

LEXSEE 2000 FLA. APP. LEXIS 15448

SANDY M. WEISER, Appellant, v. JOAN P. WEISER, Appellee.

CASE NOS. 4D99-4057 and 4D00-311

COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

2000 Fla. App. LEXIS 15448; 25 Fla. L. Weekly D 2735

November 29, 2000, Opinion Filed

NOTICE:

[*1] NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

PRIOR HISTORY: Consolidated appeals from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Thomas H. Barkdull, III, Judge; L.T. Case No. CD98-5410 FA.

DISPOSITION: Reversed and remanded.

COUNSEL: George E. Gelb of Kramer, Ali, Fleck, Carothers, Hughes & Gelb, Jupiter, for appellant.

Matthew S. Nugent of Law Office of Matthew S. Nugent, West Palm Beach, for appellee.

JUDGES: LENDERMAN, JOHN C., Associate Judge. WARNER, C.J., and TAYLOR, J., concur.

OPINION BY: JOHN C. LENDERMAN

OPINION

LENDERMAN, JOHN C., Associate Judge.

The former husband appeals a final judgment that (1) divided marital property and debts; (2) awarded the wife permanent alimony; (3) awarded child support; and (4) awarded attorney's fees. We conclude that the court's plan of equitable distribution pursuant to *section 61.075, Florida Statutes* (1999), is without error. However, we find that the record does not support the trial court's findings as to the husband's income, which formed the basis for the awards of alimony, child support, and attorney's fees.

This was a marriage of nineteen years with two minor sons, ages 15 and 13. [*2] The trial court properly determined that the wife was entitled to alimony and child support. The trial court found that the husband's historical *net* past and future predicted income is \$ 10,000.00 per month supplemented by \$ 2,000.00 monthly gifts from his family. The trial court thus found the husband's net monthly income for the purposes of calculating child support to be \$ 12,000.00. The court declined to impute income to the wife based upon the parties' agreement that she would be a stay-at-home mother during the children's minority.

Based upon these findings, the trial court awarded the wife \$ 4,000.00 per month alimony until the parties' youngest child reaches the age of 18 years or graduates from

high school. At that time, the alimony would be reduced to \$ 2,500.00 monthly permanent alimony. The court also ordered the husband to pay the wife child support and attorney's fees.

Husband's Income

The trial court concluded that the husband's historical past and future predictable net monthly income after the deduction of federal withholding, self-employment taxes, social security and medicare was \$ 10,000.00 per month. This calculation of average net monthly income [*3] from employment is apparently based upon the pre-dissolution IRS filing status of an intact family. From the record, we cannot conclude whether the parties or trial court intended the \$ 4,000.00 monthly alimony to be taxable to the wife and excluded from the husband's income. If the husband's taxable income excludes the paid alimony, his taxes are reduced by his marginal tax rate percentage. This may be as much as \$ 1,560 (39%). Additionally, the shifting of income to the wife may have adverse taxable consequences to her. If this was the trial court's intention, the incomes of the parties must be recalculated considering the parties' income tax liability to arrive at their respective net incomes. See *Brock v. Brock*, 690 So. 2d 737 (Fla. 5th DCA 1997); *Nicewonder v. Nicewonder*, 602 So. 2d 1354 (Fla. 1st DCA 1992).

Annual Gifts to Husband

The trial court found that the husband had a monthly gift income of \$ 2,000.00 from his parents. This gift income has been historically utilized for family support. The court improperly included the \$ 2,000.00 monthly gift income in the husband's available monthly income when calculating the child [*4] support. Available monthly income for child support purposes is defined in *section 61.30(2)(a), Florida Statutes* (1999). The

statutory definition does not include the \$ 2,000.00 monthly tax-free gift from the husband's parents. However, it was within the trial court's discretion to include the \$ 2,000.00 gift for the purposes of calculating income for alimony. See *Ordini v. Ordini*, 701 So. 2d 663 (Fla. 4th DCA 1997).

Automatic Reduction of Alimony

The final judgment automatically reduces the permanent alimony from \$ 4,000.00 per month to \$ 2,500.00 when the youngest child reaches the age of 18 or graduates from high school. ¹ The husband correctly argues that the automatic reduction of permanent alimony is impermissible. He cites to *Loss v. Loss*, 714 So. 2d 1093, 1094 (Fla. 4th DCA 1998), where we previously held:

1 If the parties and the court considered the shifting of income between the parties for favorable tax consequences, the automatic reduction of alimony from \$ 4,000.00 to \$ 2,500.00 upon the youngest child reaching the age of majority may not satisfy the requirements of *I.R.C. § 71*. See also Melvyn B. Frumkes, *Is It Alimony as Defined in I.R.C. § 71? Common Errors as to Whether a Stream of Payments Are Taxable/Deductible*, FLA. BAR J., Oct. 2000, at 76.

[*5]

Generally, it is error to provide for an automatic, future change or termination of alimony based upon the anticipated occurrence of a future event. See *Hitt v. Hitt*, 571 So. 2d 79 (Fla. 4th DCA 1990); *Davidson v. Davidson*, 410 So. 2d 943 (Fla. 4th DCA 1982). However, we also recognized in *Hitt* that such an automatic reduction would not be improper where the evidence supports a finding that the *receiving spouse's* financial position will *in fact* change in the future.

In Loss, the mortgage encumbering the marital home was to be paid off at a certain date. *Id.* The alimony reduction coincided with the last payment on the mortgage. *Id.*

In this case there was no evidence before the trial court from which it could determine whether the wife would, in fact, be employed or the husband would continue to have earnings at the current level in five years when the youngest child reaches the age of majority. Accordingly, we reverse on this issue. If there is a later change of circumstance, the issue may be addressed at a modification proceeding pursuant to *section 61.14(1)(a), Florida Statutes* (1999).

[*6]

Conclusion

The judgment is affirmed on issues of parental responsibility, dissolution of the marriage and equitable distribution. We reverse and remand to the trial court for findings consistent with this opinion on the issues of the spendable income. Once the trial court considers tax consequences when determining spendable income, it may decide to redetermine alimony and child support. After the trial court re-evaluates the parties' need and ability as well as their financial resources, the trial court must also reconsider the issue of attorney's fees.

Reversed and remanded.

WARNER, C.J., and TAYLOR, J., concur.