COURT OF APPEALS
DECISION
DATED AND FILED

November 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1661 **Cir. Ct. No. 1996FA961557**

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

IN RE THE MARRIAGE OF:

THOMAS J. MCPHETRIDGE, SR.,

PETITIONER-APPELLANT,

V.

CHRISTINE A. MCPHETRIDGE N/K/A CHRISTINE A. POLITOSKI,

RESPONDENT-RESPONDENT,

STATE OF WISCONSIN AND DEPARTMENT OF CHILD SUPPORT ENFORCEMENT,

RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Thomas McPhetridge appeals *pro se* from a circuit court order affirming a child support lien against income property he owns. McPhetridge argues that a child support lien may not lie against income property awarded pursuant to an underlying divorce judgment. Because the lien is proper, we affirm.

¶2 The following facts are undisputed. McPhetridge and his former wife, Christine A. McPhetridge, n/k/a Christine A. Owens, were divorced in 1997. The parties had two minor children. McPhetridge failed to make court ordered child support payments over a number of years, resulting in an arrearage of over $5000 at the end of 2002.[1] His arrearage was entered in the child support lien docket under WIS. STAT. § 49.854 (2003-04)[2]. Under the statute, a lien is created by operation of law for the amount of unpaid support owed by a support payer against all property owned by that payer so long as the amount exceeds the lien docket threshold set by the Department of Workforce Development. The threshold as of December 2002 was $5000.

¶3 McPhetridge contested his certification to the child support lien docket pursuant to WIS. STAT. § 49.854(3)(a). A hearing was held and a family court commissioner determined that the State's record of McPhetridge's arrearages was correct and that the lien certification was proper.

[1] McPhetridge admitted to the circuit court during the hearing on his challenge to the lien docket certification that his child support arrearages exceeded $10,000 at the time of the hearing.

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

¶4 McPhetridge moved the circuit court for *de novo* review, claiming the lien certification statute impermissibly applied to a duplex residence awarded to him by the divorce court in its division of marital property. After hearing the motion, the circuit court ordered that the lien docket certification was proper. McPhetridge appeals.

¶5 The issue presented is whether the circuit court properly applied the lien docket certification statute to undisputed facts. We decide such questions of law independently and without deference to the decision of the lower court. *See*, *e.g.*, ***Kania v. Airborne Freight Corp.***, 99 Wis. 2d 746, 758, 300 N.W.2d 63 (1981).

¶6 The statute at stake, WIS. STAT. § 49.854(2)(a), provides as follows:

> If a person obligated to pay support fails to pay any court-ordered amount of support, that amount becomes a lien in favor of the department upon all property of the person. The lien becomes effective when the information is entered in the statewide support lien docket under par. (b) and that docket is delivered to the register of deeds in the county where the property is located. A lien created under this paragraph is not effective against a good-faith purchaser of titled personal property, unless the lien is recorded on that title.

McPhetridge argues here, as he did before the circuit court, that ***Maley v. Maley***, 186 Wis. 2d 125, 519 N.W.2d 717 (Ct. App. 1994), prohibits the creation of a child support lien if it would apply to property awarded in an underlying divorce.

¶7 McPhetridge misapprehends ***Maley***. ***Maley*** stands for the proposition that a child support arrearage may not be applied against a capital gain reported on a tax return of a sale of an asset awarded pursuant to a property division in a divorce judgment. The facts of ***Maley*** are clearly distinguishable

from the facts at bar as this case does not involve the sale of a property and the report of capital gains from such a sale.

¶8 Instead, this case involves income and is, therefore, more properly governed by ***Cook v. Cook***, 208 Wis. 2d 166, 560 N.W.2d 246 (1997). ***Cook*** held that military retirement pay awarded to the non-custodial parent was subject to an award of child support. 208 Wis. 2d at 169. The non-custodial parent argued that it was impermissible "double-counting"[3] to include as income the portion of his military retirement pay awarded to him pursuant to the property division in the divorce judgment, for purposes of calculating child support. ***Id.***

¶9 The supreme court rejected the non-custodial parent's argument on two grounds. First, the supreme court concluded that the "double-counting" rule is not an absolute bar, but rather a caution, "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. Second, the supreme court determined that the rule does not strictly apply in the context of child support because property division and child support, while related, differ in fundamental ways:

> [A] review of the cases convinces the court that the *Kronforst* "double-counting" rule does not apply in the context of child support. Property division, maintenance and child support, although related, differ from each other. A property division distributes assets owned by the parties

[3] The rule against impermissible "double-counting" was first announced in ***Kronforst v. Kronforst***, 21 Wis. 2d 54, 123 N.W.2d 528 (1963). Although the "contours and rationale of the ***Kronforst*** rule are not clear," generally speaking the rule prohibits "the double-counting of an asset, once in property division and once in the maintenance award." ***Cook v. Cook***, 208 Wis. 2d 166, 177, 560 N.W.2d 246 (1996) (citation omitted).

> in an equitable fashion. Maintenance and child support provide for support, usually from current income. Maintenance, however, looks to the relative positions of the former spouses, while child support is based on the needs of the children and the financial abilities of the parents. Nevertheless, there is significant overlap in the three. The statutes require a circuit court in setting both maintenance and child support to consider the property division. WIS. STAT. §§ 767.25(1m)(b), 767.26(3) (1993-94).

Cook, 208 Wis. 2d at 180.

¶10 Under ***Cook***, McPhetridge's income from the duplex, virtually the only income available to him for the support of his two children, is not barred by the "double-counting" rule and is consistent with the court's concern for fairness between the parties and the needs of the children expressed in ***Cook***. The record is undisputed that the children's needs are ongoing and have been met by Owens. Meanwhile, McPhetridge has refused to pay child support voluntarily. The child support lien docket was created to ensure that individuals with property, like McPhetridge, are prevented from neglecting court-ordered child support without consequence. In light of ***Cook***, we hold that the circuit court's order affirming a child support lien on McPhetridge's income property and dismissing his challenges to earlier court orders in the matter was proper and lawful.

By the Court.—Order affirmed.

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