COURT OF APPEALS
DECISION
DATED AND FILED

April 27, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP736 **Cir. Ct. No. 2013FA131**

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

IN RE THE MARRIAGE OF:

JOSEPH M. LONGORIA,

PETITIONER-APPELLANT-CROSS-RESPONDENT,

V.

SARAH M. LONGORIA,

RESPONDENT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Kenosha County: JASON A. ROSSELL, Judge. *Affirmed*.

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Joseph Longoria and Sarah Longoria divorced in 2014 after a nine-year marriage and two children. Trial was to the court. Joseph

appeals from the child support, maintenance, and property division portions of the judgment of divorce. Sarah cross-appeals from the order denying her motions to reconsider and to reopen the judgment regarding legal custody (custody) and physical placement (placement). We hold that the trial court properly exercised its discretion in all regards. We affirm the judgment and order.

The Appeal

¶2 Issues of child support, maintenance, and property division are within the trial court's discretion. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We uphold discretionary decisions as long as the court applied a proper standard of law to the relevant facts and used a demonstrated rational process to reach a reasonable conclusion. ***Id.*** "Whether the trial court properly exercised its discretion is a question of law." ***Luciani v. Montemurro-Luciani***, 199 Wis. 2d 280, 294, 544 N.W.2d 561 (1996). We uphold a court's factual findings unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2013-14);[1] ***Lellman v. Mott***, 204 Wis. 2d 166, 170-71, 554 N.W.2d 525 (Ct. App. 1996).

1. Child support

¶3 Sarah is the senior human resources director at Abbott Laboratories. Joseph has his own business, Lucky's Carpentry. The court found Sarah's 2013 income to be $195,623—a base salary of $162,750 and bonus income of $32,873. It imputed to Joseph an income of $70,990.40. The court ordered Sarah to pay child support of $693 a month.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless noted.

¶4 Joseph first contends the trial court substantially underestimated Sarah's income when it excluded from her compensation stock options and restricted stock units,[2] and income from shares she sold in 2013.

¶5 When determining child support, Wisconsin law requires a court to base its determination on a parent's annual gross income. WIS. ADMIN. CODE § DCF 150.03. "Gross income" is broadly defined. *See* WIS. ADMIN. CODE § DCF 150.02(13)(a). Except for several types not at issue here, it includes "[a]ll other income, whether taxable or not," § DCF 150.02(13)(a)10.

¶6 The trial court ruled that the funds received in the 2013 sale of stock were not includable under the catch-all provision of WIS. ADMIN. CODE § DCF 150.02(13)(a)10., as they were used to satisfy marital debt and did not represent a regular part of her compensation package. It also noted, however, that income Sarah realizes from exercising stock options in the future will appear on her W-2 the following year and she will owe child support on that income. The court thus ordered the parties to exchange financial statements annually so that the child support award could be revisited if Sarah's income rose upon exercising stock options. We are satisfied with the court's handling of the issue.

¶7 Joseph also contends the trial court far overestimated his earning capacity by imputing to him an income of $70,990.40. The court may consider a party's earning capacity rather than actual earnings when determining support obligations. *See* ***Sellers v. Sellers***, 201 Wis. 2d 578, 587, 549 N.W.2d 481 (Ct. App. 1996). A finding of "shirking" is required to consider earning capacity, ***id.***,

[2] We ignore any distinction between stock options and restricted stock units, as the parties do not argue that it is germane to the issue of child support.

an analysis that applies equally to payor or payee, ***Chen v. Warner***, 2004 WI App 112, ¶15, 274 Wis. 2d 443, 683 N.W.2d 468, *aff'd*, 2005 WI 55, 280 Wis. 2d 344, 695 N.W.2d 758. Shirking can be established by proving that the income reduction was voluntary and unreasonable under the circumstances. ***Van Offeren v. Van Offeren***, 173 Wis. 2d 482, 496, 496 N.W.2d 660 (Ct. App. 1992).

¶8 The evidence was that the highest net income reported by Lucky's Carpentry was $28,500 in 2009; Joseph was thirty-five years old at the time of trial and had fully recovered from a 2008 work injury; if Joseph took a job as a union carpenter now he would be an apprentice and earn about $17 an hour; and, at the time of trial, a union journeyman carpenter—the level he could have achieved had he not struck out on his own after his injury—could be earning a base rate of $34.13 an hour, or $70,990.40 a year. Joseph claims he is being punished for starting Lucky's Carpentry, despite the child-care flexibility it allowed, putting it aside to "general" without pay the "dream house" the couple was building (the Meadowdale house), and restarting his business when he left the Meadowdale project.

¶9 Choice of employment is a proper consideration for imputing income. *See* ***Roberts v. Roberts***, 173 Wis. 2d 406, 411-12, 496 N.W.2d 210 (Ct. App. 1992) (parent with support obligation has some leeway in choosing employment that might mean working for lesser financial return for a time, but rule subject to reasonableness commensurate with parent's obligation to children). Further, an employment decision may be unreasonable even though well intended. ***Van Offeren***, 173 Wis. 2d at 496.

¶10 The court said it "definitely believe[d]" that Joseph now was shirking. It found that he had not provided accurate records of his income and

gave contradictory testimony about Lucky's Carpentry jobs; that there was evidence of large expenditures on personal nonbusiness expenses, including four or five vacations; and he was "hiding money or trying to make himself look poorer than he was." Thus, while Joseph's original decision to pursue self-employment may have been mutual and reasonable, the court implicitly found unreasonable his choice to restart Lucky's Carpentry rather than seek more lucrative employment after leaving the Meadowdale project. The court's findings are not clearly erroneous. Joseph did not meet his burden of justifying that his decision to continue with a business he claimed made little money was reasonable. *See* ***Chen***, 274 Wis. 2d 443, ¶14.

¶11 Joseph next contends the court erred when it deviated from the percentage standard and reduced Sarah's child-support obligation by one-half of the children's private school tuition because, he asserts, he cannot afford to contribute to the expense.

¶12 The trial court may deviate from the presumptively fair child-support percentage standard if it finds by the greater weight of the credible evidence that using the standard would be unfair to the children or either party. ***Ladwig v. Ladwig***, 2010 WI App 78, ¶23, 325 Wis. 2d 497, 785 N.W.2d 664. To assess unfairness, the court must consider relevant WIS. STAT. § 767.511(1m) factors. *See* ***State v. Alonzo R.***, 230 Wis. 2d 17, 28, 601 N.W.2d 328 (Ct. App. 1999).

¶13 The trial court found that, under the percentage standard, Sarah would pay child support of $943 a month; total tuition for the two children is $6000 a year; the parties should share the cost evenly, reducing Sarah's child-support obligation by $250 a month to $693 a month; and the current school arrangement is in the children's best interests as it meets their educational needs

and keeps them in a familiar, stable setting during this "contentious and acrimonious" divorce. The court rationally applied a proper standard of law to the facts of record and reached a reasonable result. We will not disturb it.

2. Maintenance

¶14 Joseph requested limited-term maintenance of $1000 a month for three years. The court denied maintenance completely. He contends the court failed to analyze the parties' respective incomes and expenses and implicitly found that he is not self-supporting at this time.

¶15 When determining whether to award a party maintenance, the court must consider the factors enumerated in WIS. STAT. § 767.56. The factors are designed to support the recipient spouse in accordance with the parties' needs and earning capacities and to ensure a fair and equitable financial arrangement between the parties in the individual case. ***Kennedy v. Kennedy***, 145 Wis. 2d 219, 222, 426 N.W.2d 85 (Ct. App. 1988). Disparate earnings alone, even between parties to a long-term marriage, do not compel an order of maintenance. *See* ***Gerth v. Gerth***, 159 Wis. 2d 678, 684, 465 N.W.2d 507 (Ct. App. 1990).

¶16 The court found that this was a short-term marriage for the parties, both in their early thirties; Sarah "climbed the corporate ladder" since beginning at Abbott as a college intern; Joseph was employed as a carpenter when they married and chose to become self-employed after his workplace injury; the parties' disparate earning capacities were due to Sarah's efforts at Abbott and not at the expense of Joseph's earning capacity; and Joseph's actual income was "hard[] to determine," due in part to his failure to provide accurate accounting and an updated financial disclosure statement at the time of trial.

¶17 Joseph contends the court's statement that there was "no reason to believe that [he] would not become self-supporting within a few years" necessarily implies that he is not self-supporting now. His claim ignores the very next sentence of the court's finding: "The Husband's testimony along with his Chase card statements from Lucky's Carpentry indicate[] that he is able to support himself without maintenance" and another finding that "[w]hat is clear is he can support himself." We will not address further Joseph's reiterated complaint that the court based its decision on an overstated imputed income.

¶18 Joseph also suggests that Sarah advanced professionally because he curtailed his employment. While some evidence indicated that founding Lucky's Carpentry and then suspending it for a time benefitted the family's circumstances and allowed Sarah to work longer hours, other evidence indicated that Joseph opted for self-employment because his former employer refused the raise he requested and because he was not interested in the nature of the work at the union company that offered him a position. To the extent Joseph cites findings that favor his position, this court examines the record for facts to support the findings actually made. ***Hamm v. Jenkins***, 67 Wis. 2d 279, 282, 227 N.W.2d 34 (1975).

¶19 Finally, that a court commissioner ordered Sarah to pay temporary maintenance during the pendency of the divorce does not mandate maintenance post divorce. Temporary maintenance was ordered to support Joseph while, per the parties' agreement, his sole job was working without pay on the Meadowdale house. Even if another trial court might have ordered maintenance, the issue is one of judicial discretion. The court here independently and properly exercised that discretion pursuant to WIS. STAT. § 767.56.

3. Property division

¶20 The court ordered an equal division of the parties' estate, with one exception. Joseph ceased work on the Meadowdale house before construction was complete without weatherizing it and had the utilities disconnected, leaving the sump pump inoperable. The house suffered weather and flood damage and resultant mold growth. Sarah sold some Abbott stock, a marital asset, to pay for the $20,000 in necessary repairs and $4500 for mold remediation. The court reduced the property division equalization payment from Sarah to Joseph by $14,500: the full $4500 spent on mold abatement and half of the $20,000 spent on other repairs. It also granted Sarah sixty months over which to make her $51,014 equalization payment to Joseph without interest.

¶21 WISCONSIN STAT. § 767.61(3) creates a rebuttable presumption that the marital estate is to be divided equally, but the court may alter the distribution after considering the factors listed in § 767.61(3)(a) through (m). As part of its consideration of each party's contribution to the marriage under § 767.61(3)(d), the court may depart from the presumptive equal division where there has been a "squandering of the parties' assets, or the intentional or neglectful destruction of property." *See* ***Anstutz v. Anstutz***, 112 Wis. 2d 10, 12, 331 N.W.2d 844 (Ct. App. 1983) (construing WIS. STAT. § 767.255 (1981-82), the predecessor to § 767.61). One statutory factor may be given greater weight than another. ***LeMere***, 262 Wis. 2d 426, ¶25 (construing § 767.255 (2001-02)).

¶22 After considering all of the factors, the court concluded that the expenses necessitated by the damages resulted from Joseph's failure to secure the house and his cancellation of the utilities without proper notice to Sarah. The court reasonably concluded that Joseph failed to preserve marital assets.

¶23 Joseph also criticizes the decision to allow the equalization payment to be made over five years interest-free. He contends the court could have ordered a gross payment at the time of judgment, payable through Sarah's retirement plan and effectuated through a Qualified Domestic Relations Order (QDRO), and failed to adequately explain why he should go unreimbursed for the sum the award would earn during the installment period.

¶24 A recipient spouse generally is entitled to compensation for the money an award would earn over the installment period if it had been paid in full at the time of judgment. ***Overson v. Overson***, 125 Wis. 2d 13, 16-17, 370 N.W.2d 796 (Ct. App. 1985). "Whether to allow interest on the balance due on a property division payable in installments is within the discretion of the trial court." ***Id.*** at 16. If, in exercising that discretion, the trial court does not award interest, it must explain its reasons. *See* ***id.*** at 16-17.

¶25 The court did explain its rationale. It found that the parties "stuck a lot of their money into" the Meadowdale house, "the largest asset of the marriage"; Joseph failed to finish the house pursuant to the parties' agreement and left it unprotected; those actions left Sarah with many of her cash assets tied up in trying to recoup its value; it will take time for Sarah to finish the house and begin building up her net worth; Sarah is solely responsible for the marital debt; Sarah's debt is "well over $250,000"; and it remains unclear how much money still is needed to repair and complete the house so as to "either get rid of it or to sell it." The court was clear that it would reconsider the terms of repayment if Sarah sells the home and realizes a gain. The court could have gone the QDRO route that Joseph prefers but it fully explained the remedy it fashioned. That remedy is reasonable under the facts and the law.

Cross-Appeal

¶26 A temporary order issued early in the divorce proceedings awarded joint custody and an "8/6" shared placement arrangement that gave Sarah eight and Joseph six overnights during a two-week period. The guardian ad litem (GAL) recommended that the parties be awarded joint custody and equal shared placement. The parties' initial parenting plans concurred with the GAL's recommendation. Sarah then filed an amended plan seeking primary placement.

¶27 At trial, the GAL recommended that Sarah have primary placement in a "10/4" arrangement and "be empowered to make all decisions concerning the children's schooling, education and extra-curricular activities." The trial court nonetheless ordered joint custody and a shared 8/6 placement.

¶28 Sarah filed a motion to reconsider and a motion to reopen the judgment pertaining to custody and placement based on new information pursuant to WIS. STAT. §§ 805.17(3) and 806.07(1)(a)-(h). The court denied the motions after a hearing.

¶29 Sarah first contends the court based the custody and placement order on an improper legal standard. She argues that inherent in the best-interest standard is the need to assess who is the better parent and challenges the court's position that such a determination was not the court's to make.

¶30 Joint custody is presumed to be in the best interests of the minor children. WIS. STAT. § 767.41(2)(am). Similarly, except where contraindicated, the court shall allocate periods of placement on a "schedule that allows the child to have regularly occurring, meaningful periods of physical placement with each parent and that maximizes the amount of time the child may spend with each

parent." Sec. 767.41(4)(a)2. When determining either custody or placement, the court must consider "all facts relevant to the best interest of the child" and various statutory factors. Sec. 767.41(5)(am). The court may give sole custody if it finds that doing so is in the child's best interest and that the parties will not be able to cooperate in future decision making. Sec. 767.41(2)(b)2.c.

¶31 The determination of what is in a child's best interest is a mixed question of fact and law. ***Wiederholt v. Fischer***, 169 Wis. 2d 524, 530, 485 N.W.2d 442 (Ct. App. 1992). We uphold findings of fact unless they are clearly erroneous, but review questions of law independently. ***Id.*** at 130-31. While "[t]he ultimate conclusion of the best interest of the child … is a matter of law which we review without deference to the circuit court," ***W.W.W. v. M.C.S.***, 161 Wis. 2d 1015, 1037, 468 N.W.2d 719 (1991), we give weight to the trial court's decision where its legal conclusion is "so intertwined with the factual findings." ***Wiederholt***, 169 Wis. 2d at 531.

¶32 Sarah's criticism of the court's ruling is two-fold. As to custody, she contends the decision failed to set forth why its findings are in the best interests of the children. *See* WIS. STAT. § 767.41(6)(a). As to placement, she contends the court based its decision on the premise that "[w]ho's the better parent is not an issue for the Court," which she asserts is erroneous because that determination "is exactly what the best interest factors are intended to assess" and because the court's best-interest determination is not supported by the facts.

¶33 Her arguments do not persuade. The WIS. STAT. § 767.41(5) best-interest factors are the same for custody and placement. The court fully addressed the factors in its placement ruling.

¶34 We also agree with the trial court—and the GAL—that who is the better parent is not the issue. The bulk of the statutory factors address the child's best interest, *see* WIS. STAT. § 767.41(5)(am)1.-9., not who is the better parent. While some of the factors assess parental conduct, *see* § 767.41(5)(am)12.-14., most relate to abuse or criminal behavior, and Sarah does not allege that they apply. The remaining parent-focused factor, § 767.41(5)(am)10., addresses the cooperation and communication between the parties. The record is clear that the parties were mutually unreasonable in that regard.

¶35 In contending the court's best-interest determination is not supported by the facts, Sarah directs us to evidence of Joseph's conduct that she says demonstrates that the 8/6 placement schedule is not in the children's best interest. It does not matter that there is evidence in the record that would support a contrary finding. This court looks only for facts to support the finding the trial court made. ***Hamm***, 67 Wis. 2d at 282.

¶36 The court noted that it was "difficult to determine from the record what has gotten worse since the filing of the Mother's [initial] plan … to justify primary placement," that Joseph's moving out of an unsuitable living situation since that date was a positive for the children, and that the majority of Sarah's complaints about Joseph predated the filing of the initial parenting plans. The court's findings are not clearly erroneous.

¶37 Sarah next asserts that the trial court should have granted her WIS. STAT. § 805.17(3) motion to reconsider because its custody and placement determinations were manifest errors. *See* ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853. She contends the trial court also erred in denying her WIS.

STAT. § 806.07 motion to reopen because she presented "significant" evidence of Joseph's poor posttrial parenting decisions. *See* § 806.07(1)(b). We review both decisions under the erroneous exercise of discretion standard. *See* ***Koepsell's Olde Popcorn Wagons***, 275 Wis. 2d 397, ¶6 (motion to reconsider); ***Winkler v. Winkler***, 2005 WI App 100, ¶14, 282 Wis. 2d 746, 699 N.W.2d 652 (motion to reopen).

¶38 A manifest error is the "wholesale disregard, misapplication, or failure to recognize controlling precedent." ***Koepsell's Olde Popcorn Wagons***, 275 Wis. 2d 397, ¶44 (citation omitted). Sarah's motion simply repeated her "better parent" argument; she reiterates that argument here on appeal. Disappointment in the court's ruling does not demonstrate manifest error. ***Id.***

¶39 The court addressed all the points Sarah raised, ultimately concluding they either were resolving, were cumulative, or did not warrant the relief she sought. It emphasized that co-parenting is best for children but here giving decision-making authority to one parent would only escalate the "constant arguing," further hindering co-parenting. The court stated that making it decide the parties' every disagreement is "untenable for children," and expressed its hope that once the courts and attorneys no longer were involved, "life will get to a point where co-parenting happens." The trial court properly denied both motions.

¶40 All parents bring gifts and flaws to the table. Divorce thrusts the children into an environment not of their choosing. The trial court is tasked with how to make their new situation one that, wherever possible, will foster a positive transition and a close and loving relationship with both parents. Bean-counting plays no part.

¶41 In sum, we reiterate that our standard of review on the parties' many points of disagreement with the trial court's decisions is whether the court erroneously exercised its discretion. A given fact situation may present multiple reasonable results. The test on appeal is not whether we would have ruled the same way but whether the trial court, in fact, exercised appropriate discretion. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). Its decision need only be one a reasonable judge could arrive at by considering the relevant law, the facts, and a process of logical reasoning. That a different decision also may have been reasonable does not demonstrate that the one here is not. We affirm the court's rulings in total.

¶42 No costs to either party on appeal.

By the Court.—Judgment and order affirmed.

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