

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 15, 1998

Marilyn L. Graves
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 § 808.10 and RULE 809.62, STATS.

No. 97-1990-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF: JANICE L. MILLER,

PETITIONER-RESPONDENT,

V.

ALBERT T. MILLER,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County:
MICHAEL J. MULROY, Judge. *Affirmed.*

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

PER CURIAM. Albert T. Miller appeals from a divorce judgment. The issues are whether the trial court erroneously exercised its discretion in refusing to deviate from the presumption of an equal property division because: (1) Albert allegedly brought significantly more assets to the marriage; and (2) Albert has established substantial future health care expense. We conclude

that: (1) the trial court's finding that the parties brought substantially equal assets to the marriage is not clearly erroneous; and (2) the trial court properly exercised its discretion in refusing to deviate from the presumption of an equal division of the marital estate. Therefore, we affirm.

Albert contends that the assets he brought to the marriage were worth approximately twice as much as the assets that Janice brought to the marriage. However, the trial court found that the parties brought assets of approximately equal value to the marriage. Albert also contends that because he has Alzheimer's disease, he will incur substantial health care expense, which warrants a disproportionate division of the marital estate in his favor. However, the trial court declined to deviate from the presumption of an equal division of the marital estate.

There is a statutory presumption that marital property should be divided equally, although the trial court may deviate from that presumption. *See* § 767.255(3), STATS. This court reviews the trial court's division of the marital estate to determine whether it has erroneously exercised its discretion. *See Prosser v. Cook*, 185 Wis.2d 745, 755, 519 N.W.2d 649, 653 (Ct. App. 1994). "[A] discretionary determination must be 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." *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981). The reviewing court does not substitute its judgment for that of the trial court; it examines the decision to ensure that the trial court has properly exercised its discretion. *See Zirngibl v. Zirngibl*, 165 Wis.2d 130, 135, 477 N.W.2d 637, 639 (Ct. App. 1991). This court accepts the trial court's factual findings unless they are clearly erroneous. *See* § 805.17(2), STATS.

Albert contends that because he brought substantially more to the marriage, he is entitled to a greater percentage of the marital estate. Janice contributed her home, in which she had \$65,000 in equity, to the marriage. Albert contends that he contributed assets of over \$100,000. The trial court disagreed. It found that Albert contributed approximately \$57,000 to the marriage because he was awarded that amount as his equal half of the marital estate from his first marriage, which ended six months prior to his marriage to Janice. Janice testified that when they married, Albert told her that his former wife received \$57,000, which was half of all of their holdings. Albert now claims that he also brought numerous investments to the marriage. In finding that Albert brought approximately \$57,000 to the marriage, the trial court stated:

To find otherwise would result in the Court having to conclude either that Mr. Miller defrauded the Court and the first Mrs. Miller by misrepresenting his assets or that his \$57,000.00 in assets ballooned astronomically in the following six months. Nothing in the record allows the Court to do either. It appears that when Mr. Miller listed his asset[s], he did not include the debts associated with those assets and other debts.

We are not persuaded that the trial court's finding that Albert brought approximately \$57,000 to the marriage is clearly erroneous when considered in the context of his first divorce settlement. Consequently, we are not persuaded that the trial court's reasoning based on that finding was an erroneous exercise of discretion.

Albert also contends that a specific pension should have been excluded from the marital estate. He relies on § 767.255(2)(a)2, STATS., and *Olson v. Olson*, 148 Wis.2d 219, 435 N.W.2d 266 (Ct. App. 1988). Albert's reliance on § 767.255(2)(a)2 is misplaced because it applies to property acquired "[b]y reason of the death of another," a phrase which he deletes when quoting from

the statute. We also are not persuaded that *Olson* compels the result Albert seeks. *Olson* held that “[s]ection 767.255, STATS., does not require that a trial court equally divide pension benefits earned before the marriage, but leaves this matter to the court’s discretion.” *Olson*, 148 Wis.2d at 224, 435 N.W.2d at 268. We are not persuaded that the trial court’s finding that the account was marital was clearly erroneous, contrary to § 767.255(2)(a)2 or violative of *Olson*.¹

Albert also contends that he incurs substantial health care expense because he has Alzheimer’s disease. The trial court acknowledged Albert’s condition and the substantial expense associated with it, but found that his income, including that from social security disability and his pension, covered much of that expense. The trial court noted that “[Albert’s] monthly income stream (SSI, pensions, etc.) is not only considerably greater than [Janice’s] but also tax free.” It reasoned that Janice should not be required to forfeit her equal share of the marital estate when Albert has principal available to supplement any health care expenses that exceed his income.

We conclude that the trial court’s decision to honor the presumption of an equal division of the marital estate was predicated on its consideration of the facts of record and the law. We conclude that its determination was both reasoned and reasonable. We therefore conclude that the trial court did not erroneously exercise its discretion in dividing the marital estate equally.

Janice moves for \$3,242 in attorney’s fees for defending this judgment on appeal. Her basis for seeking this award is the trial court’s reference

¹ We also note the disputed evidence on whether this pension account was commingled with other marital funds.

to the issue of appellate attorney's fees in its August 14, 1997 order and RULE 809.25(3)(c)2, STATS. Although we were not persuaded that the issues raised on appeal were as "strong" as Albert characterizes them, they were not "without any reasonable basis in law or equity." Consequently, we deny the motion.

By the Court.—Judgment affirmed.

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

