

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 1, 2007

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2006AP1674

Cir. Ct. No. 2005FA91

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

VALERIE J. SILVERNALE DAVIDSON,

PETITIONER-APPELLANT,

V.

THOMAS R. DAVIDSON,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Douglas County:
GEORGE L. GLONEK, Judge. *Affirmed.*

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

¶1 PER CURIAM. Valerie Silvernale Davidson appeals a divorce judgment dividing property between her and her ex-husband, Thomas Davidson.

Valerie argues the court erroneously exercised its discretion when it granted Thomas a larger share of the marital estate. We disagree and affirm the judgment.

BACKGROUND

¶2 Thomas and Valerie married on June 14, 1987. Valerie petitioned the court for a divorce on March 15, 2005. There were no children of the marriage.

¶3 The parties contested property division, and the matter was tried to the court on November 22, 2005. The marital property consisted of a variety of personal property, plus pensions belonging to both parties. The court divided the personal property equally. However, it awarded each of the parties their own pensions, based primarily on the fact that Valerie, who had a college degree, had the ability to earn a higher salary. This resulted in an unequal division in favor of Thomas, who had a larger pension.¹

¶4 On January 25, 2006, Valerie filed a motion for reconsideration. In the motion, Valerie offered additional evidence on the value of the pension benefits and Thomas's earning capacity, and argued the court failed to explain why it awarded Thomas his pension. At the hearing, the court allowed Valerie to make an offer of proof but excluded her proffered evidence because it was available to her prior to the November 22 hearing. The court denied Valerie's

¹ Thomas is retired from the Navy after twenty years of active duty service and receives a pension of \$1,248 per month. The amount of Valerie's pension is less clear; figures in the record indicate she will receive between \$300 and \$656 per month starting at age sixty. Neither party presented evidence on the lump sum value of either pension.

motion, explaining the rationale behind its decision and stating that nothing in Valerie's offer of proof altered that rationale.

DISCUSSION

¶5 Valerie argues the court erroneously exercised its discretion in awarding Thomas 100% of his pension and erred in denying her motion for reconsideration. Property division is committed to the discretion of the circuit court. *Settipalli v. Settipalli*, 2005 WI App 8, ¶10, 278 Wis. 2d 339, 692 N.W.2d 279. On appeal, we will uphold the circuit court's discretion if the court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789 (citation omitted).

¶6 When the circuit court divides the marital estate at divorce, it must begin with a presumption that divisible property will be divided equally. WIS. STAT. § 767.255(3);² *LeMere*, 262 Wis. 2d 426, ¶16. A court may deviate from that presumption only after considering twelve listed factors. WIS. STAT. § 767.255(3). In making its decision, the court must consider "all applicable statutory factors." *LeMere*, 262 Wis. 2d 426, ¶17. While the court remains free to determine which factors are applicable and to give varying weight to applicable factors, the court may not consider only one factor to the exclusion of all others. *Id.*, ¶¶22-25.

² WISCONSIN STAT. § 767.255 (2003-04) was revised and renumbered as WIS. STAT. § 767.61 effective June 6, 2006. 2005 Wis. Act 443, § 109. The pre-amendment § 767.255, the 2003-04 version, applies to this case. All other references to the Wisconsin Statutes are to the 2005-06 version.

¶7 In this case, the circuit court’s written decision is fully consistent with the rules noted above. The decision began by noting the presumption of equal division. It then reviewed the statutory factors, and excluded four factors from consideration—whether a party has assets subject to division, the need of one party for the family home, the tax consequences of the division, and any marital property agreement—as inapplicable. *See* WIS. STAT. § 767.255(3)(c), (h), (k), (L). The court noted that the length of the marriage weighed in favor of equal division. *See* WIS. STAT. § 767.255(3)(a). Finally, the court noted two factors that weighed in favor of an unequal division: the parties’ earning capacity and the amount of maintenance. *See* WIS. STAT. § 767.255(3)(g), (i).

¶8 The decision went on to explain that Valerie was capable of earning between \$2,900 and \$3,219 per month, and Thomas was able to earn approximately \$2,000 per month. The court noted that \$2,000 per month plus Thomas’s pension was approximately equal to Valerie’s earning potential. The court noted that Thomas had begun working toward a college degree, but concluded it was “mere speculation” what his future earnings would be, and in any case both parties now had the opportunity to pursue further education. The court also denied maintenance, noting that Thomas had requested maintenance only if Valerie were awarded part of his pension.

¶9 We see nothing in the court’s decision or result that is irrational or poorly explained. *See LeMere*, 262 Wis. 2d 426, ¶13. The court’s rationale was clear and reasonable: there was a significant difference between the parties’ projected salaries going forward, and there would be no maintenance award to close the gap. The court therefore felt equity required a property division rendering the parties’ future income roughly equal.

¶10 Valerie alleges five different errors. First, she argues, relying on *LeMere*, that the court impermissibly relied exclusively on earning capacity and ignored the other factors. *See id.*, ¶¶22-25. However, the error in *LeMere* was that the circuit court “neglected to address” all but one factor. *Id.*, ¶22. The supreme court noted that circuit courts remained free to determine how much weight to give relevant factors and to conclude some factors are not applicable at all. *Id.*, ¶25. As noted above, the court followed the proper procedure in this case. The court reviewed the listed factors, determined that two were particularly applicable, and gave a clear and rational explanation of why those factors justified a departure from the presumption of equal division.

¶11 Second, Valerie argues the court erred because it treated Thomas’s pension as non-divisible “earning capacity.” Valerie’s argument misinterprets the court’s decision. It is true that the court did at one point refer to the pension as part of Thomas’s “earning capacity.” However, as the discussion above makes clear, the court treated the pension as a fully divisible marital asset, and chose to depart from the presumption of equal division based on the relevant statutory factors. Valerie’s argument that the court did not treat the pension as a divisible asset subject to a presumption of equal division is simply not supported by the record.³

³ Valerie also takes issue with the fact that the court made its decision without the benefit of an estimate of the pension’s lump sum value. Valerie had every opportunity to present expert testimony on the pension’s value. She cannot fault the court for her failure to do so.

¶12 Next, Valerie contends the court erred because the court’s result was the same that would have been reached under prior law,⁴ and because other courts have divided property equally despite disparate earning capacity. *See, e.g., Gerth v. Gerth*, 159 Wis. 2d 678, 680-81, 465 N.W.2d 507 (Ct. App. 1990). Valerie’s argument is not consistent with our standard of review. When the circuit court makes a discretionary decision using the proper reasoning process, the result need only be “a conclusion that a reasonable judge could reach.” *LeMere*, 262 Wis. 2d 426, ¶13. There are often a wide range of reasonable results in a given fact situation; the fact that a previous court chose a different result does not indicate that the result here is unreasonable. Similarly, a conclusion can be a reasonable one even though the same result could have been reached by applying an incorrect standard of law.

¶13 Fourth, Valerie argues the property division is in effect an award of maintenance, and the award exceeds the limits of permissible maintenance. Valerie does not cite any authority explaining when property division is in fact maintenance or explain why rules governing maintenance should apply to property division. We therefore decline to graft additional maintenance-based rules onto the statutory framework governing property division.

¶14 Finally, Valerie contends the court erroneously exercised its discretion when it excluded evidence she offered in connection with her motion for reconsideration. She complains the court applied the wrong standard when it

⁴ A 1981 Supreme Court decision, *McCarty v. McCarty*, 453 U.S. 210, 232 (1981), made military pensions a non-divisible asset. *McCarty* was subsequently overruled by statute. *See* 10 U.S.C. § 1408(c)(1) (retroactive to June 26, 1981, the date of the *McCarty* decision); *Cook v. Cook*, 208 Wis. 2d 166, 172-73, 560 N.W.2d 246 (1997). Our supreme court concluded military pensions are fully divisible in *Cook*, 208 Wis. 2d at 175.

excluded all but newly discovered evidence. We need not decide this issue. When a court erroneously exercises its discretion, we will reverse a judgment only when the error affects the substantial rights of a party. WIS. STAT. § 805.18(2); *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶¶27-28, 246 Wis. 2d 1, 629 N.W.2d 768. An error affects a party's substantial rights when there is a "reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." *Evelyn C.R.*, 246 Wis. 2d 1, ¶28.

¶15 Here, the circuit court allowed Valerie to present all of her proffered testimony as an offer of proof. After considering the offer of proof, the court concluded that regardless of the proper standard,

there has been no evidence submitted at the Motion for Reconsideration (whether found by this Court to be admissible evidence or inadmissible evidence presented as an offer of proof) which leads this Court to find that it should somehow modify its prior ruling relative to [Thomas's] military retired pay.

The court then reiterated the reasons it had awarded Thomas his pension.

¶16 This statement shows the court's decision to hear Valerie's proffered evidence as an offer of proof rather than admissible evidence did not in any way contribute to the outcome of this case. Even if the court applied an incorrect standard, the error did not affect Valerie's substantial rights, and therefore is not grounds for reversal. *See* WIS. STAT. § 805.18(2).

By the Court.—Judgment affirmed.

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

