COURT OF APPEALS
DECISION
DATED AND FILED

January 31, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 00-2508 **Cir. Ct. No. 97-FA-142**

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

IN RE THE MARRIAGE OF:

MICHELLE ELIZABETH BERNIER N/K/A MICHELLE ELIZABETH SIBBING,

PETITIONER-RESPONDENT,

V.

M. CAREY BERNIER,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Dykman, Deininger and Lundsten, JJ.

¶1 PER CURIAM. M. Carey Bernier appeals the judgment divorcing him from Michelle E. Sibbing. He challenges: (1) the inclusion of money from an

employment termination agreement in the marital estate; (2) the inclusion of money from his business account in the marital estate; (3) the exclusion of a diamond ring from the marital estate; (4) a tax credit to Sibbing; (5) a finding regarding his earning capacity; (6) the amount of an offset against child support he received for costs associated with visiting his children; and (7) an arrearages award on child support. For the reasons discussed below, we reverse the tax credit and arrearage determinations, remand for additional findings on the diamond ring, and affirm all other issues.

BACKGROUND

¶2 Bernier and Sibbing were married in 1992 while they were both still in college. They had two children together. During the marriage, Bernier operated his own computer consulting business and also eventually obtained full time employment as a computer technician at the Wisconsin Education Association Counsel (WEAC), while Sibbing worked on and off as a flight attendant for Midwest Express Airlines.

¶3 Sibbing filed for divorce in 1997. By the date of divorce, Bernier was no longer working at WEAC and Sibbing had moved to California with the children. More detailed facts pertaining to the issues on appeal will be set forth below.

DISCUSSION

I. MARITAL ESTATE

A. WEAC Package

1. Characterization of severance pay as property or income

¶4 While the divorce was pending, WEAC terminated Bernier's employment and provided him $34,000 in severance pay as part of a negotiated termination agreement. Bernier maintained a 40% vested interest in a WEAC retirement account worth approximately $17,000 following his termination, but forfeited a 60% unvested interest worth approximately $20,000. WEAC's director of legal services testified that WEAC took the amount of forfeited pension benefits into account as a moral obligation when offering Bernier more in severance pay than was typical. Relying on that testimony, the trial court determined that Bernier's severance pay was primarily intended to be in lieu of the forfeited pension benefits, and should therefore be characterized as property rather than income.

¶5 Bernier argues that the trial court should not have looked beyond the separation agreement itself to determine the intent of the parties in regard to the relationship between Bernier's forfeited pension and the amount of the severance pay. He points out that the agreement explicitly states that Bernier will retain those pension rights to which he would otherwise be entitled. However, Sibbing correctly points out that the parole evidence rule may only be applied against the parties to a contract, and she was not a party to the termination agreement. ***Anderson Yard Co. v. Citizen's State Bank***, 187 Wis. 60, 64, 203 N.W. 921 (1925). Therefore, the trial court did not err by finding based on parole evidence that the amount of severance pay was attributable in large part to forfeited pension benefits, and did not err by treating the severance pay as property rather than income.

2. Inclusion of overtime and vacation benefits

¶6 Bernier asserts that he received a single check worth about $21, 000 after taxes which included all of the items in the separation agreement, and that the trial court mistakenly treated this net amount as if it were entirely attributable to the severance pay portion of the separation package. Our review of the record revealed several references to a severance package, and no indication that the categories itemized in the separation agreement were paid out separately. It therefore does appear that some items in the separation agreement which should more properly have been treated as income were included in the property award. However, Bernier has not told us how much he received for overtime, accumulated vacation time or unreimbursed expenses, nor pointed us to any place in the record which would identify either those amounts or the total value of the separation check before taxes. We are therefore unable to further evaluate this claim, and because it is undeveloped, we do not consider it further. ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

3. Date of Valuation

¶7 Bernier also claims in his brief that the trial court erred by including the severance pay in the property division because he had already used the money for house payments, child support, and other expenses by the time of the divorce. While it is true that the marital estate is generally to be valued as of the date of divorce, "special circumstances" can warrant deviation from this rule. ***Long v. Long***, 196 Wis. 2d 691, 698, 539 N.W.2d 462 (Ct. App. 1995).

¶8 We first note that Bernier has not pointed to any testimony or document in the record which traces precisely how he spent the money from the termination package. It is somewhat disingenuous to claim that the trial court

made no finding that Bernier had misspent the termination package money, when it does not appear that the trial court made any finding at all regarding how that particular money was actually spent. Rather, what the trial court said was:

> [I]t wasn't even that there was testimony that he spent [the money he had transferred from his business account to the parties' checking account] frivolously. It was that he just somehow couldn't account for that $19,000, and it seemed that he had the total ability to transfer money from his business account to his personal account without any accountability for it.

¶9 Even assuming that this transferred money was attributable to the termination package, it seems more accurate to say that the trial court did not know how Bernier had spent the money than to say that the trial court considered the money to have been spent on appropriate marital expenses.

¶10 In any event, the fact remains that Sibbing had no control over the disposition of the severance pay which was issued by check to Bernier during the divorce. The decision to use the money, for whatever purpose, was unilaterally Bernier's. As we will discuss in more detail below, it may well be that Bernier would not have needed to invade the marital asset if he had obtained employment at or near his earning capacity during the pendancy of the divorce. We therefore conclude the trial court did not erroneously exercise its discretion by including the severance pay as an asset in the marital estate, even though it no longer existed.

B. Business Account

¶11 Sibbing testified that the parties had about $15,000 in personal savings located in Bernier's business account just before they separated on March 1, 1997. Bernier denied that the parties had $15,000 in savings, but admitted that his personal and business accounts "were very, very mixed up," and

that he frequently transferred substantial sums of money between the accounts and made payments on personal expenses from the business account. The trial court assigned a value of $13,600 to the parties' personal savings, based upon a number of transfers between the accounts between the time of separation and the date of divorce.

¶12 Bernier claims the trial court erred both in its characterization of the nature of the money in his business account and in failing to choose a single date on which to value the account. Again, however, the trial court's determination was based upon its view of the credibility of conflicting testimony. The trial court was entitled to rely upon Sibbing's testimony for its determination that Bernier placed substantial amounts of marital property in his business accounts, and to conclude that Bernier's sole control over his business account constituted a special circumstance warranting the inclusion in the marital estate of amounts which Bernier had disposed of on assorted dates throughout the pendancy of the divorce.

C. Wedding Ring

¶13 Bernier claims that the trial court failed to resolve a dispute between the parties over whether Sibbing's diamond wedding ring was marital or individual property and what its proper valuation should be. We agree and therefore remand this issue to the trial court.

D. Tax Consequences

¶14 Bernier complains that the property division chart drafted by Sibbing erroneously credits Sibbing with $1,083 for taxes paid on a 401(k) account, contrary to the trial court's ruling that each party is responsible for his or her own tax consequences. Sibbing concedes that each party was to be responsible for the

taxes on property distributed to him or her, but contends that the chart debits, rather than credits, her with the 401(k) tax amount. We agree with Bernier that the way the chart is organized, the tax amount improperly benefits Sibbing by offsetting the value of her 401(k) asset. The credit should be removed from the balance sheet, and the property division adjusted accordingly.

II. CHILD SUPPORT

A. Earning Capacity

¶15 The trial court found that Bernier's earning capacity was $55,000. It based its decision on an evaluation from a vocational expert opining that Bernier was capable of earning between $50,000 and $60,000 per year.[1] Bernier argues that the trial court should not have set child support based upon earning capacity rather than actual income, because there was insufficient evidence to show that he was shirking. We are persuaded, however, that the record supports the trial court's finding of shirking based on Bernier's failure to obtain employment at or near his earning capacity following his termination from WEAC. The finding was not based on whether Bernier's departure from WEAC was voluntary or involuntary, but rather on the trial court's view of the reasonableness of Bernier's subsequent efforts to obtain work at a comparable income level.

[1] The figure also corresponds with Bernier's testimony that his total income from all sources in the year preceding his deposition was about $55,000, although it appears Bernier was including the separation package in his calculations.

B. Travel Costs

¶16 Bernier argues that the trial court erroneously exercised its discretion by failing to take into account all of the costs he must incur in order to visit his children in California. The record does not support his contention. The divorce judgment requires Sibbing to pay for Bernier's airfare for up to five visits or thirty percent of his support obligation per year. It is clear, therefore, that the trial court took the visitation expenses into account. Bernier's dissatisfaction with the amount of the offset deemed reasonable by the trial court is not a basis for reversal.

C. Arrearages

¶17 A temporary order required Bernier to pay Sibbing's $431 monthly car payment as a component of his $931 total child support obligation during the pendancy of the divorce. In July of 1998, however, Sibbing moved to California and left the car behind. In February of 1999, she moved to modify the temporary order to reflect the change in circumstances. The issue was held open until trial, and the divorce judgment included $6,816 in child support arrears, calculated as $431 for the sixteen months from August 1998 until December 1999.

¶18 We are satisfied that the record supports modifying Bernier's support obligation to take into account Sibbing's loss of benefit from the car. We note, however, that a modification of child support cannot be made retroactively. WIS. STAT. § 767.32(1m) (1999-2000).[2] It is undisputed that Bernier had made all

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

of the car payments up until the time the modification motion was filed. Therefore, Bernier was in compliance with the temporary order from August 1998 through January 1999, and the amount of his arrearage must be reduced by $2,586.

CONCLUSION

¶19 We remand this matter with directions that the trial court should decide the wedding ring issue and adjust the property division to remove Sibbing's tax credit on the 401(k) and reduce Bernier's child support arrearage by $2,586.

¶20 No costs to either party.

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.