

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 16, 2019

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. 2018AP1298

Cir. Ct. No. 2015FA2578

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

DAVID CHRISTIAN ELLESTAD,

PETITIONER-APPELLANT,

v.

JENNIFER SUSAN ELLESTAD,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County:
RHONDA L. LANFORD, Judge. *Affirmed.*

Before Lundsten, P.J., Sherman and Blanchard, 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. David Christian Ellestad¹ appeals a judgment of divorce awarding an unequal division of property to, and indefinite maintenance in favor of, Christian's former spouse, Jennifer Ellestad. Christian contends that part of the circuit court's reasoning underlying the court's determination as to the division of property was erroneous, and that an award of indefinite maintenance is not justified. For the reasons discussed below, we affirm.

BACKGROUND

¶2 Christian and Jennifer were married in April 2008 and were divorced in 2017. At the time of their divorce, David was 45 years old and Jennifer was 55 years old.

¶3 At the time of and throughout their marriage, Jennifer was disabled. Jennifer received social security benefits, which totaled approximately \$20,338 annually, plus an annual distribution from an IRA in the amount of \$141. Early in the parties' marriage, Jennifer worked part-time at a church, earning \$10.00 per hour. However, in the years leading up to the divorce, Jennifer did not work outside the home, but she provided care for Christian's son from a prior relationship and cared for the parties' home.

¶4 Christian was the primary wage earner during the parties' marriage. In 2013, Christian became the director of a senior living community in Sun Prairie. His salary for the years 2013, 2014, and 2015 totaled \$44,868, \$70,519, and \$83,887, respectively. In September 2016, Christian resigned from this

¹ The parties refer to David Christian Ellestad as Christian. We do the same.

position at the senior living community for good cause and had not found alternative employment at the time of the divorce trial.

¶5 In January 2008, prior to their marriage, Christian entered into a land contract with his sister and brother-in-law to purchase a residence on Bristol Street in Sun Prairie (the Bristol residence) for \$350,000. Jennifer was not part of the negotiations for the purchase of the Bristol residence and was not a party to the land contract. After the parties' marriage, Jennifer sold her separate residence and, from the proceeds of that sale, made a down payment of \$50,000 on the Bristol residence. At the time of divorce, the outstanding balance on the land contract was more than \$265,000.

¶6 Following a trial, the circuit court found that an unequal division of property in Jennifer's favor was equitable. The parties did not have any financially significant marital assets to divide, mostly just marital debt. Each party was awarded certain household and personal items, and cash accounts in their respective names. In addition, the court awarded Jennifer \$35,000, which Christian was ordered to pay Jennifer by a specified date. The court also ordered Christian to pay Jennifer indefinite maintenance in the amount of \$400 per month. Christian appeals.

DISCUSSION

¶7 Christian contends that the circuit court erred in awarding an unequal property division in Jennifer's favor, specifically, by awarding Jennifer \$35,000. Christian also contends that the court erred in awarding Jennifer indefinite maintenance. We address, and reject, each contention in turn below.

A. Property Division

¶8 The division of property rests within the discretion of the circuit court. *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We will uphold the court’s property division if the 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). Factual findings will be affirmed unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2017-18).² In addition, we search the record for reasons to sustain the court’s discretionary decisions. *Steiner v. Steiner*, 2004 WI App 169, ¶18, 276 Wis. 2d 290, 687 N.W.2d 740.

¶9 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, but only after considering the statutory factors set forth in § 767.61(3). *LeMere*, 262 Wis. 2d 426, ¶16. The record must 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 property division. *See id.*, ¶17.

¶10 Christian contends that the circuit court erroneously exercised its discretion in awarding Jennifer \$35,000 because part of the court’s reasoning for awarding her that money was erroneous.

² All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

¶11 WISCONSIN STAT. § 767.61(3)(m) directs the circuit court to consider “[s]uch other factors as the court may in each individual case determine to be relevant.” In considering this catch-all factor, the circuit court found that, at the “behest” of Christian, Jennifer made a payment on the Bristol residence of \$50,000 from the proceeds from the sale of her pre-marital home. The court found credible Jennifer’s testimony that Christian did not tell her, and she did not know, at the time she made the payment, that she was not receiving an ownership interest in the Bristol residence. The court found that Christian “misrepresent[ed] to [Jennifer] what her benefit would be for making the \$50,000 payment on the land contract for the Bristol [residence],” and that Christian “deceived [Jennifer] by not telling her that the Bristol [residence] was on land contract and by not telling her that she would have no interest in the ... home.”

¶12 Christian challenges the court’s finding that Jennifer did not have an interest in the Bristol residence, that she did not understand that she did not have an interest in the property, and that he misrepresented to Jennifer her interest in the property. Christian argues that the circuit court “misunderst[ood] ... [the] legal effect” of the land contract and that, contrary to the court’s finding, Jennifer “did have an interest in the [Bristol residence].” Christian argues that as the vendee under the land contract, he has equitable title in the Bristol residence. Christian argues that under WIS. STAT. § 766.31(2), all property of spouses is presumed to be marital and, thus, when married, Jennifer was presumed to also have an equitable interest in the Bristol residence. He asserts: “Although Jennifer was not a party to the land contract, at their marriage Jennifer ... shared in equitable title to the [Bristol] residence” and once the terms of the land contract were satisfied, she and Christian “would have co-owned” the Bristol residence. Christian further argues that he “cannot have deceived or misrepresented” to Jennifer her interest in

the Bristol residence because she shared equitable title in the property with him and, once the land contract was paid off, would have co-owned the property.

¶13 Christian is correct that a buyer under a land contract acquires equitable title to the Bristol residence. *See Steiner v. Wisconsin Am. Mut. Ins. Co.*, 2005 WI 72, ¶23, 281 Wis. 2d 395, 697 N.W.2d 452. However, he ignores the reality that legal title to the Bristol residence remained with the sellers of the property, and that unlike a traditional mortgage, in the event of default, the sellers may bring an action for strict foreclosure, which can result in the buyer under a land contract losing all of his or her interest in the land. *See id.*, ¶26. That is to say, although the circuit court was incorrect in stating that Jennifer had no interest in the residence, the court was effectively correct in thinking that Jennifer's interest was substantially less than ownership of legal title. Christian does not point to any evidence that Jennifer knew that the Bristol residence was being purchased under a land contract and that she was aware that she did not have legal title to the property. We therefore conclude that the court's ownership-related findings are not clearly erroneous in any way that undercuts the circuit court's reasoning.

¶14 Turning to the circuit court's consideration of the applicable statutory factors, the record reflects that the court considered all of the factors in determining that an unequal property division in Jennifer's favor is equitable. The court found that the parties had been married for nine years; that after the marriage, Jennifer and Christian both sold their pre-marital homes, that Jennifer received approximately \$93,000 from the sale of her home, and that Christian received approximately \$27,000 from the sale of his home; that Christian has the benefit of the Bristol residence and the \$50,000 down payment made by Jennifer from the proceeds of the sale of her pre-marital home, both of which are not

subject to division by the court; that Christian continues to enjoy the use of a cabin owned by Christian's sister and brother-in-law, upon which substantial marital assets were expended to improve and pay expenses and which is not divisible marital property; that Jennifer "for all intents and purposes, [] acted as [Christian's son's] mother" and "was a stay-at-home-mom." Christian was 45 years old and in good health, and had an earning capacity of \$50,000; Jennifer was 55, had been disabled for 23 years, and not able to gain gainful employment; Jennifer contributed to Christian's increased earning capacity by providing care for Christian's son, whereas Christian could not do anything to increase Jennifer's earning capacity due to her disability; the parties do not have a family home to divide because the Bristol residence is being purchased under a land contract; and Jennifer used money she received as part of an inheritance to make improvements on the Bristol residence. When these findings are combined with other factors, including the limited amount of the maintenance award (\$400 per month) and Christian's failure to apprise Jennifer of the limited ownership interest he was acquiring in the Bristol residence, it is readily apparent that the circuit court's exercise of discretion when dividing property is supported by the record.

¶15 The circuit court may give the property division factors varying weight. See *LeMere*, 262 Wis. 2d 426, ¶25. Thus, whether the court here gave greater weight to the catch-all factor was within the court's discretion and Christian has not demonstrated that the court erred in doing so. The circuit court's property division determination was based upon the court's examination of the relevant facts and the application to those facts of the appropriate law. We conclude that its decision to award an unequal division of property was reasonable and, thus, a proper exercise of the court's discretion.

B. Maintenance

¶16 In a divorce action, “it is within the circuit court’s discretion to determine the amount and duration of maintenance.” *McReath v. McReath*, 2011 WI 66, ¶43, 335 Wis. 2d 643, 800 N.W.2d 399. We will not disturb that determination on review unless there has been an erroneous exercise of discretion. *Hacker v. Hacker*, 2005 WI App 211, ¶10, 287 Wis. 2d 180, 704 N.W.2d 371. A circuit court erroneously exercises its discretion by failing to consider the relevant factors, basing its award on factual errors, making an error of law, or granting an excessive or inadequate award. *Rohde-Giovanni v. Baumgart*, 2004 WI 27, ¶18, 269 Wis. 2d 598, 676 N.W.2d 452.

¶17 Christian’s argument regarding maintenance is not well focused. He broadly asserts that the indefinite maintenance award here is “excessive” and was, therefore, an erroneous exercise of the circuit court’s discretion.

¶18 An award of maintenance has two objectives: (1) support of the payee spouse at the pre-divorce standard; and (2) fairness, which aims to “compensate the recipient spouse for contributions made to the marriage, give effect to the parties’ financial arrangements, or prevent unjust enrichment of either party.” *McReath*, 335 Wis. 2d 643, ¶44 (quoted source omitted). In deciding the appropriate maintenance award, our supreme court has “instructed [the circuit] court[] to start with ‘the proposition that the dependent partner may be entitled to 50 percent of the total earnings of both parties’ and then make any needed adjustments after considering” the ten factors set forth in WIS. STAT. § 767.56. *Id.*, ¶45 (quoted source omitted). In addition, our supreme court has cautioned that maintenance:

“is not to be viewed as a permanent annuity.” Rather, maintenance is “designed to maintain a party at an appropriate standard of living, under the facts and circumstances of the individual case, until the party exercising reasonable diligence has reached a level of income where maintenance is no longer necessary.”

Id. (internal citations and quoted sources omitted).

¶19 Pursuant to WIS. STAT. § 767.56, maintenance can be indefinite if warranted by the facts and circumstances of the case. In determining whether to grant indefinite maintenance, the court must consider the factors enumerated in § 767.56. See *LaRocque v. LaRocque*, 139 Wis. 2d 23, 41, 406 N.W.2d 736 (1987). “[T]he weight to be given to the relevant factors under the maintenance statute is committed to the [circuit] court’s discretion.” *Metz v. Keener*, 215 Wis. 2d 626, 640, 573 N.W.2d 865 (Ct. App. 1997).

¶20 Christian acknowledges that the court considered each of the factors set forth in WIS. STAT. § 767.56. However, he argues that in setting maintenance the court “did not give proper weight and consideration to” what he asserts was the relatively short length of the marriage or to Jennifer’s pre-marital standard of living. He asserts that case law does not support indefinite maintenance for a short-term marriage, which he characterizes the parties’ marriage as, and he states that *Lemke v. Lemke*, 2012 WI App 96, 343 Wis. 2d 748, 820 N.W.2d 470, a case involving a 24-year marriage, “is the only case in the past ten years where there was an award of indefinite maintenance.”

¶21 Christian is plainly wrong in his assertion that indefinite maintenance has been awarded in only *one* case in the past ten years. Ignoring the unknown number of circuit court cases in which indefinite maintenance has been awarded but has not been challenged on appeal or, if challenged, did not result in a

decision that can be located with the most common legal search tools, there are numerous published, unpublished, and per curiam appellate decisions in which an award of indefinite maintenance was ordered by the circuit court. *See, e.g., Seng Xiong v. Vang*, 2017 WI App 73, 378 Wis. 2d 636, 904 N.W.2d 814 (indefinite maintenance awarded following a twenty-four year marriage); *Skodowski v. Skodowski*, No. 2017AP2425, unpublished slip op. (WI App Mar. 5, 2019) (indefinite maintenance awarded following a thirty-three year marriage); *Roberts v. Roberts*, No. 2017AP1620, unpublished slip op. (WI App June 21, 2018) (indefinite maintenance awarded after a twenty-one year marriage); *Klein v. Klein*, No. 2016AP1916, unpublished slip op. (WI App Nov. 15, 2017) (indefinite maintenance awarded by circuit court); *Kunz v. Kunz*, No. 2015AP2490, unpublished slip op. (WI App Feb. 7, 2017). Christian does not direct this court to any legal authority supporting an argument that indefinite maintenance can never be ordered in a marriage that is nine years or less, and does not explain why the length of the marriage in this case otherwise precludes an award of indefinite maintenance.

¶22 Christian also argues that the circuit court failed to give proper consideration to the fact that, for more than ten years prior to their marriage, Jennifer was disabled and living on her social security benefits. Christian asserts that Jennifer’s earning capacity before and after the marriage is the same, therefore, requiring him to provide indefinite maintenance support is “not fair.” Christian’s focus on Jennifer’s pre-marital standard of living is misplaced. To repeat, one of the two objectives of maintenance is support of the payee spouse at the *pre-divorce* standard, not the pre-marital standard as Christian suggests.

¶23 Christian argues that the circuit court “improperly” considered its finding that Christian misrepresented to Jennifer her interest in the Bristol

residence because that finding was “incorrect.” However, as we explained above, that finding is not clearly erroneous.

¶24 We now summarize the WIS. STAT. § 767.56 factors considered by the circuit court. The court noted that the parties had been married, at the time of divorce, for nine years. The court found that both parties brought property with them to the marriage, including \$93,000 by Jennifer from the sale of her pre-marital home and \$27,000 by Christian from the sale of his pre-marital home. The court discussed the parties’ health. The court found that Christian was 45 years old and in good health. Jennifer was 55 years old, disabled and, as a result of her disability, unable to obtain employment beyond a few hours per week. The court discussed the property division, which the court acknowledged was unequal given Jennifer’s financial contribution of her separate money to the Bristol residence. The court discussed the parties’ educational level, noting that both had some college education. The court discussed the parties’ individual earning capacity, finding that Jennifer has none in the employment market, and that Christian had conceded that he had an earning capacity of \$50,000, had worked throughout the parties’ marriage, and could continue to work for years to come. The court addressed the feasibility of Jennifer becoming self-supporting. The court found that Jennifer “barely gets by” on her current income and that potential alternative sources of income she might have had, had been used to benefit the marriage. The court addressed the tax consequences, which the court did not find to be an important factor. The court addressed whether the parties had a mutual agreement concerning financial support or future compensation, and found that they did not. The court also addressed the contribution of the parties’ to the education or increased earning power of each other. The court found that Jennifer

helped Christian increase his earning power by contributing financially to the marriage and to the care of Christian's child.

¶25 To the extent the factors above are based on fact finding, Christian does not challenge the court's findings. As to the court's exercise of discretion, we conclude that the court's maintenance determination was the product of a rational mental process by which the court thoroughly explained the law and the facts its determination was based upon. We conclude that the court's decision as to maintenance was reasoned and reasonable. Accordingly, we conclude that its decision to award maintenance for an indefinite duration was a proper exercise of the court's discretion.

CONCLUSION

¶26 For the reasons discussed above, we conclude that the circuit court did not erroneously exercise its discretion by awarding an unequal division of property in this case or by awarding indefinite maintenance to Jennifer. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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

