

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 16, 2002

Cornelia G. Clark
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. 01-0933
STATE OF WISCONSIN**

Cir. Ct. No. 99-FA-231

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

PAUL S. GANTNER,

PETITIONER-RESPONDENT,

V.

DIANE JO GANTNER,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County:
WALTER J. SWIETLIK, Judge. *Affirmed.*

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Diane Jo Gantner appeals from a judgment of divorce from Paul S. Gantner. She argues that the circuit court erroneously

exercised its discretion in awarding 75% of the marital property to Paul and in not awarding her maintenance. We affirm the judgment.

¶2 These are the findings contained in the judgment of divorce and memorandum decision. The Gantners were married approximately thirteen years.¹ For a portion of the marriage, Diane was out of the home due to incarceration and drug and alcohol rehabilitation efforts. Paul is self-employed and his income fluctuates between \$35,000 and \$60,000 a year. Diane earns \$22,000 a year. The net value of the marital estate was \$277,505. The parties' home and equipment used in Paul's business were the primary assets.

¶3 Maintenance for Diane was held open for three years commencing on January 25, 2001. With respect to maintenance, the circuit court's memorandum decision states:

[T]he Court has considered the factors set forth in Section 767.26 Wis. Stats. including the length of the marriage which in this case was approximately 13 years, a portion of which the respondent wife was out of the home due to incarceration and drug and alcohol rehabilitation efforts. The Court has further considered the division of property as hereinafter set forth, the educational level of the parties, the earning capacity of each party, and all other relevant factors.

¶4 Paul was awarded the marital home and his business equipment, and related debt. Diane was awarded her retirement account worth \$400, a car and personal property. The remainder of the property was divided as follows:

¹ The parties stipulated that Paul would have sole legal custody and primary physical placement of the three children born or adopted during the marriage. No child support was ordered between the parties.

The Court has also taken into consideration the property brought in to the marriage by both parties, although the property of the petitioner husband was for the most part commingled into marital assets, also the contribution each made toward the accumulation of the marital estate, also additional expenses incurred by the respondent wife as a result of her conduct and behavior during the marriage, and finds that an equitable division of the marital estate would provide for 75 percent to the petitioner husband and 25 percent to the respondent wife.

To effectuate the 75/25 division, Paul was ordered to pay Diane \$62,536, less \$500 previously advanced.

¶5 Diane first argues that the circuit court failed to make sufficient factual findings to support a deviation from the statutory presumption that marital property be divided 50/50. We agree that the factual findings are inadequate. The circuit court cites two of the factors relevant to a deviation from the statutory presumption: property brought to the marriage and contributions to the marital estate. WIS. STAT. § 767.255(3)(b), (d) (1999-2000).² However, the particular factual findings on those factors are missing. The memorandum decision does not make a finding on the nature or value of the property brought to the marriage and what was done with that property during the marriage. In reading just the memorandum decision, we are in the dark about the relative contributions of the parties during the marriage, except that Diane's legal and addiction problems created an unquantified drain on the marital estate.

¶6 When faced with inadequate findings in the available memorandum, an appellate court may review the record anew and affirm if a preponderance of

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

evidence clearly supports the judgment, reverse if the judgment is not so supported, or remand for further findings and conclusions. *State v. Margaret H.*, 2000 WI 42, ¶37, 234 Wis. 2d 606, 610 N.W.2d 475. There is an expressed preference for remanding to the circuit court when confronted with inadequate findings in family law actions. *Id.* at ¶38.

¶7 Here, there is sufficient undisputed evidence to support the circuit court's determination. At the time of the marriage, Paul had long been operating his commercial landscaping business and owned a great deal of equipment associated with that business. Diane did not offer any contradictory evidence on the value of that equipment. While Paul testified that the equipment had since been replaced, updated or scrapped, he essentially owned the same type and amount of equipment at the end of the marriage. Paul also brought two pieces of real estate to the marriage: a vacant lot and a lot with a home, which became the first marital home. The property on which the parties first lived was sold during the marriage and the proceeds used to purchase and improve the lot where the final marital home was built. Diane testified that she and Paul had fixed up the house on Paul's property before it was sold, but there was no evidence of any special effort she made to increase the value of the home. The vacant lot was also sold during the marriage. The proceeds from the sale were used to pay off business debt. At the time of the marriage, Paul owned two life insurance policies with cash value. The evidence establishes that other than the parties' marital home, there was no significant accumulation of assets during the marriage not related to the assets Paul brought to the marriage. Thus, consideration of the property Paul brought to the marriage supports an unequal division of property.

¶8 The parties had differing views on the contributions each made during the marriage. Diane testified that she contributed to household expenses of

the marriage, including money put into the marital home when it was built. Diane was employed outside the home throughout the marriage. She also indicated that she helped out in Paul's business by answering phones and picking rocks and mowing lawns at work sites. She opined that Paul's business had increased in size during the marriage. She characterized herself as the 100% child-care provider during the marriage. In contrast, Paul testified that Diane never made any contributions to the account from which he paid household expenses. He explained that Diane had her own checking account in which she would deposit her wages and buy her clothing, her gas, her prescriptions, and pay her medical bills. He indicated that Diane occasionally purchased groceries and video rentals.

¶9 If the evidence stopped here, the factual dispute would make it impossible for this court to sustain the circuit court's conclusion that the contributions to the marriage favored an unequal division of property. However, what the circuit court looked to was the lack of contribution and, in fact, depletion of marital resources, occasioned by Diane's incarceration and rehabilitation efforts in the last few years of the marriage.

¶10 Paul testified that Diane had spent approximately one-sixth of the marriage in jail, prison or rehab programs and that during those times he was solely responsible for maintaining the family financially and caring for the children. Diane was incarcerated in the Ozaukee county jail starting on March 29, 1998, and never returned home again. Paul explained that for a nine-month period prior to her incarceration, Diane was heavily drug addicted and not contributing to but detracting from the family unit. An exhibit was put into evidence listing the amount of time Diane spent in jail and residential treatment programs. It listed the types of expenses associated with Diane's incarceration and absence from the family unit which Paul covered, including the number of months Paul paid

insurance for the children, attorney's fees, fines, prison expenses, bills associated with five car accidents, increased insurance premiums, losses due to forged check writing, the depletion of the children's bank accounts, and time Paul lost from work. While no dollar amount was assigned to any of these expenses on the exhibit, Diane did not contest that such expenses had been incurred.³ Nor did she suggest that they had been paid from any source other than marital resources. In his testimony, Paul estimated attorney's fees to be about \$10,000 and that he lost about \$20,000 worth of time from his business. He admitted that he had not calculated an exact dollar figure related to Diane's conduct.

¶11 The record shows that while the traditional contributions to the marriage may have been equal, Diane's absence from the family unit in the final years was a detriment to the accumulation of marital property. This is a situation where Diane's contribution to the marriage may be offset by subsequent years of noncontribution and depletion of marital income. See *Anstutz v. Anstutz*, 112 Wis. 2d 10, 12-13, 331 N.W.2d 844 (Ct. App. 1983). While the circuit court could have made more specific findings on this factor,⁴ a preponderance of evidence clearly supports the determination that the relative contributions to the marriage supported an unequal property division.

¶12 Diane argues that the circuit court completely ignored other relevant factors and failed to explain why it deviated so significantly from an equal

³ Diane denied that she had forged checks from Paul's account. Forged checks shown at trial amounted to only \$255. Any effect of this disputed fact is de minimis.

⁴ We deem the lack of specific findings to be nothing more than an inconvenience. *State v. Walstad*, 119 Wis. 2d 483, 515, 351 N.W.2d 469 (1984) (for convenience on review, to the parties as well as to the appellate courts, it is preferable that findings be expressly and separately set forth).

division. She suggests that the circuit court overemphasized the effect of her drug addiction and the consequences flowing from that addiction.

¶13 The circuit court need not consider all factors set forth in WIS. STAT. § 767.255, the property division statute. The obligation is to consider those factors that are relevant, *Trattles v. Trattles*, 126 Wis. 2d 219, 228, 376 N.W.2d 379 (Ct. App. 1985), or, in other words, to not ignore those factors which are clearly relevant. *Arneson v. Arneson*, 120 Wis. 2d 236, 254, 355 N.W.2d 16 (Ct. App. 1984). The circuit court presumes that marital property is divided equally and it is only in considering whether to deviate from this presumption that it looks to various statutory factors. *Gardner v. Gardner*, 175 Wis. 2d 420, 431, 499 N.W.2d 266 (Ct. App. 1993). Thus, the circuit court is not obligated to explicate those factors which support the equal division of property. So assuming that Diane is correct that all the remaining factors she cites support an equal division, it was not an erroneous exercise of discretion to cite only the two factors on which the unequal division was based.

¶14 It is within the circuit court's discretion what weight and effect should be given the various considerations. *Herlitzke v. Herlitzke*, 102 Wis. 2d 490, 495, 307 N.W.2d 307 (Ct. App. 1981). The circuit court's reasoning on a matter committed to its discretion need not be exhaustive. *Grace v. Grace*, 195 Wis. 2d 153, 157-58, 536 N.W.2d 109 (Ct. App. 1995). "It is enough that they indicate to the reviewing court that the trial court 'undert[ook] a reasonable inquiry and examination of the facts' and 'the record shows that there is a reasonable basis for the ... court's determination.'" *Id.* at 158 (quoted sources omitted). A proper exercise of discretion exists when we are able to conclude from the record that the circuit court looked to and considered the facts of the case and reasoned its way to a conclusion that is one a reasonable judge could reach

and consistent with applicable law. *Id.* at 157. The record demonstrates a proper exercise of discretion.

¶15 We soundly reject Diane’s suggestion that the division was based on “a scorecard of the parties’ hardships and misdeeds.” The circuit court properly confined its consideration of Diane’s addiction problems to the financial aspects of the marriage. Her problems and absence from the home were not used against her as marital misconduct.⁵ See *Gardner*, 175 Wis. 2d at 431.

¶16 We turn to Diane’s claim that the circuit court erroneously exercised its discretion in holding maintenance open and not awarding her maintenance. Our review of the circuit court’s decision on maintenance is the same as that applied to the property division. *Grace*, 195 Wis. 2d at 157-58. “When a court provides appropriate and legally sound reasons, based on the facts of record, for holding open a final maintenance decision until a future date, it may do so.” *Id.* at 158.

¶17 We conclude that the factors cited by the circuit court—the length of the marriage as affected by Diane’s long absence, the property division, the educational level of the parties, and the earning capacity of each party—provide adequate support for the decision not to award maintenance. Again, while specific factual findings on each of these factors were not made, a preponderance of the evidence demonstrates their import. Both parties are maximizing their income potential. Both parties submitted financial budgets that exceeded their respective incomes. Paul’s budget shortfall was substantially greater than Diane’s. Paul’s budget included expenses for maintaining a household for the three children, ages

⁵ Indeed, the circuit court kept a tight rein on Paul’s examination of Diane and questions about her drug addiction and periods of incarceration.

16, 13, and 9. Diane was not required to pay child support. Diane argues that because of depreciation deductions, Paul's actual income is higher than the lowest figure in the range assigned by the circuit court's finding. We cannot conclude that the range of income assigned to Paul is clearly erroneous.

¶18 We acknowledge that the circuit court did not state its decision in terms of the support and fairness objectives of maintenance. See *Forester v. Forester*, 174 Wis. 2d 78, 85, 496 N.W.2d 771 (Ct. App. 1993) (“We must consider whether a trial court’s application of the statutory factors achieves both the fairness and support objective of maintenance.”). However, the factors cited bear on each objective. Despite the disparity in income and cash flow, the record establishes that Paul lacks the ability to pay maintenance in addition to maintaining the household for the children. See *Enders v. Enders*, 147 Wis. 2d 138, 145, 432 N.W.2d 638 (Ct. App. 1988) (“The fact that a father is awarded custody of minor children has a direct relationship to how much maintenance he can pay.”). There is nothing in the record to suggest that the combined income of these parties can continue to support either of them at a comparable standard of living they enjoyed during the marriage. See *Bisone v. Bisone*, 165 Wis. 2d 114, 120, 477 N.W.2d 59 (Ct. App. 1991) (“One of the unfortunate realities of divorce for many parties is that their economic status cannot be maintained at precisely the same level as before the divorce.”). Under the income level, the denial of maintenance achieved a fair and equitable arrangement between the parties.⁶ While immediate maintenance was not justified, holding maintenance open also

⁶ The determination not to award maintenance was based on the financial circumstances. Thus, there is no point to laboring over the parties’ competing characterizations that the marriage was long or short term. It is a label without significance.

fostered the fairness objective of maintenance. We conclude that the circuit court properly exercised its discretion with respect to maintenance.

By the Court.—Judgment affirmed.

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

