

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 13, 2001

Cornelia G. Clark
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.

No. 01-0893

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

CHRISTINA LYNN REDFEARN,

PETITIONER-APPELLANT,

V.

WILLIAM DENNIS REDFEARN,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Lafayette County:
WILLIAM D. JOHNSTON, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Vergeront, P.J., Dykman and Deininger, JJ.

¶1 DYKMAN, J. Christina Redfearn appeals from a judgment of divorce. She argues that the trial court erred in various ways in making its property settlement. We conclude that the trial court did not erroneously exercise

its discretion in making its property division with one exception: it erred in double counting \$4,000 of assets, resulting in William Redfearn receiving \$2,000 in excess of the amount the trial court should have awarded him. We therefore affirm in part and reverse in part and remand with directions to award Christina Redfearn an additional \$2,000 of property from William Redfearn.

¶2 Christina Redfearn and William Redfearn met in early 1984 when William hired Christina to help with his grocery store in Cuba City. In the Fall of 1984, Christina and her six-year-old daughter, Michelle, moved into William's house. Christina continued to work at the store, and was paid \$300 per week, as was William. Later, Christina's wage increased to \$400 per week. Christina and William cohabited until December 1986, when they married. Both worked at the store until 1988 when William bought a grocery store in Benton, and Christina left the Cuba City Store to help manage the store in Benton. In the Fall of 1992, both stores were sold. The proceeds from the sale of the stores were invested mainly in real estate, which William bought, and sold at a profit. In August of 1997, Christina began working outside the home, managing convenience stores. In June of 1999, Christina began this action. Further facts will be developed later in this opinion.

¶3 Christina first asserts that the trial court erred by concluding that it could not consider evidence of the parties' cohabitation prior to their marriage when it divided the parties' property. She relies on *Meyer v. Meyer*, 2000 WI 132, 239 Wis. 2d 731, 620 N.W.2d 382. *Meyer* concluded that a trial court had discretion to consider premarital cohabitation when making a maintenance award

because WIS. STAT. § 767.26(9) (1999-2000)¹ permitted that consideration. *Id.* at ¶1. However, we need not determine whether, or in what way, a trial court may consider premarital cohabitation in making its property division. Christina has not shown that William's property significantly increased in value between the time she began cohabiting with him and the time she and William married, about two years later.

¶4 To show an increase in the value of William's property during their cohabitation, Christina would at least have had to show its value on the date their cohabitation began and its value when they married. The trial court considered this question, and found that Christina did not show an accumulation of assets due to the parties' joint enterprise or undertaking. The court also found that she did not show that she acted in a manner that led to either acquiring assets or increasing their value. The trial court concluded: "There is also a failure of proof that the cohabitation assets, if any were acquired during that cohabitation period, were acquired through the efforts of both [Christina] and [William]."

¶5 We are to accept a trial court's findings of fact unless they are clearly erroneous. *Bushelman v. Bushelman*, 2001 WI App 124, ¶17, 246 Wis. 2d 317, 331, 629 N.W.2d 795. The record supports the trial court's findings. Although Christina asserts in her brief that she contested the values of the property, the record citation she gives shows only that she disagreed with William's valuation of two of the properties he owned at the time of their marriage. Her brief does not refer us to testimony or exhibits which support her

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

assertion. She did not give her opinion as to the value of the property. She testified that William owned two items of personal property at the time of her marriage: shares of stock in the corporation which owned the grocery store in Cuba City, and equity in the “Tranel” land contract. An exhibit that William prepared valued these items at about \$200,000 plus other items of premarital personal property and real estate which he valued at about \$240,000.

¶6 Although Christina faults William’s exhibit as being only an estimate because it was not possible to exactly value the items, her brief does not explain or suggest what other figure the trial court should have used. Christina cannot complain that the trial court erroneously exercised its discretion in finding that the value of William’s property on the date of the marriage was \$437,000 when she offered nothing more to her liking. And she does not even discuss the value of William’s property at the time they began cohabiting, let alone value it. If she expected the trial court to credit her for the increase in value of William’s property during their cohabitation, she should have provided the trial court with evidence from which to find the value of this increase. Even assuming that the trial court could award Christina a portion of the increase in value of William’s property that accrued during their cohabitation, she has failed to show what that value was.

¶7 Our conclusion as to cohabitation values does not end here, however. WISCONSIN STAT. § 767.255(3)(b) provides that the trial court may deviate from a presumed equal division of a divorcing couple’s property by considering the property each brought to the marriage. That is what the trial court did. The trial court accepted William’s valuation of the property he brought to the marriage as \$437,000. Christina does not dispute the trial court’s finding that she brought no property of any significant value to the marriage. The trial court

considered the length of the parties' marriage, twelve and one-half years, and concluded that unlike the marriage in *LaRocque v. LaRocque*, 139 Wis.2d 23, 406 N.W.2d 736 (1987), the Redfearn marriage was short to medium length. The court considered that Christina was thirty-nine years old, had found employment at about \$30,000 per year, and was able to support herself. It found that William was sixty years old, and at retirement age, which will limit his future earning capabilities doing the physical or manual labor that was the source of his income during his working years. It found that William earned about \$17,000 per year.

¶8 The trial court considered the other factors found in WIS. STAT. § 767.255(3), some of which it found inapplicable. It found that: (1) key to the \$600,000 increase in the parties' marital estate during the marriage was William's property that he brought to the marriage; (2) neither party had any pension benefits, and that neither should pay maintenance; (3) both parties were living at a standard of living comparable to that which they knew during their marriage; and (4) neither party needed additional education or training.

¶9 Based on these factors, the trial court determined that it would divide the parties' marital estate by first returning to William the value of the property he brought to the marriage, and then dividing the remainder equally. This resulted in William receiving \$730,000 or about seventy percent of the marital estate, and Christina receiving \$294,000 or about thirty percent of the marital estate. Although other courts might reach a different result, the trial court considered appropriate factors and reasoned to a rational result, which a reasonable judge could reach. That is the definition of an appropriate exercise of discretion. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

¶10 Christina has several complaints about the trial court’s methodology and ultimate result of its property division. First, she claims that the property which William brought to the marriage was no longer a part of the marital estate, and that the trial court concluded: “if a party can identify premarital assets, and provide some tracing for the proceeds if they are disposed of after the marriage, the party is entitled to have those assets ‘returned’ or get a ‘credit’ in the property division equal to the value of the property brought to the marriage.” This assertion is a misrepresentation of the trial court’s decision, and, if Christina is suggesting that premarital property must exist in its premarital form to be considered under WIS. STAT. § 767.255(3)(b), an error of law.

¶11 The trial court cited *Hokin v. Hokin*, 231 Wis. 2d 184, 191-92, 605 N.W.2d 219 (Ct. App. 1999), which concluded that all property except gifted or inherited property is part of the marital estate and that a trial court is to presume that it is to be divided equally. Although this is the presumption, the court may alter a distribution after considering various factors, including the property each party brought to the marriage. *Id.* Thus, contrary to Christina’s suggestion, tracing premarital property is irrelevant to a property division. And the trial court did not return the value of William’s premarital property to him as a matter of law or right. It did so after considering the WIS. STAT. § 767.255(3) factors a trial court should consider when making a property division.

¶12 Next, Christina contends that the trial court applied Wisconsin’s Marital Property Act to its property division. She cites four examples which she concludes are evidence of this error of law. The first example is:

The trial court’s description of the Petitioner’s property division position as an argument that “[the Respondent]” has failed to trace all assets that were brought to the

marriage and have now been co-mingled into the property that was acquired by the parties during the marriage

¶13 It is not surprising that the trial court described Christina’s property division argument as including a “tracing” requirement. Christina’s seventy-seven page post-trial brief is replete with references to an expert witness’s description of the Redfearn marital estate as “beef stew,” in which the individual ingredients of the stew become unrecognizable and all one sees or tastes is beef stew. And Christina’s trial brief is explicit when it argues: “For tax purposes, if the funds are not directly traceable then they are presumed marital with one party not having any superior ownership over the other. The petitioner asserts that the same argument applies for the purposes of the divorce.” (Citation omitted.)

¶14 We reject Christina’s assertion that the trial court applied marital property principles to its property division. The trial court was merely recognizing, and rejecting, Christina’s suggestion that tracing of premarital assets to date-of-divorce assets was somehow relevant to the property division. We too have rejected that suggestion. Christina’s three other examples of the trial court’s alleged use of marital property principles are similarly without merit.

¶15 Next, Christina attacks the trial court’s use of the phrase “short term marriage” as meaningless. She recognizes that length of marriage is a factor a trial court is to consider under WIS. STAT., § 767.255(3)(a), but she argues:

Here, the Trial Court did not explain how it reached the conclusion that twelve years constitutes a “short term marriage,” nor is there anything in the Trial Court’s decision or in case law explaining why a twelve year marriage would justify a “credit” for all property claimed to be brought to the marriage when a marriage of different duration would not.

¶16 Christina's view of the trial court's property division is overly simplistic. The trial court did not give William a credit for the value of the property he brought to the marriage because the marriage was short. And the trial court's description of the parties' marriage as, alternatively, "short" and "short to medium-length" did not automatically translate into a rule that the value of William's property would be returned to him. The trial court did what is expected of trial courts when making a property division—it considered a variety of factors that we have already described. For instance, it noted that neither party had any pension benefits, and that Christine was thirty-nine years old and William was sixty. A reasonable inference to be drawn from these facts is that William will have need of a larger estate now because he is at retirement age, while Christina has twenty years to accumulate retirement assets.

¶17 Length of marriage is also a factor, with a reasonable inference being that the shorter the marriage, the more reasonable would be a decision returning the parties to pre-marriage status. While it is true that the label placed upon length of marriage is of little significance, it is also true that compared to marriages that last for twenty-five or thirty years, the Redfearn marriage was not "long term," and a property settlement for the Redfearns need not be what it would be for a much longer marriage. The trial court was entitled to and indeed required to consider length of marriage as a factor permitting a deviation in William's favor from the presumed equal property division set out in WIS. STAT. § 767.255(3). But Christina is wrong in believing that it was the only factor the trial court considered. It was one of several.

¶18 Christina next contends that the trial court failed to explain its reasons for varying from the statutory presumption of an equal property division. In some ways, this is similar to earlier issues, and to that extent, we repeat what

we have already said. Christina relies on *Hokin*, a case in which we reversed a trial court's property settlement because it did not adequately recognize the wife's contributions to the marriage and the length of the marriage. But it is futile here, as it usually is, to attempt to draw rules of law from what are discretionary decisions. The facts in *Hokin* were dramatically different from the facts in the Redfearn divorce. The dominant factor in *Hokin* was the husband's retirement account, which was valued at \$1.6 million dollars. 231 Wis. 2d at 195-200. The Redfearns have no pension benefits. Professor Hokin's yearly income was about \$118,000. *Id.* at 188. William's yearly income is about \$17,000. Barbara Hokin's income was insignificant, and she was fourteen years older than Christina when both were divorced. *See id.* at 188-89. Christina earns \$30,000 a year. *Hokin* did not hold that a trial court errs when it considers WIS. STAT. § 767.255(3)(b), and returns the premarital value of property to a divorce litigant. It held only that given the facts of the *Hokin* marriage, the trial court erroneously exercised its discretion by returning the premarital value of a retirement account to the husband. 231 Wis. 2d at 200. Indeed, the *Hokin* court cautioned that: "[W]e do not hold that the Court on remand may not deviate from [the 50/50] presumption because of the property brought to the marriage." *Id.* at 200 n.12.

¶19 Though Christina acknowledges that property division in a divorce action is discretionary, she does not recognize that review of discretionary acts contemplates a spectrum of "correct" results which can be reached from a single set of facts. Indeed, we have described a discretionary decision as allowing "a limited right to be wrong." *State v. Jeske*, 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995) (internal quotations omitted). A proper exercise of discretion requires only that it be based upon facts of record, in reliance upon applicable law and be the product of a rational mental process. *Hartung*, 102 Wis. 2d at 66. A

trial court in an exercise of its discretion may reach a conclusion which another judge or another court may not reach. *Id.* And we are required to search the record for reasons to support a trial court's discretionary decision. *Long v. Long*, 196 Wis. 2d 691, 698, 539 N.W.2d 462 (Ct. App. 1995). We have done that. Although Christina asserts that she cannot see the trial court's reasons for arriving at its property division, we have identified at least four: (1) WIS. STAT. § 767.255(3)(a) which permits a trial court to move toward a return the parties to their premarriage status in shorter marriages; (2) § 767.255(3)(b), which permits trial courts to do so where one party brings significantly more assets to a marriage; (3) § 767.255(3)(m), which permits a trial court to consider other relevant factors, one of which is that William is at retirement age while Christina is over twenty years from retirement, and that neither have pension plans; and (4) § 767.255(3)(g), which permitted the trial court to consider that Christina earns about \$30,000 per year, while William earns about one-half that amount.

¶20 Next, Christina argues that the trial court's findings as to the value of William's property are not supported by the evidence. Her specific contention is that William's equity in the grocery store at the time of the parties' marriage was not \$156,000, as William claimed, but \$162,000. And, she claims that the amortization table William used to calculate the equity was inaccurate, and showed that William paid too much on the mortgage.

¶21 Because William bought the grocery store in March 1984, was married in December 1986, paid the mortgage on the store in 1988 and was divorced in 1999, both he and Christina needed to determine the value of property he brought to the marriage. It would have been immediately apparent to both parties that WIS. STAT. § 767.255(3)(b) would be significant in this action. William recognized that the value of the grocery store in December 1986 would be

the difference between the value of the store and the amount of the mortgage. Accordingly, he generated an amortization schedule, which used the varying interest rates he recalled paying as the mortgage was amortized. It is the use of “recalled” rather than actual interest rates that Christina faults. She concludes that the correct equity on the date of marriage was \$162,000 rather than the \$156,000 William used as the value of the grocery store on the date of their marriage.

¶22 To begin with, we are uncertain why Christina is asserting that the correct grocery store premarital equity exceeded that which William claimed. If this is true, under the trial court’s decision, William should have received \$6,000 more prior to the court’s equal division of property accumulated during the marriage. Putting that aside, had Christina been concerned that William’s valuation of premarital assets would be suspect, she could have commissioned her own. Instead, Christina asserts that Exhibit 103 shows a payment schedule with the loan paid in three years and five months. But Exhibit 103 pertains to the Tranel land contract, and is a twenty-year amortization schedule. Exhibit 104 is an amortization schedule for Redfearn foods, which runs from March 1, 1984 to February 1, 1989. The schedule shows a balance on the mortgage of \$92,528.21 on January 1, 1987, after the payment credited on that day. Since the parties were married on December 31, 1986, that figure should be increased by \$5,000, the amount of the January 1, 1987 payment. Accordingly, the mortgage balance on the date of marriage would have been \$97,528.21.

¶23 The second part of the equation is to determine the value of the grocery store on the date of marriage. Again, Christina provides us with nothing to support her contention that William’s values are wrong. But the trial court heard testimony that the price of the store was \$260,000 when William bought it in 1984. The sale price of the store when he sold it in 1992 was about \$226,000.

Thus, the trial court could have used a value between the purchase and selling prices to determine the value of the grocery store on the date of marriage. A value of about \$253,500 would produce equity of about \$156,000. Given Christina's failure to offer a different value, the trial court could have reasonably concluded that William's equity in the grocery store was \$156,000 on the date of the parties' marriage.

¶24 Christina also challenges the assumed interest rates she believes were used for the grocery store mortgage. William testified that the grocery store was financed through the use of six-month notes. Each time a note was renewed, the interest rate dropped, reflecting a general decline in interest rates. Christina argues that while the amortization schedule used a seven percent rate, William testified that the rate dropped to eight percent. The difficulty with this assertion is that Christina is citing and using Exhibit 103, the amortization schedule for the Tranel land contract, which does carry a seven percent interest rate. But the amortization schedule for the grocery store is Exhibit 104, in which the interest rate starts at fourteen percent, and decreases to eight percent. William's testimony is consistent with the corresponding amortization schedule.

¶25 Next, Christina argues that the trial court gave William double credit for property brought to the marriage. Christina is correct. This is how that happened. The trial court accepted William's opinion that a list of property William brought to the marriage had a value of \$437,350, which the trial court rounded to \$437,000. Included in that list of property were various guns, tools, a 1979 Scout automobile and other personal property. William valued the premarital value of those items at \$4,000. Thus, the other items carried a premarital value of \$433,000. William possessed the guns, etc., at both the time of the marriage and at the time of divorce. The trial court gave each party the

personal property in his or her possession pursuant to the stipulation at trial. This necessarily included William's guns, etc., which had comprised a part of his premarital property. But the trial court credited William with \$437,000. William has been credited with the \$4,000 of guns, etc., twice, once in the household furniture and furnishings, and again in the \$437,000. Christina is therefore entitled to an additional \$2,000. We remand this issue to the trial court with directions to increase the balancing payment from William to Christina by \$2,000.

¶26 Next, Christina argues that certain Puerto Rican bonds, held in the parties' investment account with A.G. Edwards, were William's property, not the property of his mother, Adeline Hamilton. The trial court found that the Puerto Rican bonds were the proceeds of three certificates of deposit, dated in 1993, 1994 and 1995. Each certificate of deposit was owned by Adeline Hamilton, William's mother, p.o.d. to Marilyn Humphry, Carol Edwards, Richard Redfearn and Dennis Redfearn, Adeline Hamilton's children.² The certificates totaled nearly \$30,000. William's sister, Carol Edwards, testified that the certificates were her mother's, and that her mother handled them "until she just didn't want to be bothered anymore with the CDs." William testified that, in 1994 or 1995, his mother thought that she was not capable of handling the CDs, so she wanted a family member to take the money. She first wanted William's sister to take the money and invest it until she died, then take funeral expenses out of it, and divide the balance between her four children. The CDs were given to William with the idea that the moneys were to be held to pay funeral expenses and the balance then divided equally between William and his siblings. Eventually, after William used

² One of the certificates omitted Richard Redfearn, which we deem of no consequence. Dennis is William's middle name, apparently used by him and his family.

the money to build Jeff Redfearn's house, and then received it back when the house was sold, the money was used to purchase about \$30,000 of Puerto Rican bonds, which were held in William's account with the A.G. Edwards Co.

¶27 The court examined William, who testified that the A.G. Edwards account was in his and Christina's name because he assumed that any money that was put in an account "like that" had to be titled in both names. He was investing it for the family until the time it was divided. He talked to no financial counselors, attorneys or accountants about how to handle the account. Christina contributed none of the funds in the A.G. Edwards account. William kept track, and the money from his mother's CDs was kept separate. Though the account has more money in it than \$30,000, the bonds are in a separate fund.

¶28 The trial court heard considerable testimony from William about the bonds. Though William considered them a gift to him and to his siblings, the trial court found that the bonds were traceable from the three CDs to the Puerto Rican bonds. It concluded that the bonds were the property of Adeline Hamilton, not either William or Christina. Accordingly, it did not include them in the marital estate.

¶29 Christina argues that the bonds are not traceable to the CDs. And she is correct that the \$30,000 which started as the property of Adeline Hamilton went through various transactions before it was used to purchase the Puerto Rican bonds. But the trial court found that the CDs, copies of which were introduced, were not gifted by Adeline Hamilton to William Redfearn. This is a finding of fact, and a significant one. If Adeline Hamilton did not gift the CDs to William, and there is no evidence that she transferred them to anyone else, the inescapable conclusion is that she owns them, and their proceeds. Christina does not explain

how she could have an interest in property owned by her mother-in-law. We conclude that the trial court's finding that Adeline Hamilton never gifted her funds to William is not clearly erroneous. The conclusion follows that she still owns those funds, now Puerto Rican bonds, though they are managed by William. Christina cannot claim an interest in them.

¶30 No costs to either party.

By the Court.—Judgment affirmed in part; reversed in part, and cause remanded with directions.

Not recommended for publication in the official reports.

