COURT OF APPEALS
DECISION
DATED AND FILED

March 16, 2000

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

No. 99-0922

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

IN RE THE MARRIAGE OF:

ANN MARIE JAHIMIAK,

PETITIONER-RESPONDENT-CROSS-APPELLANT,

V.

DAVID RALPH JAHIMIAK,

RESPONDENT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for La Crosse County: JOHN A. DAMON, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

¶1 EICH, J. David Ralph Jahimiak appeals, and Ann Marie Jahimiak cross-appeals, from a judgment of divorce, and from an order denying their

motions for reconsideration. David argues that the court erroneously exercised its discretion in: (1) valuing his and Ann's stock as of a date earlier than the date of divorce; (2) including the accounts receivable in his dental practice as both an asset subject to property division and as part of his "income stream" for purposes of support and maintenance; (3) failing to consider the tax consequences of a sale of real estate he had to undertake in order to make the required property-division equalization payment to Ann; (4) failing to consider Ann's potential investment income when determining maintenance; (5) assigning all tax liability to him; and (6) placing a lien on his property until any federal tax liability was paid.

¶2 Ann argues on her cross-appeal that: (1) the court erred in setting maintenance; (2) she received an inadequate contribution to her attorneys' fees; and (3) she is entitled to a new trial based on what she claims is newly discovered evidence—the fact that, months after trial, David sold, or received offers to purchase, part of his collection of vintage sports cars for an amount higher than the valuation placed on them by the court in the divorce judgment.

¶3 We conclude that the trial court properly exercised its discretion in all respects and affirm the judgment and order.

¶4 The facts can fill volumes, and we only summarize them here. David and Ann divorced in January 1999, after a twenty-seven and one-half year marriage. He was fifty-one, and she was forty-nine, at the time. They have one minor child. At the time of the divorce, David worked as a dentist in his own practice, and Ann worked part-time as a sales clerk in a department store.

¶5 In 1986-87, David began buying and selling vintage cars and, at the time of the divorce, he owned two valuable Mercedes-Benz "Gullwings," as well as several mopeds, a trailer, a motor home, and various racing cars and other

vehicles. In March 1997, David opened a brokerage account in his name and Ann's, funded the account with the $231,000 proceeds from the sale of one of his sports cars, and began trading stocks on his own. By the time the divorce action was commenced in November 1997, the account was showing losses, which increased as time went along. By the time of trial, all had been lost and the account showed a negative balance of over $126,000.

¶6 David testified that Ann was aware of many of the account transactions and he contended that she could have discontinued them at any time. He said that at one point, when the account could have been sold with only nominal losses, he suggested that the account be divided equally between himself and Ann, and Ann refused. Ann's testimony was to the contrary. She said she knew nothing about any deposits David made into the brokerage account other than an initial deposit of $10,000 in May 1997, and that she was not consulted with respect to any of his trades. She testified that she asked David to liquidate the account and that she and her attorney repeatedly attempted to stop him from engaging in highly speculative trading. She said he persisted in ignoring this advice and continued trading stocks based solely on his own knowledge and research.

¶7 The circuit court found that because David was aware of the risks he was taking, and had made all trade decisions himself, "it doesn't seem fair that [Ann] should be responsible for [David's] negligent use of their financial resources." The court characterized David's stock trading as "gambling" and said that his conduct was "tantamount to misconduct and negligence," and that he had consistently mismanaged the couple's funds in this regard. The court noted that David ignored the professional advice Ann had sought to attempt to remedy things, claiming that "he knew better about what to do." On that basis, the court

valued the stock account as of February 2, 1998, and assigned any losses after that date to David.

¶8 In addition, the court ordered that: (1) in order equalize the property division, David pay Ann $394,871.00 by July 1, 1999; (2) David pay Ann maintenance of $4,500 per month, based, among other things on a finding that David's income was $165,484 per year, while Ann's was $10,000; (3) David contribute $10,000 to Ann's attorneys' fees; (4) Ann have a lien against the real estate awarded to David as security for all sums due her as a result of the judgment; and (5) David assume responsibility for all the parties' tax liabilities. The court also set the value of David's two remaining Gullwing sports cars at $150,000 and $140,000. The appeal and cross-appeal followed the court's denial of both parties' motions for reconsideration of nearly all aspects of the court's rulings.

¶9 David argues first that the court erroneously exercised its discretion in valuing the stock investment account as of February 2, 1998, instead of the date of the divorce. We disagree. It is true, as David points out, that marital assets are to be valued as of the divorce date unless special circumstances dictate otherwise, and that the "special circumstances" rule applies only where those circumstances were created by events beyond the parties' control (as opposed to situations where a party's own conduct created them). ***Brandt v. Brandt***, 145 Wis. 2d 394, 421-22, 427 N.W.2d 126 (Ct. App. 1988). The law also allows courts "to consider each party's efforts to preserve marital assets and to require a party to pay debts caused by the squandering of the parties' assets, or the intentional or neglectful destruction of property." ***Anstutz v. Anstutz***, 112 Wis. 2d 10, 12, 331 NW 2d 844 (Ct. App. 1983). And that, it appears, was the situation here.

¶10 The circuit court found that, although the investment account was owned by David and Ann as tenants in common—meaning that, legally, Ann could have cancelled the account at any time—David was the one who made all trade decisions, acting as if he were the account's sole owner. The court also found that David, knowing that he was investing in high-risk stocks, nonetheless "pushed forward" with his uncounseled investments:

> Husband was gambling with a large amount and not only did he gamble with the money he invested, he also put it on margin to increase the risk more, and it increased more, against objections of wife. It was gambling and husband was not in a position to do that. Given the warning to husband, it does not seem fair that wife should be responsible for husband's negligent use of the parties' financial resources in this way, particularly since husband was the one that made every trade and every decision regarding this account, and he admits that he made a mistake.
>
> The court finds, based on the circumstances, husband's mishandling of this account is tantamount to misconduct and negligence, as well as a disruption by total mismanagement and placing it in a high-risk account. This is not a case where wife stood passively by while her husband gambled in this high-risk market. Wife even sought professional advice about what to do and husband also ignored that. Husband stated, based on his personal research, that he knew better what to do. The Court finds that wife should not be responsible for any of the losses that have been incurred and the valuation date shall be February 2, 1998. Any losses after that date shall be husband's responsibility.

The court also stated that "[i]t was abundantly clear that by February 2, 1998, by husband's own testimony, that he was told to sell [the stock]."

¶11 The court's findings fit the ***Anstutz*** rule, and we are satisfied that it did not erroneously exercise its discretion when it valued the investment account as of February 2, 1998.

¶12 David next argues that the court erroneously double-counted the accounts receivable in his dental practice—both as an asset in the property division and as part of his "income stream" for purposes of determining support and maintenance. David correctly points out that double-counting is not permitted, *see* ***Hubert v. Hubert***, 159 Wis. 2d 803, 812, 465 N.W.2d 252 (Ct. App. 1990) (citation omitted), and it is true that, in its discussion, the court erroneously remarked that double-counting was permissible. We are satisfied, however, that, under ***Hauge v. Hauge***, 145 Wis. 2d 600, 427 N.W.2d 154 (Ct. App. 1988), the court did not erroneously double-count in this case.

¶13 In ***Hauge***, the husband, like David, claimed that the court erred in considering the accounts receivable from his dental practice as both an asset to be divided and as a component of his income for purposes of setting support and maintenance. Recognizing that double counting of accounts receivable is impermissible, we concluded that the evidence failed to bear out the husband's claim.

> The evidence disclosed that the amount of these accounts remained relatively static or rose slightly over a period of several years preceding the divorce. The [circuit] court was entitled to infer a similar accumulation into the future. Although [the husband] may collect a small portion of his income each year from accounts receivable, he apparently continues to accumulate a comparable receivable in each succeeding year. At the point of retirement or sale of his practice, he will be entitled to the outstanding accounts as an asset to replace those previously depleted through income.

¶14 The facts here are analogous. David's accounts receivable are paid in part and accrued in part on an annual basis, and Ann's expert, considering this factor, discounted the accounts according to their age. Adopting that approach itself, the court discounted the accounts from their actual value of $68,000, to

$32,000, as Ann's expert proposed. And in determining David's income for maintenance and support purposes, the court did not include the accounts receivable in David's projected income, but arrived at its decision based on exhibits showing his income from the practice in prior years. David has not persuaded us that the court engaged in a prohibited double-counting of the accounts receivable.

¶15 David also argues that the court erroneously exercised its discretion by refusing to consider the tax consequences of the property division—specifically the $14,760 capital gains tax he claimed he would have to pay on real estate he said he would have to sell in order to make the equalization payment to Ann. The court declined to consider David's evidence on the point, stating that David had the "option" to make the payment from other sources and that it would not require Ann to "pay for something that was [David's] option." The record supports the court's decision. David testified at trial that he intended to sell the two remaining Gullwing sports cars in order to make the equalization payment. Nowhere does it appear that David either planned to, or had to, sell the real estate in order to pay Ann. We see no misuse of discretion here.

¶16 David's next argument is that the court erred in determining maintenance because it failed to consider the potential income Ann could earn from investing the money she received in the property division. David says that Ann received nearly $400,000 in "cash" as part of the property division, and that there was "unchallenged evidence" that that amount of money would produce a minimum rate of return of 6-7%, or approximately $25,000 a year. David also points out that investment of the IRA accounts Ann was awarded in the property division—also at a 6-7% interest rate—would result in additional income of

$31,500. And he claims that, as a result, the court erred in determining Ann's income for purposes of maintenance to be $10,000 per year.

¶17 David's position is based solely on the testimony of Fred Fletcher, an investment advisor who David says offered "unchallenged evidence that a minimum reasonable rate of return on [a cash investment of $394,871] would be between six and seven percent." In context, Fletcher's testimony—in response to questions from David's attorney—was as follows:

> Q. [L]ets assume that Mrs. Jahimiak has $200,000 cash to invest, and she came to you, what do you believe would be a reasonable return on that investment, knowing what her situation is?
>
> A. We wouldn't approach it that way.
>
> Q. O.K.
>
> A. We would ask her … to fill out a questionnaire, and we could assess a time frame for the mon[eys] involved, and the level of risk that she was able to take, and what her goals were for the money, and if she needed to have income versus pure growth versus a combination.
>
> Q. And can you tell me what a reasonable rate of return would be for the investment of $200,000?
>
> A. It depends totally on what the needs are. If you want to tell me what the needs are for a reasonable rate of return?
>
> Q. If she were looking for income, what would be a reasonable rate of return?
>
> A. I would think in the area of six to seven percent.

¶18 Given the variables Fletcher testified to, and the lack of any evidence in the record with respect to those variables and their relation to Ann's needs—or even to the actual amount of money on which David's calculations are made—we think the court's decision was a sustainable exercise of discretion. It recognized that some investment income was probable, but because the record

didn't support any precise figure, the court put forth a "guess" that Ann might possibly earn "up to $10,000 per year" from the money she was awarded in the judgment. We agree with the court that David's imputation of income to Ann is not supported by the evidence. And while a "guess" is the antithesis of informed discretion, adding *any* amount to her actual income benefits David, not Ann, and she has not raised any challenge to the court's action in this regard.

¶19 We also reject David's argument that the court erroneously exercised its discretion when it assigned the parties' tax liabilities to him.[1] The court determined that David should assume responsibility for all the parties' tax liabilities because he was the primary manager of the couple's assets and finances, and the one who handled all taxes. In so ruling, and in recognizing that Ann had not been involved in the preparation or review of any of the tax returns and had no understanding of the tax laws, the court remarked at one point that Ann was "an innocent spouse in this regard." David seizes upon that remark, arguing that the court lacked jurisdiction to determine whether Ann was an "innocent spouse" within the meaning of the Internal Revenue Code.[2]

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[1] Tax liabilities were an issue because David's dental practice was undergoing a tax audit by the Wisconsin Department of Revenue. The audit concerned payment of sales tax for the out-of-state purchase of dental supplies used in the practice, and the DOR was seeking to charge a use tax on those purchases. At the time of trial, the auditor was also reviewing possible sales tax assessments for David's automobile sales business.

[2] *See* 26 U.S.C. § 6015(d) for explanation of an "innocent spouse" under the Internal Revenue Code. Generally, when taxpayers file a joint income tax return, they are jointly and severally liable for the amount of tax or any deficiency due. The innocent spouse provision constitutes an exception to that general rule. Congress enacted this provision to prevent hardships that resulted when one spouse did not report income, thereby leaving the innocent spouse to pay the deficiency. If a spouse succeeds in proving his or her eligibility for treatment under the innocent spouse provision, that spouse is liable for a deficiency on the joint return only to the extent that items giving rise to the deficiency are allocable to that spouse.

¶20 There is nothing in the record, however, to indicate that the court's remark—which has all of the characteristics of offhand comment rather than legal analysis—had anything to do with the "innocent spouse" rule of the Code. The court was simply recognizing that any adverse tax consequences resulting from David's handling of the parties' finances and his preparation of their tax returns would be a marital debt to be considered in dividing their property. Then, in the course of dividing the property, the court found that David contributed to the tax debts because of his position as the family financial officer and tax preparer—and that because he was the sole beneficiary of any inaccuracies in the returns, he should also be responsible for the liabilities incurred as a result. That finding, coupled with the court's recognition that Ann was a total stranger to the couple's taxes—in the court's words, an "innocent spouse" with respect to the liabilities incurred by David's machinations—caused it to conclude that David should be solely responsible for those liabilities. We see no erroneous exercise of discretion in that ruling.

¶21 David also argues that the court erred when, after determining that he should be solely responsible for any federal tax debt, it granted Ann a lien against the real estate awarded to him in the property division until any and all such federal tax liability was paid. He claims, again, that the court lacked jurisdiction to determine that he was responsible for any federal tax liability on grounds that Ann was an "innocent spouse." We reject that argument for the reasons just stated. David also contends that the lien is problematic because at the time of trial, there was no audit pending before the Internal Revenue Service, and no federal tax liability had been determined. We begin by noting that the IRS liability is only one aspect of the lien. It was imposed by the court to guarantee David's payment of not only any tax liability, but also payment of the property-

division equalization, the investment account debt, and his required contribution to Ann's attorneys' fees. There is nothing before us to indicate that David has satisfied any of these other obligations set forth in the court's order. If, at such time as they have been paid, the IRS hasn't commenced an audit, or David feels that the lien is unduly preventing him from clearing title to his properties, or causing him any other hardship, he may, at that time, seek appropriate relief from the circuit court. At this point, he has not satisfied us that the court erroneously exercised its discretion in placing the lien on his property.

¶22 In her cross-appeal, Ann argues first that the circuit court erred in determining maintenance. The court's judgment results in David having approximately $1,600 per month more in "disposable income" than Ann, and she claims this violates the "equal income presumption" applied to maintenance determinations. The court decided that the $1,600 discrepancy was appropriate under the facts of the case because David was "tak[ing] on a large debt load to balance the property division."

¶23 Whether to award maintenance—and the amount and duration thereof—are discretionary with the circuit court. ***Brabec v. Brabec***, 181 Wis. 2d 270, 277, 510 N.W.2d 762 (Ct. App. 1993). Generally, "if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision," we will affirm. ***Prahl v. Brosamle***, 142 Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987) (citation omitted). Indeed, as we have often said, "we generally look for reasons to sustain discretionary decisions." ***Burkes v. Hales***, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991). In divorce cases, however, we have also recognized that a court erroneously exercises its discretion "if it

misapplies or fails to apply any of the statutory factors set out in sec. 767.26,[3] or if it fails to give full play to the dual objectives of maintenance" which are, of course, support and fairness. ***Brabec***, 181 Wis. 2d at 277 (citation omitted).

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[3] The statute provides as follows:

> Upon every judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under s. 767.02 (1) (g) or (j), the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time after considering:
>
> (1) The length of the marriage.
>
> (2) The age and physical and emotional health of the parties.
>
> (3) The division of property made under s. 767.255.
>
> (4) The educational level of each party at the time of marriage and at the time the action is commenced.
>
> (5) The earning capacity of the party seeking maintenance, 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 find appropriate employment.
>
> (6) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.
>
> (7) The tax consequences to each party.
>
> (8) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, where such repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.
>
> (9) The contribution by one party to the education, training or increased earning power of the other.
>
> (10) Such other factors as the court may in each individual case determine to be relevant.

¶24 Our review of the record satisfies us that the court weighed the relevant statutory factors in reaching its decision. It considered, among other things, that David would be responsible for payment of approximately $670,000 of debts, while Ann would be debt-free; and it found that Ann would also receive substantial unencumbered assets which, together with $54,000 in annual maintenance, would provide her with fair and adequate support. We think the court properly exercised its discretion in setting maintenance.

¶25 Ann also argues that she should have been awarded more than a $10,000 contribution toward her attorneys' fees because of David's conduct during the litigation. She raises numerous complaints. She claims that David hid items of property from her appraisers, damaged her car, canceled her newspapers, attempted to cancel her homeowner's insurance, broke into her garage, harassed her over property and refused to pay their child's medical expenses as ordered by the court. She also complains that his out-of-control stock trading caused her additional grief and considerable time spent attempting to bring that situation "under control." She says that all this resulted in the case being overtried to the point where she unnecessarily incurred heavy legal fees. According to Ann, her lawyers' and expert witness fees exceeded $80,000 and she says a reasonable contribution from David would be $40,000.

¶26 This, too, is a matter within the court's discretion. ***Martin v. Martin***, 46 Wis. 2d 218, 228, 174 N.W.2d 468 (1970), *overruled on other grounds,* ***O'Connor v. O'Connor***, 48 Wis. 2d 535, 541, 180 N.W.2d 735 (1970). It has been recognized that in exercising its discretion, the court may consider one spouse's unreasonable approach to the litigation which results in unnecessary proceedings or unnecessarily protracted proceedings, together with attendant preparation time, for

which the opposing spouse is obliged to pay. *See* ***In re Ondrasek***, 126 Wis. 2d 469, 483, 377 N.W.2d 190 (Ct. App. 1985); ***Martin***, 46 Wis. 2d at 228-29.

¶27 Here, while Ann argues that she should have received $40,000 in attorney fees, she fails to explain how the court misused its discretion, or why she feels she is entitled to $40,000, rather than $10,000, or any other sum. The circuit court was well aware of David's conduct and it considered Ann's allegations in determining the appropriate amount of compensation. In awarding the fees, the trial court found as follows:

> [Ann] has incurred reasonable and necessary attorneys' and expert fees and cost[s] in this matter, exceeding $80,000. A substantial portion of these expenses would have been unnecessary but for the actions of [David]. He has made unnecessary and inappropriate contact with most of [Ann]'s expert witnesses and her attorneys. He has made substantial assets unavailable for appraisal and has resisted and undermined appraisals of the balance in an effort to lower their value. [David] aggressively resisted [Ann]'s attorneys' attempts to stop him from wasting the money in the stock account. He has carried on a continuous and subtle form of harassment against [Ann], causing her further attorneys' fees, including but not limited to violating the domestic abuse restraining order and the Temporary Order in this proceeding. … He has shown a general disregard for the authority of the Court and disrespect for [Ann]'s rights in this matter. As a result, [Ann's] attorneys' fees are substantially greater than they otherwise would have been. In consideration of all the foregoing, as well as the resources of each of the parties, the Court shall require [David] to contribute $10,000.00 towards [Ann]'s fees … which basically equalizes the cost of litigation for both parties.

Again, we see no misuse of discretion.

¶28 Finally, Ann claims the court should have "re-valued" David's two sports cars after trial. She frames the argument in "newly-discovered-evidence" terms, claiming that David sold the cars after trial for amounts in excess of the

court's valuations.[4] Ann asked the court to reconsider the value of the cars, and the court denied the motion, stating: "If the Court had to redo every single item here that the Court didn't get right, the value of every single item could be reopened, and often, when the[re] is a sale, nine out of ten times, it's not the same price as what the Court might have appraised."

¶29 We agree with the trial court that to grant Ann's request would seriously undercut the finality of divorce judgments. Cases like this may seem endless now; but if they could be re-opened after the fact when an item of property sells for somewhat more (or less) than the value determined in the judgment, they truly would never end. Markets fluctuate and consumer preferences change, so that any piece of property valued in a divorce proceeding may actually sell, at some later time, for more or less than that valuation. The issue is not whether a party might, for any one of a thousand reasons, get a better (or worse) deal on a post-judgment sale of property, but whether the valuation adopted by the court is supported by the evidence at trial. In this case it was, beyond a doubt; and the circuit court quite properly denied Ann's motion.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

[4] The court valued the cars at $150,000 and $140,000, based on the testimony of three qualified appraisers. A few months after entry of the divorce judgment, David apparently received an offer of $374,000 for both cars, which would have resulted in an increased value over that set by the court of approximately $50,000.