COURT OF APPEALS
DECISION
DATED AND FILED

November 22, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2945 **Cir. Ct. No. 2008FA808**

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

IN RE THE MARRIAGE OF:

MICHAEL D. HESS,

PETITIONER-RESPONDENT,

V.

SHEILA M. HESS,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Affirmed*.

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Sheila Hess, pro se, appeals her divorce judgment. Sheila argues the circuit court erroneously exercised its discretion in the property division. We affirm.

¶2 Sheila and Michael Hess began cohabitating in 1997, but were not married until February 14, 2005.[1] The parties separated in May 2006, when Sheila moved out and purchased a condominium in Minneapolis. A divorce action was commenced in April 2007, but subsequently dismissed following attempted reconciliation. Another divorce proceeding was commenced on December 12, 2008, and a judgment of divorce was eventually granted on August 9, 2010.

¶3 The circuit court incorporated a lengthy written decision into its findings of fact, conclusions of law and judgment of divorce.[2] The court concluded that the parties had lived financially separate lives during both their cohabitation and marriage, and essentially awarded each party the property in their possession. The court denied Sheila's request for maintenance and a contribution toward her attorney fees. The court also specifically found that Sheila had failed to provide a full exchange of financial information. Sheila filed a motion to reconsider, which was denied pursuant to a written decision. Sheila now appeals.[3]

¶4 The division of property 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 will sustain a discretionary decision if the court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Liddle v. Liddle***, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). Findings of fact will be

[1] No children resulted from the marriage.

[2] An amended divorce judgment withdrew a provision restoring Sheila's former surname and authorized her to continue to use her married surname.

[3] Sheila's issues on appeal involve property division. Therefore, we will not address the issue concerning maintenance or attorney fees.

affirmed unless clearly erroneous. WIS. STAT. § 805.17(2).[4] Where there is conflicting testimony, the circuit court is the ultimate arbiter of the credibility of witnesses. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979).

¶5 Sheila first argues the circuit court erred "in making adverse findings regarding Sheila's purported failure to make financial disclosures required under WIS. STAT. § 767.127." We conclude the record supports the court's findings. The record indicates that a financial disclosure statement was prepared by Sheila's attorney before Sheila discharged him, but the document was not signed and was never admitted into evidence. Sheila failed to satisfy her obligation to provide the required disclosure under § 767.127, and the court's adverse inference was appropriate. *See* WIS. STAT. § 767.127(4).

¶6 Sheila also challenges the circuit court's valuation of the Minnesota condominium she purchased in 2006 when she left the couple's Mosinee residence. Further, Sheila argues the court "erred in treating the $19,000 invested by the couple in the Minnesota property as Michael's gifted funds."

¶7 In its written decision concerning the divorce, the circuit court found that the only significant item of property acquired during the marriage was the condominium Sheila purchased, "but even that shows their separate financial lives. When it was done, Sheila acted suddenly, secretly and independently, using funds from Michael's gifted/inherited accounts." The court referenced a note from Sheila to Michael that stated, "I'm sure you are going to be very very mad at me

[4] References to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

but I hope you get over it, I borrowed money out of your account (or is it our account) to invest in the condo. … You'll get it back. … P.S. I'm sorry I couldn't talk to you about the money, I knew you would blow up about it." The court found:

> Sheila had been able to transfer $24,000 from Michael's account that represented property gifted to him by his parents into a joint account. From that account she took $5,000 in cash and $19,000 by check. Michael was able to stop payment on the check but the cash had been spent. However, he eventually returned the $19,000 for the down payment so they would not lose that which was already invested in the transaction.

¶8 The circuit court further found that "[d]uring most of the proceeding there was at least a tacit agreement that Sheila owed the $24,000."[5] The court rejected Sheila's argument that Michael's reissuance of the $19,000 check demonstrated donative intent, and the court did not err in so doing. Sheila contends that depositing gifted funds into a joint bank account creates a presumption of donative intent. However, the record supports the court's discretion in considering the gifted source of the $19,000 which Sheila converted for the condominium down payment.[6] *See* ***Schwartz v. Linders***, 145 Wis. 2d 258, 263, 426 N.W.2d 97 (Ct. App. 1988).

[5] In her brief to this court, Sheila concedes "there was an agreement in the note from Sheila to Mike that she would return the $19,000 funds …." However, Sheila argues that Michael's reissuance of the check for $19,000 demonstrated donative intent. Although not specifically stated in her brief to this court, it appears that Sheila does not dispute the $5,000 balance. In fact, she argued in her circuit court posthearing brief that "[t]he part [in the note] where I said 'you will get it back' was in regard to the $5,000[] cash that was withdrawn at the same time."

[6] Moreover, Sheila cannot unilaterally create donative intent by conversion.

¶9 At trial, the parties also disputed the value of the Minnesota condominium. Although Sheila did not file a financial disclosure statement, the circuit court determined the evidence showed that Sheila's purchase price in 2006 was $94,000. The court stated in its written decision that Sheila's sister testified the property had a present value of $26,000, which the court found "incredible and not worthy of belief." Sheila submitted a real estate sales report as an exhibit indicating a sale of a condominium for $33,000, but the record reveals no foundation for the report. Moreover, the court noted Sheila had a $64,409 mortgage on her condominium, "after at least $19,000 paid from Michael's account." The court reasoned there was no plausible explanation why the lender would lend double the amount its security was worth and therefore rejected the $33,000 value.

¶10 The circuit court acknowledged that the condominium's value declined, but indicated the most credible evidence was that the value was in excess of the mortgage. The court also noted "this is a relatively recent purchase and the current recession is showing signs of recovery, although slowly." However, the court also observed there was no urgency to sell the property and this was Sheila's home and an "investment." The court determined that it would be inequitable to reflect the condominium's value at the currently depressed worth and "lead to a future windfall for Sheila." The court indicated that "the size and duration of the recession indicates that the glut of foreclosed homes will remain for some time

…." Under the totality of the circumstances, the court concluded a reduction in value of 11% was appropriate and valued the condominium at $84,600.[7]

¶11 The circuit court further indicated that to equalize the property division would require Michael to pay Sheila $8,019. However, the court reasoned:

> [T]here can be no real equalization here since Sheila failed to provide full financial disclosure of her pre-marital property even when given an opportunity to do so at trial. Given the balance nominally due but the failure to disclose, the court will not order an equalization payment be made in this case. This will also provide the parties with a clean break without any loose ends that might encourage even more litigation between them.

¶12 In coming to this conclusion, the court emphasized its finding that the parties had lived separate financial lives. The court found that, "for the most part they maintained separate bank accounts and bought and sold property independently, at will, and without conferring with the other party." The court stated:

> It also became known that Sheila had her own premarital estate that has never been fully disclosed either during the cohabitation, their marriage or during discovery in the divorce proceedings. She does not contest that she had her own separate accounts and made purchases from them on her own. She had accounts at Valley Community Credit Union with unknown balances and a Thriv[e]nt retirement account but its value still remains an unknown with Sheila, at different times, indicating values between $40,000 to

[7] Sheila also argues the circuit court erroneously "accepted less than fair market values for the value of the motor vehicles it awarded to Michael." However, Sheila's argument in this regard is undeveloped and unsupported by record citations. We will therefore not address the issue further. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). In any event, the circuit court indicated in its written decision that "[t]here was no appraisal of them leaving only 'Blue Book' as the only neutral source." The court used the "second highest value for all [the motor vehicles]."

> $60,000. It also came out during the proceedings that Sheila sold a previous (pre-relationship) Minnesota condominium of hers for $40,000. She also had a previous business interest with her sister, and received a $20,000 social security [backpay] award. Michael had little if any knowledge of these assets or transactions until after the divorce proceedings had been commenced. Finally, her failure to provide a Financial Disclosure Statement indicates the same. If the parties had not lived separate financial lives, there would be no necessity for the secrecy that Sheila wishes to maintain.

¶13 The record reflects the circuit court's consideration of appropriate statutory factors to overcome the presumption of equal property division, most notably the "catch-all" provision under WIS. STAT. § 767.61(3)(m). This broad catch-all provision exemplifies the flexibility the circuit court has in crafting a fair and equitable remedy. *See* ***Schmitt v. Schmitt***, 2001 WI App 78, ¶18, 242 Wis. 2d 565, 626 N.W.2d 14.[8] Contrary to Sheila's perception, the failure to consider inapplicable factors is not an erroneous exercise of discretion, *see* ***LeMere***, 262 Wis. 2d 426, ¶26, and in any event Sheila fails to specify which statutory factors the court should have considered.

¶14 Here, the court gave lengthy explanations supporting its treatment of the assets and equity. The court's findings of fact are not clearly erroneous. The

[8] Although ***Schmitt v. Schmitt***, 2001 WI App 78, 242 Wis. 2d 565, 626 N.W.2d 14, involved the maintenance statute, the property division statute contains the identical catch-all provision. *See* WIS. STAT. § 767.61(3)(m).

court's rationale supporting essentially a walk-away property division was a proper exercise of discretion.[9]

By the Court.—Judgment affirmed.

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

[9] We note that Sheila failed to provide appropriate citations to the record on appeal. We admonish Sheila that WIS. STAT. RULE 809.19(1)(d) and (e) require appropriate citations to the record on appeal and references to the brief's appendix are not in conformity with the rules. *See* ***United Rentals, Inc. v. City of Madison***, 2007 WI App 131, ¶1 n.2, 302 Wis. 2d 245, 733 N.W.2d 322. A reviewing court is not required to search the record for each statement and proposition made in an appellant's brief. *See* ***Haley v. State***, 207 Wis. 193, 198-99, 240 N.W. 829 (1932). Sheila also cites unpublished opinions in violation of the rules. The rules of appellate practice are designed in part to facilitate the work of the court. Moreover, Sheila did not file a reply brief, and arguments not refuted are deemed admitted. ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Pro se litigants are bound generally to the same appellate rules as attorneys. ***Waushara Cnty. v. Graf***, 166 Wis. 2d 442, 451, 480 N.W.2d 16 (1997).