

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 19, 2004

Cornelia G. Clark
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. 03-2863
STATE OF WISCONSIN**

Cir. Ct. No. 02FA000588

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

ERIC C. CHRISTENSEN,

PETITIONER-RESPONDENT,

V.

MICHELE M. CHRISTENSEN,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County:
JAMES WELKER, Judge. *Reversed in part and cause remanded with directions.*

Before Deininger, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Michele Christensen appeals the child support and property division components of her divorce judgment. She claims the trial court failed to apply the appropriate child support guideline and made clearly erroneous

factual findings about her earning capacity and the valuation of a 401(k) plan. We agree that the challenged factual findings were not supported by the record, and therefore reverse and remand to the trial court to recalculate the child support award and property division.

BACKGROUND

¶2 Michele and Eric Christensen had been married for nine years and had two children together when this divorce action began. They were able to agree about custody and placement of the children, but proceeded to trial on the issues of child support, property division and maintenance. The trial court ordered Eric to pay \$182 per week in child support and adjusted the property division in Michele's favor in lieu of awarding maintenance. More specific facts relevant to the child support and property division issues raised on this appeal will be set forth below.

STANDARD OF REVIEW

¶3 Child support and property division determinations lie within the trial court's discretion. *Abitz v. Abitz*, 155 Wis. 2d 161, 174, 455 N.W.2d 609 (1990); *Long v. Long*, 196 Wis. 2d 691, 695, 539 N.W.2d 462 (Ct. App. 1995). A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. *Burkes v. Hales*, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991). Conversely, a trial court misuses its discretion when it fails to consider legally relevant factors or acts based upon mistaken facts or an erroneous view of the law. *Duffy v. Duffy*, 132 Wis. 2d 340, 343, 392 N.W.2d 115 (Ct. App. 1986).

DISCUSSION

Child Support

¶4 After noting that Michele would have about two-thirds of the overnight placements, while Eric would have about one-third, and that both parties would be directly responsible for day-to-day expenses, the court stated that strict application of the child support standards would be inappropriate. The trial court proceeded to set a weekly child support award of \$182 by calculating Michele's support obligation at \$40 per week (based on 25% of Michele's imputed annual earning capacity of \$25,000, multiplied by one-third for Eric's placement, and divided by 52 weeks) and subtracting that amount from its calculation of Eric's support obligation at \$222 per week (based on 25% of Eric's estimated annual income of \$70,000 multiplied by two-thirds and divided by 52 weeks).

¶5 Michele first contends that the trial court erred in finding that she had an annual earning capacity of \$25,000. Michele produced an opinion from a vocational expert that her annual earning capacity at the time of the divorce was \$16,744. The expert further opined that, if Michele completed vocational training, she could improve her annual earning capacity to between \$21,320 and \$26,125. Eric did not produce any expert opinion as to Michele's earning capacity.

¶6 When determining child support, a trial court may appropriately consider a parent's earning capacity, based on education, training, work experience and availability of work. WIS. STAT. § 767.25(1m)(hs) (2001-02);¹

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

WIS. ADMIN. CODE § DWD 40.03(3). While a significant improvement in a parent's earning capacity after a divorce could provide grounds for a modification of child support, we agree with Michele that earning capacity must be determined as of the date the child support order is being entered. Here, it appears the trial court made its finding in anticipation of Michele completing additional vocational training. We find no support in the record for a finding that Michele could currently earn \$25,000 per year.

¶7 Michele also complains that the trial court failed to apply the proper child support guideline for shared placement payers under WIS. ADMIN. CODE § DWD 40.04(2)(b). Because we are already reversing on other grounds and a new version of the guideline has taken effect since the trial court made its initial determination, we do not address the specifics of Michele's argument. *See* Wis. Admin. Reg. December 2003 No. 576 (eff. Jan. 1, 2004). We briefly note, however, that if the trial court does decide to again deviate from the administrative guidelines on remand, it must first state in writing the amount which would be required under the percentage standard for a shared time payer, the reason why the percentage amount would be unfair to the child or the requesting party, the amount by which the court's award deviates from that amount, the basis for calculating the amount of the award and the reason for the amount of the deviation. WIS. STAT. § 767.25(1n).

Property Division

¶8 Michele's only complaint with respect to the property division is that the trial court erred in assigning an outdated value of \$56,808 to Eric's 401(k) plan, rather than a more current value of \$81,668, as provided in Eric's updated Financial Disclosure Statement filed on the day of the divorce hearing and confirmed by his testimony. Eric contends that Michele waived any right to claim the higher valuation by not explicitly requesting that the court accept the higher value. Given that Michele cross-examined Eric about the more current value, however, we are not persuaded by Eric's waiver argument. We further agree with Michele that there was no dispute in the record about what the most current value of the 401(k) plan was. We therefore conclude that the trial court's use of the outdated value was clearly erroneous. Upon remand, the trial court should recalculate the property division based on a valuation for the 401(k) of \$81,668.²

¶9 The dissolution of the marriage, maintenance and custodial arrangements shall remain in effect.

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

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

² We note that Michele failed to call this error in the property division award to the trial court's attention before raising the issue on appeal. Generally, when a trial court includes a wrong number or makes a computational error in an order or judgment, the matter may be more efficiently corrected with a motion to that court as opposed to an appeal to this one.

