

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JULY 8, 1997

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.

No. 96-2674

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

JAMES J. BETHEL,

PETITIONER-APPELLANT,

V.

DIANA J. HEWSON,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Washburn County:
WARREN E. WINTON, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. James Bethel appeals those parts of a divorce judgment dividing the marital property and granting Diana Hewson \$2,200 per month maintenance until she is eligible for social security benefits. He argues that

the amount and duration of the maintenance is excessive, that the court overvalued the business it awarded him and that the court should have reopened the evidence to allow additional proof of the business's value. We reject these arguments and affirm the judgment.

The trial court properly exercised its discretion when it awarded Hewson \$2,200 per month maintenance until she is eligible for social security benefits. Discretion is properly exercised when it is a product of a rational mental process by which facts of record and the law relied upon are stated and considered together for the purpose of achieving a reasoned and reasonable determination. *See Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981).

The parties were married approximately thirteen years. At the time of the divorce, Bethel operated the Banana Abstract and Title Company. His net income ranged from \$62,000 to \$82,000 and averaged \$66,000 per year, excluding 1995 because the income for that year could not be verified at the time of the trial. Hewson, on the other hand, was temporarily employed as a school counselor earning approximately \$14,000 per year. Bethel had terminated her employment at Banana Abstract. At the time of the divorce, her employment as a counselor was about to terminate and she was unable to secure additional employment.

The trial court found that she would sustain substantial hardship in relocation and training costs. After examining the parties' monthly budgets, including Bethel's inflated budget suggesting a need to spend \$74,580 per year, the trial court properly balanced the parties' needs, income and potential earnings, and concluded that \$2,200 per month is the minimum Hewson will need to allow her to enjoy a standard of living comparable to that enjoyed during the marriage. *See* § 767.26(6), STATS.

The trial court equally divided the marital property based on its finding that Banana Abstract was worth \$210,000.¹ That valuation was based on Hewson's expert's testimony that the business was worth \$210,000 based on its gross receipts. Because Bethel violated discovery orders, Hewson's expert had no other information upon which to determine the business's value. Bethel presented no evidence on that issue other than his own self-serving and impeached opinion that the business was worth approximately \$10,000. As the arbiter of the witnesses' credibility, *see Posnanski v. City of West Allis*, 61 Wis.2d 461, 465, 213 N.W.2d 51, 52-53 (1973), the trial court accepted Hewson's expert's testimony. In light of the expert's testimony, the finding that the business was worth \$210,000 is not clearly erroneous. *See* § 805.17(2), STATS.

Two months after the trial court's decision, and four months after the hearing on the business's value, Bethel requested that the trial court reopen the evidence to allow him to present additional witnesses on that issue. The trial court reasonably exercised its discretion when it refused to reopen the evidence. Bethel's failure to comply with discovery resulted in a motion for contempt. His own attorney had to withdraw because of Bethel's lack of cooperation in turning over financial information to the attorney or his accountant. Bethel should not be heard to complain that the sparse information he provided Hewson's expert resulted in an erroneous valuation. Bethel had notice that the valuation of the business would be tried on a particular date. He failed to present any persuasive

¹ The court equally divided the marital estate and then required Bethel to turn over to Hewson some property that was exempt from division. This payment reduced the equalizing payment Bethel owed Hewson. It did not affect the equality of the property divided, but merely ensured partial payment of the amount Bethel owed by requiring transfer of non-marital property. The transfer was justified by the trial court's finding of numerous instances of Bethel's bad faith misappropriations of marital property and Hewson's non-marital property.

evidence at trial. The law does not allow him another “kick at the cat.” *See Conway v. Div. Of Conservation*, 50 Wis.2d 152, 161, 183 N.W.2d 77, 81 (1971).

By the Court.—Judgment affirmed.

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

