

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 19, 2010

A. John Voelker
Acting 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. 2009AP1410

Cir. Ct. No. 2008FA179

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

JEFFREY L. WENSEL,

PETITIONER-APPELLANT,

V.

SHARON A. SUCHLA-WENSEL,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Eau Claire County: WILLIAM M. GABLER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Jeffrey Wensel appeals a judgment of divorce. Jeffrey's principal argument is that the circuit court erroneously exercised its

discretion by ordering an equal property division. Jeffrey contends the court gave undue weight to the fact the parties declined to enter into a prenuptial agreement. Jeffrey also argues the court erred in valuing livestock and requiring a \$1,000 minimum monthly equalization payment to his ex-wife Sharon for the first year. We agree the court insufficiently explained its property division, and therefore reverse and remand on that issue. We affirm on the remaining issues.

¶2 The parties were married on February 3, 2001. Both were married previously. Jeffrey was a dairy farmer and brought a large amount of farm real estate into the marriage. Sharon was a rehabilitation technician. The couple did not have children and each waived maintenance. They stipulated to the value of many assets and debts. The only issues at the final hearing concerned an interest in 57.85 acres, livestock, and a Mondovi Cenex Coop Oil account.¹ In addition, the parties disagreed on whether the facts supported an equal property division.

¶3 The circuit court ordered an equal property division, including assets brought into the marriage. The court valued the dairy cows at \$1,500 per head. The court required Jeffrey pay Sharon a minimum \$1,000 monthly equalization payment for the first year. Jeffrey now appeals.

¶4 The division of property rests within the sound discretion of the circuit court. *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We will sustain a discretionary decision if the 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. *Liddle v. Liddle*, 140

¹ The Cenex account is not at issue on this appeal.

Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). Findings of fact will be affirmed unless clearly erroneous. WIS. STAT. § 805.17(2).² Where there is conflicting testimony, the circuit court is the ultimate arbiter of the credibility of witnesses. *Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979).

¶5 Jeffrey first argues the circuit court erroneously exercised its discretion by failing to explain why it rejected his request to deviate from the presumption of equal division despite the court having made findings of fact that would seem to support an unequal division. Jeffrey also claims the court gave undue weight to the parties' decision to not enter into a prenuptial agreement.

¶6 The circuit court made exhaustive findings of fact. Among other things, the court found that although the marriage could otherwise be considered a marriage of intermediate length, "this really is in the nature of a short-term marriage" because they "lived separate financial lives." The court found substantial assets were brought into the marriage. The court found a lack of contribution of either party to the increase in the value of the assets of the other.

¶7 We do not quarrel with the court's findings of fact. However, despite making findings which would seem to support an unequal division, we are left to wonder why the court ordered an equal property division. Quite simply, the court did not sufficiently articulate the connection between its findings of fact and the equal property division. The court apparently considered significant the fact

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

that the parties declined to enter into a prenuptial agreement. The court concluded:

Jeffrey was not interested in a prenuptial agreement because he believed such an agreement would undermine the trust and confidence that spouses should have in one another. Thus, all of Jeffrey's and Sharon's property is marital property.

¶8 Although reluctance to undermine a marriage may be a proper factor for the court to consider under WIS. STAT. § 767.61(3), the absence of a prenuptial agreement does not necessarily lead to the conclusion that all property of the parties is therefore marital.³ Accordingly, we reverse on the issue of property division and remand for the circuit court to explain the relevance of its findings of fact and how its findings support the property division.

¶9 The parties also dispute whether the court sufficiently considered the factors in WIS. STAT. § 767.61. Jeffrey contends “the court never referenced this statute nor cited any other legal authority for its decision.” Sharon responds that the lack of a prenuptial agreement was not the court's sole deciding factor for equal property division, and the discussion set forth in the court's memorandum decision demonstrates the court considered statutory factors. We cannot discern from the record whether the court sufficiently considered the statutory factors in § 767.61. Upon remand, the record must reflect the court's consideration of the statutory factors.

³ A prenuptial agreement does not classify property; rather, it expresses the parties' wishes regarding how to divide the property. The division of property in a divorce judgment is provided by WIS. STAT. § 767.61. Except for gifts or death transfers, the circuit court presumes an equality of division but may alter such distribution by consideration of various factors. One such factor is stated in § 767.61(3)(L), concerning prenuptial agreements. However, the absence of a prenuptial agreement does not mean property is marital.

¶10 Jeffrey next argues the court erred in the valuation of the dairy cattle. The court's determination of the value of an asset is a finding of fact. *Rodak v. Rodak*, 150 Wis. 2d 624, 633, 442 N.W.2d 489 (Ct. App. 1989). At trial, Jeffrey conceded that in responses to interrogatories he placed a value of \$1,500 a head on the cattle. This valuation is consistent with the valuation later found by the court. Moreover, Jeffrey conceded he had an affirmative duty to supplement his responses to interrogatories. Jeffrey did not supplement his responses prior to testifying at trial that the value of the cattle had decreased substantially. Jeffrey will not now be heard to complain the court erred in its valuation of the cattle.

¶11 Finally, Jeffrey argues the court erred by requiring the \$1,000 monthly minimum equalization payment. The court found Jeffrey retained approximately \$1,000 monthly from his farming operation beyond expenses. The court did not classify this amount as income but, rather, as a surplus from the farm account. The court did not require Jeffrey to immediately begin making payments and no interest accrued on the equalization obligation for one year. The court properly exercised its discretion in requiring the \$1,000 monthly installment.⁴

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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

⁴ Upon remand, the court may in its discretion, but is not required to, revisit the issue of equalization payments.

