

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 31, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 99-3058-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

KAREN WISEMILLER,

PETITIONER-APPELLANT,

V.

KENNETH WISEMILLER,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dunn County:
ROD W. SMELTZER, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Karen Wisemiller appeals the part of a divorce judgment dividing the marital property.¹ She argues that the trial court

¹ This is an expedited appeal under WIS. STAT. RULE 809.17 (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version.

erroneously exercised its discretion when it unequally divided the marital property and when it determined the value of the parties' home. Because we conclude that the court did not provide sufficient explanation for either of these decisions, we reverse the property division and remand the cause for supplementary findings and, if necessary, an additional hearing.

¶2 To properly exercise its discretion, the trial court must identify the facts and law it relies upon. See *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). It must not only state its findings of fact and conclusions of law, but also state the factors upon which it relies in making its decision. See *Steinke v. Steinke*, 126 Wis. 2d 372, 388, 378 N.W.2d 839 (1985).

¶3 The only rationale the trial court provided for unequally dividing the marital property is that “this would be fair and appropriate given the situation that these two individuals bring to the court as a result of the marriage.” That brief comment does not provide this court with an adequate basis for reviewing the trial court's decision and does not constitute exercising discretion.

¶4 Kenneth argues that the unequal division is justified because Karen actually received more than half of the marital property. He contends that the court incorrectly concluded that funds contained in two bank accounts were Karen's personal property and not marital property. Karen testified that these funds were the proceeds from death benefits she received as a result of her daughter's death. Kenneth argues that these accounts might include non-exempt funds. He requests that any reversal include directions to remedy that error.

¶5 Kenneth's argument fails for two reasons. First, he did not cross-appeal the judgment. Therefore, his request for relief on remand is not properly before this court. Second, in light of Karen's testimony that the accounts contain

nonmarital funds, Kenneth had the burden of presenting countervailing evidence that any portion of these accounts represents non-exempt property. *See Spindler v. Spindler*, 207 Wis. 2d 327, 338, 558 N.W.2d 645 (Ct. App. 1996). He cannot complain about the finding when he presented no evidence to establish which parts of the accounts were not exempt.

¶6 Kenneth also suggests that the trial court may have unequally divided the property based on Karen's assets not subject to division, *see* WIS. STAT. § 767.255(3)(c), or in recognition of Kenneth's support of Karen's children from a previous marriage. The trial court did not explicitly acknowledge either of those factors or any other ground set out in WIS. STAT. § 767.255(3), for unequally dividing the marital property. The parties presented little evidence on Karen's separate property or how parts of it were spent. The record provides almost no information regarding Kenneth's support of the stepchildren. We cannot conclude that the trial court properly exercised its discretion based on the record before this court.

¶7 We also conclude that the trial court did not adequately explain its valuation of the parties' residence. The court found that the house was valued somewhere in the range of \$125,000 to \$127,000. The only expert testimony placed its value at \$132,000. The court may not disregard uncontradicted testimony in the absence of something that discredits the testimony or renders it against reasonable probabilities. *See Ashraf v. Ashraf*, 134 Wis. 2d 336, 345, 397 N.W.2d 128 (Ct. App. 1986). The court made passing reference to the condition of the home, but identified nothing about the condition that the expert witness did not know. The court merely recited that "based on the testimony that was given, the condition of the house in addition to what was provided in the appraisal, I would probably appraise the house somewhat less than the \$132,000 but more in

the \$125,000 to \$127,000 area.” That conclusory finding does not provide an adequate basis for rejecting the expert testimony or for this court to review the trial court’s rationale.

By the Court.—Judgment reversed and cause remanded.

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

