

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 16, 2006

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP3178

Cir. Ct. No. 2003FA1823

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

DOUGLAS H. MELLUM,

PETITIONER-APPELLANT,

V.

CATHERINE ANN MELLUM,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County:
MICHAEL N. NOWAKOWSKI, Judge. *Affirmed.*

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

¶1 PER CURIAM. Douglas Mellum appeals the property division component of his divorce judgment. He claims the trial court failed to consider

and properly apply all of the relevant property division factors. We disagree and affirm.

BACKGROUND

¶2 The parties do not dispute the following facts found by the trial court. Douglas and Catherine were married in March of 1989. Catherine had a daughter from a prior relationship and also brought into the marriage substantial assets, including a trust fund and a furnished house. Douglas brought into the marriage some vehicles, household furnishings, and a small checking account.

¶3 The parties' lifestyle during the marriage was sustained in large part by proceeds from Catherine's trust account. However, Catherine and Douglas also started a business called Performance Plus. Catherine contributed \$85,000 from her trust fund in capital to the business, and Douglas primarily ran it.

¶4 In 1993, Douglas began molesting Catherine's daughter. After the abuse was discovered in mid-1995, Douglas moved out of the marital home and never again resided with Catherine or her daughter, with whom he was prohibited by court order from having contact. Douglas was also convicted of one count of first-degree sexual assault of a child and one count of child enticement and placed on probation for ten years with a condition of one year in jail. The legal fees, counseling costs for Catherine's daughter, and additional living expenses attributable to Douglas's criminal behavior exceeded \$125,000. Catherine and Douglas continued to have a personal relationship, however, and Douglas remained active in running Performance Plus.

¶5 At the time of the divorce in 2004, Catherine was 45 years old and Douglas was 40. Neither party had any significant health problems. Performance

Plus was providing Douglas with \$3,250 per month in income, while Catherine had monthly income of \$6,541 from the business and her trust fund. The marital estate was worth more than \$650,000. The trial court awarded Douglas property worth \$130,000.

STANDARD OF REVIEW

¶6 The division of the marital estate lies within the sound discretion of the trial court. *Rumpff v. Rumpff*, 2004 WI App 197, ¶27, 276 Wis. 2d 606, 688 N.W.2d 699. Therefore, we will affirm property division awards when they represent a rational decision based on the application of the correct legal standards to the facts of record. *Id.*

DISCUSSION

¶7 The marital estate includes all of the property and obligations of either party which have been acquired before or during the marriage, other than by gift or inheritance. *McLaren v. McLaren*, 2003 WI App 125, ¶8, 265 Wis. 2d 529, 665 N.W.2d 405, *modified on other grounds by Derr v. Derr*, 2005 WI App 63, 280 Wis. 2d 681, 696 N.W.2d 170; WIS. STAT. § 767.255(2)(a) (2003-04).¹ Section 767.255(3) sets forth a presumption that all marital property is to be divided equally between the parties, but allows the trial court to deviate from that presumption after considering the length of the marriage, the property brought to the marriage by each party, whether one party has substantial assets not subject to division, the economic and non-economic contributions of the parties to the

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

marriage, the age and physical and emotional health of the parties, the contribution of either party to the education or increased earning power of the other party, the earning capacity of each party in relation to the standard of living enjoyed during the marriage, the desirability of awarding the family home to the parent having primary physical placement of any minor children of the marriage, the amount and duration of any maintenance payments, other economic circumstances including pension plans, the tax consequences to each party, any agreement between the parties, and other factors which the court may determine to be relevant. *LeMere v. LeMere*, 2003 WI 67, ¶¶16-17, 262 Wis. 2d 426, 663 N.W.2d 789. Although the statute directs the court to consider all of the factors, the failure to address factually inapplicable or marginally relevant factors is harmless error and does not provide grounds for reversal. *See id.*, ¶¶26-27.

¶8 Douglas first contends that the trial court placed improper weight on his sexual abuse of Catherine’s daughter, in essence punishing him for that conduct. However, we are satisfied that the trial court properly limited its consideration of Douglas’s abuse to the impact it had on both the economic and homemaking contributions of the parties to the marriage, which are clearly relevant factors. Not only were substantial marital resources expended as a result of the abuse and prosecution but, in addition, Catherine was left to provide all of the necessary child care. This resulted in a situation that was nearly the reverse of the typical case in which one spouse provides greater economic contributions to the marriage while the other provides more homemaking and child care services. *Cf. id.*, ¶18 (“Part of the rationale in creating the presumption of equal property division is that the homemaking partner has contributed services which have enabled the financially supporting partner to achieve his or her station in life, and in so doing the homemaking partner has lost ground in the job market.”) (quoting

Jasper v. Jasper, 107 Wis. 2d 59, 68, 318 N.W.2d 792 (1982))). Here, the spouse with primary child-care duties was also providing the primary economic support to the family throughout the marriage. The trial court was entitled to weigh the importance of these factors more heavily than other factors in deciding to deviate from the presumption of equal property division. *LeMere*, 262 Wis. 2d 426, ¶25.

¶9 Douglas next argues that the trial court failed to give proper consideration to his personal, intimate, and business contributions to the marriage. We do not see how the personal or intimate relationship between the parties, which was presumably reciprocal, has any bearing on the appropriate property division. With regard to Douglas's contributions to Performance Plus, the trial court recognized them by awarding Douglas the entire business. However, the court also pointed out that Catherine had contributed substantially to Douglas's earning capacity by funding the business, while Douglas had in no way contributed to Catherine's earning capacity. We conclude that the trial court properly weighed Douglas's contributions against Catherine's.

¶10 Douglas next claims that the trial court failed to give proper consideration to the fact that Catherine was leaving the marriage with about \$1,800,000 in non-marital assets. However, the trial court did consider this factor, but decided that it did not weigh in Douglas's favor. That determination was supported by the fact that Catherine's separate assets played a large part in the growth of the marital estate which, in turn, weighed in favor of granting her a larger portion of the property division. The court also concluded that Douglas had not demonstrated any financial hardship that would warrant subjecting any of Catherine's individual assets to division in the divorce. That same rationale explains why the court did not consider it unfair to award Douglas a smaller portion of the marital estate.

¶11 Finally, Douglas maintains that the trial court erroneously exercised its discretion in treating this as a short-term marriage rather than a mid-length marriage. In general, the shorter the marriage, the stronger the incentive to return the parties to their prior positions. *See, e.g., Prosser v. Cook*, 185 Wis. 2d 745, 755-56, 519 N.W.2d 649 (Ct. App. 1994) (approving unequal property division in husband's favor where husband brought substantially more property into a short-term marriage). The trial court here acknowledged that the marriage had actually lasted for fifteen years, but noted that the parties had not shared a marital residence after Douglas's abuse was discovered, and that Catherine had been solely responsible for raising her daughter from then on. We are satisfied that the trial court was reasonably applying the applicable law to the unusual facts of record when deciding that this case should therefore be treated as a short-term marriage.

By the Court.—Judgment affirmed.

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

