COURT OF APPEALS
DECISION
DATED AND FILED

June 20, 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. 2005AP1082 **Cir. Ct. No. 2004FA63**

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

IN RE THE MARRIAGE OF:

LYNN HEXUM,

JOINT-PETITIONER-APPELLANT,

V.

KIRK HEXUM,

JOINT-PETITIONER-RESPONDENT.

APPEAL from a judgment of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Affirmed*.

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

¶1 PER CURIAM. Lynn Hexum appeals her judgment of divorce, arguing that the trial court erroneously exercised its discretion by refusing to divide certain assets equally after her four-year marriage and by failing to award

her maintenance. Lynn also insists the court erred by adopting Kirk Hexum's proposed findings of fact and conclusions of law in their entirety. We reject Lynn's arguments and affirm.

¶2 Lynn and Kirk were married on October 20, 2000, and the divorce was granted by interlocutory order effective November 22, 2004. Both parties had been previously married and each brought substantial assets into the marriage.

¶3 Throughout the marriage Kirk maintained an auto-body shop called Kirk's Collision, Inc., which he started in 1983 in New Richmond and moved to Star Prairie township over twenty-one years ago. The business was located adjacent to Kirk's residence and a vacant lot. Kirk also owned nearby lakeshore properties, which were referred to as the "old cabin" and the "new cabin." The old cabin was purchased in 1993. It is undisputed the new cabin, which Kirk purchased from an elderly woman next door to the old cabin, was purchased approximately one month before the parties married. Kirk made the offer to purchase the new cabin before he even met Lynn. When the old cabin was sold approximately eighteen months after the marriage, the proceeds completely paid off the existing mortgage on the new cabin. Renovations were made to the new cabin after the parties were married, and the parties dispute whether Lynn was involved in improving or maintaining the new cabin.

¶4 Lynn has significantly more education than Kirk. Kirk has a high-school education, and attended one emergency medical technician course at a technical college. Lynn is a registered nurse, with a bachelor's degree in nursing and a master's degree in business management. Lynn suffered a pre-marital injury that caused her to go on disability in 1998. Lynn's monthly disability benefit was cashed out during the marriage for $60,000. As part of the disability claim which

led to her cash-out, Lynn underwent a vocational evaluation. The evaluator concluded that Lynn was 100% disabled for vocational purposes. Notwithstanding this finding of 100% total vocational disability in late November 2002, Lynn resumed full-time employment with a new employer in June 2003. The vocational evaluator testified at trial that he was not aware that Lynn took full-time employment approximately seven months after the date of his report. Lynn then continued to work full-time until March 8, 2004, when she was involved in an automobile accident during her lunch break. Lynn continued to work for another four months, when she stopped working to have back surgery. The parties separated on March 21, 2004, less than two weeks after the car accident.

¶5 A trial was held as to all contested issues on January 20 and 21, 2005. Lynn requested indefinite term, income-equalizing maintenance and an equal division of the marital estate, including the real estate and business that Kirk brought into the marriage. At trial, the parties presented conflicting expert testimony on a number of issues, including the valuation of assets, Lynn's earning capacity, and the contributions Lynn allegedly made to the marriage. Following the conclusion of trial, the parties submitted written closing arguments. The parties also submitted proposed findings of fact and conclusions of law. The circuit court adopted Kirk's proposed findings and conclusions in their entirety. Lynn now appeals.

¶6 The division of property and the awarding of maintenance rest within the sound discretion of the circuit court. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We will sustain a discretionary decision if the circuit 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. ***Liddle v. Liddle***, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). When reviewing fact findings, we search the record for reasons to sustain the circuit court's discretionary decision, not for evidence to support findings the court could have but did not reach. ***Steiner v. Steiner***, 2004 WI App 169, ¶18, 276 Wis. 2d 290, 687 N.W.2d 740. Findings of fact will be affirmed unless clearly erroneous. WIS. STAT. § 805.17(2).[1] The valuation of assets is a factual determination. ***Liddle***, 140 Wis. 2d at 136. When there is conflicting testimony, the trial court is the ultimate arbiter of the credibility of witnesses. ***Cogswell v. Robertshaw Controls***, 87 Wis. 2d 243, 249, 274 N.W.2d 647 (1979).

¶7 An equal division of property is presumed under WIS. STAT. § 767.255(3). However, a court may deviate from an equal division after considering the factors enumerated in § 767.255(3). Here, the circuit court considered the proper factors and gave appropriate weight to factors warranting deviation in this case, including the length of the marriage, the property brought to the marriage by each party, the contributions of each party during the marriage, the earning capacities of the parties, the age and health of the parties, and whether one of the parties has substantial assets not subject to division by the court, among other factors.

¶8 While some of the enumerated factors in WIS. STAT. § 767.255(3) are economic, others reflect equitable considerations. ***Fuerst v. Fuerst***, 93 Wis. 2d 121, 133, 286 N.W.2d 861 (Ct. App. 1979). Here, the court concluded that fairness required that the parties be placed back in the position they were in

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

prior to the commencement of their short-term marriage. The record supports these findings and conclusions.

¶9 This was a marriage of only four years and a month. The court found that the parties maintained separate property during the marriage with few exceptions. The court found that Lynn essentially doubled her net worth during the time of the marriage while Kirk basically broke even because of increased debt load brought about by over-spending with credit cards. The court noted that Kirk was forced to take out additional mortgages in order to pay off the credit card debt, and Kirk was responsible for that additional debt leaving the marriage which eroded the increase in his assets during the period of marriage.

¶10 Lynn does not dispute that both parties brought substantial property to the marriage. For example, Kirk brought his primary business and residence, a vacant lot and both cabins to the marriage. Testimony also indicated that the parties maintained largely separate property during the marriage.

¶11 Lynn insists the property division is defective because there was a dispute about certain values set forth in two exhibits relied upon by the court, and because there are purportedly several errors in these exhibits.[2] However, these alleged errors are relevant only if we accept Lynn's premise that the trial court was

[2] Kirk insists in his brief that "the record shows that the trial court was fully aware of these 'errors.'" Kirk includes in the appendix to his brief what he purports to be the circuit court's copies of Exhibits 527 and 528 which Kirk states "are, apparently, the judge's handwritten comments and corrections." Lynn responds that there is nothing in the record to establish who made the notes, when they were made or how they should be interpreted. Further, Lynn claims there is no foundation for Kirk's representation that the notes represent the circuit judge's thought process. Because we conclude the alleged errors are not relevant, we need not reach the issue of whether the appendix to Kirk's brief should be stricken in this regard, but we admonish counsel that in cases where assertions of fact in an appellate brief are not properly supported, this court has not hesitated in summarily striking those portions of the brief or appendix.

required to divide the marital estate equally. Once the trial court rejected Lynn's claim to half of Kirk's pre-marital estate, the court was not required to determine the exact value of the assets to equalize the division of the marital estate, which is the premise upon which Lynn's argument largely rests. We reject Lynn's contention that the alleged errors in the two exhibits resulted "in a completely false picture of the financial status of the marriage." Lynn's argument that the circuit court improperly valued the property is simply not relevant to the property division methodology employed by the trial court in this short-term marriage. What is important is that the record demonstrates that the trial court was aware of what assets were being awarded to each party, not to equalize the division of the marital estate, but to return the parties to the positions they were in at the beginning of the marriage and which they maintained during the marriage to a great extent.

¶12 Furthermore, the disputes in this case come down largely to a question of credibility and the weight of the evidence. For example, Lynn contended that she devoted substantial labor and incentive in cleaning and remodeling the new cabin, but that testimony was disputed by Kirk. Neighbors corroborated Kirk's testimony that Lynn was not responsible for cleaning, did no yard work, and in fact did practically nothing to improve or maintain either property. Similarly, Lynn's testimony that she made contributions to Kirk's business was disputed by Kirk and his employees. The trial court was entitled to discount Lynn's testimony in its entirety.

¶13 Lynn also disputes Kirk's valuation of certain personal property and asserts that Kirk testified he had no experience whatsoever in appraising personal property. However, the trial court was free to adopt Kirk's valuation of his own property. That Kirk is not an expert at valuation goes to the weight of his

testimony. In other instances, the court adopted the values for assets based on the testimony of Kirk's expert witness over the testimony of Lynn's expert witness. The trial court reviewed the parties' budgets and found Kirk's $3,200 per month budget to be reasonable, while characterizing Lynn's $6,800 per month budget as "overstated and inflated." The court noted that Exhibit 27B was Lynn's preliminary financial disclosure filed with the Family Court Commissioner at the time of the first temporary hearing that showed a budget of $4,600 a month, even at a time when Lynn was working full-time and commuting to St. Paul, Minnesota. When two parties to a divorce present conflicting testimony, it is the trial court's job to determine the credibility of the witnesses, weigh the evidence and resolve the disputes. We conclude the trial court appropriately exercised its discretion in this regard.

¶14 Lynn next insists that the trial court erroneously exercised its discretion in failing to award her income-equalizing maintenance. We disagree. Multiple factors support the denial of maintenance, including the short term of the marriage, the substantial award of property to Lynn, her earning capacity, and the testimony that her employment disability was short-term and compensated by a disability recovery.

¶15 As emphasized by the trial court, Lynn will leave the marriage with substantial assets, much more than she brought to the marriage. The only evidence of Lynn's current earning capacity was presented by Kirk's expert, who opined that Lynn's disability would be rectified by surgery, and that she should be able to "resume full-time sedentary employment" similar to her last job at a pay range of $58,500 per year, in November 2005, if not before. Kirk's expert also testified that there were many sedentary jobs available to a woman with Lynn's qualifications in that pay range. The trial court adopted this expert's report and

there is ample evidence in the record supporting the court's decision to do so. The testimony presented by Lynn's vocational expert was dated. As mentioned previously, he evaluated Lynn in November 2002, for purposes of an employment-related disability claim and admitted that he was unaware that Lynn returned to work full-time only approximately seven months after he determined that she was 100% disabled.

¶16 Lynn claims the trial court erred by not awarding maintenance at least for the year Kirk's expert conceded she would be disabled. It was undisputed that Lynn was temporarily disabled, but the trial court also found that Lynn had income sources available to meet her needs during the period she would be without income. For example, the trial court found that Lynn "was already compensated for her future disabilities from the disability insurance settlement with UNUM and the worker's compensation settlement with American Family Insurance." The court noted that this money was for future disability, but Lynn chose to devote $30,000 of her settlement to a down payment on a new home she had built for herself. Moreover, the court noted that Lynn had received social security disability payments tax free since 1998, which the court concluded "is sufficient for a normal person to live on." The record also reveals that Lynn receives child support for a child from a previous marriage. The court concluded that if Lynn needed temporary short-term relief, she could take out another mortgage against the property, which she could pay back from her auto injury settlement. The trial court went on to find:

> During the marriage, she was active and healthy as evidenced by her own testimony, the testimony of her husband, Kirk Hexum, and photographs showing her athletically engaged during a Hawaiian vacation in January 2004, and her Match.com resume that she sent out within the last year stating her active lifestyle.

We conclude that ample evidence in the record supports the trial court's decision to deny maintenance.

¶17 Next, Lynn asserts that the circuit court erroneously exercised its discretion by adopting Kirk's proposed findings of fact and conclusions of law in its entirety without explanation. Lynn contends that the present case is "directly analogous" to the facts in ***Trieschmann v. Trieschmann***, 178 Wis. 2d 538, 504 N.W.2d 433 (Ct. App. 1996). Lynn further insists the post-trial procedure of requiring each party to submit written arguments and proposed findings was itself an erroneous exercise of discretion. We disagree.

¶18 First of all, Lynn agreed to the post-trial procedure. Lynn cannot participate in a procedure, submit her own proposed findings of fact and conclusions of law, and then later complain that the procedure itself is an erroneous exercise of discretion when the court adopts her adversary's proposed findings. In addition, we conclude that ***Trieschmann*** is inapposite. In that case, we stated that we were unable to determine based upon the record if the trial court's decision was a product of the court's rational decision-making process. ***Id.*** at 542. The present case is more analogous to ***State v. Joseph P.***, 200 Wis. 2d 227, 241, 546 N.W.2d 494 (Ct. App. 1996). In that case, we noted that although the trial court did not provide a picture-perfect example of findings of fact and conclusions of law, it was adequate. Just as important, we concluded the record was thorough enough to allow us to analyze the complaints about the trial court's handling of certain factors. We thus concluded that the record was sufficient to avoid our remanding the case for further findings. ***Id.*** Similarly, we conclude in the present case that the record sufficiently supports the trial court's decision.

By the Court – Judgment affirmed.

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