COURT OF APPEALS
DECISION
DATED AND FILED

May 6, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2046 **Cir. Ct. No. 2012FA62**

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

IN RE THE MARRIAGE OF:

TABETHA A. DOWNS,

JOINT-PETITIONER-APPELLANT,

V.

MICHAEL C. DOWNS,

JOINT-PETITIONER-RESPONDENT.

APPEAL from a judgment of the circuit court for Winnebago County: DANIEL J. BISSETT, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Tabetha Downs appeals from the judgment divorcing her from Michael Downs. On appeal, she challenges the inclusion of a debt to Michael's stepfather in the marital estate and complains that the property

division did not take into account that Michael failed to make monthly mortgage payments which led to a loss of home equity. We are not persuaded that the circuit court erred. We affirm.

¶2 Tabetha testified that the funds received from Allan Kahl, Michael's stepfather, were a gift, not a loan. Some of the Kahl funds ended up in her bank account, but she never signed a promissory note and no repayment terms or interest rate were expressed to her. Tabetha commenced a bankruptcy case and listed an "alleged" and disputed $100,000 unsecured debt to Kahl in her bankruptcy schedules.

¶3 Kahl testified that he and Tabetha had discussed funds Kahl lent to her and Michael. Over time, Kahl lent them $104,122. Kahl and Tabetha discussed interest on certain of the funds lent by Kahl, and Tabetha was aware that Kahl was lending the family funds as needed. Kahl did not ask for a promissory note because he did not think he needed to document the family-based transactions.

¶4 Michael testified that Tabetha was aware of the funds lent by Kahl. The funds were loans, not gifts.

¶5 The circuit court found Kahl's testimony credible, that Kahl made a number of payments to the parties, and that those payments were loans, not gifts. The court found that Kahl and the parties intended for the funds to be repaid, even if the parties did not execute promissory notes.[1] The court reviewed the list of

[1] The circuit court excluded from marital debt a November 2007, $42,000 payment Kahl made to Michael's business, Timberland Builders, because Tabetha had limited involvement in and knowledge of Michael's business.

payments made by Kahl and determined that of those payments, $54,974 constituted marital debt to be considered in the property division.

¶6 On appeal, Tabetha does not contest the amount owed to Kahl. Rather, she argues that all funds provided by Kahl were gifts, not loans. This argument fails for two reasons. First, Tabetha took this position in the circuit court, and Kahl and Michael took the opposite position. The circuit court specifically found credible Kahl's testimony that the funds were lent, not gifted. As the finder of fact, the circuit court was charged with assessing the credibility of the witnesses at that hearing. ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345.

¶7 Second, Tabetha relies upon ***Rohde v. Skomski***, 8 Wis. 2d 50, 51, 98 N.W.2d 440 (1959), to argue that when parents transfer money to children without qualification or explanation, such a transfer creates a rebuttable presumption that the funds were a gift, not a loan. In this case, the circuit court found Kahl credible when he testified that the funds were a loan, not a gift. At a minimum, the ***Rohde*** presumption, if it applies to this case, was rebutted.[2]

¶8 In her reply brief, Tabetha argues that there was no evidence that the Kahl funds were used for a marital purpose. Tabetha did not make this argument in the circuit court. We will not consider this argument for the first time on appeal. ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983).

[2] Michael argues that Tabetha bore the burden to show that the Kahl funds were actually a gift that should have been excluded from the marital estate for purposes of property division. ***Wright v. Wright***, 2008 WI App 21, ¶9, 307 Wis. 2d 156, 747 N.W.2d 690 (2007). Our answer to the gift versus loan question is the same under this law. Because the circuit court did not find credible Tabetha's testimony that Kahl's funds were a gift, she did not meet her burden to show that the Kahl funds should be excluded from the property division.

¶9 In light of the circuit court's credibility determinations, we conclude that the court did not misuse its discretion when it included the Kahl debt in the property division. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789.

¶10 Tabetha next argues that the circuit court should have applied WIS. STAT. § 767.63 (2013-14)[3] principles of waste to include home equity in the property division because Michael failed to make monthly mortgage payments during the divorce. The circuit court excluded home equity from the property division because the mortgage was delinquent before the divorce case began. The court held both parties responsible for failing to make mortgage payments during the marriage, leading to foreclosure and sale of the home.

¶11 It is undisputed that an interim order entered early in the divorce proceedings obligated Michael to make the mortgage payments. It is further undisputed that at the time of the interim order, the mortgage payments were delinquent. However, Tabetha has not established that the circuit court's finding that the mortgage was delinquent before the divorce case began is clearly erroneous. WIS. STAT. § 805.17(2). The equity in the home was in jeopardy before the divorce

[3] WISCONSIN STAT. § 767.63 provides in pertinent part:

> In an action affecting the family … any asset with a fair market value of $500 or more that would be considered part of the estate of either or both of the parties … and that was … wasted … within one year prior to the filing of the petition … is rebuttably presumed to be property subject to division.

All references to the Wisconsin Statutes are to the 2013-14 version.

case was filed in January 2012,[4] and the property was lost in foreclosure in November 2013. The circuit court found that both parties were responsible for failing to make mortgage payments during the marriage. The circuit court did not misuse its discretion when it declined to include allegedly wasted home equity in the property division.

By the Court.—Judgment affirmed.

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

[4] The circuit court docket entries in ***Nationstar Mortgage v. Downs***, Winnebago county circuit court case No. 2012CV1754, indicate that the foreclosure action was filed in December 2012, the default judgment of foreclosure was entered in April 2013, and the foreclose sale was confirmed in November 2013.