COURT OF APPEALS
DECISION
DATED AND RELEASED

April 3, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 95-0378
95-1213

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

In re the Marriage of:

GAIL ANN ERNST,

Petitioner-Respondent,

v.

SAMUEL ADOLPH ERNST,

Respondent-Appellant.

APPEAL from a judgment and an order of the circuit court for Washington County: RICHARD T. BECKER, Judge. *Affirmed*.

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

PER CURIAM. Samuel Adolph Ernst appeals from a judgment of divorce from Gail Ann Ernst and from an order denying his motion under § 806.07, STATS., to reopen the judgment of divorce. He argues that the equal division of property fails to give due regard to the assets he brought to the marriage, that the trial court double counted his pension, and that he should have been awarded maintenance and child support. We

conclude that Samuel waived maintenance and child support and that the property was properly divided. We affirm the judgment and the order.

At the time of the divorce, the parties had been married for approximately twenty-two years. Samuel was fifty-one years old when the parties married. He had already been employed twenty-two years with the same company and owned a home. Samuel retired from that company in 1986 and receives retirement benefits of $2096.01 monthly. Gail was not employed outside of the home for the first twelve years of the marriage. In 1984 she began her current employment as a secretary and salesperson. Her earnings at the time of trial were approximately $16,826 a year. The parties' two children were ages 17 and 13 at the time of trial.

The trial court made an equal division of the property. This included awarding to Samuel the present value of his pension in the amount of $148,070 and awarding to Gail the survivorship interest in that pension in the amount of $56,635. The parties' home was ordered to be sold and the proceeds divided equally. Joint custody of the children was ordered and Samuel was awarded primary placement. Both parties were denied maintenance and child support.

We first address Samuel's contention that child support should have been awarded according to the percentage standard and that he is entitled to maintenance to equalize the parties' post-child support incomes. The trial court found that Samuel did not request child support. Samuel's letter brief filed after the divorce trial did not request child support or maintenance. The letter concluded: "Recognizing the financial situation of all the parties, including that of Mrs. Ernst, it is therefore respectfully argued that maintenance to both parties should be denied and that Mrs. Ernst not be required to pay child support given the social security benefit that is currently available to Mr. Ernst."

By the express terms of his brief, Samuel waived the right to child support. *See* ***Douglas County Child Support Enforcement Unit v. Fisher***, 185 Wis.2d 662, 668, 517 N.W.2d 700, 702-03 (Ct. App. 1994) (waiver is the intentional relinquishment of a known right). Samuel did not argue that he was

entitled to maintenance and that issue is also waived.[1] *See* ***Evjen v. Evjen***, 171 Wis.2d 677, 688, 492 N.W.2d 361, 365 (Ct. App. 1992) (it is the party's responsibility to direct the family court's attention to issues that are being submitted for determination). *See also* ***State v. Gove***, 148 Wis.2d 936, 944, 437 N.W.2d 219, 221 (1989) (it is contrary to fundamental principles of justice and orderly procedure to allow a party to affirmatively contribute to court error and then obtain reversal because of the error).

Samuel argues that he should not be bound by the actions of his attorney because "[a]s a layman, he could not know what he and his lawyer did wrong or failed to do." Although Samuel's § 806.07, STATS., motion alleged that he was not aware of the statutory criteria for awarding child support and maintenance, there was no showing at the motion hearing that the failure to seek child support or maintenance was the result of excusable neglect.[2] The trial court made no findings of excusable neglect. Therefore, there is no basis to relieve Samuel of his waiver.

Even if excusable neglect exists, it does not automatically follow that the judgment be reopened. ***Johnson v. Johnson***, 157 Wis.2d 490, 497-98, 460 N.W.2d 166, 169 (Ct. App. 1990). The decision to grant relief from a judgment is discretionary. ***Id.*** at 497, 460 N.W.2d at 169. If grounds to reopen exist, the trial court may consider factors that would militate against granting relief. ***Id.*** at 498,

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[1] The trial court adopted Samuel's contention that child support and maintenance were not appropriate because of the $383 monthly social security benefit Samuel receives for each minor child and Gail's financial circumstances. In doing so, the trial court implicitly determined that the application of the percentage standard was unfair under the criteria in § 767.25(1m), STATS., and its articulated reason for so concluding was the social security benefits. It also found that both parties were self-supporting. Even if the issues of child support and maintenance were not waived, we would sustain as a proper exercise of discretion the trial court's determination that neither was necessary.

[2] Section 806.07, STATS., provides in part:

> On motion and upon such terms as are just, the court may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect.

460 N.W.2d at 169. Here, the trial court found that it had covered the issues of child support and maintenance in a manner consistent with the statutes and based on the evidence at trial.[3] The trial court properly exercised its discretion in determining that relief from the judgment was not necessary. The determination recognizes that "no one is entitled to more than one kick at the cat." ***Conway v. Division of Conservation, DNR***, 50 Wis.2d 152, 161, 183 N.W.2d 77, 81 (1971).

Having concluded that there is no issue as to Samuel's entitlement to maintenance, his claim that the trial court double counted his pension as an asset subject to property division and as an income stream for the purpose of maintenance is inconsequential.[4] We need not address this contention. *See* ***Community Newspapers, Inc. v. City of West Allis***, 158 Wis.2d 28, 34, 461 N.W.2d 785, 788 (Ct. App.), *cert. denied*, 498 U.S. 941 (1990).

The remaining issue is property division. Samuel argues that an unequal division of property was justified based on the accumulated pension and assets he brought to the marriage[5] and his greater contribution to the

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[3] The trial court remarked:

> I do believe I covered the issues that have been raised in your brief ... and your motion. I thought I was right in September when I did this Decision, and I spent a lot of time at it. I still think I did what was right. It's not to say that some other judge, or even myself might not do it differently again, but that should not be the criteria for awarding a new trial. I believe the case was fairly tried, that the evidence was presented to the court.

[4] Samuel argues that maintenance is appropriate when his $2096 monthly pension benefit is ignored and his monthly income from social security of $982 is compared with Gail's monthly earnings of $1400.

[5] Samuel asserts that the value of his pension that accumulated prior to the marriage was $56,565 and that $115,000 of the value of the parties' home was attributable to the use of the sale proceeds from the unencumbered home he brought to the marriage. We do not find it necessary to address Samuel's contention that the trial court misvalued the premarital interests.

parties' total income over the term of the marriage. Samuel concedes, as he must, that he is not entitled to have the property brought to the marriage returned to him in toto, *see* ***Lang v. Lang***, 161 Wis.2d 210, 229, 467 N.W.2d 772, 779-80 (1991), but that property brought to the marriage is only a factor in determining the division of marital property.

The division of the marital estate is within the discretion of the trial court. ***Liddle v. Liddle***, 140 Wis.2d 132, 136, 410 N.W.2d 196, 198 (Ct. App. 1987). We will sustain the court's decision if it 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. ***Id.*** With the exception of items acquired by gift, bequest, devise or inheritance, § 767.255, STATS., requires the court to presume that all property is to be divided equally between the parties. ***Id.***; *see also* ***Mack v. Mack,*** 108 Wis.2d 604, 607, 323 N.W.2d 153, 154 (Ct. App. 1982). The court may alter this distribution only after considering the relevant factors listed in § 767.255(3). *See* ***Mack***, 108 Wis.2d at 607, 323 N.W.2d at 154.

The trial court made findings relevant to the factors in § 767.255, STATS., including the disparity in the parties' ages and that they both enjoy good health. It recognized that Samuel was the principal financial contributor to the marriage. However, it found Samuel's claim that he was also the principal homemaker and child-care provider throughout the marriage to be incredible.[6] It acknowledged the assets Samuel brought to the marriage and explicitly found that a deviation from the fifty-fifty division was not required because of the property brought to the marriage.

The trial court was most influenced by the fact that this was a long-term marriage. The weight to be given to each of the factors in § 767.255, STATS., is within the discretion of the circuit court. ***Herlitzke v. Herlitzke***, 102 Wis.2d 490, 495, 307 N.W.2d 307, 310 (Ct. App. 1981). We cannot conclude that

[6] We reject Samuel's notion, as stated in his reply brief, that the trial court's "agenda was aimed at punishing" him. The trial court's earlier finding that Samuel was incredible when he denied interfering with or negatively influencing the children's relationship with Gail did not invade the determinations on property division, child support or maintenance.

the trial court erroneously exercised its discretion in relying on the length of the marriage to adhere to the fifty-fifty presumption, notwithstanding the fact that Samuel brought assets to the marriage. *See* ***Lang***, 161 Wis.2d at 230, 467 N.W.2d at 780.

By the Court.—Judgment and order affirmed.

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