

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 15, 2009

David R. Schanker
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. 2007AP2905

Cir. Ct. No. 2005PA207

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE PATERNITY OF A.M.U.V.

STATE OF WISCONSIN,

PETITIONER,

v.

SOM VARMA,

RESPONDENT-RESPONDENT,

NATALIA V. ZHUCHKOVA,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
ROBERT G. MAWDSLEY, Judge. *Affirmed.*

Before Vergeront, Lundsten and Storck,¹ JJ.

¶1 PER CURIAM. Natalia Zhuchkova appeals a paternity judgment, contending that the circuit court’s child support award is an erroneous exercise of discretion. We conclude that the court properly exercised its discretion in determining support, and therefore affirm.

¶2 Zhuchkova is the mother of Andrew M.U.V., born in April 2005. Som Varma was determined to be Andrew’s father. Varma is a retired physician. For purposes of child support, the circuit court calculated Varma’s gross income to be \$112,000 from investments and social security, and applied the percentage child support guidelines to that figure to calculate Varma’s child support obligation.

¶3 At issue is whether the circuit court properly declined to add or impute income to Varma based on the rental and then pending sale of his home. Varma lived for over thirty years in the home in question, which he decided to sell because he could not afford the expenses of keeping it. Those expenses included approximately \$30,000 per year in property taxes, and debt payments on mortgaged home loans totaling approximately \$900,000.

¶4 In September 2005, Varma received an offer to purchase the home for \$3,000,000, with closing no later than November 1, 2007. The buyer submitted a \$200,000 earnest money deposit with the offer, which was variously described in the offer as “nonrefundable,” and “non refundable, if it is the fault of

¹ Circuit Court Judge John R. Storck is sitting by special assignment pursuant to the Judicial Exchange Program.

the Buyer.” The offer also described the earnest money as “a credit against the purchase price at closing.” Varma accepted the offer and an accompanying rental agreement in the interim. Under the rental agreement, the prospective buyer moved into the home in October 2005, began paying \$3000 per month rent, and assumed the property tax payments. Varma used the \$200,000 to pay down his debt on the property, although the monthly payments on the debt remained substantially more than the \$3000 rent Varma received monthly.

¶5 The parties litigated the child support issue in June and July 2006. At trial, Zhuchkova contended that the house was an “unproductive asset,” and income available from Varma’s equity in it should be imputed to him. She also contended that the \$200,000 earnest money payment should be considered income available for child support. The court found that Varma’s home was not an “unproductive asset.” The court also factored out all aspects of the pending real estate transaction for purposes of computing child support, and instead ruled that child support might be revised once the home is sold and money freed for investment under the “substantial change of circumstances” standard. The court also found that “Varma did not divert income into a nonproductive asset to avoid paying child support by applying the \$200,000 earnest money payment to reduce his interest charges,” and found that his use of the money to reduce interest payments was reasonable.

¶6 The circuit court awards child support as a matter of discretion, and we uphold an award unless the court erroneously exercised its discretion. *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. Discretionary determinations are upheld if the circuit court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. *Id.* In determining child support

using the percentage child support guidelines, the court may impute “a reasonable earning potential to a parent’s assets” if the parent owns assets that are “underproductive,” and the parent has either diverted income into assets to avoid paying support or income from the parent’s assets is necessary to maintain the child or children at the standard of living they would have had if they were living with both parents. WIS. ADMIN. CODE § DCF 150.03(4).

¶7 Zhuchkova contends that the court erred because it did not treat the \$200,000 earnest money as income in the year Varma received it, 2005, given that it was nonrefundable. Zhuchkova concedes that the payment does not fit the specific categories of income in WIS. ADMIN. CODE § DCF 150.02(13)(a), but argues that the payment should be considered income for support purposes under the catchall provision, WIS. ADMIN. CODE § DCF 150.02(13)(a)10. However, there was testimony from an accounting expert that the earnest money payment, as a credit against the sale price, was not income but instead represented a return of capital. There was also some question, based on a separate transaction and the “buyer’s fault” provision in the offer to purchase, whether the earnest money was, in fact, as unequivocally nonrefundable as Zhuchkova asserts. Additionally, even if the earnest money did fall within the definition of gross income, the court had discretion to exclude it from the support calculation. *Wall v. Wall*, 215 Wis. 2d 595, 599-600, 573 N.W.2d 862 (Ct. App. 1997). Under these circumstances, and with the house continuing to be a substantial financial drain on Varma until the anticipated sale, the court reasonably excluded the earnest money from Varma’s 2005 child support income.

¶8 Zhuchkova contends that the buyer’s rental payments of \$3000 per month plus taxes were so inappropriately low that the circuit court essentially had no choice but to declare the house an underproductive asset and impute a much

higher rental income to Varma. However, the circuit court found that Varma's acceptance of the buyer's offer was reasonable and that the rental agreement likely contributed to a higher sales price. The court also found that Varma had not diverted income into the house to avoid paying support, and that income from it was not necessary to maintain Andrew at the standard of living he would enjoy if his parents were together. Zhuchkova does not argue that any of these findings are clearly erroneous, and we therefore have no basis to overturn them. *See* WIS. STAT. § 805.17(2) (2007-08). Accordingly, the circuit court reasonably determined that Varma's home was not a source of income and not an underproductive asset.

¶9 In support of her arguments for reversal, Zhuchkova reports that after entry of judgment the buyer refused or was unable to go through with the sale of Varma's home, and that Varma was suing the buyer for eviction and intended to keep the earnest money. In her view, these developments undermine the court's decision and require reversal. However, although subsequent developments may form the grounds for a motion for a modified judgment, they are not relevant to our determination whether the court reasonably exercised its discretion at the time it made its decision. *See State v. Shomberg*, 2006 WI 9, ¶17, 288 Wis. 2d 1, 709 N.W.2d 370 (issue on appeal is whether the court reasonably exercised its discretion at the time of the decision, not what the circuit court might do today on different facts).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

