COURT OF APPEALS
DECISION
DATED AND FILED

April 3, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2387-FT **Cir. Ct. No. 00-FA-395**

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

ARSHEL G. RUPERD,

PETITIONER-RESPONDENT,

V.

SHARON L. RUPERD,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: MARY KAY WAGNER-MALLOY, Judge. *Affirmed*.

Before Nettesheim, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Sharon L. Ruperd appeals from that portion of the judgment of divorce which divided the parties' property. She argues that the court improperly determined the value of the parties' house as of the time they separated, and that the court erred when it did not award her any interest in

Arshel G. Ruperd's pension. We conclude that the court did not erroneously exercise its discretion when it divided the marital property. We affirm.

¶2 Sharon Ruperd and Arshel Ruperd were married in 1967. In 1991, Sharon left the marital residence and never returned. Arshel filed for divorce in 2000. A court trial was held, and the court divided the parties' property as of the date of their separation, 1991. Specifically, the court divided the equity in the marital home as of 1991, and found that Arshel's interest in his pension had not vested at that date. The court ruled that Sharon was not entitled to any interest in the pension. Sharon appeals.

¶3 Sharon argues that the trial court should not have set the date of valuation as the date of their separation, but rather the date of divorce. Generally, we review a property division under an erroneous exercise of discretion standard. ***Brandt v. Brandt***, 145 Wis. 2d 394, 406, 427 N.W.2d 126 (Ct. App. 1988). Wisconsin law requires that assets be valued as of the date of divorce unless there are special circumstances which would warrant deviation from this rule. ***Id.*** at 421. "We envision the 'special circumstances' rule as applying to conditions over which a party has little or no control—not where a party's own conduct has contributed to the special circumstances." ***Id.*** at 422.

¶4 In this case, the trial court found such special circumstances. The court stated:

> [O]ne of the bases for a spouse acquiring interest in another person's pensions and assets or whatever is the fact that they have a mutually bonded purpose in life, and that did not occur by anybody's testimony after 1991 in this case. They did not have anything to do with each other after 1991 other than occasional contact.

¶5 Sharon argues that the decision when to get a divorce was within Arshel's control and therefore, this was not a "special circumstance" under ***Brandt***. While it may be true that Arshel could have filed earlier, Sharon's decision to leave was the event which triggered the special circumstances of this case. Nothing in this record indicates that Arshel had any control over that event.

¶6 This case is similar to ***Schmitt v. Schmitt***, 2001 WI App 78, 242 Wis. 2d 565, 626 N.W.2d 14. In ***Schmitt***, we concluded that the trial court had not erred when it considered the fact that the parties had led separate lives prior to the time they actually divorced. ***Id.*** at ¶¶17-18. The trial court found that the parties had led separate lives even though they continued to live under the same roof and shared some expenses. ***Id.*** at ¶17. We stated: "It was not impermissible for the court to consider the current and long-standing living arrangements and lifestyles of the parties." ***Id.*** at ¶18. We concluded that the court's determination was appropriate under the catchall phrase of the maintenance statute, WIS. STAT. § 767.26(10) (1999-2000).[1] ***Schmitt***, 2001 WI App 78 at ¶18. That phrase allows the court to consider "[s]uch other factors as the court may in each individual case determine to be relevant." Sec. 767.26(10). While ***Schmitt*** involved an award of maintenance, the property division statute contains the identical catchall phrase. WIS. STAT. § 767.255(3)(m). We find the rationale of ***Schmitt*** to be persuasive. We do not see any erroneous exercise of discretion by the trial court in its determination of when to value the property to be divided.

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

¶7 Sharon also argues that the circuit court improperly determined that she did not have an interest in Arshel's pension. She asserts that Arshel testified that he changed jobs in April 1989.[2] With this job change, she asserts, he began a new pension plan which did not vest until 1994. She argues that the circuit court improperly found that since the pension plan had not vested in 1991, she did not have any interest in it. She concludes that the circuit court's determination was "clearly erroneous" because the statute requires the court to consider both vested and unvested pensions. *See* WIS. STAT. § 767.255(3)(j).

¶8 WISCONSIN STAT. § 767.255(3)(j) states:

> The court shall presume that all property not described in sub. (2)(a) is to be divided equally between the parties, but may alter this distribution without regard to marital misconduct after considering all of the following:
>
> ....
>
> (j) Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.

This statute does not, as Sharon suggests, require the court to divide an unvested pension. Rather, it requires the court to consider a party's future interests, vested or unvested, when determining whether to divide property equally. "Under Wisconsin law, pension benefits are to be taken into consideration when the marital estate is divided, whether they have vested or not. *See* § 767.255(3)(j), STATS. The date upon which a spouse becomes eligible to receive benefits is just

[2] Counsel for the appellant did not include citations to the record to support these assertions, as required by WIS. STAT. RULE 809.19(1)(d). An appellate court is improperly burdened where briefs fail to cite to the record. ***Meyer v. Fronimades***, 2 Wis. 2d 89, 93-94, 86 N.W.2d 25 (1957). Counsel should be sure to include the appropriate record citations in future filings in this court.

one of many factors for the trial court to consider when deciding how to divide the marital estate." ***Garceau v. Garceau***, 2000 WI App 7, ¶5, 232 Wis. 2d 1, 606 N.W.2d 268, *aff'd on remand*, 2002 WL 342619 (WI App Mar. 2, 2002) (No. 01-1220) (citation omitted).

¶9 The circuit court in this case considered the unvested pension and determined that it would not be part of marital estate. We conclude that it was not an erroneous exercise of discretion for the circuit court to find that the unvested pension, covering two and one-half years of employment, would not be divided between the parties.

By the Court.—Judgment affirmed.

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