

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 27, 2018

Sheila T. Reiff
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. 2016AP2228

Cir. Ct. No. 2013FA134

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

TAMMY BEHNKE,

PETITIONER-RESPONDENT,

V.

JEFFREY BEHNKE,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Oconto County:
JAY N. CONLEY, Judge. *Affirmed.*

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

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Jeffrey Behnke appeals a judgment of divorce, arguing the circuit court erroneously exercised its discretion in the division of property. We affirm.

¶2 Jeffrey and Tammy Behnke were married for fifteen years. At the time of the final divorce hearing, Jeffrey was fifty-four years old and employed as a mill worker with a gross monthly income of \$5,474.42. Tammy was forty-four years old and employed as a teacher with a gross monthly income of \$4,333.33. The parties brought various assets into the marriage, although Jeffrey brought more property to the marriage than Tammy. During the marriage, the parties accumulated substantial assets. The circuit court awarded a slightly uneven property division of the marital estate in Jeffrey's favor, in the amount of \$9,426. Jeffrey now appeals, contending he should have received more property and the circuit court "did not properly explain how it reached the decision it made because the circuit court failed to apply all of the statutory factors to the facts of the case."

¶3 The division of property in a divorce case rests 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 generally look for reasons to sustain the circuit court's discretionary decisions. *Loomans v. Milwaukee Mut. Ins. Co.*, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968). We will sustain discretionary decisions if the court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion a reasonable judge could reach. *Liddle v. Liddle*, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987).

Findings of facts will be affirmed unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2015-16).¹

¶4 Property division in a divorce is subject to WIS. STAT. § 767.61(3), which establishes a presumption in favor of equal division of marital property. A circuit court may deviate from the presumptive equal division of property, but only after considering the statutory factors. *LeMere*, 262 Wis. 2d 426, ¶16. The record must at least reflect the court’s consideration of all applicable statutory factors before a reviewing court may conclude that the proper legal standard has been applied to overcome the presumption of equal division. *See id.*, ¶17.

¶5 Here, the record reflects the circuit court’s consideration of all applicable statutory factors. After a two-day evidentiary hearing, the court issued a Memorandum Decision dated January 5, 2016, which was specifically incorporated into the Findings of Fact, Conclusions of Law, and Judgment of Divorce. The court emphasized its decision was based upon the evidence received at trial and “statutory factors where applicable” Under the heading “Property Division” in its memorandum decision, the court correctly recognized that it could alter the equal division “after considering the factors set forth in Sec. 767.61(3)(a) though (3)(m) Wis. Stats.” The court emphasized it “has reviewed those statutory factors and will now address the ones most important to this case.”

¶6 We note the circuit court’s explanation of the statutory factors “most important to this case” was stated immediately after it represented that it had considered all the statutory factors. We thus reject Jeffrey’s suggestion that the

¹ References to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

circuit court merely acknowledged the statutory factors in form and disregarded them in substance.

¶7 The circuit court's memorandum decision first noted the parties had a long-term marriage of fifteen years. *See* WIS. STAT. § 767.61(3)(a). It next considered the property brought to the marriage under WIS. STAT. § 767.61(3)(b), finding that Jeffrey brought more property to the marriage than Tammy.

¶8 The circuit court also considered whether one of the parties had substantial assets not subject to division by the court. *See* WIS. STAT. § 767.61(3)(c). In particular, the court found Jeffrey had substantial assets not subject to division, including a one-half interest in a farm that was gifted to Jeffrey and his sister by their parents. The court rejected the "25% marketability discount" on the farm property used by Jeffrey's appraiser, who acknowledged the discount was "his invention and not a tested principle." The court found Jeffrey's one-half interest in the farm to be worth between \$252,500 and \$375,000. The court also excluded from the marital estate the \$12,000 value of gifted land received by Jeffrey from his parents before the marriage, on which he built his residence. The court also excluded from the marital estate an inherited "ProFunds" investment account Jeffrey held.

¶9 In addition, the circuit court found that "both parties contributed to the marital estate and produced the ample estate they now fight over." *See* WIS. STAT. § 767.61(3)(d). The court also stated, "The last important factor the Court considers is the age and physical and emotional health of the parties." *See* WIS. STAT. § 767.61(3)(e). The court observed that Jeffrey was ten years older than Tammy and "does have significant health problems."

¶10 The parties had requested two separate equalizing payments: one for nonretirement assets; and one for retirement assets. The circuit court found that the division of retirement accounts “was the most difficult issue in this case.” It noted that both parties brought these accounts to the marriage, but Jeffrey brought more than Tammy. The court stated:

This factor is, largely, overcome by the fact that [Jeffrey] has substantial assets not subject to division by the Court. Balancing these two factors, the Court felt a slight deviation from the equal division of property in favor of [Jeffrey] was merited, and the Court has given some credits for property brought to the marriage where indicated when there was support for this in the record.

¶11 Jeffrey sought reconsideration of the circuit court’s property division determination. Following a hearing, the court issued a written decision, noting Jeffrey had supplemented the record with new information, which the court accepted, regarding the separate and distinct nature of two IRAs that the court had previously assumed were the same account. Otherwise, the court reaffirmed its prior discretionary decision concerning property division:

I stand by my original decision: “After reviewing all the statutory factors, the Court finds that a slight alteration of the equal division of property is in order in this case in favor of [Jeffrey].” The bottom line is that the law presumes an equal division of property. The Court may alter the equal distribution after considering the statutory factors at Sec. 767.61(3) Wis. Stats. In this case, the property [Jeffrey] brought to the marriage is more than offset by the non-divisible assets he gets to keep.

¶12 Despite reaffirming its discretionary determination after reconsideration, and once again explicitly stating that it had considered all the statutory factors in its property division determination, Jeffrey insists the circuit court failed to give certain statutory factors “proper consideration.” Jeffrey

contends the court “only briefly reference[d], without any specific explanation, the age and health of the parties, contributions [by one party to] the education, training, and increased earnings [of the other], property brought to the marriage, and length of the marriage.” Jeffrey argues all other relevant factors were “ignored.”

¶13 For example, Jeffrey insists Tammy stood in the way of his desire to obtain more education and training during the marriage. *See* WIS. STAT. § 767.61(3)(f). He notes that his employer offered a buy-out package that included retraining into another career. Jeffrey claims he wanted to accept the buy-out package, but Tammy “did not agree to him pursuing it.” As a result, he claimed at trial that he was “stuck” working a twelve-hour swing shift job. He also claimed he “need[ed] to get surgery for his shoulder, but can’t afford to take the time away from work.” He also claims that at the present date, he is unemployed as a result of his termination from the mill. However, the final hearing transcript shows that when Jeffrey was asked about Tammy’s position on the buy-out, he testified “[s]he would never give me an answer one way or the other until it was too late.” Moreover, Jeffrey’s present employment status was not before the court when rendering its decision. We are therefore unpersuaded that the circuit court erroneously exercised its discretion by finding these factors not important to its decision.

¶14 Jeffrey also argues the circuit court should have considered the possible tax consequences should Jeffrey and his sister decide to sell the family farm. *See* WIS. STAT. § 767.61(3)(k). Jeffrey contends that because the farm property is his separate property, “the tax consequences he would have should that property be sold reduces the weight that should be given to [Jeffrey’s substantial assets not subject to division by the court under] WIS. STAT. § 767.61(3)(c).”

However, Jeffrey's argument concerning the possible tax consequences of an unknown future sales event is speculative, and we will not further address the issue. See *Wahl v. Wahl*, 39 Wis. 2d 501, 518, 159 N.W.2d 651 (1968), *overruled on other grounds by, O'Connor v. O'Connor*, 48 Wis. 2d 535, 180 N.W.2d 735 (1970).

¶15 Jeffrey also argues that Green Bay Packers season tickets should have been awarded solely to him. Yet, testimony revealed the tickets were acquired during the marriage with marital funds. The circuit court appropriately found the tickets were marital property and awarded them to the parties as tenants in common, with each party holding an undivided one-half interest.

¶16 Jeffrey further insists "the only factor given any significant weight was the property not subject to division, which was the factor most unfavorable to Mr. Behnke." See WIS. STAT. § 767.61(3)(c). In his trial brief, Jeffrey argued that seven of the thirteen statutory factors under WIS. STAT. § 767.61(3) were "neutral or inapplicable." Jeffrey argued six statutory factors were applicable and weighed in his favor. In this regard, Jeffrey argued the circuit court should conclude his exempt assets were not substantial relative to the value of the divisible marital estate accumulated during the marriage. Therefore, Jeffrey contended "the [§] 767.61(3)(c) factor should be given little, if any, weight." Jeffrey also argued that property brought to the marriage under § 767.61(3)(b) supported a substantial alteration of the presumption of equal division in Jeffrey's favor:

The extreme imbalance in property brought to the marriage weighs heavily toward an alteration to the division of divisible assets in Jeff's favor. The fact that the parties accumulated over \$615,000 in divisible assets during the marriage assures that heavily weighing Jeff's pre-marital contributions will not disadvantage Tammy Behnke.

¶17 In this regard, the circuit court disagreed with Jeffrey and found Jeffrey had substantial assets not subject to division by the court. The court determined “the property [Jeffrey] brought to the marriage is more than offset by the non-divisible assets he gets to keep.” Accordingly, the court found that a slight alteration of the equal division of property in Jeffrey’s favor was a fair result. In doing so, the court explicitly addressed five statutory factors that it found “most important to this case.” 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. *LeMere*, 262 Wis. 2d 426, ¶25. The court was well within its discretion in concluding the factors it considered important outweighed any remaining factors.

¶18 Jeffrey may not agree with the circuit court’s determination, but we will not re-try the case on appeal. In reviewing discretionary decisions, our task is to determine whether a court could reasonably come to the conclusion it reached. While the specific explanations given for the court’s determination on property division may not have been exhaustive, the court’s property division as a whole incorporates appropriate considerations. The court employed a process of reasoning based upon the facts of record and reached a conclusion based upon a logical rationale. The amount of the court’s deviation from the presumed equal division of property in Jeffrey’s favor was a proper exercise of discretion.

By the Court.—Judgment affirmed.

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

