court cannot force an obligor parent to work in a given field, it can set child support at an amount that is appropriate to the party's skills and experience. We choose to do just that here.

¶ 26 In light of the foregoing, we find the circuit court's order decreasing the child support to be an abuse of discretion. Because the petitioner's decision to not work as an LPN is voluntary underemployment, the imputation of income is appropriate. Because no evidence was presented to the contrary, income should be imputed to the petitioner at a rate of \$30,260 per year. We hereby vacate the order of the circuit court of Franklin County setting child support at \$286.22 per month and remand this case with directions that the petitioner's child

support obligation be based on an imputed income of \$30,260 per year.

¶ 27 Vacated and remanded with directions.

¶ 28 JUSTICE STEWART, dissenting:

¶ 29 The majority correctly notes that the decision of a trial court setting or modifying child support should not be reversed unless the court has abused its discretion. The trial court abuses its discretion when the court's ruling is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the court. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). I do not believe that the trial court's decision in this case was an abuse of discretion; therefore, I respectfully dissent.

¶ 30 As the statement of facts recited by the majority notes, the petitioner received her LPN license in 1997 and since that time has never worked as an LPN on a full-time basis. From 1997 to 2005 she worked a different job because she and the respondent agreed that it would be better for their family if she did not work nights. Although she occasionally worked as an LPN two days per week at her children's pediatrician's office during summer and Christmas breaks, the last time she was employed as an LPN in any capacity was in 2004. Since she was not working as an LPN, and had no desire to do so, she allowed her LPN license to expire. Evidence was offered at the 2010 hearing that the petitioner does not believe she has the skills and experience necessary to work as an LPN.

¶ 31 Thus, the question before this court is whether it was arbitrary, fanciful, or unreasonable for the trial court *not* to impute the full-time income of an LPN to the petitioner, who has never worked full-time as an LPN, who last worked part-time as an LPN six years earlier, who does not possess an LPN license, and who does not believe she has the skills and experience necessary to work as an LPN. Under these facts, was the view adopted by the court one that "no reasonable person" would take?

¶ 32 I simply do not believe that the decision of the trial court was an abuse of discretion.
I would affirm.