

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 30, 2012

Diane M. Fremgen
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.

Appeal No. 2012AP477-FT

Cir. Ct. No. 2010FA61

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

BRUCE MICHAEL NELSON,

PETITIONER-APPELLANT,

V.

BRENDA LOU NELSON,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Bayfield County:
ROBERT E. EATON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Bruce Nelson appeals¹ his divorce judgment, arguing the record does not sufficiently support the circuit court’s property division. We affirm the judgment.

¶2 Bruce and Brenda Nelson were married for twenty-four years and have seven children, four of whom were minors at the time of the divorce. Of the three adults, one has special needs. Bruce is a teacher in the Maple Ridge School District. After their child with special needs was born, the parties decided that Bruce would continue to work as a teacher but Brenda, who previously worked as a teacher, would stay at home. Bruce and Brenda accumulated no debt during their marriage. The two most valuable assets were the marital home and Bruce’s retirement account.

¶3 The parties presented the divorce court with a choice of two different property division proposals. Brenda requested the marital home and proposed Bruce be awarded his entire retirement account. Bruce proposed the retirement account be divided by a qualified domestic relations order, and that Brenda be ordered to refinance the home in her name alone or sell the home to tender him an equalization payment within sixty days. Bruce also proposed that if Brenda failed to pay his proposed equalization payment within sixty days, interest should begin to accrue at seven percent.

¶4 The circuit court declined to divide the retirement account by a QDRO, on the grounds that if Brenda could not refinance the home in her name she would be forced to list the property, but “[i]t’s not a seller’s market at this

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2009-10 version.

time.” The court stated that a “forced sale would probably lead to a sale under fair market value,” and displace the marital home’s six residents.² The court also indicated that selling the home could result in a future conflict between the parties regarding the home’s sale that “[t]he court would prefer to avoid”

¶5 The court valued the marital home at \$194,750 and retirement account at “between \$200,000 and \$220,000.” The court awarded Brenda the home and Bruce the retirement account. The court noted that Brenda possessed \$10,000 more in personal property than Bruce, and stated that it created “an approximately equal division of property.”³ Bruce now appeals.

¶6 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. Because of the difficulty in valuing pension interests, circuit courts retain broad discretion in this “complex task.” *Olski v. Olski*, 197 Wis. 2d 237, 248-49, 540 N.W.2d 412 (1995). 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 a reasonable judge could reach. *Liddle v. Liddle*, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987).

¶7 Bruce argues the circuit court erroneously exercised its discretion by not sufficiently considering his tax consequences on early withdrawal. Bruce asserts, “Bottom line—Brenda owns an unencumbered liquid asset worth \$194,750, an asset she can immediately tap without penalty, while Bruce owns a ‘non-liquid’

² One of the adult children also lived with Brenda.

³ Neither party challenges the court’s finding as to the value of the personal property.

asset he can tap only by incurring a substantial financial loss.” Bruce claims the court “did not consider the tax effects of Bruce’s immediate withdrawal. Immediately accessing his retirement account will cost him dearly in taxes and penalties”

¶8 Second, Bruce argues “speculation underlies the divorce court’s refusal to divide the retirement plan by [a] QDRO and order an equalization payment from Brenda to Bruce The divorce court speculated that if the plan was divided by [a] QDRO, Brenda would likely bear the risk of netting less than ‘fair market value’ for her asset,” and that if she was forced to sell the home, the marital home’s six residents would be displaced. Bruce insists no evidence in the record supports the court’s concerns.

¶9 We conclude this is the classic case of the circuit court properly exercising its discretion, but not in the manner that Bruce wanted. The court’s valuation of the retirement account was based on the evidence presented by accountants for both parties and was not clearly erroneous. The court valued the marital home at precisely the undisputed appraised value. The court reasonably concluded that it would be preferable to award each party a single asset rather than dividing each between the parties. Moreover, with the personal property awarded to Brenda, the court appropriately found an approximately equal property division.

¶10 Bruce suggests that a failure to take into consideration the relative liquidity of assets is equivalent to failing to take into account the tax impacts of property division, but this argument is underdeveloped. *See M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988) (we will not abandon our neutrality to develop arguments). However, even assuming relative liquidity of assets is a factor the court may consider in its property division, there is no legal

authority requiring the court to do so, or to elevate that factor above other factors the court deems more pertinent. Furthermore, Bruce fails to provide citation to testimony that he was planning an early withdrawal.

¶11 Bruce also insists “neither the divorce court’s retirement account valuation nor its property division award demonstrate fairness” However, as Brenda points out, her accountant’s testimony regarding tax calculations was not cross-examined by Bruce’s trial attorney. Brenda also notes that although Bruce’s trial attorney elicited testimony from both accountants that there would be tax penalties for an early withdrawal of the retirement funds, no figures were produced as to what effect those penalties would have on the net amounts available for distribution. Further, Bruce never provided the circuit court with an opportunity to utilize a method of valuing the retirement plan other than the methods suggested by Brenda’s accountant, as Bruce never presented the court an opinion as to the retirement account’s present value.⁴

¶12 We reject Bruce’s argument that “speculation underlies the divorce court’s refusal to divide the retirement plan by [a] QDRO and order an equalization payment from Brenda to Bruce.” Bruce proposed that Brenda refinance the home within sixty days and buy out his share, or else begin paying seven percent interest to him on the equalization payment. However, appraiser Kenneth Wheeler testified, “Very little in our area sells in 60 days. If it was going to sell in 60 days it might require, it could require a different opinion value.”

⁴ Bruce fails to refute these arguments concerning the court’s consideration of his tax consequences and these issues are therefore also deemed conceded. See *Charolais Breeding Ranches, Ltd. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

Wheeler also testified, “Since the market changed, we generally assume it is going to take at least six months to sell.” The court’s decision and order stated:

It is not a seller’s market at this time. A forced sale would probably lead to a sale under fair market value, real estate closing costs, and the dilemma of where to house the six people currently residing in the marital home. The Court would prefer to avoid further conflict between the parties which may arise over questions about the realtor with whom to list the property, the asking price and the ultimate sale price.

The court was appropriately concerned about potential problems that could arise if the marital home had to be sold.

¶13 An adequate basis exists to support the circuit court’s property division in this case. In reviewing discretionary decisions, our task is to determine whether the court could reasonably come to the conclusion it reached. Here, the court concluded the property division was fair and reasonable, and the division of the marital assets approximated an equal division of the parties’ property. The court employed a process of reasoning based on the facts of record and reached a conclusion based on a logical rationale. The court properly exercised its discretion.

By the Court.—Judgment affirmed.

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

