COURT OF APPEALS
DECISION
DATED AND FILED

February 25, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1062 **Cir. Ct. No. 2013FA464**

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

IN RE THE MARRIAGE OF:

KATHLEEN POZORSKI,

PETITIONER-RESPONDENT,

V.

ANTHONY J. POZORSKI,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County: JAMES P. CZAJKOWSKI, Judge. *Affirmed.*

Before Kloppenburg, P.J., Lundsten, and Blanchard, JJ.

¶1 PER CURIAM. Anthony Pozorski appeals a judgment of divorce, challenging the maintenance award and the property division. Anthony argues that the circuit court erroneously exercised its discretion in: (1) awarding

Kathleen Pozorski "significant maintenance," even though she did not sacrifice her own career for the sake of the family and did not significantly contribute to Anthony's career or education; (2) failing to give weight, when awarding maintenance, to Anthony's expressed intention to pay for the future college expenses of Anthony and Kathleen's minor son; (3) awarding Kathleen certain stocks in the property division that Anthony had purchased with funds that he inherited during the marriage; and (4) requiring Anthony to contribute to a portion of Kathleen's litigation costs and fees in the divorce proceedings. Anthony also presents a "catch-all" argument that the court made "errors of fact and judgment and thereby treated [Anthony] unfairly." For the reasons set forth below, we affirm.

BACKGROUND

¶2 The circuit court held a two-day trial, after which it issued a decision including its findings of fact and conclusions of law. The following are among the facts found by the court pertinent to the issues on appeal.

¶3 Anthony and Kathleen were married for 19 years. The parties had one child together, a son, who at the time of the divorce was 16 years old, still in high school, and primarily residing with Anthony. Anthony waived child support from Kathleen. At the time of her marriage to Anthony, Kathleen had two daughters from a prior marriage, both of whom lived with the parties during at least some of their minority. Later on during the marriage, Anthony and Kathleen contributed to various post-high school education expenses for Kathleen's daughters.

¶4 Throughout the marriage, Anthony was working as an assistant district attorney, a position he had held for approximately ten years by the time he

married Kathleen. At the time of the divorce, Anthony was earning $8,554 monthly. At the time of the marriage, Kathleen worked for Grant County and continued to do so at the time of the divorce, earning a monthly salary of $3,064, with additional income from two part-time jobs. Neither party sacrificed his or her career before or during the marriage for the benefit of the other spouse or the family, and neither contributed to the education, training, or increased earning capacity of the other party.

¶5 Anthony brought valuable assets into the marriage that included stocks, savings bonds, an individual retirement account, certificates of deposit, and gold coins. During the marriage, Anthony received an inheritance of roughly $104,000, which he used to purchase shares of stock that he placed in the name of both parties as joint tenants. Separately, before and during the marriage, Anthony purchased other shares of stock, which in most cases had increased in value by the time of the divorce. Some of these shares were held in the names of both parties and some were held in Anthony's name individually.

¶6 Anthony appeared pro se throughout the divorce proceedings. Kathleen was represented by counsel. By the time of the divorce trial, Kathleen had incurred costs and fees of over $48,000, and Anthony had contributed $11,000 toward Kathleen's costs and fees.

¶7 After the trial, the court issued a decision that: awarded Anthony and Kathleen each 55% of their own Wisconsin Retirement System (WRS) pensions, and 45% of the other's pension; divided assets and debts in a manner that resulted in an unequal property division in Anthony's favor; awarded $1,500 per month to Kathleen in maintenance until she reaches age 66 or remarries; and ordered that Kathleen was not required to repay to Anthony the $11,000

contribution that he had previously made to partially cover Kathleen's divorce litigation costs and fees, although Kathleen remained responsible for the balance. Anthony now appeals. We include additional facts below as necessary.

DISCUSSION

¶8 "We review the trial court's findings with respect to property division and maintenance to determine whether the court properly exercised its discretion. In the absence of an erroneous exercise of discretion, the award will be upheld." ***Settipalli v. Settipalli***, 2005 WI App 8, ¶10, 278 Wis. 2d 339, 692 N.W.2d 279. We will affirm a circuit court's exercise of discretion unless the court "fails to consider relevant factors, bases its award on factual errors, makes an error of law, or grants an excessive or inadequate award." ***Olski v. Olski***, 197 Wis. 2d 237, 243 n.2, 540 N.W.2d 412 (1995).

I. MAINTENANCE AWARD

¶9 The circuit court denied Kathleen's request for maintenance of $2,000 per month as unfair to Anthony and ordered Anthony to pay Kathleen $1,500 per month until she reaches age 66 or remarries. Anthony argues that, in awarding maintenance, the circuit court improperly exercised its discretion by failing to adequately account for two circumstances: (1) that Kathleen did not sacrifice her own career for the sake of the family or significantly contribute to Anthony's education; and (2) that Anthony expressed an intention to significantly contribute toward the future college expenses of the parties' then high-school-aged son. We first set forth the court's decisions regarding maintenance then address the sacrifice-or-contribute issue, before turning to the higher education expenses issue.

A. Section 767.56 Factors and the Court's Maintenance Award

¶10 Circuit courts are to apply ten factors in determining whether maintenance is appropriate, and if so, how much and for how long. *See* WIS. STAT. § 767.56(1c) (2013-14).[1] The maintenance statute is "designed to further

[1] WISCONSIN. STAT. § 767.56(1c) (2013-14) provides that:

> Upon a judgment of annulment, divorce, or legal separation, or in rendering a judgment in an action under s. 767.001(1)(g) or (j), the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time, subject to sub. (2c), after considering all of the following:
>
> (a) The length of the marriage.
>
> (b) The age and physical and emotional health of the parties.
>
> (c) The division of property made under s. 767.61.
>
> (d) The educational level of each party at the time of marriage and at the time the action is commenced.
>
> (e) The earning capacity of the party seeking maintenance, 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 find appropriate employment.
>
> (f) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.
>
> (g) The tax consequences to each party.
>
> (h) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, if the repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.

(continued)

two objectives: support and fairness." ***Finley v. Finley***, 2002 WI App 144, ¶10, 256 Wis. 2d 508, 648 N.W.2d 536. The support objective "ensures the spouse is supported in accordance with the needs and earning capacities of the parties." ***Id.*** The fairness objective "ensures a fair and equitable arrangement between the parties in each individual case." ***Id.***

¶11 Applying the factors to the evidence, and citing both the fairness and support objectives, the court here made the following findings with regard to the ten factors: (a) the parties had a long-term marriage; (b) both parties are in their mid-50s and are physically and emotionally healthy; (c) the court divided property unequally, in Anthony's favor; (d) Anthony's education allows him to earn considerably more than Kathleen; (e) neither party sacrificed his or her career for the benefit of the other spouse or the family by, for example, an extended absence from the job market, and given the ages of the parties, it is unlikely that either party will have a substantial change in earning capacity; (f) it is unlikely that Kathleen can increase her earning capacity by further schooling and obtaining a new, higher paying job; (g) the parties presented no evidence regarding tax consequences; (h) there were no written premarital or marital agreements; (i) the parties came into the marriage at different income levels and neither contributed to the education of the other, and the income differential between the parties was the result of Anthony's abilities and hard work, in addition to his education; and (j) as

---

> (i) The contribution by one party to the education, training or increased earning power of the other.
>
> (j) Such other factors as the court may in each individual case determine to be relevant.

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

to the fairness factor of maintenance, it is fair to reward Anthony for furthering his education, working hard, and waiving child support, while at the same time allowing Kathleen to maintain a lifestyle that approaches the lifestyle that she enjoyed prior to the divorce.

¶12 Based on these findings and an exhibit offering alternative maintenance scenarios,[2] the court awarded maintenance to Kathleen that resulted in a division of the parties' collective employment earnings in Anthony's favor, with Anthony being awarded approximately 59%, and Kathleen 41%, of the parties' joint earnings each month.

B. The Sacrifice and Contribute Factors

¶13 Anthony argues that the circuit court's maintenance decision was unfair and arbitrary, and ignored controlling case law, because the court failed to give sufficient weight to the facts that Kathleen did not sacrifice her career for the benefit of Anthony or the family, and did not contribute to the education, training, or increased earning capacity of Anthony. Although his arguments are hard to follow, we understand Anthony to be arguing that the court erroneously exercised its discretion in failing to give sufficient weight to two of the ten statutory factors that a court must consider in making its maintenance determination.[3]

---

[2] Anthony suggests several times in his briefing that the circuit court incorrectly based its maintenance award, in part, on a finding that Anthony made $699 per month from dividend interest on stocks that the court awarded Kathleen in the property division. However, this suggestion rests on a false premise. The exhibit upon which the court based its maintenance award presented various maintenance scenarios based on the parties' respective employment incomes alone, without reference to dividend interest.

[3] In his initial brief on appeal, Anthony argued that the circuit court erred by considering an equal division of the total income of the parties as its starting point in conducting the (continued)

¶14 Anthony devotes a significant portion of his maintenance argument to a recitation of certain facts in a line of cases that he suggests collectively establish that, when disparate incomes and earning capacities of spouses were not the result of sacrifices or contributions by the other spouse, the court's findings here on the sacrifice and contribute factors should be given great weight. *See* ***King v. King***, 224 Wis. 2d 235, 590 N.W.2d 480 (1999); ***Hokin v. Hokin***, 231 Wis. 2d 184, 605 N.W.2d 219 (Ct. App. 1999); ***Gerth v. Gerth***, 159 Wis. 2d 678, 465 N.W.2d 507 (Ct. App. 1990).

¶15 However, the reasoning of these opinions by and large undermines Anthony's position. More specifically, Anthony's argument fails to recognize two key points: (1) in each of those cases, the decision of the appellate courts relied upon the necessity to give deference to the circuit court's exercise of discretion in deciding whether to award maintenance and if so in what amount; *see* ***King***, 224 Wis. 2d at 247-48; ***Hokin***, 231 Wis. 2d at 207; ***Gerth***, 159 Wis. 2d at 683-84; and (2) a circuit court is required to weigh all ten factors in its maintenance analysis, not merely the two factors emphasized by Anthony. *See* WIS. STAT. § 767.56(1c) (court may grant order requiring maintenance "after considering *all* of the following" factors) (emphasis added).

¶16 For example, in ***Gerth***, this court upheld the circuit court's denial of maintenance based in part on the "fairness" objective and the particular circumstances there: the husband would not be able to pay maintenance because he could barely meet his own expenses, while the wife was able to meet her

---

maintenance analysis. In his reply brief, Anthony abandons this argument. He acknowledges that the circuit court was correct in presuming an equal division of earnings as the starting point.

expenses without maintenance. ***Gerth***, 159 Wis. 2d at 683. Notably, the ***Gerth*** court observed that it would just as easily have upheld the circuit court's decision if the court had made the opposite decision: "While maintenance could have been ordered in this case, the issue requires the exercise of judicial discretion." ***Id.***

¶17 The circuit court here followed the path described in ***King***, applying the statutory factors to the facts presented by the parties, converting "the factors into appropriate dollar amounts and time periods," while simultaneously ensuring "that its award will further the dual objectives of maintenance." *See* ***King***, 224 Wis. 2d at 249. Pertinent to Anthony's argument, the court's decision demonstrates that it considered the facts that Kathleen did not sacrifice her career or significantly contribute to Anthony's earning capacity. That the court did not accord these facts greater weight is merely a disagreement with the circuit court's exercise of its discretion. The court addressed and considered each of the ten WIS. STAT. § 767.56 factors, as well as the support and fairness objectives of maintenance, and we defer to its exercise of discretion.

C. Higher Education Expenses

¶18 Anthony argues that the circuit court erroneously exercised its discretion in determining the appropriate amount for the maintenance award by failing to take into consideration Anthony's expressed intent to significantly contribute to future college expenses for Anthony and Kathleen's then 16-year-old son. The court denied Anthony's "request for a credit for anticipated college expenses" for the son because the type, location, and cost of any such potential future educational institution had "not been established by any evidence" and therefore the value of Anthony's express intention was "speculative."

¶19 Kathleen takes the following positions: Wisconsin case law establishes that such a decision is within the court's discretion; a court setting maintenance may, but is not required to, consider anticipated contributions to the educational expenses of an adult child; and the court's decision here was a proper exercise of discretion. We agree.

¶20 Both parties purport to rely on our supreme court's decision in ***Rohde-Giovanni v. Baumgart***, 2004 WI 27, 269 Wis. 2d 598, 676 N.W.2d 452. In ***Rohde-Giovanni*** the supreme court addressed "whether education expenses for adult children may be considered when a court examines a party's maintenance award." ***Id.***, ¶36. The court observed that this court had concluded that "a parent cannot be required to provide financial support to adult children for their education expenses." ***Id.***, ¶37. Using this principle as a backdrop, the court concluded that the determination as to whether to consider a party's contributions to the education expenses of an adult child is left to the discretion of the circuit court:

> [A]ssisting adult children with their education expenses is a worthwhile and laudable endeavor. Nevertheless, we do not want to open a Pandora's box where payors could seek to reduce the amount of maintenance paid to recipients simply because the payors are making sizeable contributions to their adult children's education expenses. We feel compelled to emphasize that it will be the rare situation when these expenses should be considered. Thus, we leave the decision of whether or not to consider such expenses when determining maintenance awards for the circuit courts to decide in the exercise of sound discretion, subject to appellate review on an erroneous exercise of discretion basis. While we do not anticipate a frequent need to consider such expenses, we recognize that unusual circumstances could justify such consideration.

Id., ¶38. We note that these words of caution address contributions that are actually made ("are making sizeable contributions"), and the concerns expressed by the court would obviously be greater in a case like the one before us involving

a mere stated intent to make contributions of unknown size and duration at some point in the future.

¶21 Anthony argues that this case presents a rare situation of the type contemplated by the court in ***Rohde-Giovanni***, because Anthony contributed to his stepdaughter's college education and made clear to the circuit court his intention to assist his son in the same way. Anthony argues that the circuit court erroneously exercised its discretion "by simply failing to exercise any discretion in light of ***Rohde-Giovanni***." We disagree, and conclude that the circuit court exercised its discretion consistent with ***Rohde-Giovanni*** by concluding that the mere potential for Anthony to cover some future college expenses was too speculative to affect the maintenance award. It was a proper exercise of the circuit court's discretion to decline to give Anthony credit for contributions that Anthony is not required by law to make and may in the end decide not to make. *See* ***id.***, ¶¶37-38.

II. PROPERTY DIVISION

¶22 Anthony argues that the circuit court did not properly divide the marital estate because the court included in the estate what Anthony refers to as "the inherited stocks," and because the court ordered Anthony to pay $11,000 of Kathleen's divorce-related costs and fees rather than giving Anthony credit for this amount in the property division award.

A. The "Inherited" Stocks

¶23 To clarify, what Anthony refers to as "inherited" stocks are not that. Rather, Anthony is referring to stocks he purchased with inherited money.

¶24 Anthony acknowledges that under current law the circuit court properly included in the marital estate the stocks he purchased with inherited money during the marriage and then held in joint tenancy in both parties' names.[4] *See* ***Steinmann v. Steinmann***, 2008 WI 43, ¶¶33, 36, 309 Wis. 2d 29, 749 N.W.2d 145. However, Anthony appeals on this issue in an attempt to preserve the issue for potential review by our supreme court. We are bound by ***Steinmann***. *See* ***Cook v. Cook***, 208 Wis. 2d 166, ¶51, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.").

B. Contribution to Costs and Attorney Fees

¶25 Following trial, Kathleen requested an order requiring Anthony to pay all of her costs and attorney fees, $48,658.[5] Anthony had already contributed $11,000 toward Kathleen's costs and fees at that point. Examining the evidence, the court found that: (1) Kathleen "has a need" for a contribution toward fees; (2) Anthony "certainly has the ability to contribute;" and (3) the fees are "reasonable." The court rejected Kathleen's request that Anthony pay the full amount of her fees, and instead ordered that the $11,000 contribution that Anthony had previously made need not be returned to Anthony.

---

[4] Anthony generally does not take issue with the court's treatment of other stocks that he did not purchase with inherited money, with the exception of the court's alleged treatment of dividend income from those stocks, which we address later in the "Fairness Concerns" section of this opinion.

[5] One part of Kathleen's divorce litigation costs and fees was the expense of an accountant's report that Kathleen's attorneys offered as evidence at trial. Anthony argues that it was unfair for the circuit court to rely on the report's purported usefulness in ordering Anthony to contribute to Kathleen's costs and fees. We address this argument later in the "Fairness Concerns" section of this opinion.

¶26 Anthony asserts that he should not be required to contribute toward Kathleen's divorce proceedings costs and fees, though he presents no clear basis to challenge the circuit court's decision in this regard. We conclude that the court did not erroneously exercise its discretion in requiring Anthony to pay $11,000 out of the approximately $48,000 that Kathleen sought.

¶27 The statutes allow a court to order either party to contribute to the other party's litigation costs and attorney fees in a family action. *See* WIS. STAT. § 767.241(1)(a). Whether to do so and in what amount are decisions within the circuit court's discretion. ***Johnson v. Johnson***, 199 Wis. 2d 367, 377, 545 N.W.2d 239 (Ct. App. 1996). When awarding attorney's fees, the court generally must address the following factors: (1) the need of the spouse receiving the contribution; (2) the ability to pay of the spouse ordered to make a contribution; and (3) the reasonableness of the fees. ***Id.*** We will uphold a court's discretionary decision "'if the circuit court applies a proper standard of law, examines the relevant facts, and reaches a conclusion that a reasonable court could reach, demonstrating a rational process.'" ***Kroner v. Oneida Seven Generations Corp.***, 2012 WI 88, ¶8, 342 Wis. 2d 626, 819 N.W.2d 264 (quoted source omitted).

¶28 Here, the circuit court considered Kathleen's request for costs and fees in light of the three factors set forth above, examined the facts established at trial, and reached a reasonable conclusion. Therefore, we uphold the court's order.

III. FAIRNESS CONCERNS

¶29 Anthony makes a "catch-all" argument, repeating some of the arguments that we have rejected for reasons set forth above, and asserting

generally that the circuit court treated Anthony unfairly in its maintenance and property division decisions.[6] Anthony takes issue with what he calls "incorrect" "findings of fact" by the circuit court, which Anthony alleges demonstrate an unfair attitude or approach toward Anthony's interests in this case. We question the premise that each of these is properly characterized as a finding of fact, but we now summarize the alleged "findings of fact" as Anthony presents them: (1) that Anthony earned $699 in interest and dividend income, for the purposes of calculating maintenance, when the court awarded many of the income-producing assets to Kathleen; (2) that the parties kept separate checking accounts throughout their marriage to keep child support payments that Kathleen received for her minor daughters from a prior spouse separate from the funds of the marital estate; (3) that Anthony sought a "credit" in the property division for payments that Anthony made during the marriage for the cost of day care for the parties' minor son and to cover college expenses for Kathleen's daughters; (4) that Anthony failed to make reasonable compromises during the divorce proceedings, which drove up Kathleen's attorney's fees; and (5) that Kathleen's accountant's report was beneficial to the court in valuing certain items of property.

¶30 "The standard for harmless error is whether there is a 'reasonable possibility' that the error contributed to the outcome of the action." ***Martindale v.***

[6] We reject a subissue raised by Anthony because he did not properly develop it and preserve it before the circuit court and because it is not presented to us as a developed legal argument. Anthony submitted exhibits at trial that contained some of his personal identifying information. In a passing reference in his post-trial brief to the circuit court, Anthony requested, without citation to legal authority, that the court order redaction of this information from the exhibits. The court took no action in this regard. On appeal, Anthony asks this court to "order steps to be taken to preserve the confidentiality" of this information. Similar to his passing reference before the circuit court, on appeal Anthony fails to cite legal authority to support this request and offers no suggested remedy.

Ripp, 2001 WI 113, ¶71, 246 Wis. 2d 67, 629 N.W.2d 698 (quoted source omitted). Regarding the first three alleged errors in fact finding, the record reveals no evidence that the circuit court relied on any of those alleged findings in reaching its decision. As a result, assuming without deciding that they were errors in this regard, they were harmless. We also see nothing in the record to suggest that these three alleged errors in fact finding demonstrate an unfair attitude of the circuit court toward Anthony.

¶31 With respect to the fourth alleged factual error, involving costs and fees based on an "incorrect" finding of Anthony's unreasonable failure to compromise, Anthony's argument is a puzzle. He concedes the following: the circuit court "did not use that unfounded and unfair accusation to order a contribution for attorneys' fees and CPA fees." With this statement, Anthony appears to concede that he has no argument in this connection. If the court did not rely on Anthony's alleged unreasonable failure to compromise when ordering Anthony's contribution to the fees, then it is unclear what problem Anthony purports to raise regarding decisionmaking by the court.

¶32 As to the fifth alleged error, we fail to see how the court's statement that it found the accountant's report helpful in formulating its decision demonstrates a lack of fairness toward Anthony. Anthony fails to provide a basis for us to conclude that the report could not have been of at least some value to the court in deciding pertinent issues.

CONCLUSION

¶33 For the foregoing reasons, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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