COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP426 **Cir. Ct. No. 2006FA553**

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

IN RE THE MARRIAGE OF:

KAMIE RAE OGDEN,

PETITIONER-APPELLANT,

V.

DAVID JEFFREY OGDEN,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Affirmed.*

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. The trial court granted a judgment of divorce to Kamie and David Ogden, equally divided the marital estate and, in setting child support, imputed $41,000 income to Kamie, a voluntarily unemployed stay-at-home parent. Kamie appeals these aspects of the judgment. We affirm.

¶2 Kamie and David married in August 2003. They had one child, born in February 2005. In July 2006, Kamie and the child moved out and Kamie commenced divorce proceedings. A temporary order entered during the pendency of the divorce gave David occupancy of the house, awarded him weekend placement of the child and ordered him to pay $173.00 per week child support.

¶3 After a two-day contested divorce hearing, the trial court awarded the parties joint legal custody and shared physical placement. Applying David's most recent income of $52,116 and imputing income to Kamie of $41,000, the court ordered David to pay $119.58 child support per month. Finally, the trial court ordered a fifty-fifty division of property, and denied maintenance to both parties. Kamie appeals the child support award and the property division. Further facts will be supplied as needed.

CHILD SUPPORT

1. Use of percentage standards

¶4 The trial court used the percentage standard and shared-placement formula to calculate child support. *See* WIS. STAT. § 767.511(1j) (2005-06)[1]; *see also* WIS. ADMIN. CODE § DCF 150.04(2) (Nov. 2008), formerly WIS. ADMIN.

[1] All references to the Wisconsin Statutes are to the 2005-06 version.

CODE § DWD 40.[2] Kamie contends that the trial court failed to consider the following § 767.511(1m) factors that would have permitted it to deviate from the percentage standard:

> (a) The financial resources of the child.
>
> (b) The financial resources of both parents.
>
> ….
>
> (bp) The needs of each party in order to support himself or herself at a level equal to or greater than that established under 42 U.S.C. § 9902 (2) [the poverty line].
>
> ….
>
> (c) If the parties were married, the standard of living the child would have enjoyed had the marriage not ended in annulment, divorce or legal separation.
>
> (d) The desirability that the custodian remain in the home as a full-time parent.
>
> (e) The cost of day care if the custodian works outside the home, or the value of custodial services performed by the custodian if the custodian remains in the home.
>
> ….
>
> (hm) The best interests of the child.
>
> ….

¶5 Child support awards rest within the trial court's sound discretion. ***Sellers v. Sellers***, 201 Wis. 2d 578, 585, 549 N.W.2d 481 (Ct. App. 1996). Generally speaking, child support obligations must be based upon the percentage standard. WIS. STAT. § 767.511(1j). A court retains the discretion to deviate from the percentage guidelines, however, if it finds by the greater weight of the credible

[2] WISCONSIN ADMIN. CODE § DWD 40 recently was renumbered to WIS. ADMIN. CODE § DCF 150 but was not substantively altered. We cite to it as currently numbered.

evidence that using the percentage standard is unfair to the child or the parties. *See* WIS. STAT. § 767.511(1m); *see also* ***Vlies v. Brookman***, 2005 WI App 158, ¶16, 285 Wis. 2d 411, 701 N.W.2d 642. We will accept the court's factual findings unless they are clearly erroneous, WIS. STAT. § 805.17(2), and affirm its exercise of discretion if it applied the correct legal standards to the record facts and reached a rational, reasoned decision. *See* ***Smith v. Smith***, 177 Wis. 2d 128, 133, 501 N.W.2d 850 (Ct. App. 1993). A trial court must articulate its reasoning process for the decision to remain within or deviate from the support guidelines. ***Rumpff v. Rumpff***, 2004 WI App 197, ¶14, 276 Wis. 2d 606, 688 N.W.2d 699.

¶6 The trial court found that Kamie "has a significant capacity to earn" but "unilaterally terminated her employment" some months after the parties' child was born, and has put no effort into finding employment since filing the divorce action in July 2006. It found that David had an income of $52,116 and "determined through the testimony and evidence" that $41,000 was Kamie's earning capacity. Our review of the record supports sustaining the trial court's discretionary decision. *See* ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737.

¶7 Kamie and David both testified at the two-day contested divorce hearing, and numerous financial documents were admitted into evidence. Kamie testified that she has a bachelor's degree in accounting and worked for part of 2005 at her family's trucking business; that she quit because she does not get along with her brother; that she prefers not to return there because of the rift and trucking is "too stressful"; that her work history includes medical sales and "staging" houses to enhance their salability; that she has not looked for work; that at the time of the hearing her sole source of income was child support and payments she received from a nearly repaid loan she extended to her family's

business; and that she does not want her child in day care but wants to be a stay-at-home mother until he starts school. Her income evidence showed that she earned $41,000 in 2004, the year before the parties' child was born, although she testified that when she worked for her family, she made "[p]robably around 50."

¶8 David testified that he works for his family's plumbing and heating business; that he was an apprentice plumber when they married, advanced to journeyman and, by the time of the final hearing, to master plumber; that his wage of $24 or $25 an hour did not change with his advancement to master status. His income evidence showed his most recent earnings to be approximately $52,100. David believes their child would benefit from daycare.

¶9 The trial court held this evidence up to the light of the statutory factors and concluded that deviating from the percentage standard was unnecessary. That conclusion resulted from a proper exercise of discretion, which is what we are called to review. We affirm the use of the percentage standard.

2. Imputed income

¶10 Kamie next argues that the trial court erred in imputing $41,000 income to her to establish child support. Where a parent's earning capacity exceeds his or her income, a court may impute to the parent income at an amount representing the parent's ability to earn. WIS. ADMIN. CODE § DCF 150.03(3), formerly § DWD 40.03(3). In making the determination, the court considers the parent's education, training and recent work experience, earnings during previous periods, current physical and mental health, history of child care responsibilities as the parent with primary physical placement, and the availability of work in or near the parent's community. ***Id.***

¶11 Kamie contends that in imputing income to her to set child support the trial court "completely ignored" her current financial circumstances: that she is an unemployed stay-at-home mother who was not employed outside the home in any capacity since December 2005, has no job prospects except the undesirable possibility of returning to her family's business. Coupled with the denial of maintenance, which she does not appeal, and what she believes is an unfair property division, she contends the $119.58 monthly child support, her only income, puts her in "a nearly impossible financial situation." Consideration of her earning capacity was erroneous, she concludes, because it was not premised on a finding that she was deliberately seeking to avoid her support obligation.

¶12 "Shirking" does not require a finding that a party deliberately reduced earnings to avoid support obligations. ***Van Offeren v. Van Offeren***, 173 Wis. 2d 482, 496, 496 N.W.2d 660 (Ct. App. 1992). It is sufficient that the court finds the employment decision to be both voluntary and unreasonable under the circumstances. ***Id.*** The employment decision may be unreasonable even though it is well intended. ***Id.*** The reasonableness of Kamie's voluntary unemployment decision is a question of law, but we will give appropriate deference to the trial court's legal conclusion because it is so intertwined with the factual findings supporting it. *See* ***id.*** at 492-93.

¶13 We conclude that under these circumstances Kamie's choice is unreasonable. She is not employed because she chooses not to be and, in fact, "ha[s]n't really thought about" prospective employment. She is college educated with an established work history, and conceded that returning to her family's business is a possibility. She acknowledged being a "nervous, nervous mother," who "do[es]n't even get babysitters" for the child. "[T]here must be some limit to the degree of underemployment one may elect to choose when the former spouse

is being presented the bill for the financial consequences of the choice." ***Sellers***, 201 Wis. 2d at 586. Kamie has opted not simply for underemployment but full unemployment. However well intended, under these circumstances it is not reasonable and it was proper for the trial court to base its order on her earning capacity. *See* ***Van Offeren***, 173 Wis. 2d at 496; *see also* ***Roberts v. Roberts***, 173 Wis. 2d 406, 411, 496 N.W.2d 210 (Ct. App. 1992).

PROPERTY DIVISION

¶14 Kamie brought to the marriage assets in excess of $150,000 and David brought assets valued at about $20,000. Except for David's retirement plans which it deemed separate property not subject to division, the trial court ordered an equal property division. Kamie contends the property division is unfair because the marriage was brief, the assets she brought to it largely were purchased with a premarital personal injury settlement and the retirement plans David owned at the time of marriage were excluded from division. She argues that, in fairness, the court should have deviated from the presumed fifty-fifty split. *See* WIS. STAT. § 767.61(3)(a), (b). We disagree.

¶15 Property division at divorce is governed by WIS. STAT. § 767.61. Unless acquired by gift or inheritance, property brought to the marriage is subject to division. *See* WIS. STAT. § 767.61(2). WISCONSIN STAT. § 767.61(3) creates a presumption that the property will be equally divided, as the trial court did here. Property brought to the marriage is a factor that allows, but does not compel, the trial court to deviate from the presumptive equal division. *See* § 767.61(3)(b). We will uphold the trial court's determination unless it erroneously exercised its discretion through a legal error or failed to base its decision on the facts of record. ***Steinmann v. Steinmann***, 2008 WI 43, ¶20, 309 Wis. 2d 29, 749 N.W.2d 145.

¶16 David and Kamie each owned a house when they married. David had about $15,000 equity in his; Kamie had purchased hers with cash, using money from the personal injury settlement and a gift from her parents. They sold David's house, moved into Kamie's (the Lowell Place property), and lived there for the first year of their marriage. Kamie and David took out a nearly $39,000 line-of-credit loan against the Lowell Place property to purchase their next residence on Northridge Court, which they titled jointly. David and Kamie made improvements to the Lowell Place property and sold it in 2005. By that time, according to Kamie, over $112,000 in loans were drawn against the equity in the Lowell Place property. She testified that they used the money for a cruise and furnishing and improving the Northridge Court property. Money went in and out of the parties' joint checking account.

¶17 Determining the value and source of an asset or a part of an asset by itself does not determine a property's divisibility. *See* ***Derr v. Derr***, 2005 WI App 63, ¶¶15-16, 280 Wis. 2d 681, 696 N.W.2d 170. We will assume for argument's sake that the Lowell Place property was nondivisible property when Kamie and David first married. We have said many times that donative intent is presumed when the owning spouse transfers nondivisible property to joint tenancy, *see* ***Trattles v. Trattles***, 126 Wis. 2d 219, 222-24, 376 N.W.2d 379 (Ct. App. 1985), deposits nondivisible funds into a joint bank account, *see* ***Finley v. Finley***, 2002 WI App 144, ¶42, 256 Wis. 2d 508, 648 N.W.2d 536, or uses nondivisible funds for household expenditures and purchases for the family, *see* ***Trattles***, 126 Wis. 2d at 222, 225-27. *See also* ***Derr***, 280 Wis. 2d 681, ¶¶35-37. Kamie did all three with the money the Lowell Place property generated. Absent sufficient countervailing evidence, gifting is the only reasonable inference. *See* ***Haldemann v. Haldemann***, 145 Wis. 2d 296, 307, 426 N.W.2d 107 (Ct. App. 1988).

¶18 Here, the trial court expressly found that the identity and character of the real property the parties each owned before marriage "has changed. That the … real property was transmuted, if you will, to marital property and that there shall be no tracing of that property back to either party." During their marriage, Kamie and David each contributed money and effort to their marital residence and the property in their marital estate. The court properly refused to turn back the clock and restore the parties to their premarital position.

¶19 David's retirement accounts are a different matter. Before the contested divorce hearing, the parties each submitted a proposal to include within the property division only that portion of the accounts which accumulated after the date of the marriage. At the hearing, Kamie expressly asserted that she thought that was "only fair." Thus, the trial court's allocation of the premarital portion of the account monies to David mirrors what the parties already had agreed upon. Kamie's assertion that the funds' exclusion from the property division only "made matters worse" contradicts her earlier stance. We see no erroneous exercise of discretion.

By the Court.—Judgment affirmed.

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