

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 10, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

NOTICE

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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. 99-0496

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

CORY W. GEHLING,

PETITIONER-RESPONDENT,

V.

LORI M. GEHLING, N/K/A LORI M. WENGER,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
MARYANN SUMI, Judge. *Affirmed.*

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

¶1 DYKMAN, P.J. Lori M. Wenger appeals from a judgment of divorce awarding Cory W. Gehling, her former husband, the real estate he brought to the marriage minus the \$12,500 increase in the property's equity during the

marriage. Lori argues that the trial court should have awarded her an equal share in the property because Cory deeded the property to include her as a tenant in common two months before they married. She also contends that the trial court erred by valuing the marital estate on the date of separation instead of the date of divorce. We disagree and affirm.

I. Background

¶2 Cory and Lori married in February of 1993. Three years earlier, Cory had purchased real estate in Dane, Wisconsin. Two months before they married, Cory filed a quit claim deed changing the real estate title from his name alone to Lori and he as tenants in common. During their marriage, Cory and Lori lived in a house on the property. In August of 1996, Cory filed a petition for divorce and the parties separated the following September. Cory testified that the equity in the real estate increased by \$12,500 between the date they married and the date they separated. He also testified that the equity increased by an additional \$35,000 during their separation.

¶3 The divorce trial did not begin until September of 1998. The trial court found that two factors contributed to the delay between the parties' separation and the trial. The first was that Lori became pregnant by someone other than Cory. The second was that the circuit court branch to which the case was assigned did not have a judge for an extended period of time, for reasons beyond the control of the parties.

¶4 In December of 1998, the trial court granted the divorce. In determining an appropriate property division, the court first concluded that it would use the date of separation rather than the date of divorce to value the marital estate because of the delays caused by Lori's pregnancy and the absence of a trial

judge. The court then explained that it would divide the property by returning to each party the assets they brought to the marriage and dividing the increase in value during the marriage. It explained that such a division would be fair because: (1) the marriage was of short duration; (2) although Lori contributed to the marriage, Cory's business accounted for a large portion of the marital estate; (3) Lori had not made significant economic sacrifices because of the marriage and would not suffer an economic setback if the parties were returned to their pre-marriage positions; (4) both Cory and Lori were well off in terms of their age, and physical and emotional health; (5) neither party had contributed significantly to the other's education or increased earning power; and (6) neither party's earning capacity had been significantly affected by the short marriage.

¶5 The court concluded that the real estate was subject to property division, but concluded that Cory had brought the real estate to the marriage along with his business and his car collection. It awarded Cory the full interest in the real estate, the business and the car collection, in addition to the personal property in his possession, and his financial accounts. It awarded Lori her car, her personal property, and her financial accounts. It also awarded Lori a \$12,500 payment from Cory, an amount equal to the increase in equity in the real estate during the marriage, but before the parties separated.¹ Lori appeals.

¹ This amount was reduced by one-half of the amount necessary to satisfy a judgment in favor of Lori's first attorney.

II. Analysis

A. Standard of Review

¶6 The division of property in a divorce is within the trial court's discretion. See *Forester v. Forester*, 174 Wis. 2d 78, 91, 496 N.W.2d 771 (Ct. App. 1993). We will not interfere with the trial court's division of property unless it erroneously exercised its discretion. See *Gardner v. Gardner*, 190 Wis. 2d 216, 236, 527 N.W.2d 701 (Ct. App. 1994). We will sustain the trial court's decision if the 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." *Sharon v. Sharon*, 178 Wis. 2d 481, 488, 504 N.W.2d 415 (Ct. App. 1993).

B. The Real Estate

¶7 Lori argues that the trial court erroneously exercised its discretion by awarding Cory the entire interest in the real estate, except the \$12,500 increase in equity. She asserts that the trial court erred in departing from the presumption of an equal property division, under WIS. STAT. § 767.255(3) (1997-98),² based on the conclusion that Cory brought the real estate to the marriage. She contends that Cory did not bring the real estate to the marriage because he deeded a one-half interest in the real estate to her before they married.

² All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted. WISCONSIN STAT. § 767.255(3) provides:

The court shall presume that all property not described in sub. (2) (a) is to be divided equally between the parties, but may alter this distribution without regard to marital misconduct after considering all of the following:

(continued)

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- (a) The length of the marriage.
 - (b) The property brought to the marriage by each party.
 - (c) Whether one of the parties has substantial assets not subject to division by the court.
 - (d) The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.
 - (e) The age and physical and emotional health of the parties.
 - (f) The contribution by one party to the education, training or increased earning power of the other.
 - (g) The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.
 - (h) The desirability of awarding the family home or the right to live therein for a reasonable period to the party having physical placement for the greater period of time.
 - (i) The amount and duration of an order under s. 767.26 granting maintenance payments to either party, any order for periodic family support payments under s. 767.261 and whether the property division is in lieu of such payments.
 - (j) Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.
 - (k) The tax consequences to each party.
 - (L) Any written agreements 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.
 - (m) Such other factors as the court may in each individual case determine to be relevant.

¶8 We conclude that the trial court properly exercised its discretion in awarding the real estate to Cory. Although Cory deeded Lori an interest in the real estate two months before they married, title does not necessarily control the division of property in a divorce. In fact, WIS. STAT. § 767.255(1) provides that upon every judgment of divorce, “the court shall divide the property of the parties and divest and transfer the title of any such property accordingly.” A judgment of divorce “extinguish[es] any prior interests that the parties might have had in an asset and creates new interests which become vested at the moment the divorce decree is entered.” *Dewey v. Dewey*, 188 Wis. 2d 271, 276, 525 N.W.2d 85 (Ct. App. 1994). The division of property in a divorce is an equitable proceeding in which the trial court may, in its discretion, depart from an equal division of the property in the marital estate after considering the factors listed in § 767.255(3). See *Jasper v. Jasper*, 107 Wis. 2d 59, 66, 318 N.W.2d 792 (1982); *Kuhlman v. Kuhlman*, 146 Wis. 2d 588, 590-91, 432 N.W.2d 295 (Ct. App. 1988). One of those factors is the “property brought to the marriage by each party.” § 767.255(3)(b).

¶9 In this case, the trial court considered the factors under WIS. STAT. § 767.255(3) and properly exercised its equitable powers in making the property division. The property brought to the marriage by each party was only one of the factors the court considered in exercising its discretion. In particular, the court considered the short length of the marriage to be an important factor in departing from an equal property division. It also explained that returning the parties to their pre-marriage positions would not cause Lori to suffer any economic setback because she could continue to work in the same manner she had before and during the marriage. In exercising its discretion to depart from an equal property division, the court determined that, in practicality, Cory brought the real estate to

the marriage and awarded him the entire interest in the property, except for the \$12,500 increase in equity.

¶10 The court's decision to award Cory the real estate, despite the pre-marriage change in title, was not an erroneous exercise of discretion. Cory purchased the real estate three years before he married Lori. He testified that he changed the title to include Lori's name two months before they married only because he refinanced the mortgage on the property and the bank said that Lori's name should be on the mortgage if they were going to be married. Lori testified that she contributed to the house during the marriage by refurbishing the interior and exterior, by helping with the landscaping, and by keeping the house clean. She also testified that she paid all the household bills, except for the mortgage. Based on the testimony, the trial court was entitled to conclude, as a matter of equity and not title, that Lori did not bring the real estate to the marriage although she contributed to its increase in value during the marriage. The court determined that an equitable property division would return the full interest in the property to Cory, but give Lori one-hundred percent of the increase in equity during the marriage. Considering Cory and Lori's testimony, the trial court's decision was reasonable.³

¶11 Lori argues that Cory intended to make a gift of an interest in the real estate to her when he changed the title and that, under *Bonnell v. Bonnell*, 117 Wis. 2d 241, 344 N.W.2d 123 (1984), and *Trattles v. Trattles*, 126 Wis. 2d 219, 376 N.W.2d 379 (Ct. App. 1985), the trial court should have taken Cory's

³ The trial court could have come to the same conclusion by considering the property as brought to the marriage by both parties, but awarding most of its equity to Cory because he was responsible for most of the asset's value.

“donative intent” into account in making the property division. We disagree. In *Bonnell*, the supreme court recognized that a spouse could transfer into the marital estate, by express or implied agreement or by gift, property that would otherwise be retained as the spouse’s separate property. *Bonnell*, 117 Wis. 2d at 245. The court held that the “transfer of separately owned property into joint tenancy changes the character of the ownership interest in the entire property into marital property which is subject to division.” *Id.* at 248. In *Trattles*, we concluded that a spouse’s use of the proceeds from gifts from her father to pay for furnishings, repairs, maintenance and improvements for the jointly owned home, and to make mortgage payments demonstrated the spouse’s donative intent. *Trattles*, 126 Wis. 2d at 224. We held that when a spouse makes “a conscious and presumably informed decision to alter the existing manner in which his or her solely owned exempt property is held ... such property no longer retains its character as separate property, but rather becomes part of the marital estate subject to division under sec. 767.255, Stats.” *Id.* at 227.

¶12 In this case, neither party contends that the real estate was not subject to division as part of the marital estate. Rather, the issue is whether the trial court properly exercised its discretion in dividing the property. *Bonnell* and *Trattles* do not hold that the trial court must consider the donative intent of a spouse when dividing property that has already been determined to be part of the marital estate.

C. Valuation Date

¶13 Generally, the marital estate is valued as of the date of divorce. *See Sommerfield v. Sommerfield*, 154 Wis. 2d 840, 851, 454 N.W.2d 55 (Ct. App. 1990). However, “when conditions over which a party has little or no control

arise, such special circumstances can warrant deviation from the rule.” *Id.* We review a trial court’s decision to deviate from valuing the marital estate on the date of divorce for an erroneous exercise of discretion. *See Long v. Long*, 196 Wis. 2d 691, 698, 539 N.W.2d 462 (Ct. App. 1995).

¶14 Lori contends that the trial court erred by valuing the marital estate on the date of separation. She asserts that her pregnancy and the absence of a trial judge do not constitute the special circumstances necessary to depart from using the date of divorce. She points out that her pregnancy was not a calculated attempt to prolong the divorce action. She also argues that judicial delay is normal in divorce proceedings and that, in *Brandt v. Brandt*, 145 Wis. 2d 394, 427 N.W.2d 126 (Ct. App. 1988), we held that a four-and-one-half year delay did not constitute special circumstances.

¶15 We conclude that the trial court appropriately exercised its discretion in concluding that Lori’s pregnancy and the absence of a trial judge constituted special circumstances requiring the use of the separation date to value the marital estate. We accept Lori’s argument that her pregnancy was not a purposeful attempt to delay the divorce. It is also true that delays often occur in judicial proceedings. However, the central factor in determining whether circumstances necessitate deviating from the date of divorce is whether a party had control over those circumstances. *See Wikel v. Wikel*, 168 Wis. 2d 278, 286-87, 483 N.W.2d 292 (Ct. App. 1992). In *Brandt*, we held that a four-and-one-half year delay did not constitute special circumstances because the delay was largely caused by the parties’ own actions. *Brandt*, 145 Wis. 2d at 422. In this case, Cory had nothing to do with Lori’s pregnancy since he was not the father, and he had no control over the absence of the trial judge. Considering Cory’s lack of control over the delay, the trial court did not erroneously exercise its discretion by valuing the

marital estate on the date of separation instead of over two years later on the date of divorce.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

