COURT OF APPEALS
DECISION
DATED AND FILED

April 7, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 97-3490
98-0936

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

IN RE THE MARRIAGE OF:

JAY R. SORENSEN,

PETITIONER-APPELLANT,

V.

TERI LYNN SCHNORR-SORENSEN,

RESPONDENT-RESPONDENT.

APPEALS from a judgment and an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Jay R. Sorensen appeals from the property division in the judgment divorcing him from Teri Lynn Schnorr-Sorensen. He also appeals from an order denying his motion for relief under § 806.07, STATS. Jay claims

that the debt allocation between the nonmarital and marital estate was not fully tried. We conclude that the property division is based on the reasonable inferences from the evidence presented to the circuit court at the trial and that the later discovery of a different method of proof does not justify relief under § 806.07. We affirm the judgment and the order.

After a marriage of six years, Jay and Teri were divorced in October 1997. Jay is a grain farmer and brought substantial property to the marriage associated with the farm. A postnuptial agreement between the parties classified three parcels of land, including any related appreciation, debt repayment or exchange, as Jay's individual property. The net marital estate was found to be $432,921.65. After the division of assets and liabilities, Jay was required to make an equalization payment to Teri in the amount of $155,292.55. As a result of postjudgment motions, an adjustment was made for a $5000 ring awarded to Teri.

Jay was awarded all "farm equipment, inventory or supplies which are used in his farming business operations" and assigned loans associated with his farming business operations from the Farm Credit Services (FCS) institution. The trial court found that the liability to FCS offset the value of farm business assets and no specific value was assigned to those assets or liabilities. Jay contends that many marital assets were purchased through loans drawn on the farm's line of credit with FCS and that portions of the FCS debt should be assigned to the corresponding marital assets. He argues that the trial court's failure to apportion outstanding indebtedness to marital assets resulted in the overstatement of the net marital estate and an excessive equalization payment.

The valuation of a particular marital asset is a finding of fact which we will not upset unless clearly erroneous. *See* ***Liddle v. Liddle***, 140 Wis.2d 132,

136, 410 N.W.2d 196, 198 (Ct. App. 1987); § 805.17(2), STATS. For purposes of appellate review, the evidence supporting the court's findings need not constitute the great weight and clear preponderance of the evidence; reversal is not required if there is evidence to support a contrary finding. *See* ***Bank of Sun Prairie v. Opstein***, 86 Wis.2d 669, 676, 273 N.W.2d 279, 282 (1979). Rather, the evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence. *See* ***id.*** In addition, the trial court is the ultimate arbiter of the witnesses' credibility when it acts as the fact finder and there is conflicting testimony. *See* ***id.*** We accept the inference drawn by the trier of fact when more than one reasonable inference can be drawn from the evidence. *See* ***id.***

Jay makes little or no effort to argue that the trial court's findings were clearly erroneous based on the evidence presented at the divorce trial. Rather, he jumps right to the proof he offered in support of his postjudgment motion for a new trial and relief from the judgment. We must first consider separately the evidence presented at the divorce trial and determine if it supports the trial court's findings in the judgment of divorce. In doing so we need only look at those portions of the trial testimony for which the parties supply a record citation. *See* ***Keplin v. Hardware Mut. Cas. Co.***, 24 Wis.2d 319, 324, 129 N.W.2d 321, 323 (1964) (appellate court not required to sift the record for facts that might support an appellant's contentions).

Jay testified at trial that the purchase of several marital assets was financed by the farm's line of credit: 1991 building of the parties' home ($144,066.15 building expenditures less $110,000 repaid by home mortgage); 1993 purchase of Wilkomm farm (down payment of $76,559); May 1995 purchase of Dodge Stealth ($28,487 purchase price); and June 1995 purchase of

Abraham Lincoln silver sculpture ($30,175 purchase price).[1] However, he indicated that up until 1995, the sale of his crop was sufficient to annually pay off the operating loans. Jay did not offer evidence as to the balance of the operating loan in the years which he failed to "zero it out" or the amount of income from crop sales for those years.

Jay relied on a balance sheet approach to the valuation of farm-related assets and liabilities—a blending of values that did not lend itself to individualization of debt to a particular asset. The trial court found Jay's listing of certain business assets to be "generally vague and nondescript" and acknowledged difficulty in assigning values based on the proof offered. It found Jay's testimony and credibility as to his financial dealings "suspect."

We conclude that it was a reasonable inference from the evidence that the farm assets and liabilities balanced each other out. The trial court's finding is not clearly erroneous.[2] Jay cannot be heard to complain after the trial that the trial court should have sua sponte required the parties to submit further evidence. "A party who carries a burden of proof cannot leave the family court in an evidentiary vacuum and then complain about the lack of evidence on appeal." ***Haeuser v. Haeuser***, 200 Wis.2d 750, 765, 548 N.W.2d 535, 542 (Ct. App. 1996).

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[1] Jay claims that the February 1996 computer purchase was made from the farm operating account. His testimony at trial did not reflect the source of the funds. The same is true with respect to an account receivable generated by a $40,000 loan to family friends. At trial, Jay did not testify as to the source of the money for the loan.

[2] Citing to ***Rodak v. Rodak***, 150 Wis.2d 624, 634, 442 N.W.2d 489, 493-94 (Ct. App. 1989), Jay argues that a "manifest error" occurred because the trial court failed to consider debts arising from the purchase of marital assets. ***Rodak*** is inapposite. In ***Rodak***, the trial court's decision was silent as to the parties' debts. *See* ***id.*** Here, the trial court made a specific finding that the debt counterbalanced certain assets and the net effect on the marital estate was, therefore, zero.

Thirty days after the judgment of divorce was entered, Jay moved the trial court pursuant to § 806.07(1)(h), STATS., to reopen and reconsider the judgment. He alleged that the trial court's failure to recognize that a substantial amount of marital debt was rolled into the farm operation debt resulted in an unequal property division. Shortly after the filing of this motion, Jay changed attorneys. A new motion for relief was filed, supported by a lengthy memorandum brief and the affidavits of thirteen people.

Motions under § 806.07, STATS., are addressed to the sound discretion of the circuit court. *See* ***Eau Claire County v. Employers Ins.,*** 146 Wis.2d 101, 109, 430 N.W.2d 579, 582 (Ct. App. 1988). We will not disturb this discretionary determination unless there is a misuse of discretion. *See* ***id.*** The trial court denied Jay's motion. It acknowledged that at the time the judgment was entered, it was aware that some of the farm debt would impact certain marital assets. However, it explained that it acted on the proof before it. The trial court refused to grant relief for the mere purpose of presenting the same information in a different fashion.

We need not deliberate long over Jay's request for relief from the judgment under § 806.07, STATS., for it appears to be nothing more than a belated attempt to make the proof that should have been made at trial. Indeed, Jay admitted to the trial court that the affidavits did not present material that could be characterized as newly discovered evidence. Jay simply contends that he now has a different way to present evidence on the asset and liability issues.[3] Further, Jay

[3] Jay claims on appeal that he is entitled to relief under § 806.07(1)(a), STATS., because through mistake and inadvertence he failed to offer evidence at trial about the hours of labor his father gifted to Jay during the marriage. Not only was this claim not specifically argued in the trial court, it falls into the category of issues on which Jay has merely found a new angle.

argues that extraordinary circumstances exist to grant relief from the judgment because of the "size of the errors and waiver which occurred as a result of … ineffective assistance of trial counsel." Section 806.07 is not the proper vehicle for seeking relief due to divorce counsel's allegedly deficient representation.[4] Further, it is not a vehicle for "Monday-morning quarterbacking." *See* ***Lee v. State***, 65 Wis.2d 648, 657-58, 223 N.W.2d 455, 459-60 (1974). The trial court properly exercised its discretion in determining that no extraordinary circumstances justified relief from the judgment.[5]

Jay argues that the trial court erred by failing to add to Teri's assets a $1000 account receivable created by a loan to a family friend. There was evidence at trial that Teri made the loan and expected the family friend to repay it. Even assuming an erroneous omission by the trial court,[6] it is the type of manifest error which should have been addressed by a timely motion under § 805.17(3), STATS. Jay's motion for relief from the judgment was not timely to correct such a manifest error and constitutes a waiver of the right to have the issue considered on appeal. *See* ***Schinner v. Schinner***, 143 Wis.2d 81, 93, 420 N.W.2d 381, 386 (Ct. App. 1988).

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[4] In ***Village of Big Bend v. Anderson***, 103 Wis.2d 403, 404, 308 N.W.2d 887, 888 (Ct. App. 1981), we held that a party in a civil case who alleges poor performance by trial counsel has a remedy by way of an action for legal malpractice against counsel, not by reversal of the adverse judgment, which would be a remedy against the opposing party. Although the discussion in ***Village of Big Bend*** acknowledges the possibility of seeking relief under § 806.07, STATS., due to trial counsel's deficient representation, the rationale behind ***Village of Big Bend*** is that an innocent opposing party should not bear the burden of a new trial because the other party's lawyer was ineffective. The facts must be so unconscionable that the interests of justice demand overriding the ***Village of Big Bend*** policy.

[5] In light of our conclusion that the trial court's findings are not clearly erroneous, we are not convinced that the real controversy was not fully tried. We reject Jay's request for a new trial under § 752.35, STATS.

[6] Teri does not respond to this argument in her respondent's brief.

We reject Teri's request for an award of attorney's fees and costs for a frivolous appeal under RULE 809.25(3), STATS. We are not satisfied that the appeal was frivolous. While the result seems to us to be plainly indicated, rejection of an appeal is not the test of frivolousness under the statute. *See* ***Swartwout v. Bilsie***, 100 Wis.2d 342, 350, 302 N.W.2d 508, 514 (Ct. App. 1981). We cannot say that it was unreasonable for Jay to test the legal sufficiency of his claims.

By the Court.—Judgment and order affirmed.

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