COURT OF APPEALS
DECISION
DATED AND FILED

March 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2272

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

IN RE THE MARRIAGE OF:

JEFFREY SAMSON,

PETITIONER-RESPONDENT,

v.

MARY SAMSON,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Barron County: JAMES C. EATON, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Mary Samson appeals a divorce judgment, challenging the child support award, property division, the denial of maintenance and the award of joint legal custody. We conclude the record supports the trial

court's maintenance determinations. The record indicates, however, that a truck repair bill was subtracted from Jeffrey's gross income for child support calculations and also subtracted from the assets awarded to Jeffrey for purposes of determining property division, resulting in a double-counting. We therefore reverse the child support and property division awards, and remand these matters to permit the trial court to exercise its discretion to recalculate Jeffrey's gross income or property division. Additionally, because the parties disputed joint legal custody, we conclude § 767.045, STATS., requires the appointment of a guardian ad litem. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

Mary and Jeffrey Samson were married approximately fourteen years. They had three children, born in 1984, 1992 and 1993. Although Mary worked outside the home early in the marriage, later she stayed home to home school the three children. Jeffrey was employed as an over-the-road truck driver. His earnings were disputed at trial. The trial court awarded joint legal custody, with primary placement with Mary. Jeffrey was ordered to pay $721 child support per month.

In May of 1996, the parties purchased a 100-acre farm in Clayton, Wisconsin, for $68,000, subject to a $56,485 mortgage. Jeffrey raised emus on the farm. Details of the property division and other facts will be discussed later in this opinion. [1]

1. Child Support

[1] Only Jeffrey testified at trial; Mary did not appear. She was, however, represented by counsel who appeared at trial on her behalf. No explanation is offered for her absence.

Mary argues that the trial court erred because it deviated from the percentage standards mandated by § 767.25(1j), STATS.[2] Mary recognizes, however, that "it is possible that the Court did use the guidelines, but it applied those guidelines to an incorrect gross income." She argues that the record is silent and, therefore, we do not know the court's rationale.

We conclude that the record reveals the court's rationale. Although the trial court did not make particularized findings as to Jeffrey's income, it apparently accepted Jeffrey's calculations.[3] Jeffery proposed $721 per month child support based upon the following reasoning. Jeffrey's 1997 tax returns showed gross earnings as a truck driver of $80,648. Expenses incurred in generating that income were $43,667, including a $9,668 repair to his semi-tractor. Jeffrey incurred other expenses as a result of his emu venture and paid self-employment taxes, resulting in an adjusted gross income for tax purposes of $21,528.

Jeffrey conceded that his farming depreciation expense of $10,033 should not be allowed for income calculation for child support purposes and, consequently, that figure was added back in. Because he was self-employed and paid a 15.7% self-employment tax, instead of 7%, he subtracted $1,681, representing half of his self-employment tax. He determined his income to be $29,872, to which he applied the 29% child support standard for three children, to obtain a $721 monthly child support payment.

---

[2] Mary cites § 767.32(2), STATS., but because this section applies only upon revision of judgments, we interpret her argument to apply § 767.25(1j), STATS.

[3] *See* ***Hagenkord v. State***, 100 Wis.2d 452, 464, 302 N.W.2d 421, 428 (1981) (no erroneous exercise of discretion when the court does not articulate rationale, if the record shows that the court acquiesced in counsel's argument).

The trial court stated that $721 per month was fair considering that Jeffrey was responsible for paying medical insurance, worked long hours, was a hard worker, and paid the entire self-employment expense. From the record, we infer that the trial court adopted Jeffrey's calculations which applied the correct 29% standard. *See* WIS. ADM. CODE § HSS 80.03. The issue is whether Jeffrey's method correctly calculates gross income.

Child support issues are addressed to trial court discretion. ***Cook v. Cook***, 208 Wis.2d 166, 171, 560 N.W.2d 246, 248 (1997). We sustain the court's exercise of discretion if the record reveals a rational basis for its decision. *See* ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983). Underlying the court's discretionary determinations are questions of fact and conclusions of law. *See* ***Michael A.P. v. Solsrud***, 178 Wis.2d 137, 153, 502 N.W.2d 918, 925 (Ct. App. 1993). We review conclusions of law de novo. *See* ***id***. at 147, 502 N.W.2d at 922. Findings of fact are not overturned unless they are clearly erroneous. Section 805.17(2), STATS.

WISCONSIN ADM. CODE § HSS 80.02(14) defines "gross income available for child support" as "the amount of gross income after adding wages paid to dependent household members and subtracting business expenses which the court determines are reasonably necessary for the production of that income or operation of the business and which may differ from the determination of allowable business expenses for tax purposes."

On appeal, Mary argues that Jeffrey's gross income available for child support is either $38,245 or $47,913, depending on how the $9,668 truck repair bill is applied. She agrees that $25,835 for fuel and associated expenses, and a variety of other miscellaneous expenses, are legitimately deducted from his

$80,648 gross income. Mary claims, however, that the trial court erroneously deducted the $9,668 truck repair bill from both the property division and the income used to calculate support. In addition, she contends that losses associated with the emu operation, consisting of $10,033 depreciation and $3,985 in other expenses, should not be deducted. She also claims that the court erroneously permitted as a business deduction a $1,264 interest deduction on the homestead he was awarded.

We conclude that the record supports the court's discretionary decision to permit the farming expenses. In arriving at Jeffrey's gross income available for child support, the trial court did not allow the depreciation deduction, but permitted Jeffrey to deduct $3,985 in farm operating expenses. In setting support, the court stated that it was giving Jeffrey credit that he was a hard worker and "[t]his guy is not a malingerer." We interpret the court's comments as a credibility assessment, and conclude that the court believed Jeffrey's efforts at raising emus were a good faith attempt to make a profit, thereby increasing his income. We must defer to the trial court's assessment of the weight and credibility of testimony. Section 805.17(2), STATS.

Mary's contention that the court should not have permitted a deduction for the truck repair bill or the mortgage interest was not argued at trial or raised on a motion for reconsideration, and is apparently advanced for the first time in briefs before this court.[4] As a general rule, this court will not address

[4] Mary's brief fails to indicate that it was raised before the trial court. At trial, Mary contended that Jeffrey's income was $35,014, which she arrived at by taking his net income from trucking, $37,781, and subtracting self-employment tax and health insurance.

issues for the first time on appeal. *See* ***State v. Brown***, 96 Wis.2d 258, 263, 291 N.W.2d 538, 541 (1980). The reason for this general rule is to give trial courts the opportunity to correct errors, thus avoiding appeals. *See* ***Herkert v. Stauber***, 106 Wis.2d 545, 560, 317 N.W.2d 834, 841 (1982). Had Mary raised this issue at trial, the court would have had the opportunity to consider this claimed error. We generally decline to review an argument where an appellant has failed to give the trial court fair notice that he or she objects to a particular issue. *See* ***State v. Gilles***, 173 Wis.2d 101, 115, 496 N.W.2d 133, 139 (Ct. App. 1992).

Nonetheless, "[t]he rule is one of administration and does not involve the court's power to address the issues raised." ***Wirth v. Ehly***, 93 Wis.2d 433, 444, 287 N.W.2d 140, 146 (1980). Based upon considerations of fairness, we are persuaded that we should entertain Mary's argument even though the trial court was not provided an opportunity to do so.

While division of marital property and calculation of child support are matters generally left to the sound discretion of the divorce court, courts must apply correct legal standards in exercising that discretion. ***Cook***, 208 Wis.2d at 171, 560 N.W.2d at 248. One of the legal standards to be considered is the rule against "double-counting." *See* ***id***. at 180, 560 N.W.2d at 252. At the heart of the rule against double-counting lies the goal of achieving fairness between the parties. ***Id***. at 184, 560 N.W.2d at 253-54.

"[T]he 'double-counting' rule serves to warn parties, counsel and the courts to avoid unfairness by carefully considering the division of income-producing and non-income-producing assets and the probable effects of that division on the need for maintenance and the availability of income to both parents for child support." ***Id***. at 180, 560 N.W.2d at 252. ***Cook*** explained that the

double-counting rule is not inflexible, but "is a fact-sensitive question to be resolved on a case-by-case basis." ***Id***. at 183, 560 N.W.2d at 253.

While previous cases have focused on unfairness to the payer caused by double-counting assets, double-counting of liabilities can equally create unfairness to the payee. Here, the trial court apparently reduced Jeffrey's income available for child support by the amount of his truck repair bill.[5] In addition, as we will discuss below, it appears that the trial court also reduced Mary's share of the property division based upon Jeffrey's liability for the same truck repairs. Because the double-counting of costs for truck repairs may have unfairly reduced the income or assets available for support and property division, we reverse and remand for further consideration of this question. On remand, the trial court may in its discretion receive additional evidence to develop the facts pertaining to this issue.

2. Property Division

Next, Mary argues that the trial court erroneously valued the parties' property subject to division and entered an unequal property division. In its oral bench decision, the trial court relied on Jeffrey's testimony to value the farm at $68,000; farm equipment at $3,525; livestock at $550; a vehicle at $1,500; and the semi-tractor at $3,500. The trial court did not specifically address the value of Jeffrey's personal property or insurance policy. At trial, however, Jeffrey testified

[5] The record suggests that there may be two truck repair bills. We leave it to the trial court's fact-finding function on remand to determine the number and amount of the truck repair bills.

that he owned $1,500 of personal property[6] and an insurance policy worth $5,800. This property has a total value of $84,375.

As for liabilities, the farm carried a debt of $56,485. In addition, the trial court found that Jeffrey owed one truck repair bill of $9,640, and a second one of $4,862. The court also found that Jeffrey owed state taxes of $180 and $717, and federal taxes of $3,438. These debts total $75,322.[7] In addition, Jeffrey was ordered to pay $2,000 to Mary for property division. Because the court ordered Jeffrey to be responsible for the debts, the record discloses a net property award to Jeffrey of $7,053.[8]

The court characterized a $500 payment Jeffrey made to Mary shortly after they separated as an asset that was transferred to her.[9] It also considered that Jeffrey had paid various liabilities that Mary incurred, totaling $1,462. The court accepted Jeffrey's testimony that Mary had $500 in personal property and a vehicle worth $2,000.

The trial court noted:

---

[6] Jeffrey testified that the $1,500 figure included his 14-foot boat and trailer valued at $1,000.

[7] The court ruled that a claimed $9,700 debt to Jeffrey's mother would not be considered due to insufficient proof.

[8] Although the trial court did not make particularized findings of fact with respect to values, we may imply findings consistent with its result. *See* ***Moonen v. Moonen***, 39 Wis.2d 640, 646, 159 N.W.2d 720, 723 (1968).

[9] Whether the $500 payment to Mary is in the nature of support, maintenance or property division is not developed and therefore we do not address it on appeal. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398-99 (Ct. App. 1995).

> But Mr. Samson is paying all of the debt, all of it. He is, on the face of it, the only one working. He is going to be paying child support on the basis of a virtual round the clock work schedule. I don't think the Respondent has made a case for a perfect 50/50 split. I think there is some room here for a property equalization payment, but it's certainly nothing in the neighborhood of five or six or seven thousand dollars.
>
> … I am going to find that an equalization payment of $2000 is indicated, that Mr. [Samson] will have a bit in excess of 50 percent, but that he has done by every conceivable measure those things that justify a disparate division. … He has kept things going, at least in the economic sense.

As a result, the property awarded to Mary, together with the $2,000 payment from Jeffrey amounted to $6,462.

Mary first challenges the values of certain assets. She contends that the farm is worth $72,000, not the $68,000 assigned by the court. She argues that since the 1996 purchase for $68,000, Jeffrey had made $4,000 in improvements by installing fencing and new roofs on the house and garage.

This court will not upset the trial court's valuations of assets unless they are against the great weight and clear preponderance of the evidence. ***Holbrook v. Holbrook***, 103 Wis.2d 327, 334, 309 N.W.2d 343, 347 (Ct. App. 1981). Stated otherwise, to be overturned, the valuation, which is a finding of fact, must be clearly erroneous. Section 805.17(2), STATS.; ***Weiss v. Weiss***, 122 Wis.2d 688, 701, 365 N.W.2d 608, 615 (Ct. App. 1985).

Jeffrey's testimony supports a finding that the farm is worth $68,000. Jeffrey testified that he purchased the farm for $68,000 in 1996. Although he testified that he had spent $4,000 on repairs and improvements, the record is silent whether the fencing and the new roof increased the farm's market value. In

absence of any testimony to support a finding of increased value, the trial court was entitled to find that the recent sales price was the best indicator of value.

Mary also contends that the $3,750 attributed to farm machinery and livestock was too low. She argues that the court should have used the figures set forth on their 1997 depreciation schedule appended to their tax returns. The depreciation schedule listed the livestock and farm equipment "cost" at $8,867.

The trial court resolves conflicts in testimony, and we must defer to the trial court's assessment of weight and credibility. Section 805.17(2), STATS.; *see* ***Chapman v. State***, 69 Wis.2d 581, 583, 230 N.W.2d 824, 825 (1975) (The trial court's credibility assessment will not be overturned unless inherently incredible, in conflict with the uniform course of nature or with fully established or conceded facts.). Here, the trial court accepted Jeffrey's testimony. Because Jeffrey's testimony supported the determination of value, we do not overturn it on appeal.

Next, Mary argues that the trial court failed to consider that Jeffrey owns three motor vehicles "with a total value of $14,400," citing generally to Jeffrey's financial disclosure statement. The financial statement does not support her assertion. The statement indicates that Mary has a 1985 Ford Bronco, with a net value of $2,400. In addition, it states that Jeffrey has his semi-tractor, on which the debt exceeds its value, a "1974 Chev. pickup" that is "junk" and a 1985 pickup valued at $2,500. Because this argument is unsupported and undeveloped, we do not address it further. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398-99 (Ct. App. 1995).

Mary also argues that in entering a property division, the trial court erroneously considered the sums Jeffrey paid on her behalf for car licenses,

bankruptcy fees and car insurance. This argument is undeveloped and unsupported by legal authority. We will not develop appellant's amorphous and unsupported arguments. *See* ***id***. at 786, 530 N.W.2d at 398.

Next, Mary argues that the trial court did not take into consideration a life insurance policy with a net value of $5,800. At trial, Jeffrey testified that he has a NASE insurance policy worth $5,800 that he obtained during the marriage. The trial court did not, however, make a particularized finding with respect to the value or award of this asset. From the opinion as a whole, it appears that this asset was included in Jeffrey's award and was part of the calculation resulting in the $2,000 payment to Mary. Although it is better practice for the trial court to make specific findings, failure to do so is not always reversible error: "While no detailed findings were made, the court has stated it could affirm if the examination of the evidence shows that the trial court reached a result which the evidence would sustain if a specific finding supporting that result had been found." ***Moonen v. Moonen***, 39 Wis.2d 640, 646, 159 N.W.2d 720, 723 (1968). Because an examination of the record indicates that the court awarded the insurance policy worth $5,800 to Jeffrey, we decline to remand for further findings on this matter.

Nonetheless, the record indicates that the trial court may have erroneously given Jeffrey property division credit for paying the truck repair bill after it had already used it to reduce his gross income available for child support. As we previously discussed, we reverse the property division and remand to permit the trial court to reconsider the division of the assets in light of this issue.

3. Maintenance

Next, Mary contends that the trial court failed to consider the relevant factors when it erroneously denied her maintenance. She argues that she

is entitled to maintenance because of the fourteen-year marriage, her unemployment, the disparity in incomes and the unequal property division.

In denying maintenance, the trial court stated:

> Now, in respect [to] maintenance, there is no showing this lady is incapable of working. There is no showing that she wants to work. There is no showing that she thinks she has any obligation to work. I've taken into account the fact that she is working with the youngsters in the home. She is conducting the home schooling, but that's only partially to her credit. … But if she wants to make a case for maintenance, before she does that she has got to show that she is exercising her capacity or give us good cause why she can't. She hasn't done that. I am leaving maintenance open, and the reason I am leaving it open, gentlemen, is purely because, not because I am anxious to hear her evidence anymore, she has had her chance, but because there is a lot of debt here.
>
> ….
>
> … The maintenance issue is going to be left open to insure that she doesn't get stung with this debt. I am going to leave maintenance open indefinitely until these debts are paid, debts that exist today, April 9th, 1998.

The determination of a maintenance award is addressed to trial court discretion. ***Anderson v. Anderson***, 72 Wis.2d 631, 642, 242 N.W.2d 165, 171 (1976). The court is obliged to consider relevant facts under § 767.26, STATS. The feasibility of the dependent party's taking employment is a factor which may be weighed along with other statutory factors. ***Bahr v. Bahr***, 107 Wis.2d 72, 84, 318 N.W.2d 391, 398 (1982). The dual objectives of maintenance are support and fairness. ***Brabec v. Brabec***, 181 Wis.2d 270, 277, 510 N.W.2d 762, 764 (Ct. App. 1993).

The record is sparse with respect to Mary's financial circumstances. At trial, Jeffrey testified that Mary was healthy, that she previously worked outside

the home, and that she had the ability to earn the minimum wage of $5.15 per hour. Upon stipulation, Mary's financial disclosure statement was received by the trial court in her absence. It showed monthly living expenses for herself and the children in the sum of $1,169.66.

Based on the record, we are unpersuaded that the court's ruling was an erroneous exercise of discretion. Mary listed monthly expenses under $1,200 per month. With receipt of $721 per month child support, together with a minimum wage, her monthly income would exceed her expenses. Thus, Mary has not developed a showing of a need for maintenance. Also, Mary has not shown that the court's ruling is unfair in light of Jeffrey's responsibility for child support and debts. The court held maintenance open to ensure that Mary would have recourse in the event Jeffrey defaulted on his debt obligations. Because the record discloses a rational basis for the court's ruling, we do not overturn it on appeal.

4. Custody

Over Mary's objection, the trial court granted Jeffrey's request for joint legal custody. The trial court awarded primary placement to Mary and reasonable periods of physical placement to Jeffrey. Mary argues that she did not consent to joint custody and that the trial court erroneously concluded that the statutory elements under § 767.24, STATS., were met. [10]

We do not directly address her argument because the record indicates a guardian ad litem was not appointed pursuant to § 767.045, STATS. This section provides:

[10] Jeffrey does not respond to Mary's custody issue.

> **(1)** APPOINTMENT. (a) The court shall appoint a guardian ad litem for a minor child in any action affecting the family if any of the following conditions exists:
>
> ....
>
> 2. The legal custody or physical placement of the child is contested.

Whether the court should have appointed a guardian ad litem under § 767.045, STATS., requires us to engage in statutory interpretation. Construction of a statute or its application to a particular set of facts is a question of law we review de novo. ***Minuteman, Inc. v. Alexander***, 147 Wis.2d 842, 853, 434 N.W.2d 773, 778 (1989). The sole purpose of determining the meaning of a statute is to ascertain the intent of the legislature. In determining legislative intent, we look to the plain language of the statute. If the statute is clear on its face, our inquiry as to the legislature's intent ends and we must simply apply the statute to the facts of the case. ***In re Peter B.***, 184 Wis.2d 57, 70-71, 516 N.W.2d 746, 752 (Ct. App. 1994). We do not look beyond the statute's plain and unambiguous language. ***L.L.N. v. Clauder***, 203 Wis.2d 570, 593, 552 N.W.2d 879, 889 (Ct. App. 1996).

Here, the statute's plain language requires the appointment of a guardian ad litem in the event legal custody is disputed. The record reveals a dispute with respect to whether joint legal custody was appropriate. We conclude, therefore, that the trial court was required under § 767.045, STATS., to appoint a guardian ad litem to represent the children's interests. It did not do so. Consequently, the joint custody determination is reversed, and the matter is remanded for the appointment of a guardian ad litem and custody proceedings.[11]

[11] This remand does not preclude the parties from resolving this dispute through stipulation.

Finally, we consider Mary's motion to strike Jeffrey's brief for failure to include record citation. We note that, contrary to RULE 809.19(1)(d) and (e), STATS., Jeffrey's citations to the record are insufficient, risking sanctions that include striking the brief. *See* RULE 809.83(2), STATS. A reviewing court need not sift the record for facts to support counsel's contentions. ***Keplin v. Hardware Mut. Cas. Co.***, 24 Wis.2d 319, 324, 129 N.W.2d 321, 323 (1964). This court cannot continue to function at its current capacity without requiring compliance with the rules of appellate procedure, the purpose of which are to facilitate review. ***Cascade Mtn., Inc. v. Capitol Indemn. Corp***., 212 Wis.2d 265, 270, 569 N.W.2d 45, 47 (Ct. App. 1997).[12] While we do not impose sanctions at this time, in the future, counsel must be aware that strict compliance will be expected.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. No costs on appeal.

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

[12] When this court was created in 1978 as a 12-judge court, it was anticipated that within five years it would reach its capacity of 1,200 appeals annually, or 100 cases per judge. ***Cascade Mtn., Inc. v. Capitol Indemn. Corp***, 212 Wis.2d 265, 270 n.3, 569 N.W.2d 45, 47-48 n.3 (Ct. App. 1997). That capacity was exceeded its first full year of operation and, in 1998, 3,577 cases were filed in our 16-judge court, amounting to 224 cases per judge. This figure does not include petitions, motions and miscellaneous matters, each requiring disposition by order.