COURT OF APPEALS
DECISION
DATED AND FILED

January 25, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 97-0232

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

IN RE THE MARRIAGE OF:

CHERYL P. BARATY,

PETITIONER-RESPONDENT,

V.

LIOR BARATY,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JAMES W. RICE, Reserve Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Lior Baraty appeals from a divorce judgment. Mr. Baraty challenges the trial court's findings, and its exercise of discretion in its

valuations, its characterizations of various assets and debt, its denial of maintenance, its refusal to enforce an order for liquidated damages, and its refusal to order a fee contribution. We conclude that the trial court's finding on the value of the marital residence was clearly erroneous. We further conclude that the trial court erroneously exercised discretion in its valuation of the parties' jewelry and some of the other assets, in its characterizations of certain assets and debt, and in condoning the disposition of certain assets. We also conclude that the trial court's finding that the law firm had not appreciated in value was not clearly erroneous, and that the court properly exercised discretion in denying maintenance, in refusing to enforce an order for liquidated damages, and in refusing to order a fee contribution. Therefore, we affirm the judgment in part, reverse in part, and remand the cause for further proceedings consistent with this decision.

I. INTRODUCTION

¶2 The Baratys were married for ten years and have one son. At the time of the divorce, Cheryl Baraty and their son were living in the parties' principal residence. Although Mr. Baraty was employed sporadically and involved in several business ventures, he claims that he was principally responsible for caring for the parties' son, their home and their rental properties. Mrs. Baraty contends that his contributions, financial and otherwise, were minimal. Mrs. Baraty supported the family financially.

¶3 After a seven-day court trial, the trial court premised its findings of fact and conclusions of law on its determination that Mr. Baraty lacked credibility. It explained that "[t]he lack of credibility [Mr. Baraty] demonstrated throughout his testimony at trial [was] something the court [had] very seldom witnessed" and that it would "discount[ ]everything [Mr. Baraty] testified to except that which [wa]s verified by other accurate evidence." The assessment of weight and

credibility is uniquely a trial court function, not an appellate function. *See* ***Johnson v. Merta***, 95 Wis. 2d 141, 151, 289 N.W.2d 813 (1980). We will not interfere with the trial court's credibility determinations because of "'the superior opportunity of the trial court to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony.' Thus, the trial judge, when acting as the factfinder, is considered the 'ultimate arbiter of the credibility of a witness.'" *See* ***id.*** at 152 (citation omitted). An appellate court also will not reverse the trial court's findings of fact unless we conclude that they are clearly erroneous. *See* WIS. STAT. § 805.17(2) (1997-98).[1]

¶4 Many of the issues Mr. Baraty raises, however, concern the trial court's exercise of discretion. "An [erroneous exercise] of discretion occurs when the trial court fails to consider the proper factors or makes a mistake with respect to the facts upon which the award is based. An [erroneous exercise] of discretion also occurs when the trial court applies an erroneous interpretation of the law." ***Long v. Wasielewski***, 147 Wis. 2d 57, 61, 432 N.W.2d 615, 616 (Ct. App. 1988) (citation omitted). "A discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." ***LaRocque v. LaRocque***, 139 Wis. 2d 23, 27, 406 N.W.2d 736 (1987). Our inquiry is whether discretion was exercised reasonably, not whether it could have been exercised differently. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) ("It is recognized that a trial court in an exercise of its discretion may reasonably reach a conclusion which another judge

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

or another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning."). Our review, particularly of those issues challenged as an erroneous exercise of discretion, was made particularly difficult by Mrs. Baraty, whose brief we repeatedly rejected for violating WIS. STAT. RULE 809.19(1)(d) and (e). This court reluctantly accepted Mrs. Baraty's second substitute brief and took this appeal under submission in September of 1999.[2]

II. MARITAL RESIDENCE

¶5 Mr. Baraty challenges the trial court's finding that the marital residence was worth $242,500, claiming that the finding was predicated on a mistaken reading of a 1994 tax bill, which valued the residence at $242,200, rather than on its fair market value at the time of the divorce. Mr. Baraty testified that the residence was worth $280,000. He alternatively contends that the parties essentially agreed that the value was $267,750.[3] The trial court found that the value of the residence "was that figure which was given by the assessment of the Village of [Glendale], in the amount of $242,500. That's what [the court's] notes show." The finding of $242,500 is clearly erroneous because the only evidence regarding the tax bill established its value as $242,200.[4]

[2] We accepted Mrs. Baraty's second replacement brief because it "appear[ed] to contain adequate record citations," although it was deficient in other respects.

[3] Mrs. Baraty estimated the value of the residence in her financial declaration as "$255,000 (per appraisal)" and considered adding five percent to that value for appreciation since that appraisal.

[4] In closing argument, Mrs. Baraty's counsel referred to the amount as $242,500. The evidence, however, established the amount as $242,200.

III. JEWELRY

¶6 Mr. Baraty contends that the trial court erroneously exercised discretion because it failed to evaluate the parties' jewelry at fair market value. "Property to be divided at divorce is to be valued at its fair market value. Fair market value assumes sale by one who desires but is not obligated to sell and purchase by one willing but not obligated to buy." ***Sommerfield v. Sommerfield***, 154 Wis. 2d 840, 853, 454 N.W.2d 55 (Ct. App. 1990) (citation omitted). Fair market value, however, is not a valuation method. *See* ***Schorer v. Schorer***, 177 Wis. 2d 387, 399, 501 N.W.2d 916 (Ct. App. 1993). It is within the trial court's discretion to determine the appropriate methodology to use to evaluate a marital asset. *See* ***Sharon v. Sharon***, 178 Wis. 2d 481, 489, 504 N.W.2d 415 (Ct. App. 1993).

¶7 The trial court claimed that the fair market value of the parties' jewelry was its batch price, and adopted Mr. Benedon's appraisal, which was thirty-five percent of retail value. Mr. Benedon, however, admitted that he did not appraise the jewelry at its fair market value. Mr. Benedon's valuation was predicated on the assumption that Mrs. Baraty would sell all of her jewelry "quickly" because she needed cash. This assumption, however, is contrary to the voluntary nature of fair market value. More importantly, Mrs. Baraty did not testify that she would sell her jewelry. Although the trial court adopted the batch price valuation, it recognized that the batch price would apply only if Mrs. Baraty was compelled to sell her jewelry quickly for cash. We conclude that the trial court's valuation of the jewelry was an erroneous exercise of discretion because: (1) it characterized its valuation method as fair market value, yet adopted an expert's appraisal, which admittedly did not apply fair market value; and (2) there

was no evidentiary basis for Mr. Benedon's assumption that Mrs. Baraty would sell all of her jewelry quickly to raise cash.

IV. ALLEGED APPRECIATED VALUE OF TEMPORARY GIFT OF CONTROLLING INTEREST IN LAW FIRM

¶8 Mr. Baraty challenges the trial court's finding that Mrs. Baraty's interest in the law firm did not appreciate in value, and argues that the court erroneously exercised discretion in excluding it from the marital estate. Mrs. Baraty's father gifted controlling interest in his law firm to her during the marriage. At that time, the gifted interest had a negative book value. Approximately one year prior to filing for divorce, Mrs. Baraty gifted controlling interest back to her father. The trial court excluded the value of the gift from the marital estate because: (1) it found that the law firm had not appreciated during Mrs. Baraty's ownership; and (2) if it had, that alleged appreciation occurred despite Mr. Baraty, not because of him.

¶9 When Mrs. Baraty returned controlling interest in the law firm to her father, both claimed that it had a negative book value. Mr. Baraty retained certified public accountant David R. Werner, who valued the law firm at $46,000, two years after Mrs. Baraty returned controlling interest to her father. The trial court rejected Mr. Werner's appraisal of the appreciated value of the law firm because he "did not take into consideration many, many, many things as they were brought to his attention on cross-examination and by me." The trial court's finding, that the law firm did not appreciate in value during the time Mrs. Baraty was its controlling shareholder, is not clearly erroneous. Consequently, we do not address whether the trial court erroneously exercised discretion when it excluded any alleged accumulated value of controlling interest in the law firm from the marital estate for Mr. Baraty's repeated refusals to contribute to the marital

partnership. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (unnecessary to address issue if trial court's decision affirmed for another reason).

V. MARITAL ASSETS AND DEBT

¶10 Mr. Baraty also contends that the trial court erroneously exercised discretion in failing to acknowledge the value of various marital assets, many of which he claims Mrs. Baraty disposed of out of vindictiveness. We address these items seriatim.

a. Two-Carat Diamond

¶11 Mr. Baraty contends that the trial court erroneously exercised discretion because it failed to include Mrs. Baraty's two-carat diamond ring, valued at $10,500, in the marital estate. We disagree. Mrs. Baraty testified that Mr. Baraty told her he had given her a two-carat diamond ring. The appraisers agreed, however, that the stone in the ring was a cubic zirconium. Mr. Baraty insists that the stone was switched, whereas Mrs. Baraty maintains that, previously unbeknownst to her, Mr. Baraty had given her a cubic zirconium. After significant testimony, the trial court found that "[t]he evidence failed to establish that the marital estate contained a two-carat diamond ring. Rather, the court f[ound] that the ring in question was a two carat cubic zirconi[um]." This finding was not clearly erroneous and consequently, the trial court's exclusion of the nonexistent diamond was not an erroneous exercise of discretion.

b. Washer and Dryer

¶12 The trial court authorized Mrs. Baraty to sell the parties' rental property on Warren Avenue. Prior to the sale, Mrs. Baraty removed the new washer and dryer, which Mr. Baraty had purchased at Sears, and sold them for $500. Mrs. Baraty testified that she applied the $500 toward the unpaid balance

on the Sears account for that purchase. We consequently conclude that the trial court did not erroneously exercise discretion in this respect because the trial court held Mrs. Baraty responsible for the marital Sears debt, which exceeded the $500 sale price.

c. 1982 Lincoln

¶13 Mrs. Baraty sold the 1982 Lincoln Mark VI, which Mr. Baraty drove, for $400. Shortly before the sale, Mr. Baraty had the Lincoln "full[y] repair[ed]" for $800. Its Blue Book value was $2,750. The trial court found that the Lincoln was not "a marital asset because it's been sold. There is not enough proof here to establish that it has been wasted…." The trial court then refused to credit Mrs. Baraty with the $400, for which she sold the Lincoln. We conclude that the trial court erroneously exercised discretion for excluding the Lincoln's value from the marital estate.[5]

d. Home/Office Equipment

¶14 We conclude that the trial court erred when it found that the parties' home/office equipment (the facsimile machine, telephone, two computers and a printer) were "of no value because one [computer] is apart … and the other one is not around." The trial court's failure to recognize that this equipment had any value, and its refusal to award half of it to Mr. Baraty as he requested, constituted an erroneous exercise of discretion.[6]

[5] The record does not establish that $400, for which the Lincoln was sold to an acquaintance, was its fair market value.

[6] Mr. Baraty requested that he be awarded one of the computers as his share of the home/office equipment.

e. Kitchen Utensils and Dishes

¶15 Mr. Baraty seeks inclusion of the value of the household kitchen utensils and dishes, which Mrs. Baraty gave to her friend Brian Sanborn. We conclude that the trial court erroneously exercised discretion when it refused to acknowledge that these household items had any value.

f. Mr. Baraty's Accumulated Frequent Flyer Mileage

¶16 Mr. Baraty also seeks inclusion of the value of approximately 80,000 frequent flyer miles in the marital estate, which Mrs. Baraty converted to her own use. We conclude that the trial court erroneously exercised discretion when it determined that Mr. Baraty's accumulated frequent flyer mileage, used by Mrs. Baraty, had no value.

g. Mrs. Baraty's Public Health Service Credit Union Account

¶17 The trial court inexplicably "accorded no value" to Mrs. Baraty's Public Health Service Credit Union account of $400. This finding is clearly erroneous.

h. Mrs. Baraty's $3,760 Loan to Brian Sanborn

¶18 Mr. Baraty contends that the trial court erroneously exercised discretion in failing to debit Mrs. Baraty's $3,760 personal loan of marital funds to Mr. Sanborn. We agree. WISCONSIN STAT. § 767.087(1)(b) (1993-94), prohibits a party in a divorce action from disposing of property without the opposing party's consent, except under certain circumstances, none of which apply to the Sanborn loan. This loan was not characterized as a marital debt. The trial court found that "[w]hatever loan anybody has to Mr. Sanborn is worth zero. He is a loser from all standpoints and [the court] can't give any indebtedness of his a value." Although the trial court may have correctly assessed its collectibility, it was an unauthorized

personal loan from marital funds. Consequently, Mrs. Baraty should be debited with the unauthorized disposal of $3,760 from the marital estate for non-marital purposes.

VI. ALLEGED NECESSITY TO DISPOSE OF ASSETS

¶19 Mr. Baraty also contends that the trial court erroneously exercised discretion because it failed to assign to Mrs. Baraty personal debt of approximately $32,000 which she borrowed using the parties' home equity line of credit. We disagree. Mrs. Baraty claimed that she used $17,000 to pay the expenses of Mr. Baraty's company, Baraty Tile, and used the remaining $15,000 for marital expenses and to repay marital debt. Mr. Baraty also withdrew $9,400 for personal and business expenses from the Baraty Tile account. The trial court assigned Mrs. Baraty $16,886.68 of Baraty Tile debt. After deducting that marital debt from the $32,000 Mrs. Baraty borrowed, she retained approximately $5,500 more from the business account than did Mr. Baraty.[7] We conclude that Mrs. Baraty proved necessary expenses and sufficient marital debt to justify spending that additional $5,500 she borrowed from the business. Consequently, the trial court properly exercised discretion when it declined to debit Mrs. Baraty for spending $32,000 from the business because after payment of the Baraty Tile debt, Mrs. Baraty substantiated additional marital expense to justify this instance of her outspending Mr. Baraty by approximately $5,500.

¶20 Mr. Baraty also contends that the trial court erroneously exercised discretion in including a $7,000 loan from Metropolitan Life as a marital debt, and by failing to debit the $10,273 of stock, which Mrs. Baraty sold. Despite her loan

[7] We decline to analyze whether the withdrawn amounts ($9,500 and $9,400 for Mrs. and Mr. Baraty respectively) were for marital expenses because the amounts were comparable.

to Mr. Sanborn, Mrs. Baraty contended that she needed cash to pay necessary expenses because Mr. Baraty was not contributing financially, and her income was reduced to accommodate her need to devote more time to their son and the house. The record does not establish, however, why these funds were necessary, when considered in conjunction with Mrs. Baraty's income and a substantial cash gift from her mother. Mrs. Baraty repeatedly contends that she was receiving no support from Mr. Baraty. Mrs. Baraty testified, however, that Mr. Baraty never contributed significantly toward marital obligations, financial or otherwise. Consequently, his failure to do so while the divorce was pending was consistent with the status quo. On remand, the trial court must determine whether these funds were converted to pay necessary expenses, or whether these amounts should be charged against Mrs. Baraty as debt incurred in violation of the temporary order.

¶21 Mr. Baraty also contends that the trial court erroneously exercised discretion because it included funds withdrawn from the parties' joint savings account and credit card charges on an MBNA Mastercard as marital debt. We agree. Mrs. Baraty admitted that she spent $4,500 from the parties' joint account. She spent money on vacations and acknowledged, but did not recall, other out-of-state charges, which she did not deny were hers. She also admitted that the temporary order did not authorize the MBNA Mastercard post-separation charges, which she incurred. Consequently, the $4,500 from the joint account and the $4,000 of post-separation debt incurred by Mrs. Baraty should not have been assigned as marital debt.

VII. MAINTENANCE

¶22 Mr. Baraty also contends that the trial court erroneously exercised discretion because it denied his claim for maintenance. This court sustains a

maintenance determination unless the trial court erroneously exercised discretion. *See, e.g.,* ***DeLaMatter v. DeLaMatter***, 151 Wis. 2d 576, 582-83, 445 N.W.2d 676 (Ct. App. 1989).

¶23 The trial court's decision to deny Mr. Baraty's maintenance claim was predicated on

> [Mr. Baraty's] testimony that he could make $20,000 to $30,000 to $40,000 a year -- $20,000 to $30,000 a year in his employment which he expects to have immediately, so he can live in that fashion which he was accustomed to while he was here because [Mrs. Baraty's] income was never more than – oh, varied from up to $55,000 in one year … [and] she has got the responsibility of maintaining [the parties' son]. That will be expensive.

This was not an erroneous exercise of discretion.

VIII. ORDER FOR LIQUIDATED DAMAGES

¶24 Mr. Baraty also contends that the trial court erroneously exercised discretion because it failed to enforce an order for $10,000 in liquidated damages for Mrs. Baraty's unauthorized removal of their son from the state. The reason for the order was the concern that Mr. Baraty would abscond to Israel with their son. During Mrs. Baraty's deposition, Mr. Baraty discovered that she had taken their son to their Virginia time-share with her parents for a one-week vacation. Based on that discovery, Mr. Baraty sought to enforce the order and compel Mrs. Baraty to forfeit $10,000. The trial court refused to enforce the order, stating:

> It would be unconscionable … to require her to pay $10,000 to that man for taking that child on a vacation and then bringing him back here to the City of Milwaukee when absolutely nobody has been harmed or [h]as incurred any expenses except Mrs. Baraty in taking him to wherever she took him at the time, and I cannot in good conscience require that, so I decline that too.

¶25 The trial court has the discretion to determine whether to enforce this order. *See* ***Schmidt v. Schmidt***, 40 Wis. 2d 649, 654, 162 N.W.2d 618 (1968). There was no evidence that Mr. Baraty's visitation rights were jeopardized, and his counsel's rejoinder to the trial court was simply that, "[Mrs. Baraty] took and used our time share for that week." We conclude that the trial court properly exercised discretion when it explained why it declined to enforce the order for liquidated damages.

IX. CONTRIBUTION TOWARD ATTORNEY'S FEES

¶26 Mr. Baraty contends that the trial court erroneously exercised discretion when it denied his request for a fee contribution predicated on Mrs. Baraty's repeated attempts to conceal assets. The trial court acknowledged that both parties were at fault for increasing the amount of the fees, but denied the motion because it found that Mr. Baraty's "evasiveness" contributed to the increased fees. We conclude that the trial court properly exercised discretion because it found that Mr. Baraty's "evasiveness" contributed to the increased fees.

X. CONCLUSION

¶27 We reverse the judgment and remand the cause for further proceedings on the value of the marital residence and the parties' jewelry. We order further proceedings to determine the value of, or to account for, the 1982 Lincoln, the home/office equipment, the kitchen utensils and dishes given to Mr. Sanborn, Mr. Baraty's accumulated frequent flyer mileage, and Mrs. Baraty's Public Health Service Credit Union account. We further order the trial court to determine whether the $7,000 loan from Metropolitan Life and the $10,273 of stock Mrs. Baraty sold were converted to pay necessary expenses, or whether these amounts should be charged against Mrs. Baraty as debt incurred in violation of the temporary order. The trial court also must debit Mrs. Baraty personally

with the following sums taken from marital funds: (1) the $3,760 loan to Mr. Sanborn; (2) the $4,500 from their joint account; and (3) $4,000 of unauthorized MBNA Mastercard post-separation charges. We affirm the remainder of the judgment.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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