COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP828 **Cir. Ct. No. 2012FA71**

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

IN RE THE MARRIAGE OF:

SARAH J. STEINES N/K/A SARAH J. MYSICKA,

PETITIONER-RESPONDENT,

V.

CLAYTON J. STEINES,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. In this divorce case, Clayton Steines appeals an order pertaining to child support, maintenance, and property division. Clayton argues the circuit court erred by calculating child support and maintenance based

on his "earning capacity," rather than his actual income. Clayton also argues the court erred by deviating from an equal division of property without addressing the factors listed in WIS. STAT. § 767.61(3).[1] We reject these arguments and affirm.

BACKGROUND

¶2 Clayton and Sarah Steines were married on November 1, 1997. Throughout the marriage, Clayton worked as a master plumber, operating his own business. From 1998 until 2011, Sarah stayed home and cared for the parties' children. In 2011, she began working at a canning factory.

¶3 Sarah filed for divorce on July 19, 2012. The parties entered into a partial marital settlement agreement in which they agreed to joint legal custody and equal physical placement of their five minor children. Prior to the contested final hearing on November 12, 2014, the parties also reached an agreement regarding several other issues. As relevant to this appeal, the parties agreed they would each keep their own small retirement accounts and the personal property in their possession, and the court could "order an equalization payment be made from one to the other when the court issue[d] its final decision concerning property."

¶4 At the final hearing, Sarah testified she had recently obtained work as an administrative assistant. Her final financial disclosure statement, which was submitted as an exhibit at the hearing, reported a monthly gross income of $2021. Clayton's final financial disclosure statement reported a monthly gross income of $922.47. However, Clayton testified at the hearing that he works fifty to fifty-five

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

hours per week, and bills seventeen to twenty hours per week at a rate of $75 per hour. He further testified he charges a twenty-five percent mark-up on materials.

¶5 Both parties reported limited assets on their financial disclosure statements. Clayton admitted at the hearing, however, that he had cash "profits" from the prior year, which he had not disclosed on his financial disclosure statement. Clayton did not know the full amount of these cash profits, but he testified he had $5000 in cash at his home as of the hearing date. Clayton was ordered to retrieve this money and bring it to court, which he did.[2]

¶6 Clayton and Sarah also provided evidence regarding various debts. Sarah sought contribution from Clayton for a judgment of approximately $6000 rendered against her by Bank of America, which was the result of a credit card debt incurred in 2003 so that she and Clayton could pay off a lien in order to sell their mobile home. Clayton sought contribution from Sarah for the following debts, which totaled $76,569:

- $23,969 in unpaid income taxes for the year 2013;
- Approximately $500 to the Wisconsin Department of Workforce Development for unemployment tax;
- $5000 to his parents, Roman and Renee Steines, to repay money they loaned him for operating capital;
- $900 to "Jock's" for dump truck repairs;

[2] The court ordered Clayton to pay Sarah $1000 of this money. $3000 was placed in Clayton's attorney's trust account pending further instructions from the court, and Clayton was allowed to retain the remaining $1000. The court ultimately ordered the $3000 paid to Sarah.

- $1200 to WE Energies for utility bills incurred during the marriage;
- $6000 for medical expenses incurred after the divorce filing; and
- $39,000 to Jim Avery, a friend of Clayton's; Clayton testified Avery loaned him this money so that Clayton could pay off other debts that were incurred during the marriage.

¶7 Following the close of testimony at the final hearing, the circuit court granted the parties a judgment of divorce. The court then heard oral argument from the parties' attorneys regarding child support, maintenance, and property division. During the arguments, the court raised a question about how to calculate Clayton's "earning capacity." Clayton's attorney responded that the court should look at Clayton's tax returns, disregard the lowest and highest annual incomes, and average the annual incomes reported in the remaining years. This resulted in an annual income of "somewhere around 40 to 42 grand." Conversely, Sarah's attorney argued the court should multiply twenty hours per week—the number of hours Clayton testified he billed—times $75, times fifty-two weeks per year. This resulted in an annual income of $78,000, to which Sarah's attorney argued the court should add an unspecified amount to account for the mark-up Clayton charged on materials.

¶8 The circuit court issued oral decisions on December 9, 2014, and January 28, 2015. With respect to Clayton's income, the court found that Clayton's financial disclosure statement was "on its face … inaccurate." The court therefore used two methods to calculate what it referred to as Clayton's "earning capacity." First, based on Clayton's tax returns for the previous six years, the court concluded his average annual income was $38,027.66. Second, the court multiplied twenty hours per week by $75 per hour, and multiplied the

result by fifty-two weeks per year, to reach an annual gross income of $78,000. The court then deducted twenty-five percent for overhead, to reach an annual income $58,500, or $4875 per month.

¶9 The court ultimately used this second figure to calculate Clayton's maintenance and child support obligations. It ordered Clayton to pay Sarah maintenance in the amount of $300 per month for two years, $400 per month for the next five years, and $650 per month for the following six years. It ordered Clayton to pay $727.77 per month in child support.

¶10 With respect to property division, the court awarded Clayton the proceeds from the sale of his boat and the "personal property in his business[.]" It awarded Sarah her minivan. The court ordered Clayton to pay half of the Bank of America judgment against Sarah and the entirety of the remaining $76,569 in debt. Neither party was required to make an equalization payment to the other. On appeal, Clayton asserts, and Sarah does not dispute, that the court's rulings resulted in net property awards of -$59,441.62 to Clayton and $77.48 to Sarah.

¶11 A written order memorializing the court's oral rulings was entered on February 9, 2015. Clayton now appeals.

DISCUSSION

I. Child support and maintenance

¶12 Child support and maintenance determinations fall within the circuit court's discretion. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We will uphold a discretionary decision as long as the circuit court applied a proper standard of law to the relevant facts and used a demonstrated rational process to reach a reasonable conclusion. ***Id.*** Whether the circuit court

used the proper legal standard is a question of law that we review independently. ***Ulrich v. Zemke***, 2002 WI App 246, ¶8, 258 Wis. 2d 180, 654 N.W.2d 458.

¶13 Here, Clayton essentially argues the circuit court used an improper legal standard when it calculated maintenance and child support using his "earning capacity." A circuit court may consider a parent's earning capacity, rather than the parent's actual earnings, only after concluding the parent has been shirking. ***Chen v. Warner***, 2005 WI 55, ¶20, 280 Wis. 2d 344, 695 N.W.2d 758. To conclude a parent has been shirking, a court must find that the parent's decision to reduce or forgo income is voluntary and unreasonable under the circumstances. ***Id.*** As Clayton points out, the circuit court in this case did not conclude he was shirking. Clayton therefore argues the court should have used his actual income to determine child support and maintenance.

¶14 As a threshold matter, we note that Clayton appears to have forfeited this argument by failing to raise it in the circuit court. Throughout the final hearing, and both of its oral rulings, the circuit court consistently used the term "earning capacity" when discussing Clayton's child support and maintenance obligations. Clayton never objected to the court's use of that term or argued the court could not use his earning capacity to calculate child support and maintenance. In fact, Clayton's own attorney stated during oral argument, "I understand this Court needs to look at earning capacity[.]" We generally refuse to consider issues that are raised for the first time on appeal. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727.

¶15 Even assuming, however, that Clayton preserved this issue for appeal, we would nevertheless affirm. Despite the terminology it used, the circuit court did not actually determine child support and maintenance based on Clayton's

earning capacity. Instead, after finding that the income reported on Clayton's financial disclosure statement was inaccurate,[3] the court used two methods to calculate Clayton's actual earnings. First, as suggested by Clayton's attorney, the court used Clayton's tax returns to calculate his average annual income during the preceding six years. Second, as suggested by Sarah's attorney, the court calculated Clayton's annual income based on his own testimony regarding his work hours and hourly rate. The court then applied a twenty-five percent reduction for overhead. The court ultimately decided to use the second method to determine Clayton's income.

¶16 Both of the methods used by the court relied on evidence about Clayton's past earnings and work habits in order to determine how much money he was actually making. In contrast, earning capacity is a measure of how much money a parent *could be making* if he or she had not made an unreasonable decision to reduce or forego income. *See* ***Chen***, 280 Wis. 2d 344, ¶20. Here, the court did not determine how much money Clayton could hypothetically be making if he took a different job or worked more hours; it determined, based on Clayton's own testimony, what he was actually earning.[4] Thus, contrary to Clayton's assertion, the court did not use his earning capacity to calculate his child support and maintenance obligations.

[3] Clayton does not challenge the circuit court's finding that the income reported on his financial disclosure statement was inaccurate.

[4] Although Clayton may have preferred that the court use the method suggested by his attorney to calculate his income, rather than the method suggested by Sarah's attorney, the court's decision to choose one of these methods over the other was not an erroneous exercise of discretion. Clayton does not argue the method ultimately adopted by the court was unreliable or otherwise unreasonable.

II. Property division

¶17 Clayton next argues the circuit court erroneously exercised its discretion with respect to the division of the parties' property. Like child support and maintenance determinations, the division of property at divorce is committed to the circuit court's discretion. *See* ***LeMere***, 262 Wis. 2d 426, ¶13.

¶18 WISCONSIN STAT. § 767.61(3) sets forth a presumption that most property is to be divided equally at divorce. However, a court may deviate from an equal division after considering the factors listed in § 767.61(3)(a)-(m). Section 767.61(3) "explicitly requires that any deviation from the presumptive equal property division be based upon consideration of all the statutory factors." ***LeMere***, 262 Wis. 2d 426, ¶24.[5] Nevertheless, a court is not precluded "from giving one statutory factor greater weight than another, or from concluding that some factors may not be applicable at all." ***Id.***, ¶25. Moreover, failure to address factually inapplicable factors does not constitute an erroneous exercise of discretion. ***Id.***, ¶26.

¶19 Clayton argues the circuit court erroneously exercised its discretion in this case by ordering an unequal division of property without considering *any* of the factors listed in WIS. STAT. § 767.61(3). Specifically, he contends the court erred by making him solely responsible for debts totaling $76,569.[6] Although

[5] ***LeMere v. LeMere***, 2003 WI 67, ¶24, 262 Wis. 2d 426, 663 N.W.2d 789, refers to WIS. STAT. § 767.255(3) (2001-02), which was subsequently renumbered as WIS. STAT. § 767.61(3). *See* 2005 Wis. Act 443, § 109.

[6] Sarah argues Clayton failed to preserve this issue for review by failing to raise it in the circuit court. We disagree. Clayton argued in the circuit court that these debts should be divided between the parties.

Clayton is correct that the court failed to explicitly address the statutory factors on the record, when a circuit court fails to explain its reasoning for a discretionary decision, we will independently review the record to determine whether it supports the court's decision. *See* ***Long v. Long***, 196 Wis. 2d 691, 698, 539 N.W.2d 462 (Ct. App. 1995). After considering the statutory factors, we conclude the circuit court properly assigned the majority of the parties' debt to Clayton.[7]

¶20 Three of the factors listed in WIS. STAT. § 767.61(3) are inapplicable, on the facts of this case.[8] Of the remaining factors, six appear to favor an equal property division. For instance, the parties were married for seventeen years. *See* § 767.61(3)(a). There is no evidence either party brought significant property to the marriage or had substantial assets not subject to division. *See* § 767.61(3)(b), (c). Both parties contributed to the marriage: Clayton worked outside the home, and Sarah stayed home to care for the parties' five children until the last two years of the marriage, when she entered the work force. *See* § 767.61(3)(d). There is no evidence that either Clayton or Sarah is in poor physical or emotional health. *See* § 767.61(3)(e). Finally, the parties agreed they would each keep their own small retirement accounts. *See* § 767.31(3)(j).

[7] Sarah argues the vast majority of the debt was not incurred during the marriage and is therefore not subject to the presumption of equal division. We need not address this argument because we conclude, based on our independent review of the record, that the circuit court properly assigned the debt to Clayton. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (appellate court need not address every issue raised by the parties when one is dispositive).

[8] *See* WIS. STAT. § 767.61(3)(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), (3)(k) (the tax consequences to each party), and (3)(L) (any written agreement concerning property division).

¶21 However, other factors favor an unequal property division. WISCONSIN STAT. § 767.61(3)(f) directs us to consider "[t]he contribution by one party to the education, training or increased earning power of the other." This factor arguably supports an unequal property division in Sarah's favor, given that she stayed home with the parties' children for the majority of the marriage, which allowed Clayton to work and build his business.

¶22 WISCONSIN STAT. § 767.61(3)(g), in turn, directs us to consider each party's earning capacity, "including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for the children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting[.]" Again, this factor supports an unequal division of property in favor of Sarah. Clayton is a master plumber, while Sarah, who has no specialized job training, works as an administrative assistant. Sarah reported that she earns $24,252 per year, while the circuit court found that Clayton has an annual income of $58,500. Moreover, Sarah was absent from the job market from 1998 until 2011, during which time she stayed home to care for the parties' children. The circuit court expressly found that Sarah "sacrificed her earning capacity so that she could be a stay-at-home mom[.]"

¶23 Conversely, WIS. STAT. § 767.61(3)(i), which directs us to consider the amount and duration of maintenance, supports an unequal division of property in Clayton's favor. As noted above, the circuit court ordered Clayton to pay Sarah maintenance for thirteen years, with the amount increasing over time.

¶24 Considered together, the foregoing statutory factors do not clearly support an unequal division of property in favor of either Clayton or Sarah.

However, WIS. STAT. § 767.61(3)(m) permits consideration of "[s]uch other factors as the court may in each individual case determine to be relevant." In this case, we conclude four additional factors support the circuit court's decision to make Clayton solely responsible for the majority of the parties' debts.

¶25 First, a temporary order was entered in this case on August 13, 2012, which prohibited the parties from making further debts against each other's credit. Despite this order, Clayton subsequently incurred substantial debts, for which he now seeks contribution from Sarah.[9] That Clayton incurred these debts following entry of the temporary order supports assigning them to Clayton in the property division. Second, the evidence suggests that Clayton incurred the majority of the claimed debts without Sarah's knowledge, which, again, supports assigning them to Clayton. Third, the evidence suggests that Sarah has little or no ability to pay the debts, and that Clayton is in a better position to pay. Fourth, Clayton presented no documentary evidence to demonstrate the existence of, or basis for, two of the claimed debts: a $5,000 loan from his parents, and a $39,000 debt to his friend, Jim Avery. Based on these factors, we conclude the circuit court properly exercised its discretion by assigning the majority of the debts to Clayton.

III. Sarah's motion for costs, fees, and attorney fees

¶26 Finally, Sarah moves for costs, fees, and attorney fees, pursuant to WIS. STAT. RULE 809.25(3)(a), on the grounds that Clayton's appeal is frivolous.

[9] Sarah concedes that the debt of approximately $500 to the Wisconsin Department of Workforce Development was incurred before entry of the temporary order. In addition, she does not dispute that the $1200 debt to WE Energies was incurred before that date. Clayton does not dispute that the remaining debts were incurred after the temporary order was entered, although he does assert the $39,000 debt to Jim Avery was incurred to pay off other debts that were incurred before entry of the temporary order.

As relevant here, an appeal is frivolous where "[a] party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." RULE 809.25(3)(c)2. "Whether an appeal is frivolous is a question of law." ***Larson v. Burmaster***, 2006 WI App 142, ¶45, 295 Wis. 2d 333, 720 N.W.2d 134. When making this determination, we do not "look at 'whether one can prevail on his claim, but whether the claim is so indefensible that the party or his attorney should have known it to be frivolous.'" ***Baumeister v. Automated Prods., Inc.***, 2004 WI 148, ¶28, 277 Wis. 2d 21, 690 N.W.2d 1 (quoting ***Juneau Cty. v. Courthouse Emps.***, 216 Wis. 2d 284, 295-96, 576 N.W.2d 565 (Ct. App. 1998)). We resolve all doubts in favor of finding an appeal nonfrivolous. ***Id.***

¶27 Neither of Clayton's appellate arguments is so indefensible as to rise to the level of being frivolous. Clayton first argued the circuit court erred by determining child support and maintenance based on his earning capacity, rather than his actual income. Although we conclude the circuit court did not actually use Clayton's earning capacity when making these determinations, Clayton is correct that the court used that term throughout the final hearing and its two oral decisions. Clayton's second appellate argument is that the circuit court erroneously exercised its discretion by dividing the parties' property unequally, without considering the factors set forth in WIS. STAT. § 767.61(3). Again, Clayton is correct that the court failed to expressly consider the statutory factors. However, we nevertheless conclude, on our independent review of the record, that the evidence supports the court's discretionary decision. Under these circumstances, neither of Clayton's appellate arguments is completely without merit. We therefore deny Sarah's motion for costs, fees, and attorney fees.

By the Court.—Order affirmed.

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