COURT OF APPEALS
DECISION
DATED AND FILED

April 11, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 99-0341

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

IN RE THE MARRIAGE OF:

JAMI L. VAN BOXTEL,

PETITIONER-APPELLANT-CROSS-RESPONDENT,

V.

BRENT F. VAN BOXTEL,

RESPONDENT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Jami Van Boxtel appeals from the property division portion of a judgment dissolving her marriage to Brent Van Boxtel. Jami argues

that the circuit court erred by: (1) invalidating a "post-nuptial" agreement between the parties; (2) crediting Brent for assets that had been used to pay off Brent's pre-marital debt; (3) determining that a "Precious Moments Collection" was property subject to division; and (4) awarding Brent attorney fees in connection with the parties' continued dispute over the Precious Moments collection. We reject these arguments and affirm the judgment.

¶2 Brent, pro se, cross-appeals from that part of the judgment regarding child support. Although Brent does not take issue with the amount ordered, he intimates that the circuit court erred by ordering that Jami's payments would not begin until after the parties' son started kindergarten. He further contends that, in any event, their son has begun pre-kindergarten and he has not received any payments. Because Brent fails to develop his arguments, we refrain from addressing his cross-appeal.

BACKGROUND

¶3 The following facts are undisputed. Brent and Jami were married in July 1994. One child, Dakota, was born of the marriage in 1995. Jami's two children from a previous marriage also resided with them. At the time of the marriage, Jami owned real estate located on Walter Avenue in Appleton and Brent owned real estate located on James Street. Within weeks after the couple married, the James Street property was sold, resulting in net proceeds of approximately $14,000. Brent and Jami built a new home on Nor-Rose Lane, and the Walter Avenue property was subsequently sold, resulting in net proceeds of approximately $32,000.

¶4 Jami filed a petition for divorce in May of 1996. She later sought to purchase a house on Parkway Boulevard, and wanted to apply certain proceeds

from the sale of the Walter Avenue property to the purchase of the Parkway Boulevard home. Consequently, Jami asked Brent to sign an agreement foregoing his marital property interest in the Walter Avenue proceeds as well as any property to which these proceeds would apply. The agreement, referred to by Jami as a post-nuptial agreement, was signed by both Jami and Brent on January 27, 1997.

¶5 In June 1998, the parties proceeded to a final hearing to resolve various issues. The circuit court, relevant to this appeal, determined that the post-nuptial agreement between Jami and Brent was invalid, divided the property and ordered Jami to pay child support of $29 per week, to begin when Dakota entered kindergarten. This appeal and cross-appeal followed.

ANALYSIS

1. The Agreement

¶6 Jami argues that the circuit court erred by determining that the post-nuptial agreement was invalid. She argues the agreement is enforceable under WIS. STAT. § 766.58,[1] which governs marital property agreements. However, Jami's arguments for enforceability of the agreement under § 766.58 are misplaced. Because the agreement was signed under immediate contemplation of divorce, it is governed by WIS. STAT. § 767.10. *See* ***Ayres v. Ayres***, 230 Wis. 2d 431, 438, 602 N.W.2d 132 (Ct. App. 1999). Section 767.10(1) provides:

> The parties in an action for an annulment, divorce or legal separation may, *subject to the approval of the court*, stipulate for a division of property, for maintenance payments, for the support of children, for periodic family

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

> support payments under s. 767.261 or for legal custody and physical placement, in case a divorce or legal separation is granted or a marriage annulled. (Emphasis added.)

¶7 Here, in an attempt to preclude division by the court, the agreement purported to exclude the Walter Avenue proceeds from property division. The agreement specifically stated that the parties were "currently in the middle of a court proceeding for divorce," and further provided:

> Now, Therefore, in consideration of the mutual covenants of this Agreement, the parties agree as follows:
>
> 1. That [the Walter Avenue property] and the net proceeds from the sale of such residence has [sic] always been and shall continue to be the individual property of Jami.
> 2. That [the Parkway Boulevard property], or any other property purchased with the proceeds from the sale of the above mentioned real estate shall be classified as the individual property of Jami.
> 3. That Brent waives and releases all claims or rights he might otherwise have pursuant to Chapters 766 and 767 of the Wisconsin Statutes to [the Walter Avenue property], the proceeds from the sale of the same and any replacement residence purchased with such sale proceeds.

¶8 Our review of the record reveals no court approval of this agreement. On the contrary, the circuit court concluded that the agreement was inequitable to Brent and found that it had been signed "under conditions suggestive of a lot of persuasion and pressure." In ***Ayres***, this court recognized the policy considerations that support a court's active role in reviewing agreements prepared in anticipation of divorce. *See* ***Ayres***, 230 Wis. 2d at 441. We noted that "[t]he parties cannot by stipulation proscribe, modify, or oust the court of its power to determine the disposition of property, alimony, support, custody, or other matters involved in a divorce proceeding." ***Id***. Because the circuit court never

approved the agreement and, in fact, found the agreement to be inequitable to Brent, we conclude that it did not err by invalidating the agreement.[2]

2. The James Street Property

¶9 Jami contends that the circuit court erroneously exercised its discretion by determining that Brent had contributed the net proceeds from the sale of the James Street property to the marriage without considering that a substantial amount of this money was used to pay off Brent's pre-marital debt. Because the court ultimately divided the marital property equally, the record does not support Jami's contention.

¶10 Property division rests within the sound discretion of the circuit court. *See* ***id***. at 446. We will sustain a circuit court's discretionary acts if the court examined the relevant facts, applied a proper standard of law and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. *See* ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). "We also recognize that underlying discretionary decisions may be factual determinations that we do not upset unless they are clearly erroneous." ***Ayres***, 230 Wis. 2d at 446. The property division in a divorce case is governed by WIS. STAT. § 767.255 which creates a presumption that property will be divided equally. Unless acquired by gift or inheritance, property brought to the marriage is marital property, subject to division. *See* WIS. STAT. § 767.255(2)(a). Property brought

[2] Although the circuit court addressed the validity of the agreement as a marital property agreement under WIS. STAT. § 766.58, we conclude, as a matter of law, that the agreement is a stipulation entered into in contemplation of divorce and therefore subject to the requirements of WIS. STAT. § 767.10.

to the marriage is a factor that allows, but does not compel the circuit court to deviate from the presumptive equal division. *See* WIS. STAT. § 767.255(3)(b).

¶11 Here, Jami argues that although Brent brought assets and liabilities to the marriage that virtually offset each other, the circuit court credited Brent for the assets as if there were no liabilities. On the contrary, the circuit court considered Jami's argument regarding Brent's pre-marital debts and concluded that Brent's pre-marital debts became marital debts because the proceeds used to pay these debts benefited the family.[3] In any event, Jami has failed to establish how the court's consideration of these assets negatively affected the property division because the court ultimately divided the marital property equally, ordering Brent to make an equalization payment to Jami. We therefore conclude that the court properly exercised its discretion.

3. The Precious Moments Collection

¶12 With regard to the Precious Moments collection, Jami's argument appears to be two-fold: (1) that the circuit court erred by considering the Precious Moments collection to be property subject to division; and (2) in the alternative, that the circuit court erred by offsetting the appraised portion of the collection against property appraised at one-third the value of the Precious Moments items.[4]

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[3] Specifically, Jami contends that the $14,000 in net proceeds from the sale of the James Street property were used to pay the following debts: (1) snowmobile loan for $4,000; (2) car loan for $952; (3) engagement ring loan for $5,000; (4) credit card debt incurred remodeling the James Street property for $1,500; (5) various loans from individuals totaling $3,485.

At the final hearing, Brent testified that the $14,000 was placed in a joint account. He further testified that he was uncertain about which debts were specifically paid off from these proceeds. The circuit court made no findings regarding which debts were paid from the James Street property proceeds but rather, determined that Brent's pre-marital debts became marital debts.

[4] The Precious Moments collection consisted of both appraised and unappraised items.

Although property division lies within the sound discretion of the circuit court, *see* ***Ayres***, 230 Wis. 2d at 446, where a question involves whether certain property is "subject to division under [WIS. STAT. § 767.255]," it "presents a question of law," which we review de novo. ***Weiss v. Weiss***, 122 Wis. 2d 688, 692, 365 N.W.2d 608 (Ct. App. 1985).

¶13 Although Jami contends that the Precious Moments items were gifts not subject to division by the court, "[t]he burden of proof on the question of whether an asset is exempt as gifted property rests upon the party asserting the claim to show to a reasonable certainty by the greater weight of the credible evidence that the property was gifted." ***Spindler v. Spindler***, 207 Wis. 2d 327, 338, 558 N.W.2d 645 (Ct. App. 1996). At the hearing, Jami did not offer evidence or otherwise testify in support of her contention that several of the Precious Moments items were gifts; rather, her attorney merely argued that they were. It was not until after the hearing that Jami attempted to submit affidavits as evidence of the gifted nature of many of the items in the collection. However, "[a] party who carries a burden of proof cannot leave the family court in an evidentiary vacuum and then complain about the lack of evidence on appeal." ***Haeuser v. Haeuser***, 200 Wis. 2d 750, 765, 548 N.W.2d 535 (Ct. App. 1996). Accordingly, we conclude that Jami failed to meet her burden of proving that the Precious Moments items were gifts, not subject to division under WIS. STAT. § 767.255.

¶14 Jami further argues that the court erred by concluding, based solely on Brent's testimony, that five guns were gifts. Although the court may have referred to the property as "gifted guns," these items, like the Precious Moments collection, were nevertheless included on the parties' personal property appraisal

lists and divided with the rest of the marital property.[5] Thus, Jami fails to demonstrate how she has been prejudiced. *See* WIS. STAT. § 805.18.

¶15 In the alternative, Jami argues that the circuit court erred by offsetting the appraised portion of the collection with property appraised at one-third the value of the Precious Moments items. The parties' personal property at Brent's residence, including the appraised portion of the Precious Moments Collection and the five "gifted guns," was valued at $10,633. The appraised Precious Moments items, valued at $3,928, together with various other personal property items were to be given to Jami and were therefore removed from Brent's appraisal total and added to Jami's. This resulted in a net personal property appraisal total of $6,380 for Brent. With the addition of the appraised Precious Moments and other personal property items to Jami's appraisal, the net total of her personal property appraisal was $10,303.[6]

¶16 At the hearing, neither party contested the accuracy of this appraisal, and the circuit court subsequently awarded the parties' personal property consistent with the appraisal. Issues remained, however, with respect to certain property that had not been appraised, including various Precious Moments items, a Browning hunting bow and a nine millimeter handgun. The court assigned a value of $200 to the bow and $340 to the handgun and determined that these would

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[5] The five guns were given the following values: (1) Marlin .22 rifle for $100; (2) Winchester Model 70 for $500; (3) Remington 870 Express 12-gauge shotgun for $200; (4) Weatherby Model 82 12-gauge shotgun for $400; and (5) Winchester Model 1200 20-gauge vent rib shotgun for $150.

[6] Brent Van Boxtel personal property appraisal total: $10,633 (not including vehicle) - $4,253 (appraised Precious Moments items and various other pieces of property) = $6,380.

Jami Van Boxtel personal property appraisal total: $6,050 + $4,253 (appraised Precious Moments items and various other pieces of property) = $10,303.

offset the value of the unappraised Precious Moments items. Jami's counsel agreed to this offset stating: "That's fine. So that means you're assigning a value of $540 to the Precious Moments?"

¶17 Jami now attempts to argue that the circuit court erred by offsetting the appraised portion of the Precious Moments collection, valued at $3,928, with the five guns, valued at $ 1,350. However, Jami has again failed to demonstrate how she has been prejudiced. *See* WIS. STAT. § 805.18. Although the judgment indicates that the court considered the appraised portion of the Precious Moments collection to be a "wash" with the five "gifted guns," the judgment nevertheless awarded Jami the appraised portion of the collection consistent with the appraisal list and actually offset only the unappraised portion of the collection against the nine millimeter gun and hunting bow. Because the court properly refused to exclude the Precious Moments collection as gifts and ultimately divided the marital property equally between the parties, we determine there was no misuse of discretion with respect to the Precious Moments collection.

4. Attorney Fees

¶18 Jami additionally argues that the trial court erred by awarding Brent attorney fees in connection with clarifying the court's judgment regarding the Precious Moments collection. The award of attorney fees is subject to the circuit court's discretion and will not be altered on appeal unless the circuit court erroneously exercised its discretion. *See* ***Bisone v. Bisone***, 165 Wis. 2d 114, 123-24, 477 N.W.2d 59 (Ct. App. 1991). Further, in the context of divorce, attorney fees are interrelated with property division and maintenance awards. *See* ***Dixon v. Dixon***, 107 Wis. 2d 492, 509, 319 N.W.2d 846 (1982). It is for the circuit court to consider the parties' ability to pay, the reasonableness of the fees and the parties'

needs. *See* ***Kastelic v. Kastelic***, 119 Wis. 2d 280, 290, 350 N.W.2d 714 (Ct. App. 1984); *see also* WIS. STAT. § 767.262. Here, the circuit court could reasonably conclude that because the judgment dividing the marital property was neither confusing nor inequitable, Jami should pay the attorney fees Brent incurred resolving the post-hearing dispute over the Precious Moments collection.

5. The Cross-Appeal

¶19 On cross-appeal, Brent intimates that the circuit court erred by ordering that Jami's payments would not begin until after the parties' son started kindergarten. He further contends that, in any event, their son has begun pre-kindergarten and he has not received any payments. Brent, however, fails to develop his arguments. Pro se litigants are "bound by the same rules that apply to attorneys on appeal." ***Waushara County v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992). We will not develop an appellant's amorphous and unsupported arguments for him, *see* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995), especially where, as here, Brent notes that he only cross-appealed because his former attorney told him to. We therefore refrain from addressing Brent's cross-appeal.[7]

[7] Brent additionally intimates that Jami should be held in contempt of court for not attending court-ordered "Effects of Divorce on Children" class. However, we refrain from addressing this issue because it was not raised at the circuit court level, because this court does not hold individuals in contempt and further, because Brent failed to raise this issue in his notice of cross-appeal.

By the Court.—Judgment affirmed. Costs denied to both parties.

Not recommended for publication in the official reports.