

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-2485

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

LYNN A. SOTO,

PETITIONER-RESPONDENT,

v.

JOSE A. SOTO,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County:
DANIEL W. KLOSSNER, Judge. *Affirmed.*

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

PER CURIAM. Jose Soto appeals a divorce judgment. He contends that the trial court erroneously exercised its discretion by awarding Lynn Soto a one-half interest in his pre-marital retirement annuity, and by freezing his one-half interest in the annuity to pay for Lynn's and their minor child's health

insurance in the event Jose was incarcerated. Jose further contends that the trial court erred as a matter of law by improperly basing this award on Jose's marital misconduct. We conclude that the trial court properly exercised its discretion and that its determination was not based on Jose's marital misconduct. Accordingly, we affirm the divorce judgment.

Jose and Lynn Soto were married for approximately five years. One child was born during the marriage, and Lynn also had a daughter not of the marriage. Jose was criminally charged with two counts of first-degree sexual assault of a child for incidents involving Lynn's daughter. Jose pled guilty to those two counts prior to the divorce hearing. Despite training in family care management, Lynn was unable to work as a child care provider because she lost her license as a result of her daughter's subsequent placement in foster care. She was unsuccessful, despite substantial efforts, in finding employment. In addition, Lynn's ability to work was hampered by the need to attend court-ordered therapy with her daughter, to participate in weekly visitation with her daughter, to attend social service appointments, and to manage her own emotional problems associated with her daughter's assault.

Jose incurred substantial legal fees for his criminal defense. He paid these fees by liquidating marital assets. Jose owned several pre-marital retirement accounts, which were not commingled with marital assets during the marriage. Prior to the marriage, he withdrew some money from one of the accounts. As a result, a \$20,000 tax liability accrued during the course of the marriage for which both Jose and Lynn were responsible. Jose and Lynn paid this liability using their income and loans. Through their collective efforts, approximately \$13,000 of the liability was paid off at the time of the final divorce hearing.

Prior to the final divorce hearing, the parties reached a partial marital settlement agreement. Under the terms of the agreement, Jose would be responsible for providing child support for their minor child and health insurance for both Lynn and their minor child for eighteen months following the date of divorce. Although it declined to order maintenance, the trial court awarded Lynn one-half of Jose's retirement annuity and froze Jose's one-half interest so that the health insurance payments could be paid in the event Jose was incarcerated on the criminal charges. It is these determinations which Jose challenges on appeal.

A property division in a divorce judgment rests within the trial court's sound discretion. See *Brandt v. Brandt*, 145 Wis.2d 394, 406, 427 N.W.2d 126, 130 (Ct. App. 1988). We will sustain the trial court's property division if the court has examined the relevant facts, applied the proper standard of law and, using a demonstrable rational process, reached a conclusion that a reasonable judge could reach. See *Liddle v. Liddle*, 140 Wis.2d 132, 136, 410 N.W.2d 196, 198 (Ct. App. 1987).

Jose challenges the court's equal division of the annuity, claiming that the court failed to consider the annuity's pre-marital character and the factors enumerated in § 767.255(3), STATS. Jose contends that the annuity's entirely pre-marital character, together with the lack of commingling, the marriage's short duration, the parties' ages, and their good health required the court to alter the presumption of equal division in Jose's favor.

The court relied in part on the fact that the parties had jointly paid the tax liability from marital funds. We reach the same result for different reasons. Pension plans relating to employment that span the date of marriage represent wealth accumulated before and during the marriage and are marital assets subject

to division under § 767.255(3), STATS. See *Rodak v. Rodak*, 150 Wis.2d 624, 630, 442 N.W.2d 489, 492 (Ct. App. 1989). The pre-marital component of the plan is considered property brought to the marriage, a factor that may be relevant in determining how the asset is divided. See *id.* In dividing a marital estate, courts begin with a presumption of equal division. See § 767.255(3), STATS. Consequently, Jose's pre-marital annuity is presumed to be divided equally between the parties. That equal division, however, may be altered based upon factors set forth in § 767.255(3).

Jose's contention that the trial court failed to consider the annuity's pre-marital character and § 767.255(3), STATS., factors for altering an equal distribution is without merit. The court considered factors such as the significant marital funds expended for Jose's defense, Lynn's inability to find gainful employment, Lynn's emotional health and expenses for counseling, the amount of attention required to manage her daughter's psychological problems, and the length of the marriage. Further, the court did, in fact, consider and recognize that the annuity was a pre-marital asset and that it had not been commingled with other marital property. Having considered these factors in their totality, the court, in its discretion, nevertheless awarded one-half of the annuity to Lynn. We conclude that the court examined the relevant facts, applied the proper standard of law and reached a conclusion that a reasonable judge could reach. See *Liddle*, 140 Wis.2d at 136, 410 N.W.2d at 198.

Jose also contends that the trial court misused its discretion because its award of one-half of the pre-marital annuity to Lynn constituted a spousal support award, after the court had specifically denied Lynn's maintenance request. That is, Jose contends that the trial court cannot use property division as an equitable means to award de facto maintenance. This contention is also without

merit because the annuity, as marital property, is subject to the presumption of equal division and we have concluded that the trial court properly exercised its discretion in dividing the annuity equally. *See Rodak*, 150 Wis.2d at 630, 442 N.W.2d at 492.

Jose next contends that the trial court misused its discretion by freezing his one-half interest in the annuity to ensure payment of the health insurance premiums for Lynn and their child, because it had already awarded Lynn a one-half interest in the annuity for her own and the child's support. In other words, according to Jose, the court "applied the same reasoning" in making both determinations, which was "an abuse of discretion." This contention also fails. The court expressly identified its reasons for freezing Jose's interest. The court stated that in the event Jose was incarcerated, the annuity would be used to pay for Lynn's and their minor child's health insurance. A trial court has authority to require a party to give sufficient security for payment of child support. *See* § 767.30(2), STATS. It has inherent discretion to order security for child support. *See Poehnelt v. Poehnelt*, 94 Wis.2d 640, 654, 289 N.W.2d 296, 302-03 (1980). Because this determination is discretionary, however, it must be based upon a rationale. *See Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

Jose, by the terms of the partial marital settlement agreement, agreed to pay for Lynn's and their minor child's health insurance. The trial court expressed its concern that Jose's possible incarceration would render him unable to fully meet his obligations. Anticipating Jose's potential inability to comply with the marital settlement agreement, the court fashioned a remedy available by statute, that would enable Jose to meet this obligation. We are satisfied that the court properly exercised its discretion.

Jose next contends that the trial court misused its discretion by failing to indicate whether, when dividing the annuity, it considered that Lynn was awarded more than fifty percent of the personal property. He also contends that the court erroneously penalized him by dividing the marital estate based upon the expenditure of marital assets to pay for his criminal defense. We conclude both contentions are meritless. In this instance, the annuity was presumed to be divided equally pursuant to § 767.255(3), STATS., and we have concluded that the trial court properly exercised its discretion in declining to alter that distribution. The weight and effect to be given various considerations which enter into dividing the marital estate, such as the personal property Lynn received, is for the trial court to determine. *See Fuerst v. Fuerst*, 93 Wis.2d 121, 131, 286 N.W.2d 861, 865 (Ct. App. 1979). Furthermore, although the court discussed the sizable expenditures made to support Jose's legal defense, Jose testified that he was willing to allow Lynn to keep all of the items of personal property in order to resolve the divorce. Jose cannot complain of being penalized when he agreed to this division of personal property. In sum, our examination of the trial court's decision reflects a proper exercise of its discretion.

Finally, Jose contends that the trial court erred as a matter of law by improperly assigning Lynn a one-half interest in Jose's annuity based on Jose's marital misconduct, specifically that Jose was alleged to have sexually molested Lynn's daughter. A trial court may not consider marital misconduct in dividing the marital estate. *See Anstutz v. Anstutz*, 112 Wis.2d 10, 13, 331 N.W.2d 844, 846 (Ct. App. 1983). Upon our review of the trial court's decision, we conclude that the trial court did not impermissibly punish Jose. The court did not engage in a punitive assessment against Jose. Instead, the court considered the derivative consequences of his conduct as they impacted on the relevant factors the court

must properly consider when dividing the marital estate. We conclude that the court's determination did not improperly rest on Jose's marital misconduct. Accordingly, we affirm the divorce judgment.

By the Court.—Judgment affirmed.

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

