

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 31, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2006AP1059

Cir. Ct. No. 2004FA891

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

ROBIN D. NYLAND,

PETITIONER-RESPONDENT,

V.

SCOTT E. NYLAND,

RESPONDENT-APPELLANT.

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

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

¶1 DYKMAN, J. Scott Nyland appeals from a judgment adjudicating the divorce between Scott and Robin Nyland. Scott argues that the court erred by (1) awarding Scott and Robin joint legal custody and equal placement of the Nylands' daughter because the record does not support that decision; (2) ordering Scott to pay maintenance and child support because it did so on an erroneous determination of Scott's income; and (3) ordering the parties to sell their real estate to divide the marital properties because the record does not support that decision, and the court failed to allocate marital debt. We conclude that the court properly exercised its discretion in awarding the parties joint legal custody and equal placement of their daughter and dividing the marital estate, but erroneously exercised its discretion in determining whether and what amount of depreciation should be added back to Scott's reported income. We therefore affirm in part and reverse in part, and remand for proceedings consistent with this opinion.

Background

¶2 The following facts are taken from trial testimony and the circuit court's findings. Additional facts will be developed as needed in the discussion section. Scott and Robin Nyland were married in 1990. Shortly after Scott and Robin were married, Scott started his own business, which is now called S&R Remodeling. Scott and Robin were married for fifteen years and had one child, Destinee. Robin moved out of the house in February 2004 and filed this action three months later.

¶3 Initially, when the Nylands separated in February 2004, they agreed to divide time with Destinee equally. Several weeks after Robin filed this action, the family court commissioner held a hearing to determine temporary placement of Destinee pending final judgment in the Nylands' divorce. The commissioner

gave primary placement to Scott, with Robin having placement with Destinee on Wednesdays and Sundays with no overnights. Robin testified at trial that she felt unprepared for the hearing and did not know in advance that the placement schedule was in dispute, and that she was distraught by the order limiting her time with her daughter.

¶4 Robin and Scott both testified at trial about problems in their relationship and about each other's shortcomings, presenting very different versions of their own and each other's parenting styles and involvement with Destinee. The guardian ad litem and family court counselor recommended Destinee be placed primarily with Scott, and that the parties should have joint custody but with impasse breaking authority going to Scott.

¶5 The parties also presented different versions of their property and respective incomes. Both offered personal and expert testimony supporting their views. The court awarded Scott and Robin joint legal custody and equal placement of Destinee and ordered Scott to pay Robin \$800 in monthly maintenance and \$496 in monthly child support. It awarded Scott the Nylands' marital home and Robin a duplex that was their previous home, and ordered the other properties sold and the profits divided equally. Scott appeals.

Standard of Review

¶6 Issues of maintenance and child support are within the circuit court's discretion. *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. Similarly, a circuit court has discretion to determine child placement. *Goberville v. Goberville*, 2005 WI App 58, ¶6, 280 Wis. 2d 405, 694 N.W.2d 503. A discretionary determination is the product of a rational mental process, and is a reasoned and reasonable decision. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306

N.W.2d 16 (1981). Questions of fact and law may underlie a discretionary decision. Factual findings by the circuit court will not be disturbed unless clearly erroneous. *Lellman v. Mott*, 204 Wis. 2d 166, 170-71, 554 N.W.2d 525 (Ct. App. 1996). A court's interpretation and application of administrative and statutory rules governing child support and maintenance are questions of law, which we review independently. See *Sullivan v. Bautz*, 2006 WI App 238, ¶9, _Wis. 2d_, 724 N.W.2d 908.

Discussion

1. Custody and Placement

¶7 Scott contends that the circuit court did not properly exercise its discretion in determining placement and custody of Destinee. He argues that the record does not reflect the required demonstrated rational process to support an exercise of discretion, and that the court did not consider the relevant facts and law. Scott also argues that the facts in the record do not support the court's decision to award the Nylands equal placement and joint legal custody, and that the court was required to explain why it was not following the recommendation of the guardian ad litem and the family court counselor. We disagree with each of Scott's contentions, and conclude that the court properly exercised its discretion in awarding the Nylands joint placement and custody of Destinee.

¶8 Under WIS. STAT. § 767.24(5)(am) (2003-04),¹ a circuit court is required to consider the best interests of the child when exercising its discretion in

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

determining child placement and custody. Among the enumerated factors the court is to consider in making its decision are the wishes of the child and the parents, the interaction between the child and the parents and the amount and quality of time each parent has spent with the child, the availability of child care to each parent, any evidence of interspousal abuse, whether either party has a significant drug or alcohol problem, and other factors the court deems relevant.

¶9 Scott cites *Goberville*, 280 Wis. 2d 405, and *Guelig v. Guelig*, 2005 WI App 212, 287 Wis. 2d 472, 704 N.W.2d 916, for the assertion that the circuit court’s judgment on child placement and custody was not a proper exercise of its discretion. We conclude that *Goberville* and *Guelig* are distinguishable on their facts, and do not compel the result Scott urges.

¶10 In *Goberville*, 280 Wis. 2d 405, ¶6, we explained that a circuit court has wide discretion in determining child placement. A court is required to “articulate its findings and reasoning,” although it “need not exhaustively analyze each piece of evidence.” *Id.*, ¶7. We also explained that we may “look to the record, if necessary, for reasons to support the court’s exercise of discretion.” *Id.* Because nothing in the circuit court’s written judgment and order or oral statement of its decision, or the guardian ad litem recommendation on which the court relied, indicated which statutory factors or facts the court considered in reaching its decision, we remanded for the court to properly exercise its discretion. *Id.*, ¶¶8-18. Further, the facts in the record did not support the court’s decision based on the required statutory factors. *Id.* Thus, we concluded that “[b]ased on our scrutiny of the record, ... neither the trial court’s own statements about the placement decision nor the evidence before the court are sufficient to establish that the decision reflected a reasonable exercise of discretion.” *Id.*, ¶18.

¶11 Similarly, in *Guelig*, 287 Wis. 2d 472, ¶44, we reiterated that “[a] circuit court has wide discretion in making a decision with respect to a child’s physical placement.” However, the only two statutory factors the record indicated the circuit court considered in *Guelig* were the wishes of the parents and the cooperation and communication between the parties. *Id.*, ¶45. Our review of the record revealed no indication that the court considered those factors in terms of the best interests of the child, which is the required legal standard. *Id.*, ¶¶45-49. We therefore reversed and remanded for the circuit court to consider all relevant statutory factors under the correct legal standard, and to articulate how its consideration of those factors resulted in the decision it reached. *Id.*, ¶52.

¶12 Here, as Scott points out, the circuit court did not list the relevant statutory factors in its decision. The court did, however, specifically state that it received and considered the joint recommendation of the family court counselor and guardian ad litem. The joint recommendation specifically lists each WIS. STAT. § 767.24(5) factor and corresponding relevant findings. We have explained that a court may consider the recommendation of a guardian ad litem, and that we consider whether the guardian ad litem specifically references relevant facts and statutory factors. See *Goberville*, 280 Wis. 2d 405, ¶¶11-18. It does not follow, as Scott contends, that the court was required to explain why it was not following the guardian ad litem and family court counselor’s recommendation.

¶13 Our review of the record indicates that the correct statutory factors were presented to the court and that the court had ample evidence to apply those factors to determine Destinee’s best interests. The joint recommendation of the guardian ad litem and the family court counselor states that Destinee wanted more time with her mother and a little less time with her father. Further, the court found that both parties are fit to have custody of Destinee. Robin and Scott offered

starkly different testimony as to their own and the other's parenting, and a circuit court is not required to believe or disbelieve any particular testimony; rather, evaluating the credibility of witnesses and determining the weight to give testimony is uniquely within the court's discretion. *See Lellman*, 204 Wis. 2d at 172. Robin testified that she was the primary caretaker of Destinee during her infancy and performed all of the routine baby care without help from Scott. She testified that she established a close relationship with Destinee as Destinee was growing up and was involved in her school and extracurricular activities. The circuit court was entitled to believe that testimony and determine that shared physical placement and joint legal custody was in Destinee's best interest.

¶14 Further, the parties offered differing testimony as to the care Destinee received while placed with either parent, and each alleged spousal abuse and drug use by the other. Robin testified that she works late hours as a bartender, but that she can arrange child care through her niece on those nights. She also testified that Scott was physically and verbally abusive towards her. Scott's testimony refuted Robin's allegations and presented a picture of Robin as a neglectful mother. As noted, the court was not required to believe or disbelieve any particular testimony.

¶15 Finally, the circuit court expressly explained its reasoning in awarding equal physical placement and joint legal custody as based on the fact that it found that it was not in Destinee's best interest to have prolonged periods with no contact with her mother. Because the court's decision to award the parties equal physical placement and joint legal custody is supported by the facts in the record, we will not disturb it on appeal.

2. *Maintenance and Child Support*

¶16 Scott contends that the circuit court's findings regarding Scott and Robin's respective incomes and earning capacities are clearly erroneous. Scott asserts that the court made three errors in calculating his income: (1) adding into Scott's stated income \$36,000 that Scott invested in his properties; (2) adding into Scott's stated income \$6,580 that Scott had deducted as depreciation; and (3) relying on Robin's vocational expert, who Scott asserts lacked necessary information to give a reliable opinion as to Scott's earning capacity. Scott also asserts the court erred in limiting Robin's earning capacity to her current income. We conclude that the court properly added back the amount Scott had invested in his properties, but that the record does not reflect that the court exercised its discretion in adding into Scott's income the amount Scott claimed as depreciation. We disagree with Scott's assertion that the court erroneously relied on Robin's vocational expert to determine Scott's earning capacity. Finally, we disagree with Scott's assertion that the court erred in determining Robin's earning capacity based on her current income.

¶17 A circuit court's calculation of a party's income is a finding of fact that we will not disturb unless clearly erroneous. *DeLaMatter v. DeLaMatter*, 151 Wis. 2d 576, 588, 445 N.W.2d 676 (Ct. App. 1989). Our review of the record indicates that there was conflicting evidence as to Scott's income. First, as Scott points out, there was a disagreement as to the \$36,000 Scott invested back into the Nylands' property. Scott and Robin presented expert testimony, each with a separate opinion as to where and how the \$36,000 was and should have been deducted on the Nylands' taxes. Scott's argument at trial, and on appeal, is that the only finding supported by the evidence is that the \$36,000 invested in the

Nylands' property was money obtained through refinancing the Nylands' property, and thus could not properly be added back into Scott's income. We disagree.

¶18 The origin of the \$36,000 invested into the Nylands' property was a subject of dispute. Although the Nylands refinanced their property and established a joint refinance fund, there was significant disagreement as to how those funds were dispersed. The circuit court, as the trier of fact, was not required to believe Scott's assertion that the money invested was the borrowed money, and that he did not reduce his reported income by that amount. To the contrary, Robin's expert testified that, after reviewing the Nylands' taxes, he believed Scott had reduced his income by \$36,000 based on the investments he made in the properties. The circuit court was entitled to weigh that evidence and find that Scott's reported income should be increased by \$36,000.

¶19 We agree with Scott, however, that the record does not reflect the circuit court exercised discretion as to Scott's claimed depreciation. In determining a party's income for support purposes, a court has discretion to add back depreciation that the court finds was not reasonable for the party to deduct. *See Brad Michael L. v. Lee D.*, 210 Wis. 2d 437, 458, 564 N.W.2d 354 (Ct. App. 1997); *see also* WIS. ADMIN. CODE DWD 40.02(13)(a)9. In its written judgment, the court stated it was adding back the amount Scott claimed as depreciation on his Schedule C because it was required to do so. In support, it cited *Brad Michael L.* and *Stephen L.N. v. Kara L.H.*, 178 Wis. 2d 466, 504 N.W.2d 422 (Ct. App. 1993). However, in *Stephen L.N.*, 178 Wis. 2d at 475-76, we concluded that the trial court did not err by declining to add depreciation taken for duplexes into an ex-spouse's income for support purposes. We explained that whether to add depreciation into a party's income is within the court's discretion, rather than being "appropriate or mandatory in every case." *Id.* at 475. Because the circuit

court “considered the evidence and set forth reasons for its ruling,” we concluded that the court had properly exercised its discretion. *Id.* at 476.

¶20 Several years later, in *Brad Michael L.*, 210 Wis. 2d at 458, we reversed the circuit court’s decision not to add the value of depreciation to the father’s income because the court did not articulate any basis for that determination. We therefore remanded with directions for the court to “evaluate whether and to what extent depreciation value should be included in [the father’s] income.” *Id.* at 458-59. We did not hold that depreciation must be added back into income in every case.

¶21 Thus, we conclude that the circuit court erred in adding back the value Scott claimed as depreciation based on its erroneous conclusion that it was required to do so. On remand, the court must evaluate the relevant evidence to determine whether depreciation should or should not be added into Scott’s reported income.²

¶22 Next, we are not persuaded that the circuit court erroneously relied on Robin’s vocational expert in calculating Scott’s income. Under WIS. ADMIN. CODE DWD 40.03(3), “[i]n situations where the income of a parent is less than the parent’s earning capacity or is unknown, the court may impute income to the parent at an amount that represents the parent’s ability to earn, based on the parent’s education, training and recent work experience” Here, however, the court expressly calculated Scott’s income based on the amount Scott reported as

² Some property, often personal property, wears out over time and must be replaced. Other property, often real estate, may depreciate for tax purposes, but appreciates in value. Real estate can also lose actual value.

income, \$19,057, plus the amount it found Scott invested in the Nylands' property and deducted on his taxes, \$36,377, and the depreciation Scott claimed, \$6,580. This resulted in an income of \$62,014. The court then stated that the number it reached was consistent with the testimony of Robin's vocational expert, who had calculated Scott's earning capacity as ranging from \$50,000 to \$80,000. We need not address Scott's various arguments as to why Robin's vocational expert was wrong as to Scott's earning capacity. The circuit court did not determine Scott's income based on that testimony, but rather determined what Scott's actual earning was and based its support awards on that amount.

¶23 Finally, Scott's argument that the court erred in determining that Robin's earning capacity was limited to her actual earnings is unavailing. Under WIS. STAT. § 767.26(5), a court is to consider "[t]he earning capacity of the party seeking maintenance," which includes, *inter alia*, that party's "educational background, training, employment skills, [and] work experience." Scott presented arguments to the court that Robin is capable of earning more than she is in her present job, but the court was not required to accept those arguments. The record reveals that Robin has a high school diploma and took several community college courses. Robin testified that she was earning more at her previous job, that Scott forced her to quit that job after learning she was having an affair with her boss, and that she had since been unable to find other comparable employment. The court also took into account Robin's vocational expert, who testified that Robin could increase her earning capacity by taking additional college courses. The court was entitled to determine Robin's earning capacity was accurately reflected by her present employment.

3. *Division of Property and Debt*

¶24 Scott argues that the trial court erred by ordering the Nylands to sell their marital property and divide the proceeds, and by not specifically allocating marital debt. We disagree.

¶25 Under WIS. STAT. § 767.255(1), a circuit court “shall divide the property of the parties and divest and transfer the title of any such property accordingly.” The statute does not specifically mandate or prohibit liquidating marital property. However, we have often held that a circuit court’s division of property is within its discretion. *See Derr v. Derr*, 2005 WI App 63, ¶9, 280 Wis. 2d 681, 696 N.W.2d 170. Here, the circuit court awarded the marital home to Scott and the former marital home to Robin. It ordered the remaining three properties sold with the proceeds equally divided, finding that the Nylands had purchased those properties intending to remodel and sell them for a profit. Contrary to Scott’s assertion, the circuit court was not required to accept Scott’s testimony that the properties were intended as long-term investments and that therefore selling them imposed an unintended financial hardship of capital gains taxes. Although Scott testified that the parties did not intend to sell their properties, Robin testified that she did not know whether the properties were purchased as long-term investments. Further, the record reveals that the parties had already sold one of their properties and placed another property for sale, pursuant to an agreement in a previous temporary order. The court was entitled to disbelieve Scott’s testimony and find that the parties intended to sell their properties. We defer to the circuit court’s findings as to witness credibility, including implicit credibility findings in its analysis of the evidence. *Jacobson v. American Tool Cos., Inc.*, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998).

¶26 Finally, Scott has not adequately developed his argument that the court erred in failing to allocate debt, and we therefore decline to address this issue. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶27 No costs to either party.

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

Not recommended for publication in the official reports.

