

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 22, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP2264

Cir. Ct. No. 2003FA163

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

MOLLY BAYS,

PETITIONER-RESPONDENT,

V.

JAMES E. BAYS, II,

RESPONDENTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Adams County:
DENNIS C. SCHUH, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. James Bays appeals a judgment of divorce from Molly Bays, contending the circuit court erred in determining the amount of child support. We affirm.

¶2 In setting child support, the court added to James' income the amount of \$485. The court found this amount was the value of free housing provided to James by family members. The court found the housing was provided in exchange for James' work on the family farm.

¶3 James makes several arguments on appeal but none of them are actually directed at the basis for the circuit court's decision. He argues gifts are not considered gross income; however, he does not argue that the court erred by finding the value of housing he receives is income, compensating him for his labor, rather than a gift. Similarly, James makes an argument about phantom rent payments and imputed income that is irrelevant to the court's analysis. Finally, he argues that if gifts are considered, they should be considered only with respect to his ability to pay support, not to the actual amount. However, this argument again assumes, without actually arguing, that the housing he receives is a gift.

¶4 Although James does not argue that the court erred by finding that the housing is income, we address that issue briefly. Whether the housing is in exchange for labor is a question of fact. We affirm findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2003-04).¹ The testimony in this case could support a contrary finding, that the housing has been, and still is, offered to family members without regard to their labor. However, considering all the

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

circumstances, the testimony can also be reasonably interpreted as suggesting that James is receiving the housing because he is working at the farm. We are satisfied that finding is not clearly erroneous.

¶5 In addition, we note that even if the court had not made this finding, the court could still have properly considered the free housing in setting child support. Even if a gift, the effect of the free housing is to eliminate from James' life one of the expenses to which most support payors must devote income. The child support percentages are established with the expectation that the payor is devoting some significant portion of income for housing costs. If a payor is receiving a gift of housing, that may be a proper basis for a court to deviate from the established guidelines, if the court concludes it is equitable to do so.

¶6 Molly asks that we find the appeal frivolous under WIS. STAT. RULE 809.25(3) on the ground that James or his attorney knew or should have known it was without any reasonable basis in law or equity. We deny the motion because, although James did not clearly make the argument on appeal, the testimony was sufficiently subject to interpretation that it would not be frivolous to argue the court erred by finding the housing was income.

By the Court.—Judgment affirmed.

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

