

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 2, 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. 01-2311
STATE OF WISCONSIN**

Cir. Ct. No. 99-FA-985

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

JERI LEE KOEPPEN,

PETITIONER-RESPONDENT,

v.

THOMAS WILLIAM KOEPPEN,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
LEE S. DREYFUS, Judge. *Affirmed.*

Before Nettlesheim, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Thomas William Koeppen challenges aspects of the judgment divorcing him from Jeri Lee Koeppen. He also challenges the circuit

court's requirement that he reimburse Waukesha County for the costs incurred by the sheriff to transport him from prison to the divorce proceedings. We affirm.

Unequal Property Division

¶2 The circuit court found that Thomas wasted the marital estate, overtried his case and made little contribution to the marriage in its last years. Therefore, the court awarded roughly two-thirds of the marital estate to Jeri and one-third of the marital estate to Thomas.¹

¶3 On appeal, Thomas argues that the circuit court was predisposed to make an unequal property division due to marital misconduct. We disagree. During a pretrial discovery dispute, the circuit court stated that it would consider Jeri's argument that Thomas's waste of marital assets, incarceration and criminal conduct toward family members might warrant an unequal division of the estate. The court specifically stated that it would take evidence on the question.

¶4 We see nothing out of order here. The circuit court had a motion before it which raised the issue of waste of marital assets. The court noted that the question of Thomas's lack of contribution to the marital estate and the marriage would be addressed later. The court did not decide the issue before hearing evidence.

¹ This division related only to property and does not take into account debts assigned solely to Thomas. The court observed that the length of the marriage and other factors favored a maintenance award to Jeri. However, because Thomas was incarcerated at the time of the circuit court proceedings, the court held maintenance open for ten years.

¶5 Equal division of the marital estate is presumed. WIS. STAT. § 767.255(3) (1999-2000).² However, the court may make an unequal division after considering various factors. *Id.* The division of the marital estate is within the discretion of the circuit court. *Liddle v. Liddle*, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). We will sustain the court's decision if it 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. *Id.*

¶6 The circuit court found facts which warranted an unequal division in favor of Jeri. Thomas has a history of domestic abuse. The court found that from 1989 to 1997, there were significant periods during which Thomas was barred from having contact with his family. During this period, Thomas violated no-contact orders by going to the marital residence. From 1997 forward, Thomas did not make any contribution to the family due to his incarceration. Thomas also has a history of alcohol abuse. Thomas expended family resources to defend himself against criminal charges arising from his conduct toward his family members.³ The court did not find Thomas to be a credible witness.

¶7 The circuit court found that Thomas significantly dissipated marital assets by using those assets to defend himself against criminal charges arising from his intentional criminal conduct toward family members. The court declined

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

³ From July 1989 through April 1997, there were ten incidents of domestic abuse involving Thomas. Thomas was criminally charged with battery, harassment, disorderly conduct, reckless use of a weapon, recklessly endangering safety, and was convicted of felony obstructing and bail jumping. Jeri testified at trial that she was the victim in the criminal charges relating to spousal abuse and that Thomas damaged the residence and its contents during domestic disputes. Thomas also abused his daughter.

to require Jeri to bear the cost of Thomas's self-inflicted legal problems. According to the circuit court, the funds were "used for the sole purpose of keeping [Thomas] out of jail and to avoid that occurring and in no way benefited [Jeri] or the marriage or the family under the circumstances." The court specifically acknowledged that even though it could not make an unequal property division due to marital misconduct, *see Brabec v. Brabec*, 181 Wis. 2d 270, 282, 510 N.W.2d 762 (Ct. App. 1993), it could take into account criminal conduct by one spouse against the other, *id.* at 282-83. The court found that it would be unreasonable to equally divide the property because that would effectively make Jeri responsible for the cost of defending Thomas against criminal charges arising from his conduct toward her and other family members.

¶8 When dividing the marital estate, the circuit court may consider the contributions of each party to the marriage. WIS. STAT. § 767.255(3)(d). A party's contribution to the marriage, or lack thereof, is a relevant consideration. *Anstutz v. Anstutz*, 112 Wis. 2d 10, 13, 331 N.W.2d 844 (Ct. App. 1983). A party's financial contribution to the marriage may be offset by a spouse's "unjustified depletion of marital assets," a burden which would be unfair to place on the other spouse. *Id.* at 12-13. "The prohibition against considering marital misconduct does not prevent consideration of a party's depletion of the marital assets." *Id.*

¶9 The record shows that Thomas earned between \$40,000 and \$50,000 prior to his 1997 incarceration. Since his incarceration, he has earned nothing and has not contributed to the marriage, leaving Jeri with the financial responsibility for the family. Jeri was also the primary caretaker of the children and the home.

¶10 Thomas complains that there was insufficient evidence that he wasted marital assets by using them to defend against criminal charges and by damaging the parties' residence and its contents. The record supports the court's findings. Thomas withdrew \$20,000 from his retirement account to pay legal fees related to the criminal charges against him. He also borrowed money for bail or to pay bills related to his incarceration. Also, waste was but one aspect of the circuit court's decision to divide the marital estate unequally. The court also noted Thomas's lack of contribution to the marriage due to his periods of incarceration.

¶11 Thomas argues that his criminal conduct resulted from the disease of alcoholism and should not be a basis for unequally dividing the marital estate. The circuit court considered but declined to reduce Thomas's culpability for waste of marital assets and criminal conduct based on his alcoholism. Thomas did not present any expert testimony to support his contention that his alcoholism affected his ability to be employed and control his behavior, or that his conduct was other than volitional. The court noted the role of alcohol in Thomas's life and found that his conduct and use of alcohol was volitional and did not excuse his conduct. We reject Thomas's argument that his alcoholism explains or justifies his abusive conduct.

¶12 We hold that the circuit court considered the appropriate factors in making an unequal division of the marital estate, including the parties' respective contributions to the marriage and Thomas's depletion of marital assets by his criminal conduct. The weight of these factors was for the circuit court. *See Meyer v. Meyer*, 2000 WI 132, ¶49, 239 Wis. 2d 731, 620 N.W.2d 382 (Prosser, J. concurring) ("Sound discretion in maintenance determinations must reflect consideration of the factors set out in WIS. STAT. § 767.26, but the factors in the statute do not appear to be weighted, implying that the weighting will be done by

the circuit court.”). The circuit court reached a reasonable decision based on the facts and the law when it unequally divided the marital estate. The circuit court did not intend to punish Thomas; rather, it intended to be fair to Jeri.

Debt to Thomas’s Parents

¶13 Jeri contended that all of the debt allegedly owed to Thomas’s parents had either been repaid or forgiven; Thomas testified that the debt remained. Thomas’s parents never requested payment on any of the notes and they did not testify. The court did not find Thomas credible. Based upon the testimony, the court found that nothing was owed to Thomas’s parents. The court determined that if there were any debt, the debt would be Thomas’s sole responsibility and would not be treated as marital debt.

¶14 Thomas complains that the circuit court did not take evidence from his parents, having taken a request to have the parents appear telephonically under advisement after an offer of proof that they would testify to the validity of the notes. The trial concluded without the telephonic appearance issue being raised again with the court. A litigant must bring to the court’s attention issues that are being submitted for the court’s determination. *See State v. Ledger*, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993). Because Thomas did not bring to the court’s attention that a ruling on an issue important to him was outstanding, we decline to find error by the circuit court for not addressing the issue.

State Income Tax Liability

¶15 Thomas challenges the assignment to him of state income tax liability for 1995-97. Jeri filed her income tax returns as “married filing separately” during this period because of Thomas’s incarceration. Thomas did not

file his income tax returns and has been assessed back taxes. The court held Thomas solely responsible for this tax liability because he had the ability to file tax returns and did not. The court declined to treat the tax liability as a marital debt. We see no misuse of discretion in this aspect of the property division. The court stated its reasons for assigning this debt to Thomas.

Thomas's Retirement Account

¶16 Thomas challenges the circuit court's award to Jeri of \$20,000 from his General Electric retirement account. At the divorce trial, the account had a balance of \$31,900. The circuit court held Thomas responsible for the \$31,000 previously withdrawn. The court rejected Thomas's claim that the \$31,000 was used for necessities and for the benefit of the family. The court found that Thomas had not shown that these funds were used to benefit the family. The court found that Thomas used these funds to defend himself against the criminal charges arising from his conduct toward family members. The expenditure of the funds for this purpose was not necessary to maintain marital property; rather, the court found that it wasted marital property under the facts of the case.

¶17 Given his waste of marital assets and his overtrial of the divorce, the court found that a contribution to Jeri's attorney's fees was warranted. In light of the foregoing, the court awarded Jeri \$20,000 from the retirement account and awarded the balance to Thomas. The court observed that a Qualified Domestic Relations Order (QDRO) might be necessary to divide the account.

¶18 On August 9, 2001, Jeri's counsel submitted a QDRO for Thomas to sign. The account's value dropped precipitously after September 11, 2001. Thomas refused to sign the QDRO, and Jeri had to bring a motion to show cause to obtain Thomas's signature. At the hearing in late September, the court ordered

Thomas to sign the QDRO. Thereafter, the court held Thomas in contempt and held that any decrease in the value of the retirement account would be borne solely by Thomas due to his willful delay in signing the necessary documents.

¶19 Although the drop in the value of Thomas's retirement account was sudden, we nevertheless affirm the circuit court's discretionary decision to award Jeri \$20,000 from this asset regardless of the change in value. The circuit court awarded a specific dollar amount from the retirement account, rather than a percentage of the account's value. Therefore, Thomas was liable to Jeri for \$20,000, and the market value of the retirement account was not relevant in the context of this obligation. This award was made in the context of Thomas's waste of marital assets and his overtrial of the divorce, which would normally have resulted in a separate award of attorney's fees to Jeri. The record supports the circuit court's disposition of the account even though the value of the account dropped after September 11, 2001.

¶20 Thomas also complains that the circuit court did not account for \$3750 from the account which he contends was used to pay marital debts with the parties' agreement that they would share the tax obligation on this withdrawal. Thomas paid the taxes but did not receive a credit for this in the property division. We decline to reverse due to this alleged error. Thomas did not bring this error to the circuit court's attention. Therefore, it is waived. *See Schinner v. Schinner*, 143 Wis. 2d 81, 93, 420 N.W.2d 381 (Ct. App. 1988).

Reimbursement of Waukesha County

¶21 Thomas protests the circuit court's requirement that he reimburse Waukesha County for the costs of producing him for the numerous hearings in this case. The court found that Thomas would receive property in the property

division and would have the means to reimburse the County for the \$1277 it incurred to transport him to court. At the court's request, the sheriff provided a summary of the transportation costs. Thomas's counsel objected that some of the hearing dates related to appearances in criminal matters. The circuit court responded that it understood that the costs in this summary related solely to hearing dates in the divorce, but that if Thomas could demonstrate otherwise, adjustments would be made.

¶22 Thomas did not object to the concept of reimbursing the County. In fact, counsel conceded that it would be appropriate to require Thomas to reimburse the County for the costs of producing him for hearings in the divorce case. Thomas cannot take a contrary position on appeal. *See Godfrey Co. v. Lopardo*, 164 Wis. 2d 352, 363, 474 N.W.2d 786 (Ct. App. 1991).

By the Court.—Judgment affirmed.

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

