

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 8, 2009

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. 2008AP2911

Cir. Ct. No. 2005FA30

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

KAREN MAE KEIM,

PETITIONER-RESPONDENT,

V.

JAMES KEIM,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County:
ELLIOT M. LEVINE, Judge. *Affirmed.*

Before Dykman, P.J., Higginbotham and Bridge, JJ.

¶1 PER CURIAM. James Keim appeals from that portion of a judgment of divorce in which the trial court reversed a previous order and

determined that a post-marital agreement was unenforceable. James argues that the circuit court erroneously exercised its discretion when it overruled a previous decision, made by a judge who had since retired. James argues that the circuit court erred because its decision involved weighing testimony heard by its predecessor, and because its determination that the post-marital agreement was inequitable was not based on the correct legal standard. Because we conclude that the circuit court properly reconsidered the order of its predecessor and properly exercised its discretion when it determined that the post-marital agreement was inequitable, we affirm.

¶2 James Keim and Karen Keim signed a post-marital agreement one month after they were married in 1984. This agreement provided, in relevant part, that the parties' earnings would remain separate property, and that only property acquired jointly from the time of the marriage forward would be considered marital property. At the time of the marriage, James earned about \$31,000 and Karen earned about \$4,000. In 2005, Karen filed for divorce. At the time of the divorce proceedings, James earned approximately \$119,000 and Karen earned approximately \$10,000. James also had substantial retirement benefits, while Karen did not.

¶3 During the divorce proceedings, Karen moved the court to determine the validity of the post-marital agreement. The circuit court, by Judge Perlich, held a hearing and took testimony. The court then entered an order determining that the post-marital agreement was enforceable. Shortly afterwards, Judge Perlich retired. For reasons that are not apparent, an order memorializing this ruling was never entered. Judge Perlich's successor, Judge Levine, reconsidered the prior order and determined that enforcing the marital settlement agreement would be inequitable.

¶4 James first argues that Judge Levine did not have the authority to reconsider Judge Perlich’s determination that the agreement was equitable because doing so required Judge Levine to consider testimony he did not hear. He further argues that Judge Perlich’s decision was a valid exercise of discretion and should be upheld.

¶5 When a new judge is appointed, he or she has all the powers and authority of his or her predecessor. *Starke v. Village of Pewaukee*, 85 Wis. 2d 272, 282, 270 N.W.2d 219 (1978). “[A] successor judge may in the exercise of due care modify or reverse decisions, judgments or rulings of his [or her] predecessor if this does not require a weighing of the testimony given before the predecessor and so long as the predecessor would have been empowered to make such modifications.” *Id.* at 283. Because Judge Perlich would have been able to modify his determination that the post-marital agreement was equitable, we conclude that Judge Levine had the authority to do so also.

¶6 Further, we disagree that Judge Levine’s decision involved a weighing of testimony. In reaching the determination that the post-marital agreement was equitable, Judge Perlich applied the three-prong test established in *Button v. Button*, 131 Wis. 2d 84, 99, 388 N.W.2d 546 (1986). Under this test, an agreement is inequitable if it fails to satisfy one of the three requirements: “each spouse has made a fair and reasonable disclosure to the other about his or her financial status; each spouse enters into the agreement voluntarily and freely; [and] the substantive terms of the agreement dividing the property upon divorce are fair to each spouse.” *Id.* Judge Levine did not weigh the testimony; rather, he applied the facts to the law to reach a different conclusion. Judge Levine concluded that the substantive terms of the agreement were not fair to Karen. We conclude that it was within Judge Levine’s authority to make this determination.

¶7 Because Judge Levine acted within his authority to reconsider his predecessor's decision, we also reject James's argument that Judge Perlich's determination was a reasonable exercise of discretion and should be upheld. The decision to reconsider was Judge Levine's, and we have concluded that decision was proper. The order we review in this appeal is Judge Levine's.

¶8 James also argues that Judge Levine did not properly exercise his discretion to determine that the agreement was not equitable. We again disagree. Substantive fairness is "an amorphous concept," to be considered by the courts on a case-by-case basis. *Id.* at 96. In determining whether an agreement is substantively fair, a court must be mindful of two legislative concerns: "the protection of the parties' freedom to contract and the protection of the parties' financial interests at divorce." *Id.*

To meet the requirements of substantive fairness an agreement need not divide the property in conformity with how a divorce court would divide the property, but it should in some manner appropriate to the circumstances of the parties take into account that each spouse contributes to the prosperity of the marriage by his or her efforts.

Id. at 96-97.

¶9 Judge Levine first noted that the language of the agreement was not clear about what the parties meant by marital assets. The court determined that the agreement was inequitable to Karen because of the length of the marriage and the significant inequality in the parties' financial status. The court considered that the agreement failed to consider the contributions Karen brought to the marriage, including caring for James's children and the home, which allowed James to increase his income. Further, the court concluded that the agreement left Karen with essentially no retirement, and a provision for a joint account for household

expenses was not complied with during the course of the marriage. We conclude that Judge Levine considered the appropriate factors and properly exercised his discretion when he determined that this portion of the post-marital agreement was inequitable to Karen.¹ For the reasons stated, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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

¹ In her brief, Karen notes that James indicated in the Docketing Statement he filed with this court that he intended to appeal the award of attorneys' fees. As Karen also notes, James did not address that issue in his brief. Because he did not address the issue, he has waived it. See *Post v. Schwall*, 157 Wis. 2d 652, 657, 460 N.W. 2d 794 (Ct. App. 1990) (arguments raised but not briefed or argued are deemed abandoned by this court).

