

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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. 99-0513

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

LISA A. NOBLE,

PETITIONER-RESPONDENT,

v.

JOHN H. NOBLE,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Taylor County:
GARY L. CARLSON, Judge. *Reversed and cause remanded with directions.*

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

¶1 PER CURIAM. John Noble appeals his divorce judgment and challenges the property division. He argues that the trial court erroneously exercised its discretion when it found that his interest in a family trust constituted

a substantial nonmarital asset that justified departure from a presumed equal property division. Because the trial court's rationale does not support its determination, we reverse and remand for further proceedings.

¶2 John and Lisa Noble were married in 1981. John was employed throughout the marriage as a computer analyst and, at the time of the divorce, earned approximately \$50,000 annually. During the marriage, Lisa held occasional minimum wage employment. The parties had no children. At the time of the divorce, Lisa worked part-time and earned \$5.60 per hour. The court found that Lisa had a present earning capacity of \$12,000 per year.

¶3 The trial court awarded Lisa \$1,500 per month maintenance for three years. After three years, the monthly maintenance amount is to be reduced to \$1,000 and after three more years, to \$500. After three more years, it will terminate. The maintenance award is not challenged on appeal.

¶4 The trial court equally divided the parties' largest asset, John's retirement plan, which was worth \$145,885. The court awarded Lisa the home and land with marketable timber, worth in total \$86,105. The court assigned vehicles and other personal property and insurance policies and allocated debts. The net effect of the court's rulings was to award John \$104,540 and Lisa \$156,492 of the marital estate.

¶5 The trial court justified its unequal division by reasoning that John had substantial assets not subject to division. John owns a one-sixth interest in real estate known as the Levis Creek property; his one-sixth interest had a stipulated value of \$14,650. Also, John is a beneficiary of an irrevocable family trust established by his parents for estate planning purposes.

¶6 The trust is funded primarily with life insurance policies. The beneficiaries will receive their interest in the trust after both parents have died. The trust provides, however, that if a transfer to the trust is made, the children shall, within thirty days, have the right to withdraw their share of the transferred property. The court made no finding as to any present value of John's interest in the trust. John has not made any withdrawals from the trust.

¶7 The court explained its reasons for the unequal property division:

This is a 60/40 division of the marital estate. Normally in a marriage of this size or length, I would award a 50/50, but I am satisfied there are substantial nonmarital assets in this estate that are going to go to John. For example, there is his trust, the Noble trust. Now, you will note that I have not added any property to the property values here for the fact that although he had the authority to exercise a right to 1/6 of the amount put in by his parents, he chose not to do so, and he did that on all, I believe, four occasions when it was available to him, and had he taken the money out at that time and put it into an account, it would have become marital but he did not. It is there, but because it is still there, it is not income to him. It is not property that is subject to the marital estate. He has no control over the trust proceeds or the funds but it is an asset that we cannot ignore existed, and because of that, I am exercising my discretion as of that asset because of the asset with respect to the Levis Creek property to modify the property division into a 60/40 split as I have indicated on the record.

¶8 Property division is addressed to trial court discretion. *See Sharon v. Sharon*, 178 Wis.2d 481, 488, 504 N.W.2d 415, 418 (Ct. App. 1993). This court will sustain the decision if the trial court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *See id.* Underlying discretionary decisions may be factual determinations that we do not upset unless they are

clearly erroneous. *See Hollister v. Hollister*, 173 Wis.2d 413, 416, 496 N.W.2d 642, 643 (Ct. App. 1992).

¶9 With the exception of items acquired by gift, bequest, devise or inheritance, § 767.255, STATS., requires the court to presume that all property is to be divided equally between the parties. *See Mack v. Mack*, 108 Wis.2d 604, 607, 323 N.W.2d 153, 154 (Ct. App. 1982).¹ The court may alter this distribution only after considering the relevant factors listed in § 767.255. *See Mack*, 108 Wis.2d at 607, 323 N.W.2d at 154.² The court may consider that one party has substantial

¹ Section 767.255(2), STATS., reads:

(2) (a) Except as provided in par. (b), any property shown to have been acquired by either party prior to or during the course of the marriage in any of the following ways shall remain the property of that party and is not subject to a property division under this section:

1. As a gift from a person other than the other party.

2. By reason of the death of another, including, but not limited to, life insurance proceeds; payments made under a deferred employment benefit plan, as defined in s. 766.01 (4) (a), or an individual retirement account; and property acquired by right of survivorship, by a trust distribution, by bequest or inheritance or by a payable on death or a transfer on death arrangement under ch. 705.

3. With funds acquired in a manner provided in subd. 1. or 2.

(b) Paragraph (a) does not apply if the court finds that refusal to divide the property will create a hardship on the other party or on the children of the marriage. If the court makes such a finding, the court may divest the party of the property in a fair and equitable manner.

² 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.

(continued)

assets not subject to division as a factor in deviating from the presumed equal division. *See* § 767.255(3)(c), STATS.

¶10 We are unpersuaded that the court's rationale supports its discretionary decision to award Lisa 60% of the marital assets. The court acknowledged that John has no control over the trust assets. His interest in the trust will not be paid until both his parents die. There was no evidence of any present value. The court relied primarily on its hypothesis that had John previously exercised a right to withdraw funds, he would have converted them into marital assets subject to division. This finding, however, is based on speculation.

(d) The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.

(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.

There is no showing that even if he would have withdrawn his share, he would have converted it into an asset subject to division.³ Also, the record is unclear what value the withdrawn share would have had.

¶11 And, although John has a 1/6 interest in the Levis Creek property, this \$14,650 interest is not sufficiently substantial to justify a \$51,952 deviation from an equal award. The court's rationale fails to support its determination that John's nondivisible assets are "substantial assets" that justify a deviation from a presumed equal property division.

¶12 The record does not indicate that the court based its determination on any factor other than John's nondivisible assets. Lisa argues that her limited maintenance was a factor. We disagree. The court did not indicate its maintenance award justified a disparate property division. In setting maintenance, it commented that maintenance could have been set at \$2,000 monthly. This comment was part of the court's maintenance rationale, not its property division ruling.

¶13 Because neither the court's reasoning nor the record reveals a rational basis to support the disparate property awards, we conclude that the court

³ "[W]here a trust grants only an income interest but no power over the corpus, the income is the sole gift of the settlor and thus the beneficiary's separate property. However, where a beneficiary has power to reduce the corpus to a present possessory control, any income generated from that portion is community property." *Friebel v. Friebel*, 181 Wis.2d 285, 295, 510 N.W.2d 767, 771 (Ct. App. 1993) (citation omitted). There is no evidence of any potential income that may have been generated by the non-exercised right of withdrawal.

erroneously exercised its discretion. As a result, we reverse the ruling and remand for a new property division.⁴

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

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

⁴ Lisa requests that we also remand to permit the court to reconsider maintenance. We decline her request. She filed no cross-appeal. We recognize that maintenance and property, although separate awards, are interdependent and cannot be made in a vacuum. *See Bahr v. Bahr*, 107 Wis.2d 72, 78-79, 318 N.W.2d 391, 395-96 (1982). Under some circumstances, property division reversal may require the reconsideration of maintenance. Here, however, there is no showing that our property division ruling impacts John's income potential or Lisa's maintenance needs. Therefore, it does not require the court to reconsider maintenance.

