

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

February 4, 1999

Marilyn L. Graves  
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 § 808.10 and RULE 809.62, STATS.

**No. 97-1542**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN RE THE MARRIAGE OF:**

**DONNA M. ROIDT,**

**PETITIONER-RESPONDENT,**

**v.**

**THOMAS D. ROIDT,**

**RESPONDENT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Marquette County:  
RICHARD L. REHM, Judge. *Affirmed; motion denied.*

Before Eich, Vergeront and Deininger, JJ.

PER CURIAM. Thomas D. Roidt appeals a judgment of divorce. He claims the trial court erroneously exercised its discretion by: (1) failing to include his former wife's income during the marriage as part of the marital estate; (2) including the full value of an outdated corn appraisal within the marital estate;

(3) determining that Thomas had a positive net worth and sufficient equity in his farm to allow him to make an equalization payment, notwithstanding the substantial operating losses suffered by the farm during the course of the marriage; (4) erroneously assigning to him the value of a number of items of personal property; and (5) awarding his former wife a \$2,000 contribution toward attorney fees. The respondent, Donna Roidt, claims that all of the issues raised on appeal are frivolous, and she moves for costs and attorney fees under RULE 809.25(3), STATS. Upon reviewing the record, we conclude that the trial court did not erroneously exercise its discretion in any of these regards. While we are not persuaded that the trial court erred, we do not conclude that the appeal is frivolous within the meaning of RULE 809.25. Accordingly, we affirm the judgment of the trial court and deny respondent's motion for the costs of the appeal along with reasonable attorney fees.

## **I. BACKGROUND**

Thomas and Donna were married on March 20, 1993. Each party had been married previously. Thomas brought 317 acres of farm land, livestock, equipment and commodities into the marriage, while Donna brought a mobile home. At the time of the divorce, Thomas was fifty-one years old and Donna was fifty-six years old. They were both in good health and they had no children together. The only contested issues at trial related to the property division and attorneys fees.

During the marriage, Donna earned approximately \$19,000 a year as a nurse, in addition to keeping house and helping out with farm chores. Donna kept her nursing income separate from the farm proceeds, and she used the money

for household expenses and to make payments on her mobile home before she sold it.

Meanwhile, the farm struggled. In 1993, flooding destroyed most of the corn crop. As a result, Thomas needed to purchase feed for his livestock, and he borrowed an additional \$31,000 for his farming operation. In addition, the prices for hogs and cattle dropped precipitously between 1993 and 1995, and Thomas sold off a number of the livestock. In 1993, the farm showed a profit of \$3,329. In 1994, the farm showed a loss of \$26,779, and in 1995, it showed a loss of \$31,203.

The trial court found that Donna had a monthly income of \$1,456 while Thomas had a negative monthly income of \$2,600. The court valued the remaining livestock at \$25,673 and the corn at \$20,000 and awarded 25% of these values, or \$11,418, to Donna. The court also awarded Donna half the value of an \$8,000 payment that the court found had been made by Thomas to his brother without consideration after the parties had separated; \$5,450 worth of farm equipment which Donna testified had been acquired during the marriage; \$885 worth of personal property bought by Donna during the marriage and already in her possession; and \$465 worth of other personal property acquired during the marriage and in Thomas's possession. In addition, the court found that Donna was in need of a contribution to attorney fees and that Thomas reasonably had the ability to pay \$2,000 toward her fees based on his substantial assets not subject to division. Thus, the final divorce judgment ordered Thomas to pay Donna an equalization amount of \$17,933, plus the contribution toward her attorney fees.<sup>1</sup>

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<sup>1</sup> The divorce judgment also dealt with an adjustment to the parties income taxes, which is not at issue in this appeal.

## II. STANDARD OF REVIEW

The valuation and division of the marital estate lie within the sound discretion of the circuit court. *See Long v. Long*, 196 Wis.2d 691, 695, 539 N.W.2d 462, 464 (Ct. App. 1995). Therefore, we will affirm property division awards when they represent a rational decision based on the application of the correct legal standards to the facts of record. *See id.* An award of attorney fees is also within the trial court's discretion, and will not be altered on appeal unless the trial court erroneously exercises its discretion. *See Bisone v. Bisone*, 165 Wis.2d 114, 123-24, 477 N.W.2d 59, 62 (Ct. App. 1991).

## III. DISCUSSION

### *Donna's Income During the Marriage.*

Section 766.31(4), STATS., provides that income earned by either spouse during the course of a marriage is marital property. Under § 767.255(3), STATS., marital property is to be divided equally at the time of divorce. Thomas argues that, in conjunction, these two statutes require the trial court to take into account all income earned by Donna throughout the course of the marriage for purposes of the property division.

Appellant's contention is without merit. First, it is well established that marital assets are generally to be valued as they exist at the date of the divorce. *See Sommerfield v. Sommerfield*, 154 Wis.2d 840, 851, 454 N.W.2d 55, 60 (Ct. App. 1990). While Donna's income was marital property as it was received and remained in her bank account, it ceased to be a marital asset as soon as it was spent during the marriage. There was no evidence showing that Donna had converted her income into tangible assets, or that she had otherwise preserved

three years' worth of wages at the time of the divorce. To the contrary, there was ample testimony in the record explaining how Donna had spent her income during the marriage.

Furthermore, this court has previously rejected the argument made by appellant here. In *Long v. Long*, 196 Wis.2d at 696-97, 539 N.W.2d at 464-65 we specifically noted that "there is no Wisconsin law that holds a party's income to itself be property subject to division in a divorce," and we concluded that "[t]o include income earned by [one party] but not converted to tangible assets or other property in the property division ... was error." See also *Kuhlman v. Kuhlman*, 146 Wis.2d 588, 593, 432 N.W.2d 295, 297 (Ct. App. 1988) (distinguishing marital property for purposes of chs. 766 and 767). The trial court properly excluded Donna's income from the property division.

### *The Corn*

On May 21, 1996, Donna had the corn appraised at \$20,000, based upon 5000 bushels at \$4 per bushel. At trial on October 18, 1996, the appellant testified that he only had 3400 bushels of corn left, which were worth only \$2.50 per bushel on the volatile commodities market. Thomas claims that the trial court erroneously exercised its discretion by including an outdated and inflated value for the corn in its calculation of the marital estate. The trial court, however, refused to accept the respondent's unsubstantiated testimony as to the corn's worth as of the date of the divorce. We will not disturb the trial court's assessment of the relative weight to be given to various items of evidence. See, e.g., *Turner v. State*, 76 Wis.2d 1, 18, 250 N.W.2d 706, 715 (1977) (noting that the trial court's credibility determinations are not subject to review).

In addition, we note that special circumstances may warrant deviation from the general rule that property is to be valued as of the date of the divorce. See *Sommerfield*, 154 Wis.2d at 851, 454 N.W.2d at 60. In this case, the trial court discussed at length why it believed that it was appropriate to use the May 21st appraisal value for the corn, notwithstanding its acknowledgment that its value may have changed since that date. First, the court noted that it had established a specific discovery date for the determination of values to allow the opposing parties time to consider them. Thomas could have had the corn appraised and offered an opinion on the likely fluctuation of the corn's value by the discovery deadline, but instead he offered no estimate of the corn's value until the trial. Second, the court noted that Thomas had the full use of the corn since the time of the appraisal, and that a certain amount of the depleted corn supply had been used to feed the livestock, which then presumably increased in weight since the time of the appraisal, adding to the livestock value. Finally, the court pointed out Thomas' own testimony that there was still some unharvested corn which had not been included in the appraisal.

Given the circumstances cited by the trial court, and because the prior appraisal was the only independent estimate in the record, the finding that the corn was worth \$20,000 was not clearly erroneous, and did not represent an erroneous exercise of discretion.

### *Net Worth and Equity in Farm*

Thomas claims the trial court erroneously exercised its discretion by finding that he had a positive net worth at the time of the divorce. However, Thomas does not dispute that his farm was appraised at \$280,000 in August of 1996, and that his debts at the time of the divorce totaled \$174,322. Thus, the trial

court's finding that Thomas had a positive net worth was not clearly erroneous. Moreover, Thomas' repeated assertions that his net worth and equity in the farm at the time of the divorce were significantly less than at the time of marriage are irrelevant to the property division analysis, because Donna was not awarded any portion of the value of the farm or the appreciated value of the residence. The trial court did not include those figures in its division of the marital estate. Similarly, the decrease in the number and value of the livestock over the course of the marriage is irrelevant because the only question before the trial court was the value of the livestock at or around the date of the divorce.

It appears that appellant's entire argument with regard to the effect of his equity in the farm upon the property division is based on a false factual premise. Thomas states in his brief that the trial court found he had "significant assets not subject to division in the divorce and had an ability to make a property division to the respondent." However, the record shows that the trial court's statement about Thomas's significant assets was made in the context of its award of attorney fees, not the property division. Moreover, the trial court awarded Thomas the vast majority of the marital estate, including the farm, in recognition of the short duration of the marriage.<sup>2</sup> This does not mean, however, that Thomas could not be required to borrow against his farm assets in order to pay Donna for her share of the assets whose value the court did choose to divide.

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<sup>2</sup> Thomas does not appear to accept that the marital estate includes assets brought into the marriage by each party, other than those which were gifted or inherited, and that the trial court's award to him of the entire farm represented an equitable deviation from the presumption of a fifty-fifty division of the marital property. *See* § 767.255(2) and (3), STATS.

### ***Assignment of the Value of Personal Property Items***

Thomas asserts that Exhibit 24, which listed the personal property in his possession at the time of the divorce, included a Polaris snowmobile and canoe which did not belong to him, a John Deere tractor belt which had been inherited, and three collectible tractors which he had owned prior to the marriage. He claims that the inclusion of these items on the exhibit “artificially inflated the appellant’s net worth at the time of the divorce,” and constituted error on the part of the trial court. Again, we conclude that the appellant’s contention is without merit.

The admission of an exhibit does not necessarily mean that the court accepted the figures represented therein. Exhibit 24 was a professional appraisal of all the items of personal property located at the farm, some of which had been marked with B’s to indicate that they had been brought into the marriage. The appraisal itself was clearly relevant, admissible evidence, regardless of who the court ultimately determined owned each of the pieces of property on the list.

Furthermore, the record shows that the court separated out those items which had been acquired during the course of the marriage and assigned a value of zero to all of the personal property which either party had brought into the marriage. Since the court did not assign or divide the value of any of the items about which Thomas complains, there is no factual basis for Thomas’ claim that these items inflated his net worth, artificially or otherwise.

### ***Contribution to Attorney Fees***

Attorney fees may be awarded “upon a showing of ability to pay, need, and reasonableness.” *Bisone*, 165 Wis.2d at 124, 477 N.W.2d at 62. In its discussion of Donna’s motion for a contribution to attorney fees, the court found:



[C]onsidering the petitioner's need for contribution to attorney's fees, that her expenses exceed her net monthly income. Further, considering ability to pay, the respondent has significant assets not subject to division and income which permits him to make a contribution. Therefore, it is fair for the respondent to make a \$2,000 contribution to the petitioner's attorney's fees.

The record thus reflects that the trial court applied the proper standard of law to the facts of record to reach a reasonable result. *Cf. Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982). We will not disturb the trial court's award of attorney's fees.

### *Costs for Frivolous Appeal*

Donna moves for costs, fees and reasonable attorney fees under RULE 809.25(3), STATS., on the grounds that the appeal is frivolous. She cites a continuing pattern of conduct which she construes as indicative of bad faith on the part of the appellant, noting that the divorce has now lasted longer than the marriage. In addition, she maintains that counsel for the appellant should have known that the appeal was without a reasonable basis in fact or law.

There are insufficient facts in the record before us to allow us to conclude that Thomas filed this appeal, or continued it, in bad faith, solely for the purpose of harassing or maliciously injuring Donna. *See* RULE 809.25(3)(c)1, STATS. We agree with Donna, however, that several of the arguments Thomas makes on appeal are without a reasonable basis in law or equity, and his counsel should have known it. *See* RULE 809.25(3)(c)2, STATS. One example is Thomas's effort to convince us that income earned by Donna during the marriage, but which was spent prior to the divorce, should be included as a divisible marital asset.

Nonetheless, RULE 809.25 (3), STATS., “does not allow us to find that individual arguments in a brief are frivolous.” *See Nichols v. Bennett*, 190 Wis.2d 360, 365 n.2, 526 N.W.2d 831, 834 (Ct. App. 1994). For the most part, Thomas challenged discretionary rulings made by the trial court in dividing and distributing the property of the parties. While we review such decisions on a standard which is highly deferential to the trial court’s determinations, Thomas did point to matters in the record which called into question the reasonableness of certain of the court’s determinations, such as the court’s decision to adopt a five-month old appraisal in lieu of Thomas’s testimony regarding the value of corn remaining on the farm at the time of the divorce. Thus, we cannot conclude that all of the issues and arguments Thomas raised in this appeal are so lacking in merit that he or his attorney knew, or should have known, that he could not prevail on any of them. Accordingly, we deny Donna’s motion for costs under RULE 809.25(3), STATS.<sup>3</sup>

*By the Court.*—Judgment affirmed; motion denied.

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

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<sup>3</sup> Costs against Thomas under RULE 809.25(1), STATS., are allowed.

