COURT OF APPEALS
DECISION
DATED AND FILED

May 7, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2108-AC **Cir. Ct. No. 2000FA193**

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

IN RE THE MARRIAGE OF:

CATHERINE M. WISTH,

PETITIONER-THIRD PARTY-PETITIONER-RESPONDENT,

V.

WILLIAM A. WISTH,

RESPONDENT-APPELLANT,

ARTHUR H. WISTH AND AHW PROPERTIES, LLC,

THIRD PARTY-RESPONDENTS.

APPEAL from a judgment of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM , Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. William Wisth appeals pro se from a judgment of divorce from Catherine Wisth. He argues that gifted property should not have been sold to satisfy outstanding obligations, that the parties' prenuptial agreement should have been enforced to preclude inclusion of his real estate holdings in the marital estate, and that an equal division of all the property was an erroneous exercise of discretion. We reject his claims and affirm the judgment as a proper exercise of discretion.

¶2 William and Catherine started dating in 1983. Their first child was born in 1986. After the birth of their second child in 1987, they began to live together. They had a third child together in February 1989. The parties married on August 29, 1992. The prenuptial agreement drafted by William's attorney listed nineteen different properties owned by William and declared those properties to be William's individual property not subject to division in the event of divorce. The agreement was signed the day before the wedding as the parties and their three young children were on their way to the wedding location. A fourth child was born during the marriage in 1994.

¶3 The parties separated permanently in 1999. A petition for divorce was filed August 7, 2000, and under a temporary order William was required to pay $540 a month as child support. On July 30, 2004, Catherine's motion to appoint a receiver to take charge of William's real estate holdings, several of which had tax delinquencies or were subject to foreclosure, was granted.[1] Trial was adjourned five times before it finally commenced on March 1, 2006. As he

[1] The appointment of a receiver was stayed for thirty days to give William the chance to obtain a loan and pay off outstanding fees, taxes, and child support. The receiver's appointment was effective October 4, 2004.

had done at the October 12, 2004 hearing regarding the enforceability of the prenuptial agreement,[2] William represented himself at trial. On April 6, 2006, the circuit court approved the receiver's proposed sale of William's interest in two properties in Vilas County. The judgment of divorce was granted April 7, 2006, which required remaining real estate holdings to be sold and the proceeds divided equally, with William's share being applied to a $100,000 security fund he was required to establish to give security for child support and a property division equalization payment. William was awarded his business valued at $50,000 and was not charged with its value as part of the marital estate. William was also required to make a $15,000 contribution to Catherine's attorney fees.

¶4 William first argues that his interest in one of the Vilas County properties retained its undisputed gifted status and could not be liquidated as part of the marital estate. *See* WIS. STAT. § 767.61(2)(a)1. (2005-06).[3] We initially reject William's contention that the Vilas County property was sold as marital property. A receiver was appointed out of concern that William was dissipating the marital estate while the action was long pending. Particularly, the court found that a receiver was necessary to "fund the litigation, to pay some of the bills, the child support, the GAL fees and other steps necessary to insure that all these properties, the marital properties aren't going to be dissipated during the time this matter has been pending." While the action was pending, William's individual obligations were piling up, particularly child support and guardian ad litem fees.

[2] A written decision entered March 25, 2005 found the prenuptial agreement unenforceable.

[3] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Judgments and tax liens had been recorded against Ozaukee County properties. The receiver was not able to borrow sufficient funds against other properties to pay delinquent taxes and William objected to the receiver's proposal to sell a single-family home the parties owned in Cedarburg. The receiver demonstrated to the court that an influx of cash was necessary to preserve the marital estate and that a sale of Vilas County properties could be accomplished in short order.[4] The court allowed the sale in discharge of the receiver's obligation to preserve the martial estate and meet William's mounting obligations. "Circuit courts have the power to apply equitable remedies as necessary to meet the needs of the case." ***Syring v. Tucker***, 174 Wis. 2d 787, 804, 498 N.W.2d 370 (1993). Initially the sale was approved as a means of preserving the marital estate.

¶5 William calls the sale of the gifted property a de facto division of gifted property because in the judgment of divorce the circuit court required the remaining sale proceeds to be added to the proceeds from the sale of all other marital real property and divided equally between William and Catherine. Even if we consider the gifted property to have been drawn into the marital estate, WIS. STAT. § 767.61(2)(b) allows the court to divest a party of gifted property in a fair and equitable manner if the refusal to divide the property will create a hardship on the spouse or children. William contends that the circuit court did not make a finding of hardship. Although the court may not have made a specific finding, it reviewed the reasons for the appointment of the receiver and William's

[4] William's suggestion that other marital properties could have been sold to save marital assets rings hollow in light of the circuit court's finding that William was an evasive witness, engaged in a pattern of chicanery designed to thwart and complicate the proceeding, and was completely responsible for the court's inability to determine the value of the real estate to be included in the marital estate. A party cannot complain when he or she leaves the court in an evidentiary vacuum. *See* ***Popp v. Popp***, 146 Wis. 2d 778, 796, 432 N.W.2d 600 (Ct. App. 1988).

dilatory conduct throughout the action. The request to sell the Vilas County properties arose on the fourth day of trial and the court had already heard evidence that William had sold real estate in Milwaukee County in violation of a court order and he had not satisfied his outstanding obligations with the proceeds. The court acknowledged that "extraordinary circumstances" would permit the division of gifted property. Implicitly the court found extraordinary circumstances which is the equivalent of hardship on Catherine and/or the children. We are convinced the hardship finding is supported by the record and the history of William's conduct during the litigation.

¶6 We turn to the enforceability of the prenuptial agreement.[5] Although an agreement is presumed to be equitable, a prenuptial agreement is not binding if the terms of the agreement are inequitable to either party. WIS. STAT. § 767.61(3)(L). An agreement can be inequitable if it is unfair in either its procurement or in its substantive provisions. *See* ***Button v. Button***, 131 Wis. 2d 84, 94, 388 N.W.2d 546 (1986). Fairness in the procurement is determined as of the date of execution and requires that each spouse make a fair and reasonable disclosure to the other of relative finances and that each spouse enters into the agreement voluntarily and freely. *See* ***id.*** at 95. Substantive fairness is determined on a case by case basis and prevents the parties from ignoring the State's interest in protecting the financial interests of the parties at divorce. *See* ***id.*** at 96. Substantive fairness is evaluated as of the execution of the agreement and, if there

[5] William contends that under language in the prenuptial agreement the "lion's share of the real estate he owned at the time of the divorce" would have been awarded to him as individual property.

have been significantly changed circumstances after the execution of the agreement, at the time of divorce. ***Id.*** at 99.

¶7 The circuit court exercises its discretion in determining if a prenuptial agreement is inequitable. ***Id.*** The court's findings of fact are sustained unless clearly erroneous. WIS. STAT. § 805.17(2). Moreover, "we are obligated to accept the trial court's resolution of the credibility of the witnesses because of the court's superior opportunity to judge such matters." ***Gardner v. Gardner***, 190 Wis. 2d 216, 230, 527 N.W.2d 701 (Ct. App. 1994).

¶8 Catherine did not challenge the agreement for a lack of adequate disclosure. Rather, she claimed that the agreement was not freely and voluntarily entered into and that it was inequitable at the time of enforcement. The circuit court found that Catherine did not freely enter into the agreement and that it was blatantly inequitable to permit William to benefit from paying debt on real property from marital funds while insulating sale proceeds of those properties from the marital estate.

¶9 The parties' testimony about the circumstances surrounding execution of the agreement conflicted. William testified that they met with his attorney on two occasions before the day that the agreement was signed and that Catherine was told she could have her own attorney review the agreement. Catherine testified that she first met William's attorney the week before the wedding, that she was not advised what effect the agreement would have or what property rights she had in absence of the agreement, that she was not told she could have independent counsel, that she was not provided a draft of the agreement at any time before execution, and that she felt pressured to sign the agreement the day before the wedding with the children in tow and because the

marriage was important to her to legitimize their three children. The circuit court made a finding that Catherine's testimony was more credible. It found that she was not told she could have independent counsel review the agreement, that she did not have the funds to do so, and that she was never provided a draft of the agreement to review. It also found that the final agreement was not shown to her until the day before the wedding when the three young children were present and that on that day the meeting with William's attorney was very short and did not result in Catherine's complete understanding of the contents of the agreement.

¶10 William's challenge to the circuit court's findings is nothing more than a disagreement with the court's explicit credibility determination. Evidence is incredible only when it is in conflict with the uniform course of nature or with fully established or conceded facts. ***Haskins v. State***, 97 Wis. 2d 408, 425, 294 N.W.2d 25 (1980). Inconsistencies and contradictions in the statements of witnesses do not render the testimony inherently or patently incredible, but simply create a question of credibility for the trier of fact to resolve. *See* ***id.*** The circuit court resolved the potential inconsistencies William points to in Catherine's testimony in Catherine's favor.

¶11 The circuit court's findings address the touchstones of voluntariness and the inquiry into whether each spouse had a meaningful choice: "whether each party was represented by independent counsel, whether each party had adequate time to review the agreement, whether the parties understood the terms of the agreement and their effect, and whether the parties understood their financial rights in the absence of an agreement." ***Button***, 131 Wis. 2d at 95-96. We conclude that the circuit court properly exercised its discretion in determining that

the agreement was inequitable as to procurement.[6] Indeed, it is one thing for the parties to have generally discussed in the years preceding the marriage that a prenuptial agreement would be a precondition to marriage and quite another to rush the drafting and execution of the agreement within a few weeks and the day before the wedding.

¶12 Because we sustain the circuit court's exercise of discretion that the prenuptial agreement was inequitable in procurement, we need not specifically address the alternative reason for invalidating the agreement—that its terms are inequitable. We conclude that the circuit court's rationale on that alternative ground demonstrates a proper exercise of discretion. The payment of debt on or the acquisition of real property with marital funds while removing that property from the marital estate offends the State's interest in the financial consequences of divorce, particularly, where as here, the properties are the only potential marital assets.

¶13 William argues that the circuit court erroneously exercised its discretion by including all his real estate holdings in the martial estate and dividing it equally. There is a statutory presumption in favor of equal division of marital property. WIS. STAT. § 767.61(3). William acknowledges the presumption but contends that Catherine's share should be limited to the post-marriage increase in equity in the property he brought to the marriage and assets

[6] In a footnote William contends the circuit court erroneously exercised its discretion when it refused his request for an adjournment so he could procure the testimony of the agreement's drafting attorney. An argument set forth only in a footnote is not adequately raised or preserved for appellate review. ***State v. Santana-Lopez***, 2000 WI App 122, ¶6 n.4, 237 Wis. 2d 332, 613 N.W.2d 918. We observe that the circuit court gave William at least two chances to present the telephonic testimony of the drafting attorney but the attorney was unavailable.

acquired during the marriage. However, absent proof that the property brought to the marriage was acquired by gift, bequest, devise or inheritance, or with funds so acquired, such property is, by statute, part of the marital estate and subject to division. *See* ***Lang v. Lang***, 161 Wis. 2d 210, 229, 467 N.W.2d 772 (1991); § 767.61(2)(a).

¶14 The circuit court may deviate from the fifty-fifty presumption after considering the lengthy and detailed list of statutory factors in WIS. STAT. § 767.61(3). ***LeMere v. LeMere***, 2003 WI 67, ¶16, 262 Wis. 2d 426, 663 N.W.2d 789. William's real argument is that in rejecting his claim for an unequal property division, the circuit court failed to give due consideration to the considerable real property he brought to the marriage. It is for the circuit court to determine what weight and effect should be given the various considerations. ***Settipalli v. Settipalli***, 2005 WI App 8, ¶12, 278 Wis. 2d 339, 692 N.W.2d 279; ***Herlitzke v. Herlitzke***, 102 Wis. 2d 490, 495, 307 N.W.2d 307 (Ct. App. 1981).

¶15 The circuit court demonstrated a proper exercise of discretion by addressing each statutory factor and explaining why it did not require a deviation from the presumption of an equal division. Of greatest significance is the court's findings that marital funds and efforts were used to pay down the mortgages on the real property brought to the marriage and to improve those properties. Catherine's income was used for family purposes freeing up money to maintain the real estate holdings. Notably William's business was excluded from the marital estate despite the fact that he had dissipated the marital estate. We reject William's contention that even after declaring the prenuptial agreement inequitable and unenforceable, the circuit court was required to consider it as a factor in the property division. It makes no sense that the court would look to an agreement that it found grossly inequitable. Such reliance would be inconsistent with court's

"oversight function" in evaluating the terms of marital agreements. *See* ***Franke v. Franke***, 2004 WI 8, ¶40, 268 Wis. 2d 360, 674 N.W.2d 832.

By the Court.—Judgment affirmed.

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