COURT OF APPEALS
DECISION
DATED AND FILED

September 14, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1525 **Cir. Ct. No. 2007FA2554**

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

IN RE THE MARRIAGE OF:

LYNNE MARIE KERHIN,

PETITIONER-RESPONDENT,

V.

BRIAN CHRISTOPHER KERHIN,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 CURLEY, P.J. Brian Christopher Kerhin appeals the divorce judgment that divided his and his ex-wife's, Lynne Marie Kerhin's, marital

property and debts.[1] He argues that the trial court erred in granting a motion for reconsideration that resulted in a change in the valuation of his business. He also contends the trial court erroneously exercised its discretion in dividing the marital property and in ordering him to pay an equalization payment of $19,065 to Lynne. Finally, he argues that the trial court erroneously exercised its discretion in excluding certain property and debt from a fifty-fifty division. Because the trial court properly exercised its discretion in: (1) hearing the motion for reconsideration; (2) valuing and dividing the marital estate; and (3) ordering Brian to be personally responsible for certain debts of the parties and business, we affirm.

I. BACKGROUND.

¶2 On May 16, 2007, Lynne filed a petition seeking a divorce from Brian. The parties were married on June 11, 2004, and had two young children. After the divorce petition was filed, an assistant family court commissioner set temporary orders. As pertinent to this appeal, the commissioner ordered that Lynne would have the use of a Dodge Caravan and Brian would have the use of a Toyota Corolla. In addition, the parties were ordered to continue the use of the joint account with U.S. Bank and Wells Fargo for payment of debts. The commissioner also ordered that any debt incurred after June 18, 2007, the date of the temporary orders, "shall be a 'non[-]family purpose debt' within the meaning of the marital property law." The commissioner declined to order either party to be responsible for filing income tax returns or for the payment of liabilities. At the time, income taxes and real estate taxes were outstanding.

[1] Because the parties' last names are the same, we will refer to them by their first names.

¶3 While the divorce was pending, Lynne's parents gave her a new vehicle. Prior to the trial, the parties entered into a partial settlement concerning custody and placement of their children. On one of the dates set for the trial, the parties entered into a stipulation on other matters. Specifically, they agreed that neither party would be awarded maintenance; assigned the payment of certain debts from joint to individual; agreed that each would be awarded their retirement plans; stipulated to the value of the duplex they owned; and entered into a temporary child support order. The trial court adjourned the trial, over Brian's objection, to afford Lynne the opportunity to determine whether she needed to depose Brian's expert, who Lynne first became aware of that day, and to disclose whether she would be hiring her own expert.

¶4 A bench trial was ultimately held on August 28-29, 2008. Following the taking of testimony and arguments of counsel, the trial court made the following findings of fact and conclusions of law which concern this appeal: the business, Byte Harmony, Inc., was valued at $5687 and awarded to Brian; the duplex, with a stipulated value of $159,000 and equity of $38,320, was awarded to Lynne, who later got credit for mortgage payments she made which brought the value of the property for marital estate purposes to $37,430. The trial court also found that Lynne's new car was gifted property from her parents and did not include it in the marital estate. Brian was awarded his car valued at approximately $4300. With regard to the debts of the parties, the trial court determined that Brian was responsible for a U.S. Bank credit card balance of "slightly over $10,000" and he was awarded all the furniture purchased with this credit card. He was also made responsible for the payment of his Iowa State student loan of $15,483. The trial court did not include it in the marital estate equalization. The trial court also ordered Brian to pay back a pre-marriage loan from Lynne to

Brian's business of $8000. In addition, the trial court determined that both parties should be responsible for the preparation of and payment of outstanding individual income taxes; however, the court ordered Brian to pay any interest or penalties. As a result of the court's decision, the trial court ordered Lynne to pay what the court approximated to be between $8000 to $9000 to Brian to equalize the property division.

¶5 Approximately one month after the trial, Lynne filed a motion for reconsideration of the valuation placed on Brian's business. The trial court held a hearing and accepted Lynne's co-counsel's argument that the business's fair market value was actually $54,875, not $5687 as originally found by the court. Consequently, the trial court changed its earlier ruling and ordered Brian to pay Lynne $19,065 to equalize the property. This appeal follows.

II. ANALYSIS.

A. The trial court properly considered the motion for reconsideration and arrived at a reasonable valuation for Brian's business.

¶6 Brian first contends that the trial court should have denied the motion for reconsideration because the motion did not establish a manifest error of law or fact, nor did Lynne present newly-discovered evidence. *See* ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853 ("To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact."). We review a trial court's grant of a motion for reconsideration under the erroneous exercise of discretion standard of review. ***Id.***, ¶6. "A 'manifest error' is not demonstrated by the disappointment of the losing party." ***Id.***, ¶44 (citation omitted). "It is the 'wholesale disregard,

misapplication, or failure to recognize controlling precedent.'" ***Id.*** (citation omitted). Stated differently, "we are able to state that 'manifest error' contemplates that self-evident kind of error which results from ordinary human failings due to oversight, omission, or miscalculation. It is the type of error which tends to immediately reveal itself as such to reasonable legal minds." ***Schinner v. Schinner***, 143 Wis. 2d 81, 92-93, 420 N.W.2d 381 (Ct. App. 1988). We are satisfied that the trial court properly exercised its discretion when it both heard and granted the motion for reconsideration.[2]

¶7 At trial, Brian called an expert witness who gave an opinion that the divisible marital portion of the business was worth $5687. The expert witness reached this conclusion by starting with the book value of the business less the outstanding debts which put the value at around $60,000.[3] The witness then took the receivables, which along with the money on hand equaled the book value, and reduced them by twenty percent, believing that not all of the receivables would be collectable. She also subtracted out of the retained earnings money that was earmarked to buy new computers but failed to add in the value of these new computers. This then left the book value number at $45,726. At this point the expert witness further reduced the company value:

[2] Brian argues that the trial court's new valuation of the business is clearly erroneous because the trial court valued it as of December 31, 2007, not as of the date of the divorce. The financial records for December 31, 2007 were used at trial because the updated records had not been turned over to opposing counsel. "Special circumstances can warrant deviation from [the rule that generally the assets of a marriage are to be valued as of the date of divorce]." ***Schinner v. Schinner***, 143 Wis. 2d 81, 98, 420 N.W.2d 381 (Ct. App. 1988).

[3] The term "book value" has no commonly accepted meaning, but a corporation's book value can be defined as the difference between its assets and liabilities. *See* J.H. Crabb, Annotation, *Meaning of "Book Value" of Corporate Stock*, 51 A.L.R.2d 606, 608, 610 (1957).

> I arrived at the calculation by analyzing the component that I thought was personal goodwill. That being[,] I analyzed the sales that the company generated by Mr. Kerhin versus the sales that were generated by employees who do client work for him. I broke that down by a percentage of the total sales of the company. Then I took their respective salaries that were paid to each of those individuals in 2007 to come up with a profit, revenue minus the salaries, to come up with a gross operating profit, gross margin profit, and looked at the percentage of the whole and because Mr. Kerhin's share of that was 86.99 percent, I attributed that percentage to the [$]45,726 minus the [$]2,000 [identified as pre-marital capitalization] to come up with $38,039, and the difference of the whole, the [$]5,687.

¶8 At the motion for reconsideration, Lynne's co-counsel explained to the court that when determining a business's value, sound accounting rules and common sense require that when money is taken out of retained earnings for the purchase of computers the value of the new computers must be added back in. Brian's expert witness did not do this.[4]

¶9 In addition, Lynne's co-counsel argued that the expert witness's calculation of applying personal and business goodwill to the hard assets value was "completely incomprehensible and without any support in Wisconsin [l]aw." Lynne's co-counsel, citing ***Holbrook v. Holbrook***, 103 Wis. 2d 327, 309 N.W.2d 343 (Ct. App. 1981), argued that goodwill is strictly the value of an entity beyond its hard assets. In explaining the problem, the attorney said:

> The problem with what [the expert witness] did and what you adopted, based on her testimony, was to create manifest error. You took hard assets that were marital assets and you treated them as though they were a value in excess of the hard assets, i.e. goodwill, and then reduced the hard assets by the proportion that would be … allocated to personal goodwill. You can't. You can't allocate hard

[4] Brian argues that co-counsel was testifying, not arguing. We are satisfied that what co-counsel stated to the trial court constituted argument, not expert testimony.

> assets to personal or entity goodwill because they are not goodwill.

¶10 As a result, the trial court originally valued a business with a book value of approximately $60,000, including $38,000 in cash, as being worth only $5687. Clearly, the original value placed on the business by the court was a manifest error of fact and law. This error is self-evident. Who wouldn't buy a business with $38,000 in cash plus other assets for $5687? In reaching its original decision, the trial court adopted the flawed formula proposed by Brian's expert witness and in doing so violated basic accounting rules and disregarded existing case law. The trial court was persuaded by Lynne's co-counsel that its initial valuation, relying on the expert witness's misapplication of the concept of goodwill, which ignored precedent, was incorrect.

¶11 As the trial court remarked at the motion for reconsideration, "I think the expert did co-mingle incorrectly the concepts of goodwill and hard assets in such a way as to misapply the law in this state regarding valuation and goodwill. Particularly the ***Holbrook*** case." The trial court was free to disregard the testimony of the only expert witness. "The weight and credibility to be given to the opinions of experts is uniquely within the province of the fact-finder"—in this instance, the trial court. *See* ***Bauer v. Piper Indus., Inc.***, 154 Wis. 2d 758, 764, 454 N.W.2d 28 (Ct. App. 1990). We are satisfied that the trial court properly entertained the motion for reconsideration.

¶12 Further, the valuation the trial court adopted at the motion for reconsideration is not clearly erroneous. "'Fair market value' is the proper method of valuing property in a divorce property settlement." ***Liddle v. Liddle***, 140 Wis. 2d 132, 138, 410 N.W.2d 196 (Ct. App. 1987) (citation omitted). "Fair market value is the price that property will bring when offered for sale by one who

desires but is not obligated to sell and bought by one who is willing but not obligated to buy." ***Id.***

¶13 With respect to the new valuation, we are satisfied that the trial court's revised evaluation was a reasonable one. It took the book value of the business and reduced the accounts receivable by twenty percent. As Lynne argues, and we agree, this was the lowest possible fair market value for the business.

B. The trial court's division of the marital property was a proper exercise of discretion.

¶14 Brian complains that the trial court's "overall property division is inconsistent; the court ordered both an unequal property division and an equalization payment, and[,] as a result, the court failed to properly exercise its discretion in dividing the parties[']property." Specifically, Brian contends that the trial court mislabeled some of the parties' property as non-marital, and as a result, the property division was "unequal and erroneous." He also argues that the court did not consider the statutory factors. We are not persuaded.

¶15 While an equal division of a marital estate is presumed under WIS. STAT. § 767.61(3) (2007-08),[5] the court may alter this distribution after considering statutory factors. The statutory factors to be used by a court when dividing property are found in § 767.61(3). The relevant § 767.61(3) factors here include:

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

Property division.

….

(3) PRESUMPTION OF EQUAL DIVISION. The court shall presume that all property not described in sub. (2) (a) is to be divided equally between the parties, but may alter this distribution without regard to marital misconduct after considering all of the following:

(a) The length of the marriage.

(b) The property brought to the marriage by each party.

….

(d) The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.

(e) The age and physical and emotional health of the parties.

….

(g) The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.

(h) The desirability of awarding the family home or the right to live therein for a reasonable period to the party having physical placement for the greater period of time.

….

(k) The tax consequences to each party.

….

(m) Such other factors as the court may in each individual case determine to be relevant.

¶16 The division of property rests within the sound discretion of the trial court. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We will sustain discretionary decisions if the trial 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.'" ***Id.*** (citation omitted). We generally look for reasons to sustain the trial court's discretionary decisions, *see* ***Loomans v. Milwaukee Mut. Insurance Co.***, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968), and "we may search the record to determine if it supports the court's discretionary decision," ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. Additionally, findings of fact will be affirmed unless clearly erroneous. WIS. STAT. § 805.17(2).

¶17 First, Brian claims that the trial court should have included in the marital estate Lynne's 1995 Dodge Caravan and should have excluded Brian's Toyota from the marital estate because it was purchased prior to the marriage. Next, he argues the duplex should have been valued at $39,347, not $37,430 as reflected in the findings of fact. Finally, he submits the Wisconsin Energy stock, the U.S. bank account, the Tri City checking account and the ING savings account all should have been included in the calculation in determining the equalization payment. Brian is mistaken.

¶18 Lynne testified that the 1995 Dodge Caravan was a gift from her parents in 2005. On cross-examination, she clarified that the car was given to both she and Brian. Lynne testified that her parents paid $500 for the car. During the time the car was in her possession it was stolen and, as a result, when she got it back the car had mechanical problems. Lynne stated that the ignition was broken and the only way to start it was to use a screwdriver. She stated she no longer had the car as her parents gave her a newer car while the divorce was pending. She

testified that she believed the 1995 Dodge Caravan had no value. Brian presented no evidence that would counter Lynne's opinion of the value of this fifteen-year-old car. Although the trial court made no specific reference to this car in its decision, the trial court implicitly found the car to be worthless.

¶19 Brian also disputes the trial court's inclusion of his Toyota valued at $4300 being treated as a marital asset. He submits that the car was purchased before his marriage, so it, like the Iowa State student loans, should have been excluded. First, we note that Brian requested that the student loans be excluded as a liability of the parties. In her closing argument, Brian's attorney told the court: "Mr. Kerhin's position is, yes, student loans incurred prior to the marriage are his." Unlike the student loans, the trial court was not prepared to treat both cars of the parties as separate property. The trial court included Brian's car as marital property and would have, in all likelihood, included the value of Lynne's new car in the equation except for the fact that Lynne's new car was gifted property. Gifted property is properly excluded from the marital estate under WIS. STAT. § 767.61(2)(a)1.; thus, no basis exists to disturb the trial court's decision. Consequently, the trial court's decision was not inconsistent.

¶20 Brian also complains that the trial court did not use the most current mortgage balance when it determined the value of the duplex. At the time of the trial court's original oral decision, the trial court stated that the mortgage balance was "$38,320." However, the findings of fact state: "Petitioner is also credited with her principal payments from April 1, 2008 through the date of divorce in the amount of $890.00 resulting in a net value for the real estate for the purposes of the divorce of $37,430.00 to the Petitioner." The trial court signed the findings and Brian's attorney approved them as to form. This reduction is a reasonable one. On April 22, 2008, the parties entered into several stipulations on the record

which were later reduced to writing. One of the stipulations was that "Petitioner shall be responsible for the payment of her own expenses and the mortgage on the duplex." Given that Lynne was made responsible for the mortgage payment starting in April 2008, it was appropriate to give her credit for the mortgage reduction after this date.

¶21 Next, Brian argues that the "ING Savings Account, the Wisconsin Energy shares, the U.S. Bank Account [and] the Tri City Checking Account … should be included in the calculation of any equalization payment to be made." We first observe that the trial court did include the Wisconsin Energy shares value, which were awarded to Brian, when determining the property equalization payment. Also, we note that the trial court divided the ING savings account giving fifty percent to each party. As to the U.S. Bank checking account, a finding of fact in the judgment of divorce reflects that it was given to Brian and it was "his working account at a nominal value." The Tri City Bank checking account was treated identically; the trial court awarded it to Lynne "as her working account at a nominal value." Given the fact that the trial court took into account the Wisconsin Energy shares in its calculation, that it gave Lynne and Brian half of the ING savings account and determined that their working accounts had nominal values, the trial court did not erroneously exercise its discretion in the division of these assets or in failing to add these amounts to the equalization equation.

C. The trial court properly exercised its discretion when it required Brian to pay a business debt to Lynne and to be responsible for the payment of the U.S. Bank credit card, as well as to pay the interest and penalties on the parties' outstanding income and real estate taxes.

¶22 Brian argues that the trial court erroneously exercised its discretion when it excluded from the marital property "the business loan that [Lynne] made

to the business, the U.S. Bank credit card and the interest and penalties on the parties' income and real estate taxes." (Footnote omitted.)

¶23 First, Brian contends that the trial court erred when it awarded Lynne the $8000 she loaned to Brian's business prior to the marriage. This money came from a trust created by Lynne's grandfather. At the trial, Brian testified that he repaid the loan by making three separate deposits from the business account into the parties' joint account. Lynne testified that she did not consider the loan repaid and the first she knew of any alleged repayment was when Brian opened a package containing expensive shoes which he purchased for himself, and when she asked Brian whether they could afford them, he said: "we have plenty of money I just got [sic], we just repaid ourselves from the loan you made."

¶24 The trial court found Brian's explanation as to the repayment to be "disingenuous," and further found that "his testimony that this loan was repaid is a fiction." This court accepts the trial court's assessment of the credibility of the parties.

¶25 The trial court is the ultimate arbiter of a witness's credibility. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979). Brian's position at trial was that the money was repaid. The trial court disagreed and remarked that even if Brian put the loan proceeds into the joint account from the business account as he claimed he did, "At best he was giving up half the money." Because Brian's position was that he repaid the loan, he never argued that the outstanding loan was an asset of the parties. The trial court found that the $8000 was an outstanding business debt that Brian's company owed to Lynne. The trial court's determination that Brian still owed the money to Lynne was a reasonable one. After all, had Brian borrowed the money for his business

from a bank, he would have had to pay it back. Consequently, the trial court did not err by ordering Brian to repay the loan. In addition, the money was gifted to Lynne; therefore, had she not loaned it to Brian's business, it would have been excluded from the marital estate.

¶26 Next, Brian argues that the trial court unfairly exempted the U.S. Bank credit card debt of approximately $10,000 from the marital estate when it ordered him to pay it. During the trial court's oral decision there was much disagreement between Lynne's and Brian's attorneys as to the origin of that debt and whether it was a marital debt. Ultimately, the trial court concluded that if the purchases were made by Brian after the temporary hearing held on June 18, 2007 (which apparently they were), it was Brian's debt. The trial court explained:

> Then it is all his. It is not marital. If he bought it after June 18th, then it is his. He has got to pay that debt. He is going to get the property. The debt follows the asset. It [is] non-marital. I am making him solely responsible for that debt.

As noted, the trial court awarded Brian all the furniture he purchased with this credit card. The trial court's order was an appropriate exercise of discretion. Brian was warned at the first hearing that any purchases from that day forward were not going to be considered a marital debt. He accrued over $10,000 worth of new debt. The trial court properly ordered him to pay it.

¶27 Finally, Brian submits that the trial court erred when it ordered him to be responsible for the interest and penalties on the parties' overdue income and real estate taxes. The trial court found that the tax liability was a joint liability and ordered Brian and Lynne to split equally both the tax liability and the preparation of the taxes. However, the trial court said that it believed Lynne's claims that she gave all the necessary information to Brian at the end of each tax year, thereby

rejecting Brian's contention that because Lynne never gave him the necessary tax forms, he could not file the taxes. The trial court also found that Brian controlled the finances during the marriage, including the taxes. Because the trial court found that Brian could have paid the taxes but chose not to, the trial court properly exercised its discretion when it ordered Brian to pay any interest and penalties. The trial court reasoned that because Brian handled the finances and he had the paperwork, he could have filed the taxes. We agree.

¶28 The trial court rejected Brian's claim that he was not in charge of the finances during the marriage. Consequently, the trial court found that since he chose not to file the taxes even though for one of the years the parties were due a refund, Brian would be responsible for the consequences of his actions. It would have been unfair to allow Brian to escape having to pay the interest and penalties when he unilaterally decided not to pay the taxes.

¶29 For the reasons stated, the judgment of divorce is affirmed.

By the Court.—Judgment affirmed.

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