COURT OF APPEALS
DECISION
DATED AND RELEASED

August 28, 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. 95-1456
95-3550

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

In re the Marriage of:

CHRISTINA L. RIEDLINGER,

Petitioner-Respondent,

v.

JOSEPH C. RIEDLINGER,

Respondent-Appellant.

APPEALS from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Joseph C. Riedlinger appeals from a judgment of divorce and an order denying his request for the preparation of transcripts without cost.[1] He argues that the custody and visitation determination was a

[1] By an order of February 27, 1996, we held that we do not have jurisdiction to review orders entered on June 20 and September 28, 1995, by the family court commissioner, as referenced in

misuse of discretion, that the property division is unfair, and that the trial court erred in determining that he was not indigent for the purpose of obtaining transcripts. We affirm the judgment and the order.

Both parties proceed pro se in this appeal. Joseph's brief lacks citation to the record and legal authorities.[2] The brief does not provide any guidance as to what transpired in the more than twenty hearing dates over which the divorce was tried. This court has reviewed the record in an attempt to reconstruct the course of the proceedings and presentation of evidence. Despite the shortcomings of Joseph's brief, we have discerned several issues which we will address.

The parties were married in September 1984. An action for divorce was filed in September 1989, when the parties' daughter was two years old. Notably, because of protracted litigation over custody, the judgment of divorce was not granted until March 2, 1995. The written judgment was entered on May 19, 1995.

Christina was awarded sole legal custody and primary physical placement of the minor child. Joseph contends that custody should have been awarded to him because he was the child's primary caregiver prior to the parties' separation and while Christina traveled for business. He also suggests that it is eminently wiser to award him custody because he is disabled and able to provide care when the child would otherwise be with a day-care provider.

(..continued)
Joseph's notice of appeal. Those orders are not final orders within the meaning of § 808.03(1), STATS. ***State v. Trongeu***, 135 Wis.2d 188, 191-92, 400 N.W.2d 12, 13 (Ct. App. 1986). Therefore, we do not address Joseph's challenge to the order regarding church attendance by the parties' minor child.

[2] Joseph includes numerous documents in his appendices which are not part of the record. He has not given any cross-reference to where the documents may have been offered as exhibits. An appellate court may review only matters of record in the trial court and cannot consider materials outside that record. ***South Carolina Equip., Inc. v. Sheedy***, 120 Wis.2d 119, 125-26, 353 N.W.2d 63, 66 (Ct. App. 1984).

The discretion of a trial court in making a custody and legal placement decision should not be disturbed unless the trial court erroneously exercised its discretion with no reasonable basis. *See* ***Bohms v. Bohms***, 144 Wis.2d 490, 496, 424 N.W.2d 408, 410 (1988). The exercise of discretion requires that the trial court consider the facts of record in light of the applicable law to reach a reasoned and reasonable decision. *See* ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981).

Joseph does not suggest how the trial court erroneously exercised its discretion. He only expresses a disagreement with the judgment of the court. We have reviewed the transcript of the custody decision made on January 13, 1994.[3] The decision reflects a proper exercise of discretion. The trial court considered the positive and negative behaviors and influences of each parent. Contrary to Joseph's claim, the trial court did not disregard the care and support Joseph provides to his daughter. It found that both parties were fit to be the custodial parent. It reviewed the testimony given by expert witnesses and expressed its reasons for rejecting some of that testimony. In addition, the court made supplemental findings indicating that the child's wishes and the recommendation of the guardian ad litem were considered. No grounds exist to disturb the custody determination.

Joseph contends that the visitation schedule is unfair because he does not get July 4th visitation and cannot pick up his daughter the night before a holiday. The trial court's decision made clear that precise guidelines were needed to facilitate visitation because the parties had demonstrated their inability to accommodate each other or work out agreeable deviations to the visitation schedule. The trial court was striving for consistency which would be easy for the parties to follow. In light of the trial court's concern that there be no deviation from its order, we cannot conclude that the limits placed on visitation were unreasonable or a misuse of discretion.

We review the property division because Joseph asks that "all the financial belongings and obligations in this case be reopened and reviewed

[3] The decision resulted in an order entered on May 5, 1994. The trial court adopted the May 5, 1994, custody order when it rendered the judgment of divorce on March 2, 1995.

including martial assets and child support obligations." An unequal division of property was made. Christina was awarded the family residence, a time-share campsite, a pop-up camper, two 1988 automobiles, a mutual fund account, and a pension plan. Christina was also made responsible for a bulk of the parties' debts, including payment of the $2391.18 balance of the guardian ad litem fees. Joseph was awarded household furniture, personal belongings, guns and tools in his possession, and two 1986 automobiles. He was ordered to pay an outstanding credit card debt.

The division of property in a divorce is within the trial court's discretion, and we review for an erroneous exercise of that discretion. ***Parrett v. Parrett***, 146 Wis.2d 830, 843, 432 N.W.2d 664, 669 (Ct. App. 1988). The trial court must begin with the presumption that all marital property is to be divided equally between the parties. *See* § 767.255(3), STATS. However, the court may deviate from this equal division after considering several statutory factors. ***Id.*** Those factors include the length of the marriage, the property brought to the marriage by each party, and the contribution of each party to the marriage, including economic and child care services. ***Id.***

The trial court expressed several reasons as to why an unequal division of property was justified. It noted that the marriage had been very short. It found that Christina had provided most of the economic contribution to the marriage while both parties cared for the minor child. It also found that Christina had expended substantial money in improving the family residence after the parties separated and thus had increased the value of the asset during the pendency of the action. It considered that Christina had paid the greatest percentage of the guardian ad litem fees—a sum in excess of $6000. Christina also substantially reduced the marital debt while the action was pending. The factors relied on were appropriate and the decision was a proper exercise of discretion.

Joseph appears to contest the findings that: (1) Christina's parents put up the money for a down payment, closing costs, and a new furnace for the family residence; (2) the pontoon boat was not a gift to the parties; (3) the time-share campsite was purchased with funds Christina inherited; and (4) Christina actually incurred the bills evidenced by receipts she produced for the purpose of improving the family residence while the action was pending. Joseph gives

an alternative explanation for the events related to these findings[4] and further suggests that he received gifted or inherited antiques and gifts from Christina which were not returned to him. There is simply no basis for us to conclude that the trial court's findings are clearly erroneous. In the absence of a transcript, we assume that every fact essential to sustain the trial court's decision is supported by the record. *See* ***Zintek v. Perchik***, 163 Wis.2d 439, 480, 471 N.W.2d 522, 538 (Ct. App. 1991).

The next issue on appeal is child support. Joseph was ordered to pay 17% of his gross weekly income as child support. It is presumed that child support established pursuant to the percentage standard is fair. ***Abitz v. Abitz***, 155 Wis.2d 161, 179, 455 N.W.2d 609, 617 (1990). The trial court may deviate from the percentage standard only if the great weight of the credible evidence shows the percentage standard to be unfair to the child or to any of the parties. Section 767.259(lm), STATS.

Joseph claims that the support order is unfair to him because: (1) the trial court erred in finding that he is capable and fit of maintaining reasonable employment; (2) Christina earns substantially more money than he does; (3) he is on disability for which his daughter receives a monthly social security benefit in addition to the 17% withholding from his social security benefit; and (4) he has another daughter who gets a part of his social security benefit. For the purpose of reviewing the judgment of divorce, the record is completely devoid of any evidence that the parties' daughter receives social security benefits or that Joseph pays support for another child.[5] The mere possibility that Christina earns more than Joseph does not suggest that the application of the percentage guidelines is unfair to Joseph. *See* ***Luciani v. Montemurro-Luciani***, 199 Wis.2d 280, 285, 544 N.W.2d 561, 563 (1996) (absent a payer's showing of unfairness by the greater weight of the credible evidence,

[4] Joseph asserts that he received a $20,000 settlement for a pre-marriage work injury which was put into the parties' joint checking account. He contends that part of the down payment and the purchase of the campsite were made from the joint account.

[5] Although the trial court was aware that Joseph's claim for social security benefits was pending, a determination of benefits had not been made when the judgment of divorce was entered. Postjudgment occurrences which may support Joseph's contentions are not of record and are not relevant to review the already existing judgment.

the percentage standards presumptively apply even where the payee earns a substantially greater income than the payer).

In determining that Joseph was truly able to work, the trial court considered the result of the court-ordered independent physical examination, its observation of Joseph in court, and a videotape of Joseph changing a tire. We are required to give due regard to the opportunity of the trial court to resolve conflicts in the testimony which requires assessing the credibility of the witnesses. *See* ***Hughes v. Hughes***, 148 Wis.2d 167, 171, 434 N.W.2d 813, 815 (Ct. App. 1988). We must sustain the trial court's finding.

Joseph contends he was not allowed to present expert testimony that the videotape had been altered. We cannot review this issue adequately without a transcript of Joseph's offer of proof, if there was one. However, Joseph's claim appears to be that the videotape edited out periods of rest he found it necessary to take while changing the tire and problems he encountered during the process. He admits that it was obvious from the video that the tape had been stopped and started. If it was obvious, there was no need for expert testimony on that point. *See* ***State v. Pittman***, 174 Wis.2d 255, 268, 496 N.W.2d 74, 79, *cert. denied*, 510 U.S. 845 (1993) (determining whether expert testimony assists the fact finder is a discretionary decision of the trial court).

Even if the video was not representative of the length of time it took Joseph to change the tire, that does not change the fact that the video demonstrated Joseph's ability to lift, twist and bend contrary to his contention that he could not do so. If excluding the expert testimony was error, it was harmless error. Error may not be predicated upon a ruling which excludes evidence unless a substantial right of the party is affected and the substance of the evidence was made known to the judge by offer or was apparent from the context within which the questions were asked. Section 901.03(1)(b), Stats.

Joseph's final claim with respect to the trial court's finding that he could work is that the determination is contrary to that made by the social security administration. The trial court was aware that Joseph's disability claim

was pending when it rendered its decision. It correctly noted that it would not be bound by the determination of that agency.[6]

In conclusion, Joseph failed to meet his burden of proving that the application of the child support percentage guidelines was unfair to him. We affirm the trial court determination of child support.

Joseph asserts that he waited until the end of the case to submit his best evidence but that the trial court cut him off. He contends that he should have been allowed more time to present his "side of the story without interruptions." The record reflects that the child custody issue—the principle issue—was decided in January 1994. Joseph's attorney was allowed to withdraw in February 1994. On March 10, 1994, Joseph appeared with new counsel. The trial continued on three separate dates. It concluded on November 18, 1994, and the parties were to submit briefs by December 12, 1994. Joseph's attorney was permitted to withdraw on December 22, 1994, and the time for filing the briefs was extended to January 10, 1995. Joseph never filed a brief. Instead, he filed successive "order to show cause" pleadings asserting that Christina had presented false evidence with respect to the purchase and maintenance of the family residence. Given that Joseph was represented by counsel through the close of the evidence in the divorce trial and chose not to file a brief, we reject his contention that the trial court prematurely cut off his opportunity to present relevant evidence.

After Joseph commenced this appeal, he requested the preparation of transcripts without cost. By an order of August 4, 1995, we remanded that request to the trial court for resolution under ***State ex rel. Girouard v. Circuit Court for Jackson County***, 155 Wis.2d 148, 454 N.W.2d 792 (1990). In ***Girouard***, the supreme court held that § 814.29(1), STATS., provides that a person may prosecute an appeal without being required to pay any fee, including a court reporter's transcription fee, upon the court's approval of an affidavit that because of poverty the person is unable to pay the costs of the appeal and that

[6] Joseph's reliance on the determination of an administrative agency cuts both ways. The trial court noted that Joseph's worker's compensation benefits had been terminated because of a determination that he was employable. To require reliance on one agency would require reliance on the other. The competing determinations would cancel each other.

the person believes that he or she is entitled to the redress sought. ***Girouard***, 155 Wis.2d at 157-58, 454 N.W.2d at 796. Not every appellant is entitled to the preparation of transcripts at no cost. "The individual must be found to be indigent by the court, and the person must present a claim upon which relief can be granted." ***Id***. at 159, 454 N.W.2d at 797.

The trial court found that Joseph was not indigent because he receives social security benefits and is capable of working. "Indigency primarily is a factual question. We must accept a finding of fact by a trial court unless it is clearly erroneous." ***State ex rel. Richards v. Circuit Court for Dane County***, 165 Wis.2d 551, 555, 478 N.W.2d 29, 31 (Ct. App. 1991). We have sustained the trial court's finding that Joseph is able to work. Likewise, the trial court's finding that Joseph is not indigent is not clearly erroneous. We affirm the trial court's order denying the preparation of transcripts without cost.

By the Court.—Judgment and order affirmed.

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