COURT OF APPEALS
DECISION
DATED AND FILED

April 28, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1636 **Cir. Ct. No. 2001FA566**

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

IN RE THE MARRIAGE OF:

CHRISTINE A. ROTHERAY F/K/A CHRISTINE A. WILSON,

PETITIONER-RESPONDENT-CROSS-APPELLANT,

V.

TIMOTHY D. WILSON,

RESPONDENT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Deininger, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Timothy Wilson appeals the property division and child support provisions of the judgment divorcing him from Christine Rotheray. Rotheray cross-appeals the property division. We affirm the trial court's valuation of the family home and the court's imputation of additional income to Wilson for child support purposes. But we reverse portions of the divorce judgment based on the court's failure to account for a second mortgage on the home and failure to apply the version of the child support guidelines in effect when the child support order was issued.

BACKGROUND

¶2 Wilson and Rotheray were married in 1990 and had two children together. In 1999, the couple started a bowling alley venture with Wilson's brother and his wife. Wilson left a job that had been paying about $40,000 per year in order to run the bowling alley. Meanwhile, Rotheray obtained a full-time job in order to provide income for the family while the bowling alley business was developing.

¶3 Wilson and Rotheray also took out a $65,000 second mortgage on their home, and used the majority of the proceeds as investment capital for the bowling alley. Wilson testified that, because the funds were treated as a capital investment by the owners, the debt was not listed on the balance sheets for the bowling alley. However, because the bowling alley had been making the mortgage payments, the trial court found that the second mortgage was business-related and did not deduct it from the equity of the house when calculating the value of the marital estate. The trial court ultimately valued the bowling alley at $65,584.00, based on an appraisal from Wilson's expert, Donald Peterson.

¶4 The parties presented competing evidence regarding the value of the family home. Wilson's expert opined that the house was worth $87,000 as of June 26, 2002. Rotheray's expert opined that the house was worth $117,500 as of July 24, 2003. The trial court decided to disregard the more recent appraisal relied upon by Rotheray because the court found that the bulk of the increase in value from the prior appraisal was attributable to Wilson's home improvement and remodeling efforts, which had benefited the children during placement. Instead, the trial court took the earlier, lower appraisal, and increased it by 5% to account for market appreciation, thereby valuing the home at $91,350. The court awarded Wilson the bowling alley and the family home and ordered him to make an equalization payment to Rotheray of $65,592.84.

¶5 Rotheray was given primary placement of the children and Wilson was given placement totaling 36%. The trial court found that Rotheray was earning $27,540 per year by the time of the divorce. Although the bowling alley was not yet profitable, the trial court found that Wilson was drawing income of $26,000 per year. Based on those income levels, the court found that, as of January 23, 2004, Wilson should pay $100.02 per week in child support, under the guidelines that were in effect prior to January 1, 2004. The court further found, however, that Wilson had an earning capacity of $40,000, and that it would be "unreasonable [for him] to persist in [his] low compensation" if the bowling alley had not become viable more than five years after its inception, as the parties had contemplated when starting the venture. Therefore, the trial court ordered that Wilson's child support payments would increase to $153.88 per week after July 1, 2005.

DISCUSSION

Property Division

¶6 "Marital assets and debts (collectively, the marital estate) include all of the property and obligations of either party which were acquired before or during the marriage unless specifically exempted by statute." ***McLaren v. McLaren***, 2003 WI App 125, ¶8, 265 Wis. 2d 529, 665 N.W.2d 405; *see also* WIS. STAT. § 767.255 (2003-04).[1] The valuation of the marital estate lies within the sound discretion of the circuit court. ***Long v. Long***, 196 Wis. 2d 691, 695, 539 N.W.2d 462 (Ct. App. 1995). Further, the division of divisible assets is discretionary. ***Duffy v. Duffy***, 132 Wis. 2d 340, 343, 392 N.W.2d 115 (Ct. App. 1986). A trial court misuses its discretion when it fails to consider legally relevant factors or when it acts based on mistaken facts or an erroneous view of the law. ***Id.***

¶7 Wilson contends the trial court misused its discretion by failing to take the second mortgage on the parties' home into account when calculating the value of the marital estate. We agree. The trial court was operating under the assumption that the second mortgage had already been accounted for in expert Donald Peterson's valuation of the bowling alley. The court's finding in that regard was clearly erroneous. Based both on Peterson's testimony, which the trial court explicitly found credible, and supporting financial documentation, it is clear that the second mortgage was a personal obligation of the parties rather than an obligation of the bowling alley, and that the second mortgage was not included in

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Peterson's valuation of the business. Therefore, the second mortgage should have been listed as a separate marital debt, decreasing the marital estate subject to division.

¶8 Rotheray argues on her cross-appeal that the trial court also erroneously exercised its discretion by using an appraisal from 2002 rather than an appraisal from 2003 when setting the value of the house. We disagree. The trial court explained that it was using the older valuation because the increase in value in 2003 was largely attributable to Wilson's efforts in renovating the house during the extended pendency of the divorce. The court then adjusted the older valuation upward, based on what it determined the appreciation would have been absent the improvements made by Wilson. This type of equitable consideration was well within the trial court's discretion.

¶9 Because we cannot determine whether the trial court would have divided the marital estate in the same manner had it properly taken the second mortgage into account, we set aside the trial court's decision and remand with directions that the trial court reconsider the property division, treating the second mortgage as a marital debt.

Child Support

¶10 We also review child support awards under the erroneous exercise of discretion standard, considering whether the trial court reasonably applied the applicable law to the facts of record. *See* ***LeMere v. LeMere***, 2003 WI 67, ¶12, 262 Wis. 2d 426, 663 N.W.2d 789. No deference is due in considering whether the proper legal standard was applied, however, because this court's primary function is to correct legal errors. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

¶11 The trial court is required by statute to determine child support payments according to the guidelines set forth by the Department of Workforce Development (DWD), unless the court determines, based on a number of enumerated factors, that use of the standards would be unfair to the child or to any of the parties. *See* WIS. STAT. §§ 767.25(1j) and (1m) and 767.001(1d). A note to the DWD child support guidelines indicates that any modifications to their provisions "shall apply to orders established after the effective date of the modification." WIS. ADMIN. CODE § DWD 40.01, Note.

¶12 It is undisputed that the DWD guidelines for determining the child support obligations of shared placement parents were modified effective January 1, 2004. Under the modification, the guidelines take both parents' income into account for a 64%/36% placement schedule such as that in effect here. *See* WIS. ADMIN. CODE § DWD 40.04(2) (WIS. ADMIN. REG. Dec. 2003 No. 576). The trial court chose not to apply the new version of the guidelines in this case, however, explaining that it was "setting child support as the law was effective in October of 2003 as of the time the court granted the divorce." This was an error of law. Regardless of the effective date of the divorce, it is plain that the child support order was not "established" until after the effective date of the changes. The divorce judgment, containing the child support order, was not entered until May 14, 2004. The judgment expressly made the child support provisions effective as of January 23, 2004 (a date shortly after the trial court had rendered its oral decision from the bench). Therefore, the new guidelines should have been applied. Because the trial court was operating under a mistaken view of the law when it applied the old guidelines to this case, we will remand to allow the court to exercise its discretion in setting child support under the new guidelines.

¶13 Wilson claims the trial court also erroneously exercised its discretion by ordering a future increase of child support. We disagree. The trial court may permissibly take earning capacity into account when setting child support and may anticipate changes that are certain to occur when setting support obligations. *See* WIS. STAT. § 767.25(1m)(hs); ***Enders v. Enders***, 147 Wis. 2d 138, 146, 432 N.W.2d 638 (Ct. App. 1988). In this case, the court took Wilson's earning capacity into account, but gave him a "grace period." This grace period is consistent with the parties' expectations when they pursued the bowling alley enterprise that Wilson's income from the enterprise would eventually meet his earning capacity. Because the court could have set child support to begin immediately based on Wilson's $40,000-per-year earning capacity, we cannot see how Wilson was harmed by having support at that level delayed for some eighteen months.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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