COURT OF APPEALS
DECISION
DATED AND FILED

JULY 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1797

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

IN RE THE MARRIAGE OF:

CINDEE GARDNER

PETITIONER-RESPONDENT,

V.

DAVID GARDNER,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH D. MC CORMACK, Judge. *Affirmed in part, reversed in part and cause remanded with directions.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. David Gardner appeals from a judgment of divorce from Cindee Gardner. We affirm the child support, custody and supervised placement determinations in the judgment. However, we conclude that the circuit

court erroneously exercised its discretion with respect to the property division, maintenance, attorney's fees and constructive trust determinations. We reverse those provisions in the judgment and remand those issues for redetermination and with directions that the circuit court award Cindee costs and attorney's fees for that portion of David's appeal which we conclude to be frivolous.

The Gardners were married on June 30, 1979, and have two children. Cindee filed for divorce on September 27, 1995, and simultaneously sought a temporary restraining order or domestic abuse injunction against David. On October 2, 1995, the same day the domestic abuse injunction was entered,[1] David engaged in conduct which subsequently resulted in his conviction of burglary while armed to his own home and false imprisonment and second-degree sexual assault of Cindee. At the time of the divorce trial, October 15-17, 1996, David was serving a thirty-year prison sentence.

The circuit court rejected David's request for an equal division of the marital property. It concluded:

> It is this Court's opinion that Mr. Gardner's conduct was so outrageous that it is beyond anything contemplated in Wisconsin Statute 767.255 where it states that marital misconduct cannot be the basis upon which a court can determine property division. If this was mere "marital misconduct," perhaps the Court would be obligated to base its decision without regard to Mr. Gardner's actions. But his action was not "marital misconduct," it was "outrageous, felonious, assaultive conduct" which led to his incarceration and which effectively should cede any claim that he has to marital property…. To award Mr. Gardner any part of the marital estate would in this Court's opinion constitute a reward for the most vile and outrageous crime imaginable. Neither Wisconsin Statute Section 767.255(3) nor ***Dixon v. Dixon***, 107 Wis.2d [492, 319 N.W.2d 846 (1982),] require such result.

[1] Neither David nor Cindee appeared in person at the injunction hearing.

> Rather, it is the opinion of the Court that this is a case not unlike the facts in ***Brabec v. Brabec***, 181 Wis.2d 270[, 510 N.W.2d 762 (Ct. App. 1993)], where the Court distinguished ***Dixon***, supra, from the facts in ***Brabec*** where the petitioner had solicited others to kill the respondent. Accordingly, it is the opinion of the Court that Mrs. Gardner should be awarded 100 percent of the marital estate, including debt, of the parties.

Based on the same reasoning, the circuit court denied maintenance to David. It found that awarding anything to David would violate the fundamental fairness requirement of maintenance.

David argues that it was an improper exercise of discretion to award Cindee the entire marital estate and deny him maintenance solely because of the assault he committed against her.[2] We conclude that the circuit court proceeded on an erroneous reading of the ***Brabec*** decision and that it failed to consider all the statutory factors in exercising its discretion with respect to property division and maintenance. *See* ***Forester v. Forester***, 174 Wis.2d 78, 86, 496 N.W.2d 771, 774 (Ct. App. 1993) (a circuit court misuses its discretion if it misapplies or fails to apply the statutory factors relevant to determining maintenance); ***Parrett v. Parrett***, 146 Wis.2d 830, 843, 432 N.W.2d 664, 669 (Ct. App. 1988) (the circuit court must begin with the presumption that all marital property is to be divided equally between the parties and may deviate from this equal division only after considering the statutory factors).

[2] David claims that the circuit court improperly took judicial notice of the criminal case. We reject this contention. There was no objection when Cindee requested judicial notice of the sexual assault at the commencement of the divorce trial. The records in the criminal case were appropriate for judicial notice. *See* § 902.01(2), STATS. Indeed, a copy of the criminal judgment of conviction was added to the record to clarify the record in light of David's objection that the circuit court had misstated the circumstances of the conviction. The conviction was relevant and cognizable by judicial notice.

In ***Barbec v. Brabec,*** 181 Wis.2d 270, 274-76, 510 N.W.2d 762, 763-74 (Ct. App. 1993), the circuit court denied maintenance to the wife after she was convicted of soliciting the murder of her husband. Recognizing that in ***Dixon v. Dixon***, 107 Wis.2d 492, 505, 319 N.W.2d 846, 853 (1982), the Wisconsin Supreme Court effectuated a prohibition against considering marital misconduct in determining maintenance, the ***Brabec*** court nonetheless upheld the circuit court's denial of maintenance based on the wife's conduct. *See* ***Brabec***, 181 Wis.2d at 282-83, 510 N.W.2d at 766-67. However, the holding cannot be read to allow the spouse's criminal conduct to be the only consideration. Indeed in ***Brabec***, the circuit court had made findings under all of the relevant statutory factors and "gave full play to the dual objectives of maintenance," before denying maintenance. *See* ***id.*** at 284, 510 N.W.2d at 767. ***Brabec*** also illustrates that consideration of criminal misconduct is permissible when it constitutes something other than punishment of the offending spouse. *See* ***id.*** at 282, 510 N.W.2d at 766. In ***Brabec,*** the wife was not being punished for her act, but rather, fairness to the husband was the controlling consideration. *See* ***id.*** It was found to be fundamentally unfair to require the husband to pay maintenance to a person who tried to have him killed. *See* ***id.*** Additionally, the denial of maintenance was merely a refusal to reward the unsuccessful attempt to kill the husband because if she had been successful, the wife would have received no maintenance. *See* ***id.***

Here, the circuit court did not mention consideration of any of the statutory factors relevant to an unequal property division or maintenance.[3] David's criminal conduct was solely used as a sword against him to punish him for misconduct.[4] We cannot sustain a determination which does not demonstrate a proper exercise of discretion by consideration of all relevant factors. Although the result may be the same on remand, the circuit court is required to state its rationale. *See* ***Trieschmann v. Trieschmann***, 178 Wis.2d 538, 544, 504 N.W.2d 433, 435 (Ct. App. 1993).

It also appears that the determination regarding contribution to attorney's fees was affected by the circuit court's singular reliance on David's criminal conduct against Cindee. In denying David's request for a contribution towards his attorney's fees, the circuit court stated: "It is the Court's opinion that Mr. Gardner is not entitled to attorney's fees, that the position took [sic] during the course of this action caused the Petitioner to incur unnecessary and additional legal fees and unduly protracted the length of this litigation." This is a finding of "overtrial" which eliminates the circuit court's obligation to make findings regarding need for and ability to pay a contribution to attorney's fees. *See*

[3] The only relevant factor the circuit court alluded to was economic contributions to the marital estate. The circuit court characterized David's conduct during the marriage as "consist[ing] of long periods of noncontribution to the marital estate." To the extent this was a finding that David had not contributed to the marriage, it is clearly erroneous. *See* § 805.17(2), STATS. The record shows that David was employed by the City of Milwaukee for twelve years and that during a period when Cindee commuted weekly to her job in Indiana, David cared for the parties' children.

[4] David argues that the circuit court's "finding" that the sexual assault was not marital misconduct is clearly erroneous. The circuit court's statement that David's conduct was not marital misconduct was to merely distinguish it from the traditional concept of marital misconduct as adultery or conduct causing the failure of the marriage. *See* ***Brabec v. Brabec***, 181 Wis.2d 270, 280-81, 510 N.W.2d 762, 765-66 (Ct. App. 1993). The timing of the conduct is not as critical as the nature of the conduct. *See* ***id.*** at 279 n.4, 510 N.W.2d at 765. In the final analysis, it matters little whether or not the assault is labeled as marital misconduct.

Johnson v. Johnson, 199 Wis.2d 367, 377, 545 N.W.2d 239, 243 (Ct. App. 1996). However, the circuit court did not explain what "position" protracted the litigation. Given the terseness of the circuit court's entire decision, there is a chance that the circuit court believed that David had no business contesting any issues in this divorce in light of his criminal conduct. This would again be using the criminal conduct as a sword to punish David and deny him the right to a trial on the issues. On remand, the circuit court should reconsider the contribution to fees issue, particularly in light of the new determinations regarding property division and maintenance.

David was ordered to pay child support equal to twenty-five percent of all his income, including payments he receives as a member of the Stockbridge Munsee Community tribe. David claims that because the circuit court made no findings as to the needs of his children or his ability to pay, the child support order is an erroneous exercise of discretion. At trial, David did not contest his obligation to pay twenty-five percent of his income. In his posttrial brief, one of the alternative dispositions David proposed regarding child support was to set it at twenty-five percent of his total income. David waived an objection to a twenty-five percent child support order and cannot now claim error. *See* ***Douglas County Child Support Enforcement Unit v. Fisher***, 185 Wis.2d 662, 668, 517 N.W.2d 700, 703 (Ct. App. 1994). *See also* ***Evjen v. Evjen***, 171 Wis.2d 677, 688, 492 N.W.2d 361, 365 (Ct. App. 1992) (it is the party's responsibility to direct the family court's attention to issues that are being submitted for determination); ***State v. Gove***, 148 Wis.2d 936, 944, 437 N.W.2d 218, 221 (1989) (it is contrary to fundamental principles of justice and orderly procedure to allow a party to affirmatively contribute to court error and then obtain reversal because of the error).

David opposed Cindee's request that a constructive trust be imposed against any future assets he may acquire to insure payment of child support. *See* § 767.255(1), STATS. We summarily reverse the imposition of the constructive trust because there is no factual basis for it. The circuit court did not make findings that David had failed or would fail or unreasonably resist his responsibility to make the required child support payments. *See* ***Rosenheimer v. Rosenheimer***, 63 Wis.2d 1, 11, 216 N.W.2d 25, 29 (1974) (impose a trust when it reasonably appears that the payor will fail or unreasonably resist a support obligation). David's criminal conduct against Cindee, although resulting in his incarceration and reduced ability to pay child support, does not alone exhibit a disposition to shirk his support obligation. The circuit court erroneously exercised its discretion in imposing a trust against future assets. If on remand the circuit court deems a constructive trust to be appropriate, it should give sufficient reasons for doing so.

The remaining issue is whether the circuit court's failure to schedule periods of physical placement of the children with David was an erroneous exercise of discretion. At trial, David indicated his agreement with the recommendation made by the guardian ad litem with respect to sole custody being granted to Cindee. He also indicated that as to visitation, "he wants to visit with the children but not to force the visits on them." The circuit court ordered that David "shall be entitled to supervised placement with the minor children as they desire, based on the recommendations of the therapist and the Guardian ad Litem." Now David faults the circuit court for not making specific provisions for periods of physical placement. He claims that the visitation order lacks evidentiary support because the therapist did not testify and the guardian ad litem did not submit a written report. He also claims that the circuit court failed to consider the

factors relevant to allocating periods of physical placement. *See* § 767.24(5), STATS.

This issue is moot because at a hearing on March 7, 1997, the parties entered into a stipulation which permitted Cindee to remove the children to a different state and required phone contact at a minimum of once per month for fifteen minutes and one supervised visit per year in Wisconsin, if the children want to visit.[5] An order incorporating the stipulation was entered on April 17, 1997.

Even in the absence of the stipulation, David cannot now be heard to complain about the visitation order made. At trial David did not ask the circuit court to make a schedule for visitation at the prison. David's posttrial brief did not mention visitation at all. Nor did he suggest that Cindee would interfere with his relationship with the children or their desire to visit him. He cannot contest these matters for the first time on appeal. *See* ***Segall v. Hurwitz***, 114 Wis.2d 471, 489, 339 N.W.2d 333, 342 (Ct. App. 1983). Moreover, the order entered is consistent with David's request to allow visitation but not force visits upon the children. David cannot now complain about the order made.[6] *See* ***Evjen***, 171 Wis.2d at 688, 492 N.W.2d at 365; ***Gove***, 148 Wis.2d at 944, 437 N.W.2d at 221.

Cindee requests an award of attorney's fees and costs incurred in responding to David's claim about custody and placement of the minor children. *See* RULE 809.25(3), STATS. She contends that it was a frivolous issue in light of

[5] The divorce trial concluded on October 17, 1996. The circuit court's written decision on contested issues was entered on March 6, 1997. The final judgment was entered on April 29, 1997.

[6] The record belies David's claim that the circuit court was only interested in keeping the children from him. The judgment does not amount to an order that prevents David from ever seeing his children again.

David's failure to raise his claims during trial and because the issue was rendered moot by the parties' subsequent stipulation permitting Cindee to remove the children from the state. David's reply brief does not respond to Cindee's request. We conclude that there was no reasonable basis for arguing that the circuit court erroneously exercised its discretion in not making specific provisions for periods of physical placement with David. *See* RULE 809.25(3)(c)2.

In summary, we affirm the judgment with respect to child support, custody and supervised placement with David. We reverse the property division, maintenance, attorney's fees, and constructive trust determinations. Those issues shall be revisited on remand. We also direct the circuit court to make an award to Cindee of reasonable attorney's fees and costs associated with responding to David's appellate argument which we have found to be frivolous.[7] Other than the award to be made by the circuit court, no costs are allowed to either party on appeal. *See* RULE 809.25(1), STATS.

By the Court.—Judgment affirmed in part, reversed in part and cause remanded with directions.

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

[7] We note for the circuit court's benefit that only three pages of Cindee's respondent's brief were devoted to the issue of whether the court properly exercised its discretion with respect to its order for supervised periods of physical placement. No portion of the respondent's appendix was relevant to that issue.