COURT OF APPEALS
DECISION
DATED AND FILED

January 27, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2930 **Cir. Ct. No. 2007FA853**

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

IN RE THE MARRIAGE OF:

KIYOMI BRYSON,

PETITIONER-RESPONDENT,

V.

NEAL W. BRYSON,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Judgment modified and, as modified, affirmed.*

Before Brown, C.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Neal Bryson appeals from a judgment of divorce from Kiyomi Bryson. He challenges the inclusion of military disability annuity

payments in his gross income, the failure to include a bank account Kiyomi brought to the marriage in the property division, the valuation of certain real property, the inclusion of monies gifted to his parents in the property division, and the correction of the judgment after entry. We modify the judgment with respect to the premarital bank account, but otherwise conclude that the circuit court's remaining findings are not clearly erroneous and that it properly exercised its discretion. We affirm the modified judgment.

¶2 Kiyomi and Neal were married seventeen years and have two minor children, ages fifteen and ten at the time of the divorce judgment. They agreed to joint custody and shared physical placement of the children. The circuit court drafted the findings of fact, conclusions of law and judgment, which carefully and thoroughly addressed the disputed issues and the applicable statutory factors on both maintenance and property division. An equal division of the martial property was made with the equalization payment of $32,990 to Kiyomi. The circuit court found that Neal's annual earning capacity is $88,000 and, with the addition of military disability annuity payments, his total annual income capacity is $98,400. The circuit court found that Kiyomi's annual earning capacity is $28,000. Neal was ordered to pay maintenance of $1500 per month for an indefinite period and child support of $1100 per month.

¶3 Neal first argues that his military disability annuity payments should not be included in his gross income for the purpose of calculating child support and maintenance. The circuit court's determination of income is a finding of fact which we will not set aside unless clearly erroneous. ***DeLaMatter v. DeLaMatter***, 151 Wis. 2d 576, 588, 445 N.W.2d 676 (Ct. App. 1989). However, to the extent that a party claims error stemming from the circuit court's allegedly erroneous view of the law, we will consider the legal question de novo. *See* ***Gohde v.***

Gohde, 181 Wis. 2d 770, 774, 512 N.W.2d 199 (Ct. App. 1993) (whether the circuit court misapplied the administrative code provision defining income presents a question of law which we review de novo).

¶4 We reject Neal's contention that because his military disability annuity payments are not included in his federal taxable income, they are not included in his income for maintenance and child support purposes. The Internal Revenue Code does not control, and Neal cites nothing in support of his suggestion that it does. For child support purposes, under WIS. ADMIN. CODE § DCF 150.02(13)4, 10, gross income includes "[n]et proceeds resulting from worker's compensation or other personal injury awards intended to replace income," and "[a]ll other income, whether taxable or not."

¶5 Neal argues that his disability payments are not income replacement but are to pay for continuing medical treatment he needs to address his military service related injury.[1] The circuit court found that Neal's disability payments were income replacement. The finding is consistent with the recognition in ***Leighton v. Leighton***, 81 Wis. 2d 620, 636, 261 N.W.2d 457 (1977), that "[t]he disability allowance is a federally-provided replacement for earning capacity lost by reason of injuries sustained while in military service" and relevant to a determination of maintenance. *See also* ***Weberg v. Weberg***, 158 Wis. 2d 540, 543-44, 463 N.W.2d 382 (Ct. App. 1990) (***Leighton*** controls and makes federal military disability payments relevant to the maintenance determination). Additionally, because the disability payment is based on a scheduled rate for a

[1] In 1992, while in the military, Neal was involved in a car accident caused by a retired Navy captain. The accident severely injured his shoulder and caused permanent nerve damage and chronic pain.

person, like Neal, with a twenty percent disability rating, it is not tailored to Neal's specific future medical needs. Neal is entitled to and does receive treatment from the Veteran's Administration. Neal did not establish that the military designated his disability payments for medical treatment. Thus, the circuit court's finding that the payments were income replacement is not clearly erroneous and it properly included the disability annuity payments in Neal's gross income.

¶6 Neal also challenges the imputation of income to him. Neal earns $76,000 annually at his present job. However, prior to the filing of the divorce action, Neal was earning $88,000 annually with another employer. Neal voluntarily quit that job at the end of May 2007 in anticipation of his plan to move the family to Evansville, Indiana, in the summer of 2007 to be closer to his parents. The circuit court found that at the time Neal terminated his employment, he did not have another job lined up and the move was not imminent. The circuit court noted Neal's testimony that he quit his job in advance of the move because he had never really had a vacation. For over four months Neal utilized family savings to support the family.

¶7 The imputation of income reflects the circuit court's finding that Neal was shirking, that is, his decision to quit his $88,000 a year job was voluntary and unreasonable under the circumstances. *See* ***Chen v. Warner***, 2005 WI 55, ¶20, 280 Wis. 2d 344, 695 N.W.2d 758. We review reasonableness as a question of law, but in these circumstances we must pay appropriate deference to the circuit court's determination because it is intertwined with the facts. ***Id.***, ¶43. The circuit court is the arbiter of the weight and credibility of the evidence and we must accept the inferences it draws from the evidence. ***Daniel R.C. v. Waukesha County***, 181 Wis. 2d 146, 161, 510 N.W.2d 746 (Ct. App. 1993).

¶8 Neal argues that his decision to quit his job was ethically and morally sound as it was motivated by a desire to be able to assist his aging parents and not objected to by Kiyomi until she filed this action. He also points out that upon abandoning the plan to move, he found employment paying him $76,000 annually. Shirking does not require a finding the obligor reduced his or her earnings for the purposes of avoiding a child support or maintenance obligation. ***Chen***, 280 Wis. 2d 344, ¶¶20, 54. "When a parent's change in financial circumstances is initially nonvolitional, there should be positive evidence of his or her bad faith in failing to recover financially unless the trial court can find that the parent's explanation or circumstances are inherently improbable or the parent's veracity is discredited." ***Wallen v. Wallen***, 139 Wis. 2d 217, 226, 407 N.W.2d 293 (Ct. App. 1987). We accept that there is not evidence that Neal failed to recover financially. However, the circuit court found Neal's explanation of the circumstances, particularly his choice to quit a good job without first securing another one, his choice to live off family savings, and his testimony that it was a "family decision" to move, inherently improbable. It found Neal's veracity discredited and specifically found Kiyomi's testimony that Neal unilaterally decided to quit his job and move the family to be more credible. Taking into account this credibility finding, the determination that Neal unreasonably reduced his income is not an error of law. It was not error to base the child support and maintenance determination on the imputed income amount.

¶9 Kiyomi's financial disclosure statement listed a solely held savings account at a Japanese bank with a balance of approximately $8000 as property owned prior to the marriage. The circuit court rejected Neal's contention that the bank account was funded with marital income that Kiyomi hid in their house and then took to Japan. It specifically stated that Neal presented no credible evidence

that the account received marital income. It found the account to have nominal value and assigned a zero value to it in determining the equal division of marital property. Neal challenges the circuit court's finding that the account had no value. We agree that the finding is clearly erroneous because Kiyomi herself admitted that the account was worth $8000. Eight thousand dollars is not a nominal amount when one of the property items in dispute was gifts to Neal's parents of $9500. To support a higher valuation, Neal offers nothing more than his own testimony that Kiyomi hid money in their house and his belief that she took the money to Japan and deposited it in the bank there. The circuit court specifically rejected Neal's proof of a higher value. When a finding of fact is premised on the court's assessment of the competing credibility of the parties, we must give due regard to the circuit court's opportunity to make this assessment. ***Jacquart v. Jacquart***, 183 Wis. 2d 372, 386, 515 N.W.2d 539 (Ct. App. 1994).

¶10 Neal argues that even as property brought to the marriage and kept separate during the marriage, the Japanese bank account was property subject to division under WIS. STAT. § 767.61(3) (2007-08).[2] Kiyomi does not respond to this claim in her respondent's brief, and we deem her to concede that the Japanese account, valued by her at $8000, should have been part of the balancing equation in the equal division of property.[3] *See* ***Charolais Breeding Ranches, Ltd. v. FPC***

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

[3] The circuit court suggests the account was funded by money gifted to Kiyomi from her father. However, that finding is clearly erroneous. Kiyomi testified that the money represented savings she accumulated while working before the marriage and living with her parents. She indicated she never added to the account after the marriage. She also indicated that money gifted to her from her father when she visited Japan was converted to American currency and brought back for use by the family. There is no evidence to support a finding that the Japanese fund was gifted property not subject to division under WIS. STAT. § 767.61(2)(a)1.

Sec. Corp., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (that which is not refuted is deemed conceded). We direct that the judgment of divorce be modified accordingly.

¶11 As part of the property division, Neal was awarded a twenty-acre parcel of vacant land adjoining his parents' property in Illinois and valued at $20,000. Neal contends that the assigned value is clearly erroneous. He points out that the property tax value is $3000, that the parties purchased the property for $14,000 based on sentiment, and that the property is not worth more than $5000 because it floods annually. This is nothing more than a challenge to a finding based on the circuit court's assessment of credibility. The circuit court specifically found that Neal's assertion of value was not credible. It does not matter that Kiyomi offered no opinion as to the value of the vacant parcel. The circuit court was free to reject Neal's opinion and determine value based on the purchase price and appreciation over ten years. There was no error in the value assigned to the vacant parcel in determining the equal division of property.

¶12 The circuit court added back to the marital estate two cash gifts totaling $9500 that Neal made to his parents in the six months preceding the commencement of this action. Neal contends the gifts were an agreed upon valid family expenditure to assist his parents with medical bills from his mother's October 2006 surgeries and to repair his father's truck so water and wood could be hauled and utilized by his parents. Again this is nothing more than a challenge to a finding based on the circuit court's assessment of credibility. The circuit court rejected Neal's explanation of the gifts and that both parties agreed to give the money away. WISCONSIN STAT. § 767.63 creates a rebuttal presumption that property given away within one year of the filing of an action affecting the family is subject to division. Because the circuit court rejected Neal's explanation, it

properly determined that the presumption had not been rebutted and included the cash gifts in the property division calculation.

¶13 After the circuit court drafted and entered its findings of facts, conclusions of law and judgment of divorce, Kiyomi wrote the court suggesting a mathematical error had been made in awarding Kiyomi only the first $16,495 from the proceeds of the sale of the house as an equalization payment. The circuit court entered an order correcting the judgment to reflect that Kiyomi was to receive the first $32,990 of sale proceeds to equalize the property division. Neal contends the circuit court erroneously exercised its discretion in correcting the judgment without giving him an opportunity to be heard on the matter. He submits that Kiyomi's letter requesting correction should have been treated as a motion for reconsideration under WIS. STAT. § 805.17(3)[4] and set for a hearing.

¶14 We are not persuaded that the circuit court was required to conduct a hearing on the request to correct a mathematical error. Although in ***Schinner v. Schinner***, 143 Wis. 2d 8, 93, 420 N.W.2d 381 (Ct. App. 1988), we characterized "mechanical" adjustments to correct manifest errors as falling under WIS. STAT. § 805.17(3), we did not establish any procedural requirements for hearing and deciding requested adjustments. We explained that manifest error "contemplates that self-evident kind of error which results from ordinary human failings due to oversight, omission, or miscalculation" which tends to immediately reveal itself as such to reasonable legal minds as distinguished from "those kinds of alleged errors

[4] WISCONSIN STAT. § 805.17(3), provides in part: "Upon its own motion or the motion of a party made not later than 20 days after entry of judgment, the court may amend its findings or conclusions or make additional findings or conclusions and may amend the judgment accordingly."

which lend themselves to legitimate legal debate and difference of opinion viewed from the standpoint of reasonable advocacy." ***Schenner***, 143 Wis. 2d at 92-93. There is no dispute that the circuit court intended an equal division of property. The type of error pointed out in Kiyomi's letter was mathematical only and did not require a hearing.[5] No change in the values of the marital estate was made.

¶15 Moreover, Neal's contention that he did not have an opportunity to be heard is disingenuous because he never objected to Kiyomi's proposed correction of the judgment. Her letter request was hand-delivered to the court on October 15, 2008. The order correcting the judgment was not entered until November 10, 2008. Having received no objection, the circuit court was not required to invite one. Even after entry of the order correcting the judgment, Neal did not object or raise a claim in the circuit court that he had been denied the opportunity to be heard on the correction.

¶16 In summary, we modify the judgment of divorce to reflect that Kiyomi is awarded additional martial property valued at $8000. The equalizing payment must be modified accordingly and the judgment should reflect that the first $24,990 of the proceeds from the sale of the home be paid to Kiyomi. As modified, we affirm the judgment of divorce. No costs to either party.

By the Court.—Judgment modified and, as modified, affirmed.

[5] The letter pointed out that the judgment required the first $16,495 of sale proceeds to be paid to Kiyomi and requested that the first $32,990 out of the sale proceeds be paid to Kiyomi. By way of explanation the letter stated: "I base this on the equity in the house being equal, if the first $16,495.00 was taken off the house, half of that amount was Ms. Bryson's to begin with and thus Mr. Bryson would only be paying her $8,247.50 which would not be an equal division as you have ordered."

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