

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 7, 2017

Diane M. Fremgen
Clerk of Court of Appeals

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.

Appeal No. 2015AP2490

Cir. Ct. No. 2014FA55

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

STEPHANIE T. KUNZ,

PETITIONER-RESPONDENT,

V.

PATRICK J. KUNZ,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Pierce County:
JOSEPH D. BOLES, Judge. *Affirmed.*

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

¶1 PER CURIAM. Patrick Kunz challenges the circuit court's division of property and maintenance determination in his divorce proceedings. We affirm.

¶2 Patrick and Stephanie Kunz were married for thirty-seven years, and both parties are now retired. Patrick was employed by businesses the couple owned and was the significant income-earner during the marriage. Stephanie worked for a period of time as a nurse but was primarily responsible for raising the couple's children. She also did the bookkeeping and other office work for the couple's businesses but received no hourly wage or salary.

¶3 Stephanie receives \$717 monthly social security. She has severe scoliosis. Patrick receives approximately \$1,953 monthly social security and pension benefits. The circuit court awarded Stephanie the parties' home in Prescott. The parties disputed its value, and the circuit court accepted Patrick's appraiser's valuation of \$390,000.¹ Patrick resided in the couple's Spooner property, which the court awarded to him.

¶4 At the time of the divorce, the parties had a home equity line of credit on the Prescott home in the amount of \$99,895 and a Capital One credit card debt of \$26,432.88. Both debts encumbered the Prescott property. In 2012, Patrick drew \$57,000 from the line of credit to invest in a cranberry bog that subsequently went bankrupt. The circuit court found the cranberry bog investment was "done without [Stephanie's] knowledge or permission and was a reckless gamble of their marital funds." The court determined Stephanie should have no responsibility for the debt incurred to purchase the cranberry bog. Immediately

¹ The testimony of Patrick's valuation expert was sufficient to support the circuit court's valuation of the Prescott property. Valuation of the marital estate lies within the sound discretion of the circuit court. *Sommerfield v. Sommerfield*, 154 Wis. 2d 840, 851, 454 N.W.2d 55 (Ct. App. 1990). Moreover, the weight and credibility to be given the opinions of expert witnesses are uniquely within the province of the fact-finder. See *Schorer v. Schorer*, 177 Wis. 2d 387, 396-97, 501 N.W.2d 916 (Ct. App. 1993).

prior to the divorce filing, Stephanie drew \$32,500 from the line of credit, which she repaid pursuant to an order at the temporary hearing. The parties also stipulated to certain withdrawals from the line of credit, and Stephanie took \$17,500 from the line of credit. Excepting the cranberry bog investment, the court found the remainder of the balance of the line of credit debt was incurred for marital purposes and constituted a marital debt. The court assigned it to Patrick. The Capital One credit card was reduced to a judgment of \$26,433, which was also assigned to Patrick for payment.

¶5 The circuit court found the value of the marital estate was \$836,869.10. The court awarded Stephanie \$527,420.98, and it awarded Patrick \$309,448.12. The court noted that under an equal division of the property, each party would receive a value of \$418,434. The court indicated the amount owed by Stephanie to Patrick to equalize the property division was \$108,986.

¶6 The court also ordered \$642 monthly maintenance to Stephanie of indefinite duration. Rather than invading Patrick's \$1,953 monthly social security and pension to pay Stephanie's \$642 monthly maintenance, the court ordered an immediate lump sum property division equalizer of \$108,986 to satisfy Patrick's monthly maintenance obligation to Stephanie. This property division equalizer essentially amounted to a term of maintenance of fourteen years. Patrick now appeals.

¶7 The division of property and the award of maintenance rest within the sound discretion of the circuit court. *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We will sustain a discretionary decision if the circuit court examined the relevant facts, applied a proper standard of law, and reached a conclusion that a reasonable judge could reach using a demonstrated

rational process. *Liddle v. Liddle*, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). We generally look for reasons to sustain the court’s discretionary decision. *Steiner v. Steiner*, 2004 WI App 169, ¶18, 276 Wis. 2d 290, 687 N.W.2d 740. We also search the record for reasons to sustain the court’s findings of fact, which will be affirmed unless clearly erroneous. WIS. STAT. § 805.17(2) (2015-16).²

¶8 Patrick argues the circuit court erred by awarding “a vastly unequal property division in lieu of maintenance.” Property division is governed by WIS. STAT. § 767.61, which establishes a presumption in favor of the equal division of marital property. A circuit court may deviate from the presumption of equal division of property after considering the factors in § 767.61(3).

¶9 However, this was not an unequal property division. Patrick ignores the circuit court’s award of an equalization payment from Stephanie. The court merely used the property division equalizer to satisfy Patrick’s maintenance obligation. The court appropriately found the lump sum property division payment in lieu of monthly maintenance “to be fair and equitable under the circumstances particular to this case.”

¶10 Contrary to Patrick’s perception, the circuit court provided adequate explanations supporting its reasoning, and the record reflects the court’s consideration of appropriate statutory factors. The court emphasized the thirty-seven-year marriage where Stephanie sacrificed her ability to earn money to serve as the primary caretaker for the family. Stephanie further sacrificed her ability to

² References to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

earn money by supporting the family businesses without receiving a wage or salary. The court found her efforts contributed significantly to Patrick's earning capacity and the profitability of their businesses, resulting in a higher standard of living for the family and a higher social security payment to Patrick because she contributed to his higher earnings. In turn, Stephanie received a much smaller social security payment because of her uncompensated work in support of the family.

¶11 The circuit court avoided the necessity to invade Patrick's \$1,953 monthly social security and pension to pay Stephanie's \$642 monthly maintenance by using the property division equalizer of \$108,986 to satisfy Patrick's monthly maintenance obligation to Stephanie. The court recognized that under a lump sum maintenance award, Stephanie would not receive the amount of maintenance she would be entitled to receive if she were awarded \$642 monthly from Patrick indefinitely and he lived a normal life expectancy. However, by awarding Stephanie the lump sum payment she would not have to pay Patrick the property equalizer. The court stated:

If the Court were to award to Ms. Kunz lump sum maintenance in the amount of \$108,986, she would not have to pay to Mr. Kunz the property equalizer. The term of maintenance would, in essence, be 14 years. Ms. Kunz is willing to accept this because she worries about Mr. Kunz[']s health and life expectancy, and this result would make it easier for her to remain in the Prescott property, which is where she very much wants to live.

¶12 We conclude the circuit court's division of property and maintenance determination employed a process of reasoning based upon a logical rationale that applied appropriate law to the facts of record. Its decision to award maintenance for an indefinite duration and utilize the lump sum equalizer payment to satisfy the maintenance obligation was a proper exercise of discretion.

¶13 Patrick insists the circuit court failed to consider property Patrick brought to the marriage, the sale proceeds of which were purportedly used to pay for the Prescott property. In this regard, we note Patrick’s assertions are unsubstantiated by the record on appeal, and we decline to embark on our own search of the record to look for evidence to support his contentions. See *Grothe v. Valley Coatings, Inc.*, 2000 WI App 240, 239 Wis. 2d 406, ¶6, 620 N.W.2d 463, *abrogated on other grounds by Wiley v. M.M.N. Laufer Family Ltd. P’ship*, 2011 WI App 158, 338 Wis. 2d 178, 807 N.W.2d 236. In any event, the parties were married in 1977, and the Prescott home was purchased in 2000. Stephanie testified she was not aware of any significant assets the parties brought into the marriage, and Patrick presented no evidence concerning the tracing of any purported contributions of property he brought to the marriage.

¶14 Patrick also argues the circuit court failed to consider the tax consequences of the property division. However, Patrick fails to identify specific tax consequences and whether, or to what extent, such consequences would favor him or Stephanie. Failure to consider a factually inapplicable factor when dividing property is not an erroneous exercise of discretion. *LeMere*, 262 Wis. 2d 426, ¶26.

¶15 Patrick contends the circuit court “also erred when it failed to take into consideration the present value of future payments.” In this regard, Patrick relies upon *Jasper v. Jasper*, 107 Wis. 2d 59, 69, 318 N.W.2d 792 (1982). Patrick’s reliance upon *Jasper* is misplaced, however, as the court in the present case did not order an equalizing payment by installments. Patrick concedes the present case “deals with a lump sum payment of future monthly installments rather than the reverse,” but he argues “there is no reason the same logic would not apply here. The present value of the lump sum payment should have been considered.”

However, Patrick provides no citation to legal authority supporting this contention, and we are unpersuaded that a legitimate factual or legal basis exists. Moreover, the lump sum payment was less than Stephanie would have been paid in monthly maintenance payments assuming Patrick lived a normal life expectancy. The court did not err by failing to take into consideration the present value of future payments under the facts of this case.

¶16 Patrick also complains the circuit court erroneously overlooked \$1,700 of rental income Stephanie received from the Prescott property's tillable acreage. However, Stephanie responds that Patrick did not raise this issue before the circuit court. Stephanie also contends the Spooner property consists of 140 acres, and Patrick bartered some pasture land for horse hay. This would constitute income to Patrick, which the court also did not consider. Patrick fails to refute the argument in his reply brief, and we therefore deem the issue conceded. *See M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

¶17 For the first time in his reply brief, Patrick also complains the circuit court erred by determining Stephanie was entitled to "lifetime maintenance." We will not address issues raised for the first time in the reply brief. *See Northwest Wholesale Lumber, Inc. v. Anderson*, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).

By the Court.—Judgment affirmed.

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

