

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 25, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0121-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

LINDA WILSON-OTTO,

PETITIONER-RESPONDENT,

V.

JAMES OTTO,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: PAUL B. HIGGINBOTHAM, Judge. *Affirmed in part; reversed in part and cause remanded.*

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

¶1 PER CURIAM.¹ James Otto appeals a judgment of divorce. He challenges the property division, claiming the trial court erroneously exercised its discretion by awarding his former wife, Linda Wilson, a disproportionate share of the marital estate to compensate for Otto's interest in a family farm not subject to division. He contends the trial court made several clearly erroneous factual findings and failed to consider other factors which would have supported an equal property division, if not an unequal division in his favor. Having reviewed the record, we agree. We therefore reverse the property division component of the divorce judgment and remand for further proceedings consistent with this opinion.²

BACKGROUND

¶2 The parties were married for six and a half years, though they resided together for only about four and a half years. There were no children of the marriage. At the time of the divorce, Wilson was 53 years old and was earning \$1,520 per month after taxes. Her estimated monthly budget was \$1,830. Otto was also 53 years old and was receiving \$482 per month in permanent total disability social security benefits as the result of a stroke. Otto also had annual rental income of \$3,150 from a dairy farm partnership with his brother, although the farm itself had been operating at a net loss for several years prior to the

¹ This appeal was expedited under WIS. STAT. RULE 809.17 (1997-98) by order dated February 8, 2000. All further references in this opinion to the Wisconsin Statutes are to the 1997-98 version.

² Otto also filed a notice of appeal from an order amending the judgment, but does not specifically challenge any of the modifications contained in that order. Therefore, the order is reversed only to the extent that it incorporates the property division provisions of the original judgment. Nothing in this opinion changes the effective date of the divorce, the parties' waivers of maintenance, or Wilson's right to resume her maiden name.

divorce. Otto was no longer able to manage the dairy herd after his stroke. His estimated monthly budget was \$1,352.

¶3 In addition to some vehicles, personal bank accounts and other items of personal property which were divided on the basis of possession at the time of the divorce, the parties' assets included \$107,700 in equity in the family home. Also, Wilson's 401k plan was valued at \$8,000; Otto's life insurance policy was valued at \$11,400; Wilson's life insurance policy was valued at \$544; Otto's interest in the family farm was valued at \$127,400 and his farm machinery at \$7,967.50. Otto sold cattle during the pendency of the divorce for \$14,700, and there was \$1,500 cash on hand in the farm partnership. The farm machinery was encumbered by a \$6,000 lien, and the cattle proceeds had been used to pay \$11,250 worth of farm partnership debt during the pendency of the divorce. The parties generally agreed on the distribution of their assets,³ but disagreed on the amount of the equalization payment which Wilson would pay Otto in order to keep the house. Otto sought \$48,000 to reimburse him for the money he had put into the house, while Wilson argued the payment should be limited to \$20,000. The trial court awarded Wilson the house, her 401k plan and her life insurance policy, and ordered her to make a \$20,000 equalization payment to Otto.

³ Otto testified that he wanted some of the dishes, silverware, tools and other items which were still in the house, but did not specify to the trial court the items he wanted, and does not raise the issue on appeal.

STANDARD OF REVIEW

¶4 The valuation and division of the marital estate lie within the sound discretion of the circuit court. *See Long v. Long*, 196 Wis.2d 691, 695, 539 N.W.2d 462 (Ct. App. 1995). To be sustained, therefore, a property division must represent a reasoned application of the correct legal standards to the facts of record. *See id.*

ANALYSIS

Valuation of the Marital Estate

¶5 Marital assets and debts (collectively, the marital estate) include all of the property and obligations of either party which were acquired before or during the marriage, unless specifically exempted by statute. *See* WIS. STAT. § 767.255(2)(a). Here, the trial court valued the marital estate at \$151,812. This amount included the farm machinery which Otto's father had given to him and the cattle which had been sold during the pendency of the divorce,⁴ but did not take into account the \$6,000 encumbrance on the farm machinery or the \$11,500 farm partnership debt to which Otto had applied the proceeds of the cattle sales. The omission of the machinery encumbrance was apparently an oversight, as the trial court noted from the bench that it would be taking that debt into account. The

⁴ WISCONSIN STAT. § 767.255(2)(a) excludes gifted property from division. However, we do not consider whether the farm machinery and cattle were properly included in the marital estate because Otto did not argue for their exclusion either at trial or on appeal. Nothing in this opinion, however, precludes the trial court from re-examining the character of these assets on remand.

omission of the farm debt paid by the cattle proceeds is not adequately explained on the record.⁵

¶6 Although marital assets and debts are generally to be valued as they exist at the date of the divorce, *see Sommerfield v. Sommerfield*, 154 Wis. 2d 840, 851, 454 N.W.2d 55 (Ct. App. 1990), it is appropriate to include in the marital estate assets which have been divested during the pendency of the divorce without proper consideration. *See Zabel v. Zabel*, 210 Wis. 2d 336, 339-40, 565 N.W.2d 240 (Ct. App. 1997); *see also* WIS. STAT. § 767.275. Here, there is nothing in the record to show that the sale of the dairy herd which Otto could no longer manage after his stroke was effected at an unreasonable price or for any improper purpose. Otto did, however, fail to obtain preauthorization for the sale from the family court commissioner, in violation of the temporary order. While it may sometimes be proper for a trial court to impute proceeds from the sale of property to the marital estate as a sanction for the violation of a temporary order, consistency requires that the trial court should also impute to the estate any marital debts which were satisfied by the sale of the assets.

¶7 We therefore conclude that the trial court's valuation of the marital estate at \$151,812 was clearly erroneous. The amount should have been reduced to take into account the farm debts.

⁵ The trial court indicated from the bench that it would be accepting "Schedule B" from Wilson's post-trial memorandum, which excluded the debt, "in light of 767.255(3) criteria." However, the valuation of the parties' marital assets and debts should have been performed prior to considering the appropriate division of the marital estate under WIS. STAT. § 767.255(3).

Division of the Marital Estate

¶8 WISCONSIN STAT. § 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 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; any agreement between the parties; and other factors which the court may determine to be relevant. Here, the trial court deviated from an equal division to award Wilson assets worth \$96,244, approximately 70% of the marital estate as adjusted for farm debts. We will consider the trial court's analysis of each of the relevant factors in turn.

¶9 The trial court properly noted that this was a short-term marriage. It did not, however, in any way acknowledge the significance of the length of the marriage in its analysis. 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 an unequal property division in husband's favor where husband brought substantially more property into a short-term marriage).

¶10 The trial court found that Otto had contributed \$49,000 toward the marital residence in an initial downpayment and a subsequent lump sum payment from the proceeds of an insurance settlement on a farm house which had burned down and the sale of the land on which the house had been located. However, the court's written finding that Wilson had contributed \$18,550 toward the downpayment on the marital residence is not supported by the record. Although Wilson testified that she and Otto had pooled their money to purchase the house, she did not specify the amount of her contribution. Wilson's financial disclosure statement indicates that the purchase price of the house, plus the cost of additions, was \$105,070. There was a mortgage balance of \$22,300 at the time of the divorce. Therefore, subtracting the mortgage balance and the \$49,000 which Otto contributed from the cost of the house, the combined total of any amount Wilson contributed to the downpayment, plus all principal payments the parties made on the house during the marriage, was \$33,770.⁶ Thus, regardless of the actual amount Wilson contributed to the downpayment, the record shows that Otto brought considerably more property into the marriage.

¶11 The trial court correctly noted that Otto had a substantial interest in a family farm which was not subject to division and which kept his monthly expenses to a minimum. It appears, however, that the trial court may have placed undue emphasis on this factor without considering the effect of other factors that weighed against a property division in Wilson's favor.

⁶ The parties contributed to a joint living expenses account in unequal amounts but the record does not show how this account was disbursed, or whether either party could have contributed more.

¶12 The trial court also correctly found that Wilson had contributed more economically to the marriage than did Otto, since she put approximately \$1,400 per month into their joint account compared to his \$400 per month. Despite the modest amount of Otto's economic contributions, however, it was undisputed that he had worked on the farm full time, "from sunup to sundown," until he had his stroke. Neither party testified about who had performed what homemaking tasks. Thus, there was no evidence that Wilson made greater non-economic contributions than Otto to the marriage.

¶13 The parties were the same age. However, while Wilson was in relatively good health, Otto was disabled as the result of a stroke and unable to perform the farm labors which he had done all of his life.

¶14 With respect to earning capacity, the trial court stated that Otto's monthly income was "not substantially less than Linda's net income." We question the basis for this finding, given the uncontroverted evidence that Otto received \$482 per month while Linda earned \$1,520. In addition, the trial court's comment that Otto might "have some ability to do perhaps some kind of work" is not supported by any evidence in the record.

¶15 The trial court correctly noted that there was no evidence to show that educational contributions, placement considerations, maintenance, pension plans, tax consequences, or prenuptial agreements had any relevance to the property division in this case.

¶16 Finally, the trial court considered possible economic hardship to the parties as an "other" relevant factor. It is not clear, however, what facts the trial court relied upon when concluding that Wilson would suffer economic hardship without an unequal property division in her favor, given that the trial court found

that each party was more or less “self-supporting” taking into account their monthly expenses.

¶17 In sum, we conclude that the trial court erroneously exercised its discretion by awarding Wilson a disproportionate amount of the estate, because it relied in part upon clearly erroneous facts and it failed to properly acknowledge those factors which would weigh against deviating from the fifty-fifty presumption in Wilson’s favor. We therefore reverse the property division component of the judgment and order, and remand for a reconsideration of the property division consistent with this opinion. We leave it to the trial court’s discretion whether to re-evaluate the property division based upon the facts already of record, or to take additional evidence and/or argument from the parties.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded.

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

