COURT OF APPEALS
DECISION
DATED AND FILED

August 23, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1251 **Cir. Ct. No. 2008FA378**

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

IN RE THE MARRIAGE OF:

LIANE M. GETSCHOW,

PETITIONER-RESPONDENT,

V.

KURT GETSCHOW,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: JOHN D. MCKAY, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Kurt Getschow appeals from a judgment of divorce. He asserts the circuit court erroneously exercised its discretion when

dividing the couple's marital estate, erred in its credibility determinations, and improperly deviated from the percentage guideline for child support contained in WIS. ADMIN. CODE § DCF 150.04(2) (Nov. 2009).

¶2 We conclude the circuit court erred in two ways. First, the court included in the property division a building on Suburban Drive in De Pere that neither Kurt nor Liane Getschow owned. Second, the court failed to explain why it valued certain furs and jewelry at only ten percent of their insured value. Accordingly, we reverse and remand to the circuit court with directions to review its valuation of the furs and jewelry and divide the marital estate excluding the Suburban Drive property. We affirm the judgment in all other respects.

BACKGROUND

¶3 Liane was granted a divorce from Kurt in 2008 after eight years of marriage. At the time, the court held open the issues of property division, maintenance, custody and placement of the couple's two children, and child support.

¶4 The circuit court held several hearings on property division, after which it requested written final arguments. Kurt's final argument noted that the parties' testimony regarding personal property was "contradictory." He raised issues regarding two tax refunds, an emergency cash fund, Bank of America credit card debt, and the value of certain furs and jewelry in Liane's possession. Kurt's submission also noted differences in the valuation of a property on Melanie Lane in Oneida. Finally, Kurt argued that the Suburban Drive property was not subject to division because neither he nor Liane owned it. Kurt followed up with an amendment correcting several errors in his earlier submission.

¶5 The circuit court ultimately divided the property equally and ordered Kurt to make an equalization payment of $213,040.79. It accepted Liane's testimony and evidence on multiple points, including the value of the Melanie Lane property and the divisibility of the Suburban Drive property. The court deemed Kurt's testimony and evidence incredible, and, citing the maxim "falsus in uno; falsus in omnibus," rejected his amended final argument.[1]

¶6 The court ordered joint custody and shared physical placement for the couple's children. It also ordered that Kurt pay $2,083.33 per month in child support. In doing so, the court deviated from the percentage guidelines contained in WIS. ADMIN. CODE § DCF 150.04(2), under which Kurt's obligation would have been $1,703.12 per month. The court determined that the increased payment was warranted based on prior failures to timely pay child support and communicate with Liane regarding variable expenses.

DISCUSSION

¶7 Kurt first asserts that the circuit court erroneously exercised its discretion in dividing the marital estate. Specifically, Kurt contends that the court erred by accepting Liane's testimony regarding the value of the Melanie Lane property; including the Suburban Drive property in the marital estate; assigning him the Bank of America credit card debt; failing to account for a tax refund and emergency cash fund; and valuing certain furs and jewelry at ten percent of their insured value.

[1] "Falsus in uno, falsus in omnibus" is a Latin phrase meaning "false in one thing, false in all." *See* BLACK'S LAW DICTIONARY 637 (8th ed. 2004).

¶8 The division of property is a discretionary act by the circuit court, and will not be disturbed unless there has been an erroneous exercise of discretion. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We will affirm as long as the court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rationale process, reached a conclusion that a reasonable judge could reach." ***Id.*** We decide de novo any questions of law which may arise during our review of an exercise of discretion. ***Id.***, ¶14.

¶9 We reject most of Kurt's contentions. We have thoroughly reviewed the transcript of the property division hearing and conclude that the circuit court's discretionary decisions regarding the value of the Melanie Lane property, the Bank of America credit card debt, and the tax refund and emergency cash fund were all reasonable determinations. Liane's testimony and evidentiary submissions, which the circuit court credited, supplied a sufficient factual basis for the court's determinations regarding the value of the Melanie Lane property, the credit card debt, and the tax refund. Liane did not offer evidence regarding the emergency cash fund, but the circuit court was not required to accept Kurt's testimony on that point. *See* ***Scarcia v. Stadelman***, 28 Wis. 2d 403, 409, 137 N.W.2d 57 (1965).

¶10 However, we reverse with respect to the inclusion of the Suburban Drive property in the marital estate. WISCONSIN STAT. § 767.61 "prescribes the manner in which the property of a married couple is divided upon dissolution of the marriage. It concerns division of the 'marital estate'—that is, property brought into the marriage or acquired during the marriage …." ***Kuhlman v. Kuhlman***, 146 Wis. 2d 588, 590, 432 N.W.2d 295 (Ct. App. 1988) (citing § 767.61's predecessor,

WIS. STAT. § 767.255).[2] Implicit in the property division statute is the notion that a spouse must have some interest in the property at issue; without a present or future interest in the property, there is nothing for the court to divide.

¶11 The Suburban Drive property is not subject to division because neither Kurt nor Liane has any interest in it. Kurt transferred ownership of the Suburban Drive property in 1998, two years before his marriage to Liane. The property went to LAK Enterprises, a business owned by adult children from Kurt's first marriage. Neither Kurt nor Liane appears to have any divisible interest in the property.

¶12 We reject Liane's arguments to the contrary. Liane contends that the building is divisible because she and Kurt jointly operated several businesses on the property and used marital income to pay the rent. She also proffers a sort of "unclean hands" argument, suggesting that Kurt transferred the property in 1998 to avoid paying maintenance to his first wife. Even if those assertions are true, neither establishes an interest in the property by one or both spouses. Thus, neither alters the indivisible nature of the property.

¶13 We also direct the circuit court to review its valuation of the furs and jewelry. A homeowners' policy rider submitted at the property division hearing

[2] Kurt unhelpfully cites the marital property provisions of WIS. STAT. § 766.31. As we explained in ***Kuhlman v. Kuhlman***, 146 Wis. 2d 588, 591, 432 N.W.2d 295 (Ct. App. 1988), the Marital Property Act contained in WIS. STAT. ch. 766 "has nothing to do with division of property on dissolution of a marriage."

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

showed the furs and jewelry were insured for $64,114.00. Yet the circuit court inexplicably valued those items of personal property at $6,411.40.

¶14 Kurt next argues the circuit court erred by applying the maxim "falsus in uno; falsus in omnibus" to his final property division argument. Kurt submitted his final argument on February 24, 2009. Two days later, he sent a letter informing the court that the earlier submission incorrectly stated the amount of two real estate down payments. In addition, Kurt informed the court that he owned two classic cars "well before the date of marriage …. They should not be included in the marital estate."

¶15 The circuit court rejected the amendment, deeming it incredible in light of the evidence presented at the property division hearings. The court further determined that the submission

> casts serious doubt on the reliability of any information provided to the Court in either of [Kurt's] submissions. The court affords itself the application of a permissive rule of evidence, to wit: "falsus in uno; falsus in omnibus." False in one thing; false in everything. The Court has kept the rule in mind as it has attempted to analyze the property of the parties and to divide it fairly and equally.

The court then rendered its decision regarding the property division.

¶16 Kurt asserts that the maxim "falsus in uno; falsus in omnibus" is "outdated and no longer in use."[3] Kurt does not, however, point to any Wisconsin authority for this proposition, instead citing a federal appellate decision. *See*

[3] This is a curious position for Kurt to take, as he invoked the falsus in uno doctrine in his final property division argument when he wrote, "The simple question is this: if the Court concludes that Liane intentionally failed to disclose these substantial assets, can the Court believe any of the rest of her testimony?"

United States v. Edwards, 581 F.3d 604, 612 (7th Cir. 2009), *cert denied*, 130 S. Ct. 1301 (2010). Whatever the state of the maxim in federal court, it has not been abandoned in Wisconsin, though its presentation to jurors is disfavored. *See* ***State v. Lagar***, 190 Wis. 2d 423, 433, 526 N.W.2d 836 (Ct. App. 1994). We have held that in some ways the falsus in uno instruction is duplicative of other instructions regarding credibility and the weight of evidence. ***Ollman v. Wisconsin Health Care Liab. Ins. Plan***, 178 Wis. 2d 648, 663, 505 N.W.2d 399 (Ct. App. 1993).

¶17 We conclude application of the falsus in uno doctrine was a proper exercise of the circuit court's function as fact-finder. Credibility is a matter within the province of the circuit court. *See* ***Jacobson v. American Tool Cos.***, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998). The circuit court has the opportunity to observe the witness's demeanor and gauge the testimony's persuasiveness. ***Id.*** A circuit court's credibility finding "will not be questioned unless based upon caprice, an abuse of discretion, or an error of law." ***Id.***

¶18 Here, the record shows the circuit court had concerns about Kurt's demeanor early in the property division hearings:

> And, Mr. Getschow, I'm … going to say this right now, but credibility is as much derived by this Court on the basis of body language and everything else. … But when you sit there staring out the window behind your attorney paying no attention to what's going on here, with the exception of periodically turning to write notes hurriedly to your lawyer, you're not participating in these proceedings. And I would ask you to at least make the effort to appear that you are.

The amendment further undermined the circuit court's confidence in Kurt's testimony and submissions. In any event, Kurt has failed to show caprice, an erroneous exercise of discretion, or an error of law. As stated previously, the court

properly observed that the doctrine it invoked was merely "permissive" in application.

¶19 Kurt next contends the circuit court erroneously exercised its discretion in setting child support because it deviated from the shared-time payor guideline under WIS. ADMIN. CODE § DCF 150.04(2). "The determination of appropriate child support is committed to the sound discretion of the trial court and we will affirm the court's discretionary act if the trial court examined the relevant facts, applied a proper standard of law, and used a rational process to reach a [reasonable] conclusion …." ***Rumpff v. Rumpff***, 2004 WI App 197, ¶10, 276 Wis. 2d 606, 688 N.W.2d 699.

¶20 Child support is generally determined by using the percentage guidelines established by the Department of Children and Families. *See* WIS. STAT. § 767.511(1j); *see also* WIS. STAT. § 49.22(9). The court may deviate from these percentage guidelines only upon request by a party. *See* WIS. STAT. § 767.511(1m), (1n).

¶21 Kurt contends the circuit court improperly deviated from the shared-time payor guideline because "[n]either party requested a deviation." The record contradicts this contention. Liane dedicated four pages of a February 2010 memorandum to her request for a deviation. The memorandum states, "It is [Liane's] position that she should be responsible for all variable expenses paid for by her and that, in order to defray said variable costs, this Court should deviate from the shared payor percentage guidelines in calculating Mr. Getshow's child support obligation." As support, Liane cited numerous contempt findings against Kurt, which she asserted demonstrated an unwillingness to comply with court orders and co-parent. The circuit court adopted this position, concluding that

deviation from the percentage standard was warranted because the parties were "incapable of communicating well enough with one another to share and reimburse each other for variable expenses," and Kurt "has not paid child support during the course of these proceedings, has not contributed to variable expenses, and has failed to pay other [court-ordered] obligations in a timely manner." The circuit court properly exercised its discretion by adjusting Kurt's child support obligation to account for his demonstrated unwillingness to pay his share of variable expenses.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. No costs on appeal.

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