COURT OF APPEALS DECISION DATED AND FILED

April 28, 2009

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. 2008AP1672

Cir. Ct. No. 2006FA2

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

IN RE THE MARRIAGE OF:

WENDIE BETH JOHNSON,

PETITIONER-RESPONDENT,

V.

SCOTT A. JOHNSON,

RESPONDENT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Sawyer County: FREDERICK A. HENDERSON, Judge. *Reversed and cause remanded with directions; oral orders vacated.*

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

¶1 PER CURIAM. Scott Johnson appeals a divorce judgment dividing his and Wendie Johnson's property equally between them. Scott argues the circuit court erroneously exercised its discretion by failing to address evidence he contends warranted deviation from the presumption of equal division. He also argues the court erred by awarding Wendie attorney fees in its initial decision, and then twice more in oral orders following Scott's postjudgment motions. We agree. We reverse and remand for the court to make factual findings on the evidence Scott presented and to address his argument that he rebutted the presumption that the parties' property should be divided equally. We also direct the court to redetermine the initial grant of attorney fees. We vacate the orders awarding Wendie attorney fees for Scott's postjudgment motions.

BACKGROUND

¶2 Scott and Wendie were married for four and a half years. Prior to marrying, they lived together for three and a half years and had a child together. During the marriage, Wendie worked primarily as a homemaker and Scott worked as a school district administrator. Shortly after marrying, the couple bought a home together, which they purchased in part with proceeds from the sale of a house Scott owned prior to the marriage. Wendie moved out of the marital home when the parties separated in November 2005. They divorced in July 2007. When the court granted the divorce, it resolved the issues of maintenance, child placement, and child support. However, the court held a second hearing for the parties to present additional evidence on property division. Following that hearing, the court asked each party to file a posttrial brief detailing and explaining their proposals for dividing their property.

¶3 Scott proposed each party keep what they brought to the marriage, but divide equally property acquired during the marriage. He acknowledged that the property division statute contains a presumption in favor of dividing property equally. However, he contended he rebutted this presumption with evidence that (1) the marriage was short, (2) he brought more property to the marriage than Wendie, and (3) he contributed more during the marriage than she did. As evidence for the disparity in premarital property, Scott submitted his own calculations of what each party possessed when they married. According to Scott, Wendie brought negative net assets to the marriage whereas his net assets totaled approximately $135,000. As evidence he contributed more during the marriage, he asserted he earned between $65,000 and $75,000 per year, while Wendie earned less than $2,000. He also claimed Wendie overstated her household duties because he helped care for the marital child and Wendie's child care responsibilities included parenting a nonmarital child.

¶4 Wendie largely ignored Scott's argument that the evidence warranted deviation from the presumption of equal division. Instead, she argued Scott's proposal "disregard[ed] her contributions to the relationship as a homemaker, as a mother [and] as a marriage partner." She proposed: "The net marital estate is about $220,844.00. With the application of WIS. STAT. § 767.61[1] and the presumption that the marital estate should be equally divided, each party would be awarded about $110,422.00 of the parties' assets."

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶5 The court then issued a decision, which neither addressed Scott's argument that equal division was inappropriate nor made any findings on the evidence Scott presented. Instead, the court essentially reiterated the proposals in Wendie's brief and concluded simply: "The court is satisfied the credible evidence shows net [marital] assets of approximately $221,000. Each party is awarded $110,500." It then ordered Scott to contribute $15,000 to Wendie's attorney fees "because of the large disparity in earning capacity of the parties," and instructed Wendie's attorney to draft findings of fact and conclusions of law.

¶6 After Wendie's attorney drafted the findings and conclusions, Scott asked the court to modify them based on his recalculation of certain assets and debts. The court refused, stating it "couldn't understand [his] argument" and was therefore granting Wendie attorney fees for costs related to his motion. It then signed the findings of fact and conclusions of law, which—like the decision—contained no findings or conclusions on the evidence Scott offered to rebut the presumption of equal division. Scott appealed and asked the circuit court to stay execution of the judgment pending the appeal. The court denied Scott's motion, held he was in contempt, and granted Wendie attorney fees for the contempt motion.[2]

DISCUSSION

¶7 This appeal presents two issues. The first concerns the court's lack of explanation for not deviating from the equal division presumption. The second pertains to the court's rationale for granting Wendie attorney fees. In a divorce

[2] We later granted Scott's motion to stay the judgment pending this appeal.

case, both the division of property and awarding of attorney fees are within the circuit court's discretion. ***Bahr v. Bahr***, 107 Wis. 2d 72, 77, 318 N.W.2d 391 (1982); ***Kastelic v. Kastelic***, 119 Wis. 2d 280, 290, 350 N.W.2d 714 (Ct. App. 1984) (citation omitted). We will uphold a discretionary determination if it is "the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." ***Bahr***, 107 Wis. 2d at 78.

1. The property division

¶8 The division of property in divorce is governed by WIS. STAT. § 767.61. This statute establishes a presumption in favor of dividing marital property equally. However, this presumption is rebuttable, ***Jasper v. Jasper***, 107 Wis. 2d 59, 68-69, 318 N.W.2d 792 (1982), and courts may alter the division after considering certain statutorily enumerated factors. WIS. STAT. § 767.61(3). These factors include: the length of the marriage; the property brought to the marriage by each party; and the contribution of each party to the marriage, giving appropriate economic value to each party's contribution in home-making and child care services. WIS. STAT. § 767.61(3)(a), (b), and (d).

¶9 Scott argues the court abused its discretion by failing to examine these factors after he argued they warranted deviation from the equal division presumption. We agree.

¶10 To comply with the requirement that a discretionary decision be based on a rational mental process, "a court must not only state its findings of fact and conclusions of law, but also state the factors upon which it relied in making its decision." ***Trieschmann v. Trieschmann***, 178 Wis. 2d 538, 542, 504 N.W.2d 433 (Ct. App. 1993). Here, the circuit court failed to make any findings of fact on the

evidence Scott introduced. Scott presented evidence that while Wendie entered the marriage in debt, he entered it with net assets of $135,000. Although the parties' premarital wealth was integral to Scott's assertion their property should not be divided equally, the court made no findings on this issue. Nor did it address Scott's evidence of the relative contributions of each party to the marriage. The statute does not require an unequal division simply upon a showing one party earned substantially more than the other. However, here Scott also alleged the contributions Wendie claims to have made to the marriage were minimal because of Scott's own contributions to the home and Wendie's obligations to a nonmarital child. Whether these allegations have merit depends on factual findings, yet the court made none.

¶11 We do not conclude Scott's evidence in fact warranted an unequal property division. We admit to being puzzled by some of his evidence—his calculation of the parties' respective premarital wealth, for example.[3] But this is precisely the problem with the court's failure to make relevant factual findings: it is impossible for us to review facts that have not been found.

¶12 We likewise cannot review a court's discretionary decision when the court does not explain the relevance of the facts it did find. Here, the parties disputed the length of time they cohabitated prior to marriage; Scott alleged the period was shorter than Wendie claimed. The court agreed with Wendie and found the parties cohabitated for three and a half years. But it did not explain why

[3] Among other things, Scott's summary of the assets and debts Wendie brought to the marriage notes she had no real estate assets yet also somehow lists as a debt: "1/2 of Johnson Bank home equity line of credit." There may be a reasonable explanation for this, but the lack of any factual findings on the parties' premarital wealth leaves us guessing.

this was relevant. It also acknowledged the parties separated before divorcing, but did not explain what bearing, if any, this had on its decision to divide the property equally.

¶13 To be sustained, a court's discretionary decision must also "be arrived at by application of the proper legal standards." ***LeMere v. LeMere***, 2003 WI 67, ¶14, 262 Wis. 2d 426, 663 N.W.2d 789 (citations omitted). The proper legal standard in a property division case is set forth in WIS. STAT. § 767.61. Yet the court never referenced this statute or cited any other legal authority for its decision.

¶14 We are satisfied that here, the court "failed to articulate and use the discretionary standards which the legislature has set." ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (discussing the court's discretion to award maintenance). Instead, the court's decision is basically an adaptation of Wendie's brief. For example, Wendie's post-trial brief opens:

> [T]he parties[] cohabitated prior to marriage. At the time of marriage they had a minor child, and Petitioner's primary responsibilities for the family were as homemaker and primary caretaker of the marital child as well as her minor child from another relationship. When the Respondent's minor children from a previous marriage were in the home, it was Petitioner's responsibility to provide a home for them as well.

The circuit court's decision likewise begins:

> The parties cohabitated prior to their marriage. By the time of marriage … they had a minor child.…

> The Petitioner's primary responsibilities during their relationship were as homemaker and primary caretaker of their child as well as her minor child from a prior relationship. She also served to provide a home for the Respondent's children from a prior relationship when they were visiting the Respondent.

The remainder of the decision similarly tracks Wendie's brief.

¶15 The problem with this is that it provides no insight into how the court made its decision. We rejected a similar procedure in ***Trieschmann***. There, the court explicitly adopted one party's memorandum as its decision and asked that party to submit findings of fact, conclusions of law, and a judgment consistent with the memorandum. ***Trieschmann***, 178 Wis. 2d at 540-41. We held this was inadequate because we could

> only speculate as to why the court accepted Patricia's view …. While Patricia's memorandum discusses both sides of many of the issues, it fails to provide any analysis or reasoning as to why her positions are more persuasive. Since the trial court accepted her memorandum as its decision, we have no insight into the court's decision-making process.

Id. at 543-44.

¶16 If anything, the circuit court's analysis and reasoning is less accessible here because it never explained Wendie's brief was a template for its decision. As in ***Trieschmann***, the court's de facto adoption of Wendie's brief here leaves us guessing about its decision-making process. This is insufficient to satisfy the requirement that an exercise of discretion be the result of "a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." ***Bahr***, 107 Wis. 2d at 78.

2. Attorney fees

¶17 We agree with Scott that the circuit court erroneously exercised its discretion when it concluded the large disparity in earning potential between the parties merited awarding Wendie $15,000 in attorney fees. WISCONSIN STAT. § 767.241 grants courts the discretion to award attorney fees following divorce actions, "after considering the financial resources of both parties." This requires the court to "make findings of the need of the spouse seeking contribution, the ability to pay of the spouse ordered to pay, and the reasonableness of the total fees." ***Kastelic***, 119 Wis. 2d at 290 (citation omitted). Here, the court made none of these findings. Absent the requisite findings of need, ability, and reasonableness, a mere disparity in earning potential is not a sufficient factor for awarding attorney fees. *See* ***id.***

¶18 Scott applies the same rationale to the court's decisions to award Wendie attorney fees for his motion to amend the findings of fact and for his motion to stay execution of the judgment. The record indicates, however, that although the court did not state so explicitly, it made these awards to sanction Scott for prolonging the litigation. "A circuit court may sanction a party who has engaged in overtrial by ordering that party to pay the opposing party's attorney fees." ***Zhang v. Yu***, 2001 WI App 267, ¶13, 248 Wis. 2d 913, 637 N.W.2d 754. Whether excessive litigation has occurred is a question of historical fact, which we will not disturb unless clearly erroneous. ***Id.***, ¶11. However, because we are reversing and remanding for the court to consider the evidence Scott presented, we conclude his requests that the court reconsider its findings cannot be deemed excessive litigation. We therefore vacate the orders awarding Wendie attorney fees for Scott's postjudgment motions.

¶19 On remand, the court is directed to make factual findings on the evidence Scott presented and address his argument that he rebutted the presumption of equal property division. It is also directed to redetermine the initial award of attorney fees by considering Wendie's need, Scott's ability to pay, and the reasonableness of the total fees.

By the Court.—Judgment reversed and cause remanded with directions; oral orders vacated.

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