COURT OF APPEALS
DECISION
DATED AND FILED

March 28, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1327 **Cir. Ct. No. 2009FA315**

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

IN RE THE MARRIAGE OF:

JOYCE A. HILLER,

PETITIONER-RESPONDENT,

V.

GEORGE C. HILLER,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: JAMES G. POUROS, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. George C. ("Chuck") Hiller appeals from the maintenance and property division portions of the judgment divorcing him and

Joyce A. Hiller. We interpret the trial court's decision, issued after a three-day trial and consideration of the parties' posttrial memoranda, as an effort to balance the equities in light of the parties' particular circumstances and as an appropriate exercise of the court's discretion. We affirm.

¶2 Chuck and Joyce married in 2002 after cohabiting for approximately twenty years. It was a second marriage for both. They each have children from their prior marriages. Chuck is retired from the carpentry business he owned. His long-time avocation has been collecting and restoring classic cars. Throughout their years together, Joyce cared for the home. She also worked as a retail clerk until retiring in 2007. The parties maintained separate checking accounts but generally used the funds for marital purposes.

¶3 The trial court ordered Chuck to pay Joyce maintenance of $2000 per month for an indefinite period, reflecting a 55/45 income split in Chuck's favor. The court valued the marital estate at $1,003,383. It deviated from the presumptive fifty-fifty property division under WIS. STAT. § 767.61(3) (2009-10),[1] awarding Joyce approximately thirty-seven percent of the estate and Chuck approximately sixty-three percent. We will supply additional facts as necessary.

Property Division

¶4 Property division lies within the sound discretion of the trial court. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We sustain discretionary decisions where the trial court examines the relevant facts, applies a proper standard of law and, using a demonstrated rational process,

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

reaches a conclusion a reasonable judge could reach. ***Id.*** Findings of fact are affirmed unless clearly erroneous. WIS. STAT. § 805.17(2). The weight and credibility to be given to testimony is uniquely within the province of the trial court, ***Siker v. Siker***, 225 Wis. 2d 522, 528, 593 N.W.2d 830 (Ct. App. 1999), "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).

¶5 Due to its underlying philosophy that "marriage is akin to an economic partnership between the spouses," ***Rodak v. Rodak***, 150 Wis. 2d 624, 630, 442 N.W.2d 489 (Ct. App. 1989), WIS. STAT. § 767.61(3) creates a rebuttable presumption that the marital estate is to be divided equally at the time of divorce. "[S]pouses are presumed to be equal contributors to the accumulated wealth of a marriage, regardless of whether their contributions are principally made inside or outside the home." ***LeMere***, 262 Wis. 2d 426, ¶19 (citation omitted). Courts may deviate from an equal property division, however, upon considering numerous statutory factors. Sec. 767.61(3).

1. Attorney fee "add-backs"

¶6 When Joyce filed for divorce in June 2009, Chuck's checking account had a balance of $63,575. From June 2009 through January 24, 2011, just before trial commenced, Chuck deposited $92,093 in social security, pension and annuity income into the account, so that, had there been no expenditures, a balance of $155,668 should have existed at the time of divorce. Instead, the balance was $3,325. The trial court found that some of Chuck's expenditures—$20,000 in attorney fees paid from joint monies, $39,000 in gifts to his adult children, and a $20,000 "loan" to a friend—constituted "marital waste or depletion of assets" and therefore should be added back into the marital estate.

¶7 On appeal, Chuck counts as error only the adding back of the $20,000 he paid toward attorney fees during the pendency of the action. He argues that paying for one's own attorney fees is not "waste" under WIS. STAT. § 767.63 and there is no other authority for subjecting that sum to an "add-back."

¶8 The "waste" phraseology notwithstanding, we disagree in the final analysis that the court looked at Chuck's legal expenses in the framework of the "waste" statute.[2] Rather, the court expressly noted that the so-called "add-back" line of cases comes under the "contribution to the marriage" factor of WIS. STAT. § 767.61(3)(d). This factor allows the court to consider each party's efforts to preserve the marital assets. *See* ***Anstutz v. Anstutz***, 112 Wis. 2d 10, 12, 331 N.W.2d 844 (Ct. App. 1983).

¶9 With that premise, we turn to the "add-backs." Whether an asset is subject to division under WIS. STAT. § 767.61 is a question of law. *See* ***Weiss v. Weiss***, 122 Wis. 2d 688, 692, 365 N.W.2d 608 (Ct. App. 1985). While paying one's own attorney fees may not be "waste," nonmarital liabilities incurred after the petition for divorce is filed should not be subtracted from the marital estate. *See* ***id.*** at 699. Personal expenditures may bear on the property division and a party's ability to pay maintenance. ***Id.*** at 699-700. Furthermore, just as assets acquired during the pendency of a divorce action are included when determining the size of the marital estate at the time of the divorce, ***Overson v. Overson***, 125 Wis. 2d 13, 21, 370 N.W.2d 796 (Ct. App. 1985), by the same logic, the trial court should be able to add back the value of assets spent or disposed of during the

[2] Even if it did, we could affirm on different grounds. ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995).

pendency of the action if they were acquired during the marriage and if the court deems their expenditure to be an unjustified depletion of the estate.

¶10 Here, the court found that Joyce paid her attorney fees from an inheritance and "contributed mightily to the homemaking" and to hostessing and catering large events related to Chuck's car hobby, and that Chuck negatively impacted the marital estate by depleting assets. "[R]ecompense [is] available when one spouse has mismanaged or dissipated assets." ***Covelli v. Covelli***, 2006 WI App 121, ¶30, 293 Wis. 2d 707, 718 N.W.2d 260. The court's analysis under WIS. STAT. § 767.61(3)(d) was proper. We construe the attorney fee add-back as an appropriate effort to make the marital estate whole.

2. Asset value add-back

¶11 The court also ordered an add-back of the value of cars and car parts Joyce claimed were missing at the time of divorce. Suspecting that Chuck might conceal assets, Joyce and her son secretly photographed Chuck's vehicle and parts inventory and photocopied his car records. When court-appointed appraiser Larry Vanne later evaluated the collection, he could not locate five cars, eleven chrome bumpers and two performance carburetors ("tri-carbs"). Chuck testified that he had dismantled one of the cars and sold another one; that Vanne overlooked some of the bumpers; and that the other three cars, the tri-carbs and the remaining bumpers actually were owned by third parties who had retrieved them. Vanne appraised the value of the missing cars and parts between $77,300 and $101,400. The court placed the value at $80,000 and ordered that amount added back.

¶12 Chuck challenges only the add-back for the three cars and the tri-carbs. He claims there is no evidence he ever owned those three cars and that the evidence is uncontradicted that he was working on them for the real owners.

¶13 A court may not disregard uncontradicted testimony absent something that discredits it or renders it against reasonable probabilities. *See* ***Ashraf v. Ashraf***, 134 Wis. 2d 336, 345, 397 N.W.2d 128 (Ct. App. 1986). Here, the court had "something else." It had Joyce's photographic documentation and Vanne's appraisal, which the court deemed more credible than that of Chuck's appraiser. Both served to discredit Chuck's self-serving explanations about the items' whereabouts and ownership.

¶14 Next, citing ***Dean v. Dean***, 87 Wis. 2d 854, 865, 275 N.W.2d 902 (1979), Chuck asserts that the burden of proof was on Joyce as the party seeking inclusion in the marital estate of assets held in the name of a third party. Third-party ownership never was established, however, and Chuck was better situated to prove that claim.[3] The failure to produce relevant evidence in his control and that would have been in his interest to produce permits an inference that the evidence would have been unfavorable to him. *See* ***Convey v. Milwaukee & Suburban Transp. Corp.***, 8 Wis. 2d 520, 526, 99 N.W.2d 713 (1959).

¶15 We conclude that these assets are subject to division under WIS. STAT. § 767.61. We uphold the trial court's finding that their value was $80,000 because that valuation is not clearly erroneous. *See* ***Liddle v. Liddle***, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). It was within the court's discretion to add back their value.

[3] Chuck supplies in his appendix a certificate of title indicating third-party ownership of one of the three cars. The court did not admit it as an exhibit at trial because Chuck did not produce the alleged owner as a witness. As the document is not part of the record, it will not be considered. *See* ***Balele v. Wisconsin Pers. Comm'n***, 223 Wis. 2d 739, 752, 589 N.W.2d 418 (Ct. App. 1998).

3. Property division methodology

¶16 Chuck next takes issue with the court's exercise of discretion in making the property division, through which the trial court awarded him approximately two-thirds of the property. He asserts that, while the trial court "was conscientious in mentioning" the relevant statutory factors, its decision failed to reveal a reasoning process. He contends the court's lack of analysis stems from the court's reluctance to divide the property, about ninety percent of which he claims he brought to the marriage, after only an eight-year marriage. We disagree.

¶17 A court begins with the presumption that property should be divided equally. WIS. STAT. §767.61(3). It may deviate from that presumption after considering twelve listed factors. *See* ***id.***; *see also* ***LeMere***, 262 Wis. 2d 426, ¶22. The court may give varying weight to the factors it deems applicable. *See* ***LeMere***, 262 Wis. 2d 426, ¶25. The court's explanation "need not be a lengthy process. While reasons must be stated, they need not be exhaustive." ***Burkes v. Hales***, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991).

¶18 Here, the trial court's decision fully satisfied the standard we have set forth. The court first observed that the case was "fact intensive and fact specific" making witness credibility "critical." It explained why it found Chuck's testimony less credible than Joyce's and Chuck's appraiser's testimony less credible and reliable than Vanne's. The court also observed that the parties did not have either a cohabitation agreement or a premarital agreement, either of which might have defined assets as not being subject to division.

¶19 The court then (1) determined what assets comprised the divisible estate, including those that should have been there but no longer were; (2) presumed an equal division; (3) assessed whether to deviate from the presumed

fifty-fifty split by examining each statutory factor; and (4) determined how to accomplish the division in practical terms. Several factors weighed heavily in the property division the court fashioned: the substantial assets Chuck brought to the marriage, Joyce's significant homemaking contributions, Chuck's asset depletion, and Joyce's lesser earning capacity. *See* WIS. STAT. § 767.61(3)(b), (d) and (g). It expressly noted that it was not considering the parties' two-decade cohabitation as an "other factor" relevant to property division. *See* § 767.61(3)(m). The weight given the various considerations is within the trial court's discretion. *See* ***Herlitzke v. Herlitzke***, 102 Wis. 2d 490, 495, 307 N.W.2d 307 (Ct. App. 1981).

4. Gifted and inherited assets

¶20 Chuck next criticizes the trial court for acknowledging gifted and inherited funds but not explaining the impact, if any, that they had on the property division. He complains that the court simply "stated that it had taken the ***Schwartz v. Linders*** case into account in making the property division."

¶21 Chuck does not go even that far. He does not provide a citation to ***Schwartz***,[4] let alone discuss its application. We could search the record for support for the court's discretionary decision. *See* ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. But as Chuck's undeveloped, four-sentence argument comes nowhere near persuading us that the court erroneously exercised its discretion, we decline to address it further. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995).

[4] ***Schwartz v. Linders***, 145 Wis. 2d 258, 426 N.W.2d 97 (Ct. App. 1988).

Maintenance

¶22 Like property division, the determination of the amount and duration of a maintenance award also is entrusted to the trial court's discretion. *See* ***Grace v. Grace***, 195 Wis. 2d 153, 157, 536 N.W.2d 109 (Ct. App. 1995).

¶23 In setting maintenance here, the trial court found authority in ***Meyer v. Meyer***, 2000 WI 132, 239 Wis. 2d 731, 620 N.W.2d 382, to consider the parties' twenty years of premarital cohabitation. WISCONSIN STAT. § 767.56(9) permits a court to consider as a factor in setting maintenance "[t]he contribution by one party to the education, training or increased earning power of the other." In ***Meyer***, where the issue was the wife's support of the husband's educational pursuits, the supreme court held that § 767.56(9) is broad enough to embrace premarital contributions. ***Meyer***, 239 Wis. 2d 731, ¶¶1, 43.

¶24 In view of ***Meyer***'s interpretation of WIS. STAT. § 767.56(9), the court concluded that Joyce contributed to Chuck's earning power throughout the parties' entire time together by performing services that allowed him to pursue his business and his avocation. Given the plainly stated scope of the statute, we must reject Chuck's claim that ***Meyer*** is limited to spousal contributions only to the other's education.

¶25 In addition, the trial court found that the twenty years the parties cohabited also was an "other factor" relevant to setting maintenance in this particular case. *See* WIS. STAT. § 767.56(10). We reject Chuck's contention based on the ***Meyer*** dissent that this was error because "[i]f parties want the benefits of marriage, the Family Code makes it clear that the way to obtain them is to get married." First, a dissent "is what the law is not." ***State v. Perry***, 181 Wis. 2d 43, 49, 510 N.W.2d 722 (Ct. App. 1993). More to the point, though, we

disagree that the cohabitation drove the court's decision. Rather, it considered the parties' mutual contributions to their "economic partnership." *See* ***Rodak***, 150 Wis. 2d at 630. The court deemed the long-term nature of the contributions to be an "other factor" relevant to this particular case, a consideration that falls under the court's general discretion and § 767.56(10).

¶26 Chuck also complains that the court wrongly factored into his available income sums it had "deprived" him of in the property division and an amount he receives monthly from an inherited annuity. Chuck is mistaken. The court set maintenance based on income figures he provided which, according to his own posttrial brief, did not include the amounts he complains about.

¶27 In sum, the trial court carefully ticked through each of the statutory factors, explaining why it did or did not find them applicable to the maintenance award. It awarded Joyce $2000 a month, one of Chuck's alternate proposals on the Mac Davis calculation he submitted to the court. The court's findings are not clearly erroneous, and we are bound by them. Those findings support the court's exercise of discretion in awarding maintenance. We see no error.

By the Court.—Judgment affirmed.

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