COURT OF APPEALS
DECISION
DATED AND FILED

June 2, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP2105 **Cir. Ct. No. 2005FA187**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN RE THE MARRIAGE OF:

DENISE LYNN ARNOLD,

PETITIONER-APPELLANT-CROSS-RESPONDENT,

V.

ROBERT ARNOLD,

RESPONDENT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS APPEAL from an order of the circuit court for Ozaukee County: JOSEPH D. MCCORMACK and SANDY A. WILLIAMS, Judges. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Denise Arnold appeals from an order which amended a judgment of divorce on remand following Robert Arnold's appeal from the original judgment of divorce.[1] Under the amended judgment Denise, who was awarded the parties' home, was required to pay Robert $85,140 for his share of equity in the home.[2] She argues that the parties' marital property agreement (MPA) should have been enforced with the inequitable provision regarding the sale of the home severed and that the circuit court lacked authority to modify specific provisions of the original judgment of divorce. Robert cross-appeals the order arguing that the unequal property division is an erroneous exercise of discretion. We conclude that the circuit court made a proper division of the marital property and we affirm the order.

¶2 When the parties married, Robert owned and operated a family company that was worth approximately $2.6 million. The parties executed a MPA for the purpose of protecting Robert's interest in his company by classifying it as his individual property. Individual property was to retain that character and if marital property was mixed with or added to individual property, the addition was to be deemed an interest-free loan to the owner of the individual property. Additionally, all deferred employment benefits, all automobiles, artwork, and jewelry held at the time of the marriage, and any real estate titled in one person's name was classified as individual property. The MPA defined marital property as earned income and all other assets not classified as individual property owned at

[1] Ozaukee County Circuit Court Judge Joseph D. McCormack entered the original judgment of divorce and decided the case on remand. Ozaukee County Circuit Court Judge Sandy A. Williams signed and entered the order amending the judgment of divorce on Judge McCormack's decision.

[2] Under the original judgment of divorce the payment was $10,000.

the time of the marriage or acquired by either or both during the marriage. The MPA provided that upon divorce the principal residence of the parties would be sold and the proceeds, less the mortgage and customary closing costs, divided equally. The MPA also included a severability clause such that if any provision of the agreement was held to be invalid by any court, the agreement would be interpreted as if the invalid provision was not part of the agreement.

¶3 After ten years of marriage, Denise filed for divorce. By that time Robert's company was in severe financial crisis and $238,304 of marital funds had been used to satisfy some of the company's obligations. In rendering the original judgment of divorce the circuit court found that the parties had shared a lavish lifestyle which led to the downfall of the company by the drawing of executive compensation, retained earning, and dividends from the company. The circuit court also found that loans from Denise's mother were the only things that permitted the parties to function financially and to save their marital home from foreclosure. The court determined equity in the home to be $340,000 and, after applying offsets against Robert's one-half interest in the home equity, vested $330,000 of the equity in Denise and $10,000 in Robert. Robert appealed the original judgment of divorce arguing that the circuit court did not adequately explain how it arrived at the division of assets and liabilities of the marriage. *See* ***Denise Lynn Arnold v. Robert Arnold***, 2008AP678, unpublished opinion and order at 1 (Wis. Ct. App. Mar. 5, 2009).

¶4 The appellate court concluded that the circuit court failed to directly address whether it was enforcing the MPA and whether money from Denise's mother was a legal loan. ***Id.*** at 2 n.3, 3. The appellate court summarily remanded the matter to the circuit court to make the appropriate and necessary findings of facts and conclusions of law. ***Id.*** at 2, 4.

¶5 On remand the circuit court wrote, "what is clear from the record is that, as stated in the Court's original decision, the agreement no longer comported with the reasonable expectations of the parties and that it would be patently unfair to both to enforce said agreement." It found that loans from Denise's mother totaled $287,388 and that Denise was entitled to a credit for that sum owed to her mother. It further determined that $30,000 borrowed from Robert's mother and step-father (the Heuer loan), as well as $25,125.17 borrowed from the E. Arnold Trust, were marital debts and joint obligations of the parties. The court specifically disallowed any cost of sale as a setoff against the home equity because Denise had no present intent to sell the home. The court subtracted the loans from Denise's mother from the equity in the home, determined the payment from Denise to Robert to be one-half the result, deducted $26,108 from the payment to compensate Denise for the Ozaukee Country Club debt assigned as Robert's sole responsibility, and calculated that Denise owes Robert $85,140.[3]

¶6 We first set forth the parties' positions on appeal because we think they can be resolved on a single premise. Denise argues that Robert failed to meet his burden of proof in overcoming the statutory presumption that the MPA is

[3] The parties agree that the circuit court made a mathematical error in subtracting $287,388 (loans from Denise's mother) from $409,886 (home equity) for a sum of $222,496, rather than $122,498, as the equity to be divided equally. They also agree that the circuit court failed to offset the Heuer and E. Arnold Trust loans in determining the equalization payment. The parties agree that these mathematical errors need to be corrected. Denise further contends that the amount of the Ozaukee Country Club judgment lien on the date of the amended judgment would approximate the $33,686.42 sum she calculates to be Robert's equalization payment.

Neither party moved the circuit court to correct the mathematical errors. Failure to bring a motion before the circuit court to correct such manifest error constitutes a waiver of the right to have such an issue considered on appeal. ***Schinner v. Schinner***, 143 Wis. 2d 81, 93, 420 N.W.2d 381 (Ct. App. 1988). The parties are not precluded from stipulating to a corrected equalization payment after remittitur in lieu of further litigation.

valid. *See* WIS. STAT. § 767.61(3)(L) (2007-08).[4] She contends that because the MPA anticipated both the financial success and failure of Robert's business that the MPA could not be set aside for the reason that it no longer comported to the reasonable expectations of the parties. She argues that the MPA is not inequitable when the failure of Robert's business was reasonably foreseeable. *See* ***Button v. Button***, 131 Wis. 2d 84, 97, 338 N.W.2d 546 (1986) (in framing their agreements the parties should consider the circumstances reasonably foreseeable and the circuit court should assess the fairness of the agreement with the same consideration); ***Warren v. Warren***, 147 Wis. 2d 704, 708, 433 N.W.2d 295 (Ct. App. 1988) ("a spouse will not be saved from an unwise agreement unless the circumstances of the parties at divorce were beyond the contemplation of the parties at the time the agreement was made"). Despite Denise's efforts to enforce the MPA, she argues that the provision requiring the marital home to be sold is inequitable and should be severed from the agreement because it allows Robert to escape responsibility for loans from her mother which staved off foreclosure.

¶7 Robert contends that once the MPA was set aside the circuit court was obligated to divide the marital property, including Denise's deferred compensation and stock accounts which were classified as individual property under the MPA, in accordance with the statutory presumption of equal division. *See* WIS. STAT. § 767.61(3). He argues that the circuit court failed to apply the presumption and did not explain by reference to the statutory factors why it was deviating from the required equal division. *See* ***LeMere v. LeMere***, 2003 WI 67, ¶¶13, 25, 262 Wis. 2d 426, 663 N.W.2d 789 (the division of property is reviewed

[4] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

for an erroneous exercise of discretion; the circuit court's failure to subject a request for unequal division of property to the proper statutory rigor is an erroneous exercise of discretion). He asks this court to again remand the case to the circuit court with directions to divide all the property equally.

¶8 We conclude that regardless of whether we agree with one or both parties' appellate arguments, the property division was a proper exercise of discretion. With regard to Denise's perspective, the circuit court achieved the result she seeks—the property division left her deferred compensation and stock accounts untouched, did not make her responsible for any debt incurred by Robert's business, and did not enforce the MPA's requirement that the house be sold and proceeds divided equally. The division had the effect of enforcing the MPA with the exception of the provision that the house be sold. The treatment of the Heuer and E. Arnold Trust loans was based on additional findings of fact that those loans were marital debts. Denise does not challenge those findings.[5] Denise would have been responsible for one-half of those loans regardless of whether the MPA was enforced or not. She also benefited from having the loans from her mother treated as marital debt. In short, any alleged error with respect to the

[5] Denise points out that the original judgment of divorce did not address the designated portion of the E. Arnold Trust loan and held that the Heuer loan was Robert's sole responsibility. She argues that on remand the circuit court lacked authority to reverse findings of fact and modify the original judgment of divorce, including the treatment of cost of sale of the marital home. We summarily reject this argument. The argument is not developed by the citation and discussion of any legal authority. *See* ***Fryer v. Conant***, 159 Wis. 2d 739, 746 n.4, 465 N.W.2d 517 (Ct. App. 1990) (we will not consider an argument that is inadequately briefed). The remand was for the very purpose of making findings of fact supported by the record and conclusions of law. The circuit court was forced to consider what findings were supported by the record and make appropriate adjustments. The circuit court's changes to the original division of property were not inconsistent with the appellate court's remand but in execution of it. *See* ***State ex rel. J.H. Findorff v. Cir. Ct. for Milwaukee County***, 2000 WI 30, ¶25, 233 Wis. 2d 428, 608 N.W.2d 679 (on remand the circuit court has discretion to take action not inconsistent with the mandate).

validity of the MPA does not prejudice Denise and Denise's argument does not provide grounds for reversal on appeal. *See* WIS. STAT. § 805.18.

¶9 With regard to Robert's perspective, even if we agree that the circuit court's decision was not a model exercise of discretion in terms of linking the unequal division to the statutory factors, we conclude the record supports the property division.[6] *See* ***Prosser v. Cook***, 185 Wis. 2d 745, 753, 519 N.W.2d 649 (Ct. App. 1994) (we look for reasons to sustain discretionary decisions); ***Andrew J. N. v. Wendy L. D.***, 174 Wis. 2d 745, 767, 498 N.W.2d 235 (1993) (a reviewing court is obliged to uphold a discretionary determination, if it can independently conclude that the facts of record applied to the proper legal standard support the circuit court's decision). In deviating from an equal division the circuit court must consider all applicable statutory factors. ***LeMere***, 262 Wis. 2d 426, ¶¶24, 25. In the exercise of its discretion the court is not "precluded from giving one statutory factor greater weight than another." ***Id.*** at ¶25. It is not an erroneous exercise of discretion for the court to ignore factually inapplicable statutory factors. ***Id.***, ¶¶26, 27. Moreover, even if the court erroneously overlooks a factor, its error may be deemed harmless if the overlooked factor is only marginally relevant or not relevant at all. ***Id.***

[6] Our obligation to sustain a discretionary decision supported by the record but perhaps inartfully stated is different from the preference, in family law matters, to remand for additional findings of fact when confronted with inadequate findings. *See* ***State v. Margaret H.***, 2000 WI 42, ¶38, 234 Wis. 2d 606, 610 N.W.2d 475. In as much as the circuit court has already entered a supplemental decision with additional findings of fact there is no need to remand the case again. We may look to the original judgment of divorce where it supports the supplemental decision and modifications.

¶10 The circuit court first observed that the marriage was short-term. *See* WIS. STAT. § 767.61(3)(a). Both parties brought substantial property to the marriage. *See* § 767.61(3)(b).

¶11 Although the circuit court determined that the MPA was unenforceable, it was not required to reject what the agreement represented in terms of the parties' intended financial arrangements during the marriage and the treatment of property brought to the marriage. Both parties understood before the marriage that certain assets would remain each person's separate property and treated them so during the marriage. The parties shared their income. Thus, treating Denise's deferred compensation funds and solely-titled stocks as property not subject to division did not weigh in favor of compensating Robert because separate treatment was maintained during the marriage. *See* § 767.61(3)(c). Additionally, the court found that the financial downfall of Robert's company was precipitated by excessive executive compensation and irresponsible reduction in retained earnings. That Robert no longer had substantial property not subject to division was of his own doing.

¶12 The court found that the financial crisis at Robert's company occurred five years or so into the marriage. Denise's effort in the continued functioning of the parties financially, preservation of the marital home and staving off foreclosure consumed the later half of the marriage. These findings relate to the consideration of the contribution of each party to the marriage. *See* § 767.61(3)(d). The court weighed Denise's contribution in maintaining financial functionality heavily.

¶13 There was no suggestion of significant contribution of either party to the earning capacity of the other since both were earning substantial income at the

time of the marriage. *See* § 767.61(3)(g). The circuit court acknowledged that Robert incurred debt for vocational assistance but dismissed that as having a marital purpose because it was necessary by Robert's own doing and undertaken to solely benefit himself at the end of the marriage.

¶14 The circuit court also found that Robert had primarily utilized the country club membership for business purposes. This was another factor the court found relevant. *See* § 767.61(3)(m).

¶15 Finally, although the circuit court recognized that the parties enjoyed a lavish lifestyle that contributed to the downfall of Robert's company, it visited the economic mismanagement which consumed marital assets and Robert's individual property on Robert. In its discretion the circuit court could heavily weigh that mismanagement in making an unequal property division. *See* ***Haack v. Haack***, 149 Wis. 2d 243, 253-54, 440 N.W.2d 794 (Ct. App. 1989) (the court may consider the dissipation of assets due to a spouse's mismanagement). The determination that the circumstances called for a property division that approximated as closely as possible the parties' separate financial positions at the inception of the marriage was a proper exercise of discretion.

¶16 No costs to either party.

By the Court.—Order affirmed.

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