

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 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. 99-0419

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

LUCY A. GOEBEL,

PETITIONER-RESPONDENT,

v.

HENRY S. GOEBEL,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Reversed and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., Peterson, J.

¶1 PER CURIAM. Henry Scott Goebel appeals a judgment of divorce and an order finding him in contempt for failing to meet the terms of the divorce

judgment. Because we conclude that the circuit court erroneously exercised its discretion by applying an incorrect legal standard in dividing property, we reverse the judgment and order and remand for further proceedings.

¶2 Henry and Lucy Goebel were married in 1990. Henry testified at trial that he and his mother purchased his tool business's property as equal partners at a sheriff's auction in 1978. Henry and his father initially operated the tool business together. After his father's death in 1985, Henry took full control of the business. Before Henry and Lucy's marriage, Henry signed a promissory note to his mother for \$174,000 for his share in the business real estate and inventory.

¶3 The trial court concluded that Henry owned business property and some stock that were not subject to division because Henry acquired them before the marriage. This left Henry with most of the property. Therefore, the court concluded that the equities in the case required a payment of \$50,000 from Henry to Lucy. The court also ordered Henry to pay maintenance of \$1,250 per month for a period of five years and to pay Lucy's attorney fees.

¶4 In its decision, the trial court discussed the stock that Henry had purchased prior to marriage. The court described the stock in the following manner: "As far as the stock is concerned it appears to the Court that is premarital stock. ... If it is not marital, it is not divisible by the Court unless it falls under the hardship exception." Further, in discussing Henry's business assets, the court wrote: "[Henry] brought most if not perhaps all of his business assets to the marriage along with the business debts. Based on this, it would appear that [Henry] has substantial assets that are not subject to division by the Court."

¶5 Henry did not make any of the payments ordered in the judgment. After a hearing in December of 1998, the court found Henry in contempt for

intentionally failing to meet the terms of the judgment with respect to the property division, maintenance and attorney fees.

¶6 Henry's first argument is that the trial court misstated the law concerning property division. Property division in a divorce judgment is within the trial court's sound discretion. *See Bahr v. Bahr*, 107 Wis.2d 72, 77, 318 N.W.2d 391, 395 (1982). A trial court's property division will be sustained if the court examines the relevant facts, applies a proper standard of law and, using a demonstrable rational process, reaches 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).

¶7 The only property that remains separate and not subject to division at divorce is property acquired before or during the marriage by gift or inheritance, or funds acquired from either. *See* § 767.255(2)(a), STATS. Inherited or gifted property under § 767.255(2)(a), may only be divided if the court finds that refusal to do so will create a hardship on the other party. *See* § 767.255(2)(b), STATS. All other property, whether acquired before or during the marriage, is property subject to the presumption of equal division. *See* § 767.255(3), STATS.¹

¹ Section 767.255(3), STATS., provides:

The court shall presume that all property not described in sub. (2) (a) is to be divided equally between the parties, but may alter this distribution without regard to marital misconduct after considering all of the following:

- (a) The length of the marriage.
- (b) The property brought to the marriage by each party.
- (c) Whether one of the parties has substantial assets not subject to division by the court.
- (d) The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.

(continued)

¶8 Henry argues that the trial court relied on an erroneous view of the law, namely, that property brought into marriage is not subject to division. Henry contends that he never claimed his property was gifted or inherited and the trial court made no such factual findings. Lucy does not respond to his arguments and, therefore, concedes they have merit. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979).²

¶9 Here, the court erroneously believed that all property brought into the marriage, property it termed “premarital,” is excluded from division unless the

(e) The age and physical and emotional health of the parties.

(f) The contribution by one party to the education, training or increased earning power of the other.

(g) The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.

(h) The desirability of awarding the family home or the right to live therein for a reasonable period to the party having physical placement for the greater period of time.

(i) The amount and duration of an order under s. 767.26 granting maintenance payments to either party, any order for periodic family support payments under s. 767.261 and whether the property division is in lieu of such payments.

(j) Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.

(k) The tax consequences to each party.

(l) Any written agreements made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable as to either party. The court shall presume any such agreement to be equitable as to both parties.

(m) Such other factors as the court may in each individual case determine to be relevant.

² While we do not normally address arguments that are not prejudicial to the party raising them, the interrelation between the property division and the trial court’s other determinations necessitates our consideration in this case.

hardship exception applies. Because the court did not apply the proper standard of law, we must reverse the property division. *See Liddle*, 140 Wis.2d at 136, 410 N.W.2d at 198.³

¶10 Furthermore, we conclude that the trial court's other determinations are so interrelated to the property division that they must also be remanded. The trial court relied on the "premarital" property as a significant factor in its maintenance decision, and in ordering Henry to pay Lucy's attorney fees. The court's primary consideration was the inequity in the parties' ability to pay, which, in turn, was at least partially due to the unequal property division.⁴

¶11 Finally, the order finding Henry in contempt is based on failure to comply with the judgment we have already determined must be reversed. Henry argues that we must reverse the contempt order upon reversal of the underlying divorce judgment. Lucy fails to respond to Henry's argument. Arguments to which no response is made may be deemed conceded for purposes of appeal. *See*

³ Property that the parties brought into the marriage is one factor a court may consider in determining whether to apply the statutory presumption of equal division. *See* § 767.255(3)(b), STATS. However, the court must first presume to divide property brought into the marriage, rather than presume to not divide it as the court did here.

⁴ We note that the trial court is required to make the following factual determinations before awarding attorney fees:

1. the spouse receiving the award needs the contribution;
2. the spouse ordered to pay has the ability to do so; and,
3. the total fee is reasonable (this provides guidance in determining what is a reasonable contribution).

Holbrook v. Holbrook, 103 Wis.2d 327, 343-44, 309 N.W.2d 343, 351 (Ct. App. 1981). With regard to the third factor, the trial court must first determine what the total fee actually is and, second, whether it is reasonable. *See id.* Neither of these considerations was addressed by the trial court in its memorandum decision.

Schlieper v. DNR, 188 Wis.2d 318, 322, 525 N.W.2d 99, 101 (Ct.App. 1994).
Therefore, the contempt order must also be reversed.⁵

By the Court.—Judgment and order reversed and cause remanded
with directions.

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

⁵ Henry alleges other errors related to specific factual findings. Those can be addressed to the trial court on remand.