

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 15, 2008

David R. Schanker
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. 2007AP1404

Cir. Ct. No. 2005FA176

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

KEN HENRY SCHNEIDER,

PETITIONER-RESPONDENT,

V.

DARESE M. SCHNEIDER, N/K/A DARESE M. SMITH,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Lincoln County:
GARY L. CARLSON, Judge. *Reversed and cause remanded for further proceedings.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Darese Schneider, n/k/a Darese Smith, appeals portions of a divorce judgment relating to property division, child support, and

maintenance, arguing the court erroneously exercised its discretion. We agree, and we reverse those portions of the judgment and remand for reconsideration.

BACKGROUND

¶2 Ken and Darese Schneider were married in 1993, and they have two minor children born of the marriage. The divorce judgment awarded Ken and Darese joint legal custody and shared physical placement of the children.

¶3 When dividing Ken and Darese’s property, the court did not divide the property equally, instead assigning certain consumer debts solely to Darese. These debts, amounting to \$33,592.11, were the subject of an agreement between Ken and Darese signed on August 26, 2005, shortly before Ken filed for divorce in October 2005. The agreement stated, “I Darese M Schneider have made purchases on two credit cards[,]” identified the two cards, and continued:

These purchases were made without Ken’s knowledge or consent. Most of the purchases were made to cover non-essential elective surgeries or practices of a cosmetic nature.

In the event of a divorce filed by either party, I Darese M Schneider, accept full financial responsibility for any and all purchases made on the above two cards. I also will accept all financial responsibility for any purchases I make on any credit or debit type card from this date forward. (Emphasis in original.)

The court rejected Darese’s argument that the agreement was signed under duress.

¶4 The court awarded Darese \$431.60 per month in child support, along with \$300 per month in maintenance for one year, followed by \$150 per month for a second year. When awarding these amounts, the court did not consider Ken’s overtime pay.

DISCUSSION

¶5 Maintenance, child support, and property division determinations are entrusted to the discretion of the circuit court and are upheld unless the court erroneously exercised its discretion. *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. Discretionary determinations are upheld if the court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. *Id.*

¶6 When dividing property in a divorce, courts are to presume that property should be divided equally. WIS. STAT. § 767.61(3).¹ Courts may deviate from an equal property division based upon numerous factors, including:

Any written agreement 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.

WIS. STAT. § 767.61(3)(L).

¶7 Darese raises a number of arguments challenging the court's exercise of discretion in assigning her sole responsibility for the consumer debts. She disagrees with the court's finding that the agreement was not signed under duress, and she argues the agreement is ambiguous. Further, she contends the court failed to adequately address whether the agreement was equitable pursuant

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

to WIS. STAT. § 767.61(3)(L). Ken does not address Darese's arguments regarding the agreement and therefore concedes them. *See State v. Peterson*, 222 Wis. 2d 449, 459, 588 N.W.2d 84 (Ct. App. 1998) (unrefuted arguments deemed conceded). As a result, we reverse the property division portion of the divorce judgment and remand for reconsideration.

¶8 Darese also challenges the court's child support award, claiming the court applied a general policy of not considering overtime pay. We have previously held that, while courts can exclude overtime pay from child support calculations when justified by the circumstances, courts cannot exclude overtime pay as a general policy. *Welter v. Welter*, 2006 WI App 54, ¶7, 289 Wis. 2d 857, 711 N.W.2d 705.

¶9 Here, the court adopted the calculations of the child support agency, which determined that Ken should pay \$431.60 per month. This amount was based upon Ken's hourly wage, but did not include Ken's overtime pay, which the agency had a general policy of not considering. By adopting the agency's child support figure that was based upon a policy of excluding overtime, the court effectively applied the same policy. Because this practice is contrary to *Welter*, we reverse the portion of the divorce judgment relating to child support and remand for reconsideration.

¶10 Finally, Darese challenges the court's maintenance award of \$300 per month for one year, followed by \$150 per month for a second year. Darese argues the maintenance award was unconscionably low and that the court erred by not considering Ken's overtime pay. Courts are to consider a number of factors when determining maintenance awards. *See* WIS. STAT. § 767.56. Among those factors, a court is required to consider the feasibility of the party seeking

maintenance becoming self-supporting at a “standard of living reasonably comparable to that enjoyed during the marriage.” WIS. STAT. § 767.56(6). A court should award maintenance sufficient to maintain the standard of living enjoyed during the marriage if that objective can be accomplished without unreasonable hardship to the supporting party. *Bahr v. Bahr*, 107 Wis. 2d 72, 83, 318 N.W.2d 391 (1982). An equal division of the parties’ total income is “meant to be a starting point for an award that is fair, meets the needs of the recipient, and allows the recipient to achieve an equivalent standard of living.” *Hubert v. Hubert*, 159 Wis. 2d 803, 822-23, 465 N.W.2d 252 (Ct. App. 1990).

¶11 Here, the court’s maintenance analysis was flawed because Ken’s income was artificially lowered by the court’s general policy of disregarding overtime pay.² From the divorce judgment and a prior maintenance order attached to the judgment, it is evident the court relied upon the child support agency’s income figures when determining maintenance. As stated above, the child support agency had a policy of excluding overtime pay. As with child support, we conclude that applying a general policy of excluding overtime pay is impermissible when determining maintenance.

² Because the court’s failure to consider Ken’s overtime pay requires reversal of the maintenance award, we need not also address Darese’s argument that the maintenance award was unconscionably low. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

¶12 Ken contends the court actually reasoned “the overtime was too unreliable,” yet he provides no citation to the record to support this proposition.³ Further, Ken does not refer to any evidence relied upon by the court that would justify a conclusion that his overtime was too unreliable to be considered. By contrast, Darese does point to evidence from which the court could infer Ken’s overtime was stable. Ken provides us with no basis for concluding the court applied anything other than a general policy of not considering overtime. Therefore, we also reverse the maintenance portion of the divorce judgment and remand for the court to reconsider maintenance.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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

³ In addition to Ken’s failure to properly cite the record, we note that some of Darese’s record citations are erroneous. For example, while she cites the correct page and line numbers, she fails to cite the correct hearing transcript, and there were several hearings in this matter. We note that parties are required to provide adequate record citations to support factual propositions in their briefs to this court. See WIS. STAT. RULE 809.10(1)(d), (3). We warn both parties against haphazard appellate practice, as failure to comply with the rules of appellate procedure may result in penalties under WIS. STAT. RULE 809.83(2).

