

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 26, 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. 2009AP1846**

**Cir. Ct. No. 2008FA47**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**IN RE THE MARRIAGE OF:**

**STEPHEN W. SMITH,**

**PETITIONER-RESPONDENT,**

**V.**

**ANNA A. SMITH,**

**RESPONDENT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Outagamie County: HAROLD V. FROEHLICH, Judge. *Reversed and cause remanded for further proceedings.*

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

¶1 PER CURIAM. Anna Smith appeals from a divorce judgment. She argues the circuit court erroneously exercised its discretion with regard to the

property division and maintenance determinations. We agree and therefore reverse and remand for further proceedings.

¶2 Anna and Stephen Smith were married on December 31, 2001, and divorced December 9, 2008.<sup>1</sup> At the time of the divorce, both parties were approximately fifty-eight years old and in good health. Anna worked part-time at Wal-Mart and Stephen was an electrician.

¶3 At the final hearing, evidence valued the marital home between \$89,900 and \$101,000. The circuit court found its value at the time of divorce \$90,000 subject to a \$10,000 mortgage. The court found the home was “property [Stephen] brought into the marriage, and it’s not going to be divided.” The court also excluded the \$14,177.14 value of Stephen’s pension as of the date of the 2001 marriage, but divided the remaining portion of the pension and a 401K account as marital property. The court further ordered \$75 weekly maintenance until Anna turned sixty-two years of age. Anna now appeals.

¶4 The division of property and the awarding of maintenance 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. All property at divorce except that acquired by gift or inheritance is part of the marital estate and is presumed subject to equal division. *Hokin v. Hokin*, 231 Wis. 2d 184, 191-92, 605 N.W.2d 219 (Ct. App. 1999). The court may alter the equal distribution of property, but only after considering various statutory factors. WIS. STAT. § 767.61(3)(a)-(m).<sup>2</sup> Property

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<sup>1</sup> The parties were previously married to one another from April 21, 1995 through May 23, 2000.

<sup>2</sup> References to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

brought to the marriage is a factor that may allow, but does not compel, a circuit court to deviate from the presumption of equal division in divorce. *See* WIS. STAT. § 767.61(3)(b). Moreover, a court may consider whether divisible property was generated in whole or part by one party's donation of non-divisible property to the marriage. *Schwartz v. Linders*, 145 Wis. 2d 258, 259-63, 426 N.W.2d 97 (Ct. App. 1988). The party alleging property is not subject to division has the burden of showing the property is non-divisible at the time of divorce. *Krejci v. Krejci*, 2003 WI App 160, ¶¶30, 32-33, 266 Wis. 2d 284, 667 N.W.2d 780.

¶5 Anna argues the circuit court erroneously exercised its discretion in the property division regarding the marital home and the pension account. Anna insists these assets, although acquired prior to the marriage, are nonetheless subject to the presumption of equal division. Anna further argues Stephen failed to overcome the presumption of equal division.

¶6 The *LeMere* court emphasized, “The text of [WIS. STAT. § 767.61(3)] now explicitly requires that any deviation from the presumptive equal property division be based upon consideration of all the statutory factors.” *LeMere*, 262 Wis. 2d 426, ¶24. As the court stated:

This is not to say that the circuit court is precluded from giving one statutory factor greater weight than another, or from concluding that some factors may not be applicable at all. Property division in divorce remains a discretionary decision of the circuit court, but the record must at least reflect the court's consideration of all applicable statutory factors before a reviewing court can conclude that the proper legal standard has been applied to overcome the presumptive equal property division under [WIS. STAT. § 767.61(3)]. Circuit courts must subject requests for unequal division of property to the proper statutory rigor. The failure to do so is an erroneous exercise of discretion.

*Id.*, ¶25.

¶7 Here, we find insufficient support in the record for the circuit court’s conclusion that the marital home “was property brought into the marriage, it’s not going to be divided.” The court did not explain its rationale and we cannot determine to what extent it considered any statutory factors in reaching an unequal distribution regarding the marital home. We therefore conclude the court erroneously exercised its discretion regarding property division. We reverse and remand for further proceedings. Upon remand, the court in its discretion may determine that it is appropriate to deviate from the presumption of equal division, but it must do so by application of the proper legal standard.

¶8 Anna also contends the court “misapplied the law in not dividing the full value of Stephen’s retirement accounts ....” Anna argues Stephen failed to present evidence as to the value of the accounts “at the time the parties were first married in 1995.” Anna insists the circuit court was “required to include not only the present marriage of the parties between 2001 and 2009 but also the prior marriage between the parties from 1995 to 2000.” Anna is incorrect. When parties have been married to one another more than once, the circuit court may in its discretion, but is not required to, look at the total number of years of the marriage. *Wolski v. Wolski*, 210 Wis. 2d 183, 192, 565 N.W.2d 196 (Ct. App. 1997). Here, the circuit court appears to have considered only the time period of the second marriage between the parties, but it failed to provide a rationale for doing so. This need not be a lengthy process, but reasons must be stated. Upon remand, the circuit court shall therefore also revisit the issue of the division of the retirement accounts.

¶9 Anna also argues the circuit court erroneously exercised its discretion in awarding maintenance. She contends the court failed to adequately consider the support and fairness objectives of maintenance. Anna also insists the

court “paid lip service to the statutory factors ....” We conclude that although the court mentioned statutory factors, including the parties’ ages and the disparity in income, the court inadequately explained the connection between those factors and its award of \$75 per week to age sixty-two. Nor can we determine to what extent the court’s decision on maintenance considered the “twin goals” of maintenance: support and fairness. *See LeMere*, 262 Wis. 2d 426, ¶32. Accordingly, upon remand the court shall revisit the amount and duration, if any, to be awarded in maintenance.

*By the Court.*—Judgment reversed and cause remanded for further proceedings.

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

