COURT OF APPEALS
DECISION
DATED AND FILED

June 11, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1710 **Cir. Ct. No. 2011FA822**

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

IN RE THE MARRIAGE OF:

SUSAN M. SASENICK,

PETITIONER-RESPONDENT,

V.

RICHARD T. MCCREARY,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: JOHN P. ZAKOWSKI, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten, and Sherman, JJ.

¶1 BLANCHARD, P.J. Richard McCreary appeals a circuit court order revising his child support obligations. McCreary argues that the court

erroneously exercised its discretion by requiring McCreary to pay in child support the equivalent of 17 percent of the oil and gas royalties derived from real property in Wyoming that McCreary had an ownership interest in at the time of his divorce from Susan Sasenick, even though McCreary sold his ownership interest in the royalties soon after the judgment of divorce was entered. The court based its decision on its determinations that McCreary sold his right to receive the royalties in a post-divorce transaction that was not an arm's length transaction, that the transaction was unreasonable, and that the transaction was intended to avoid fulfilling a portion of McCreary's child support obligations. We conclude that the circuit court did not erroneously exercise its discretion in ordering support payments equivalent to 17 percent of ongoing royalties. Accordingly, we affirm.

BACKGROUND

¶2 Before Sasenick and McCreary married in 2000, McCreary inherited an undivided one-half interest in a parcel of property in Wyoming, with the other one-half interest going to his sister. Approximately three years before the divorce, in 2009, McCreary and his sister executed mineral rights leases allowing leaseholders to drill for oil and gas on the Wyoming property. Beginning in 2009, McCreary began receiving his share of royalties based on these leases. Between 2009 and 2012, the property generated a total of $269,623 in royalties for McCreary, with projected royalties to McCreary of $111,903 in 2013.

¶3 Sasenick and McCreary were divorced on May 8, 2012. The parties negotiated and entered into a marital settlement agreement, which was incorporated into the judgment of divorce. As pertinent to this appeal, the agreement awarded to McCreary "all right, title and interest in" his ownership

interest in the Wyoming property, and Sasenick was "divested of all right, title and interest" in that property. The agreement further provided:

> All property and money received and retained by the parties shall be the separate property of the respective party, free and clear of any right, title, interest or claim of the other party, *and each party shall have the right to deal with and dispose of his or her separate property as fully and effectively as if the parties had never been married*.

(Emphasis added.)

¶4 On the topic of child support for three minor children, the parties agreed that McCreary would make base child support payments of $4,570 per month. The parties further agreed that, as additional child support, McCreary would make payments tied directly to his receipt of oil and gas royalties from the leaseholders of the Wyoming property. Specifically, McCreary was obligated to pay in child support "17% of any taxable royalty, rent or similar income as identified on his income tax returns and [tax forms] from the production of gas and oil income" generated through the oil and gas leases. For ease of reference, we will call this portion of the child support payments that McCreary was obligated to make under the marital settlement agreement as incorporated in the divorce judgment "the royalty support payments."

¶5 Approximately three months after the divorce, on August 9, 2012, McCreary used a mineral deed to convey his ownership interest in the mineral rights on the Wyoming property to a Nevada corporation called FORTC Incorporated, which is owned by McCreary's girlfriend, Tammy Sharkus.[1] This

[1] Following the lead of the parties and the circuit court, we treat Sharkus and FORTC as a single unit throughout this opinion, at times using the name Sharkus when referring to FORTC or to both Sharkus and FORTC.

included the right to receive McCreary's oil and gas royalties from the Wyoming property. According to testimony from Sharkus and McCreary, Sharkus and McCreary entered into an agreement under which Sharkus would pay $30,000 for McCreary's rights in the property. Further, according to McCreary and Sharkus, this agreement was memorialized in a promissory note that charged no interest and set no date for payment. This promissory note was not presented to the circuit court because it had purportedly been destroyed, with McCreary testifying that he and Sharkus, acting together, had shredded it and Sharkus testifying that she had burned the note. Sharkus and McCreary testified that Sharkus paid McCreary $9,700 in cash as a down payment on August 9, 2012, the same day on which McCreary gave Sharkus the mineral deed, and that Sharkus paid McCreary the remainder of $20,300 between October and December 2012 in installments, with the $20,300 coming from royalties on the Wyoming property. On the day Sharkus allegedly paid the last installment, McCreary executed a bill of sale transferring all of his ownership interest in the Wyoming property to Sharkus. However, Sharkus was not named on the title to the Wyoming property until June 2013.

¶6 In October 2012, when the royalties allegedly began going to Sharkus instead of McCreary, McCreary stopped making royalty support payments. McCreary did not notify Sasenick of the sale of the Wyoming property at the time of the sale. Instead, Sasenick learned of the sale only after she asked McCreary in December 2012 why McCreary had failed to make the November and December royalty support payments. At that time, McCreary responded that he did not make those support payments because he had sold his right to receive the royalties.

¶7 Sasenick filed a motion for revision of child support that was ultimately considered at a de novo circuit court hearing, at which the court made

the following determinations. McCreary's "removal of a specifically agreed upon source of child support payment," that is, the royalty support payments, "clearly constitute[es] a substantial change in circumstances" affecting child support. Further, McCreary's "transfer of mineral rights and ultimate transfer of the Property from [McCreary] to FORTC was not an arm['s] length[] transaction." McCreary "chose to divert the ownership and income [from the property] to his girlfriend" for the following purposes: "(1) to provide financial support to his girlfriend; and (2) to avoid paying additional child support payments." The circuit court found that "the sale of the Property for $20,300—or even $30,000" was not "the product of a reasoned business decision," given the history of and anticipated future income generated from the mineral rights. As the court further explained,

> Despite no longer holding title ownership to the Property, [McCreary] continues to benefit from the income from the gas and oil production. Whereas [McCreary] might otherwise have had to pay child support and a higher tax rate on the income, he is instead able to channel the income to [Sharkus], who pays a lower tax rate and does not have to pay child support. [Sharkus] is then able to use the funds she receives to cover personal expenses, some of which [McCreary] might otherwise have paid, including travel expenses for [Sharkus] and her daughter to visit [McCreary].

¶8 Based on these determinations, and relying on authority that included ***Evjen v. Evjen***, 171 Wis. 2d 677, 492 N.W.2d 361 (Ct. App. 1992), the court ordered McCreary to "obtain proof" of Sharkus's income from the Wyoming property and, based on this information, to "continue to make monthly child support payments of 17% of that income," in addition to the other child support payments required under the marital settlement agreement. McCreary now appeals.

STANDARD OF REVIEW

¶9 A revision of child support "is to be made only upon a finding of a substantial or material change in circumstances." ***Evjen***, 171 Wis. 2d at 683; WIS. STAT. § 767.59(1f). "[C]hild support determinations are entrusted to the circuit court and are not disturbed on review unless there has been an erroneous exercise of discretion." ***Ladwig v. Ladwig***, 2010 WI App 78, ¶15, 325 Wis. 2d 497, 785 N.W.2d 664. A circuit court has not erroneously exercised its discretion where it has "'examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.'" ***Id.*** (quoted source omitted). We will uphold a circuit court's findings of fact unless they are clearly erroneous. ***Id.***

DISCUSSION

¶10 Before turning to the arguments of the parties, we explain the limited nature of the issues on appeal. First, McCreary does not develop an argument challenging any of the circuit court's factual findings as clearly erroneous. Second, McCreary does not argue that the circuit court erred in determining that his refusal to make child support payments in the amount of 17% of the royalties from the Wyoming property, based on his purported sale of his interest in that property, constituted a substantial change in circumstances that could warrant revision of his child support obligation. Third, the parties agree that, under a plain language interpretation, the marital settlement agreement provided that McCreary could sell his interest in the Wyoming property at any time.

¶11 This leaves the issue on which the parties disagree, which is whether, given the facts found by the circuit court, the court properly exercised its discretion in modifying the child support order to require McCreary to continue to

pay 17% of the royalties generated from the Wyoming property after McCreary purportedly sold his right to receive that income to Sharkus.

¶12 We conclude that the circuit court properly exercised its broad discretion, reasonably applying the proper legal standard to the court's unchallenged factual findings, including the findings that McCreary's purported sale of the Wyoming property was in effect a sham transaction intended to reduce his child support payments. *See* ***id.***; WIS. STAT. § 767.59(1f). McCreary argues, to the contrary, that the court erroneously exercised its discretion. We turn now to McCreary's arguments and our reasons for rejecting each.

¶13 We begin with an argument that McCreary makes based on the language of the martial settlement agreement. The argument is that the circuit court's decision effectively inserts one or more new conditions into the marital settlement agreement, and through the agreement thereby adds conditions to the judgment of divorce. McCreary accurately points out that, as summarized above, the marital settlement agreement does not prohibit him from selling his right to receive the royalties at any time, and obligates him to pay only the 17% of royalties that he in fact receives, as reflected in his tax filings. McCreary argues that, in ordering him to continuing making these support payments after he sold his right to receive the royalties, the court effectively "insert[ed] a new contractual term into" the martial settlement agreement, to the effect that he could not sell the property for some period of time or that he had to continue making these support payments even if he sold the property.

¶14 The fundamental problem with this argument is that the challenged court decision here was not a remedy for a violation of a term of the marital settlement agreement. As stated above, there is no question that McCreary could

sell his right to receive royalties without violating the agreement. The challenged court decision was based on the authority of the court to address potential changes in the income, or the imputed income, of a child support payer as those changes might bear on the terms of a divorce judgment requiring the payment of child support. It is McCreary who effectively asks this court to add terms to the marital settlement agreement, to the effect that the circuit court could under no circumstances modify McCreary's child support obligations based on his disposition of the Wyoming property. In sum, McCreary's argument that the terms of the marital settlement agreement, in and of themselves, dispose of the issue presented here goes nowhere.

¶15 McCreary also argues that, putting aside the terms of the marital settlement agreement, the circuit court erroneously exercised its discretion in determining that ***Evjen*** provides authority for its order modifying McCreary's child support obligation, on the ground that ***Evjen*** is readily distinguishable. We first summarize this court's decision in ***Evjen***, and then explain why we conclude that, while ***Evjen*** is distinguishable in some respects, the rationale of the opinion supports the circuit court decision here.

¶16 Evjen was a noncustodial parent subject to a child support obligation. ***Evjen***, 171 Wis. 2d at 682. He owned a closely held corporation that operated a funeral home. ***Id.*** After his divorce and a remarriage, Evjen hired his new wife to be secretary of the corporation. ***Id.*** Evjen's corporation paid his new wife a salary well in excess of what the corporation had previously paid for the work she was doing. ***Id.*** In concluding that the circuit court did not erroneously exercise its discretion when it imputed part of Evjen's new wife's salary to Evjen's corporate profits for purposes of calculating Evjen's child support obligation, this court explained that

> a family court is authorized to pierce the corporate shield if it is convinced that the obligor's intent is to avoid financial obligations arising from the dissolution of the marital relationship. Depending upon the case, it is the obligation of the family court to determine if corporate income or profits are a necessary part of a well-managed corporation or an excuse for the sole shareholder to keep income or profits from being considered when the family court is setting financial obligations.

Id. at 685. The Evjen court concluded that "the family court properly found that by having the corporation pay [Evjen's wife] a substantial salary, [Evjen] was using the corporation to bury his true income" in an "attempt[] to dodge his child support obligations." ***Id.*** at 684-85. Under these circumstances, the family court properly "used its creative talents to resurrect that portion of the salary paid to [Evjen's wife] which bore no rational relationship to the amount [Evjen] previously paid" for the same work. ***Id.*** at 685.

¶17 McCreary argues that the circuit court erroneously exercised its discretion in relying on ***Evjen*** for two reasons, each of which we now address and reject. First, McCreary argues that ***Evjen*** is distinguishable because McCreary

> is not diverting regular income or otherwise using a corporate structure to reduce his income—he sold an income producing asset, and as a result, he is no longer receiving income from that asset. Conversely, in ***Evjen***, the father *still owned and controlled* the corporation, and the Court found he was simply diverting income from the corporation to his [new] wife.

(Emphasis in original.) McCreary fails to persuade us that it matters that Evjen diverted income by overpaying an employee of his corporation, as opposed to diverting income by purportedly selling an asset as McCreary did. The rationale underlying the court's decision in ***Evjen***, as it relates to the instant case, is that a circuit court has broad authority to use its "creative talents" to impute income that

a parent payer diverts, but still benefits from, in order to avoid making child support payments. *See* ***id.*** at 684-85. This is what the circuit court did here.

¶18 Second, McCreary argues that

> Unlike … Evjen, who, by virtue of marriage (and therefore law (*see generally* Wis. Stat. Sec. 766.31(1)-(3)), possessed an ownership interest in his new wife's funeral home income, [McCreary] and [Sharkus] are not married, they reside on opposite sides of the United States, … and there was zero actual evidence presented to the trial court that [McCreary] had received any money from FORTC or [Sharkus].

There appear to be multiple problems with this argument, but it is sufficient to say that the circuit court at least implicitly determined that McCreary effectively continues to receive *all* of the royalties because the purported sale was a sham, the purpose of which was to allow McCreary to avoid child support payments while continuing to reap the benefits of the royalties. We reach this conclusion about the court's implicit determination based on explicit findings made by the circuit court that include the following: much of McCreary and Sharkus's testimony was not credible; the sale was unreasonable in light of the sum allegedly paid by Sharkus as compared to the value of the mineral rights; the transfer of the right to receive the royalties from McCreary to Sharkus was not an arm's length transaction; and McCreary "continues to benefit" from the royalties. Despite his assertion to the contrary, McCreary fails to develop an argument with citations to the record that any of these findings are clearly erroneous.

¶19 In sum, we reject McCreary's attempts to distinguish ***Evjen***, and we conclude that the circuit court properly exercised its discretion in determining that on the facts here, ***Evjen*** supports modification of the child support award.

¶20 We also find support for the circuit court's decision in the rationale of courts analyzing the concept of "shirking." We recognize that, as McCreary points out, "shirking," as that term has been used by Wisconsin courts, is typically applied solely in the context of parent payers avoiding potential employment. For example, this court explained in ***Evjen*** that a parent is "shirking" when he or she "has chosen not to fully and diligently pursue his or her best employment opportunities." *See* ***id.*** at 684. However, in explaining the rationale behind the shirking concept, this court has stated that "[s]hirking is established where the obligor intentionally avoids the duty to support or where the obligor unreasonably diminishes or terminates his or her income in light of the support obligation." *See* ***Van Offeren v. Van Offeren***, 173 Wis. 2d 482, 492, 496 N.W.2d 660 (Ct. App. 1992). Regardless of the label used, this same rationale applies to the facts here. The circuit court determined that the purported sale of the right to receive the royalties was unreasonable and conducted so that McCreary could avoid a portion of his child support obligation. Under these circumstances, the circuit court here had the discretion to impute income to the parent payer. *See* ***id.***

¶21 McCreary argues that reliance on shirking case law does not help Sasenick in light of the fact that the circuit court expressly found that McCreary was not shirking, because as the court put it the "children have not been financially harmed by the sale of the property and diversion of child support." We reject this argument for the following reasons. The circuit court's more complete formulation was to observe that McCreary "is correct that this is not a case where the children's standard of living is of concern or where he is, on the whole, shirking his obligation to pay support. He is providing a great deal of support to" the children. Read in context, the circuit court's statement that McCreary was not shirking can only reasonably be read to mean that McCreary pays a significant

amount in child support, even when one excludes the royalty support payment. However, this acknowledgement does not undermine the court's ultimate decision to impute the income from the royalties to McCreary, given the court's finding that McCreary's purported sale of the rights to receive the royalties was unreasonable and done in order to avoid paying additional child support, and that the "children's right to child support is still being adversely affected." As we have already observed, the circuit court's analysis is in line with case law regarding shirking, where the question is not just whether the parent is paying a significant amount of support, but whether the parent is depriving his or her children of the support to which they are entitled by intentionally failing to pursue income matching his or her earning capacity. *See* ***Chen v. Warner***, 2005 WI 55, ¶25, 280 Wis. 2d 344, 695 N.W.2d 758; ***Knutson v. Knutson***, 15 Wis. 2d 115, 117-18, 111 N.W.2d 905 (1961).

¶22 McCreary makes an additional argument that the circuit court erroneously exercised its discretion in failing to consider two sources of authority that McCreary argues are directly on point: WIS. ADMIN. CODE § DCF 150.03(4) (through April 2015) (determining income imputed from assets), and ***State v. Maley***, 186 Wis. 2d 125, 519 N.W.2d 717 (Ct. App. 1994).

¶23 Turning first to WIS. ADMIN. CODE § DCF 150.03(4), McCreary argues that this regulation provides that a court may impute a reasonable earning potential to a parent's underproductive assets only where the parent has "ownership and control" over those assets. *See* § DCF 150.03(4)(a). McCreary argues that it was error to impute the income from the royalties to him because he no longer has ownership and control over the Wyoming mineral rights. This argument entirely misses the mark. The problem here is not that McCreary owns an asset that is underproductive, into which he is diverting income. The problem

is that McCreary effectively created a sham transaction to hide income, thereby reducing his child support obligation, while retaining the benefit of that income. For the reasons already explained above, in this circumstance, the circuit court had the discretion to impute income to McCreary for the purpose of determining whether and to what degree support payments should be revised.

¶24 As for ***Maley***, McCreary fails to point to any aspect of this opinion that overlaps with any pertinent aspect of that case. In ***Maley***, a non-custodial father who was subject to a child support obligation was awarded property under the terms of a divorce judgment. ***Maley***, 186 Wis. 2d at 126-27. The father eventually sold the property. ***Id.*** at 127. The only issue before the court was "whether the sale proceeds are income subject to the child support order." ***Id.*** The instant case has nothing to do with proceeds from a sale of property, and the court in ***Maley*** did not address any issue presented in the instant case.

CONCLUSION

¶25 For the forgoing reasons, we affirm the decision of the circuit court ordering McCreary to obtain current information about the royalties and then make monthly payments equivalent to 17 percent of the income generated from the Wyoming property as additional child support.

By the Court.—Order affirmed.

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