

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 28, 2003**

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. 02-2339  
STATE OF WISCONSIN**

**Cir. Ct. No. 00-FA-1023**

**IN COURT OF APPEALS  
DISTRICT II**

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**IN RE THE MARRIAGE OF:**

**MARION KAY SMITH,**

**PETITIONER-RESPONDENT,**

**V.**

**ROBERT JOSEPH SMITH,**

**RESPONDENT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Kenosha County:  
BARBARA A. KLUKA, Judge. *Affirmed.*

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

¶1 PER CURIAM. Robert Joseph Smith appeals from the portions of the judgment of divorce which divided property and awarded maintenance to him and against Marion Kay Smith. Robert argues that the circuit court did not

support its decision to divide the property unequally and that it erred when it set the maintenance award. We conclude that the circuit court properly divided the property between the parties and that the evidence supports the court's maintenance award. Therefore, we affirm.

¶2 Robert and Marion were married for thirty-seven years. Generally, such a long-term marriage calls for an equal division of the marital property. *See* WIS. STAT. § 767.255(3) (2001-02).<sup>1</sup> A circuit court may deviate from an equal division, however, based on any of the statutorily enumerated factors, including the catchall provision “[s]uch other factors as the court may in each individual case determine to be relevant.” Sec. 767.255(3)(m). The division of the marital estate lies within the sound discretion of the trial court. *Trieschmann v. Trieschmann*, 178 Wis. 2d 538, 541, 504 N.W.2d 433 (Ct. App. 1993).

¶3 The circuit court relied on the catchall provision in deviating from the requirement to divide the property equally. The court awarded \$448,446.50 in assets to Marion and \$305,701.17 in assets to Robert. The court found that Robert had withdrawn \$40,000 from a business account to invest in the year before the divorce without Marion's knowledge, and over the course of the marriage Robert had lost at least \$100,000 gambling.

¶4 Robert argues that the court erred when it divided the property unequally because his alleged gambling debts were too far removed in time from the divorce, and there was too little evidence to support the figure of \$100,000. We disagree. In determining each party's contribution to the marriage, the circuit

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

court may consider a party's waste of assets by actions such as excessive gambling. *Anstutz v. Anstutz*, 112 Wis. 2d 10, 12, 331 N.W.2d 844 (Ct. App. 1983). It was appropriate, therefore, for the court to consider the loss of money from gambling.

¶5 Robert asserts that evidence did not support the circuit court's determination that his gambling losses amounted to \$100,000. The record, however, supports the court's determination. Robert and Marion's son, Jeffrey, who worked with Robert in the car sales business, testified that Robert had accumulated over \$100,000 in gambling debts during the years 1986-95. He testified that he had seen his father fill out betting sheets and had heard him place bets over the telephone. He further testified that he had paid off the gambling debts for his father, sometimes with his own money and other times through the business account. Robert counters that at another point in his testimony Jeffrey stated that he had paid off both business and gambling debts. He further asserts that there was not any other evidence that the gambling debt amounted to \$100,000. The record shows, however, that Jeffrey also testified that he knew the debt was from gambling.

¶6 To the extent that Jeffrey's testimony may have been inconsistent, it is the circuit court's role to assess the weight and credibility of Jeffrey's testimony. "The rule in Wisconsin is that the [fact finder], as the ultimate arbiter of credibility, has the power to accept one portion of a witness' testimony, reject another portion, and assign historical facts based upon both portions." *O'Connell v. Schrader*, 145 Wis. 2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988) (citation omitted). It was the circuit court's responsibility to assess this testimony and to determine whether Robert had wasted \$100,000 on gambling. The court made this finding and the record supports it.

¶7 Robert also argues that even if the evidence does establish that he wasted \$100,000 gambling, this is not a significant amount when spread over a thirty-seven year marriage. The fact remains, however, that if Robert had not lost this money gambling, the money would have increased the marital estate over that same time. While \$100,000 may not seem to be a significant amount to Robert, it is to most people and certainly was to the circuit court. Further, we are not persuaded by Robert's argument that the debt goes too far back in time. He cites no cases in support of this argument and we see no logical reason why it should make a difference when the assets were wasted. The waste resulted in a loss to the marital estate and the circuit court is entitled to consider that history.

¶8 Robert also argues that gambling is no different than spending money for things such as cigarettes. We again disagree. When a person spends money on a pack of cigarettes he or she ends up with something in return—a pack of cigarettes. Gambling carries no such guarantee. It represents a practice that is uniquely and inherently risky, and more often than not, results in losses rather than winnings. We similarly are not persuaded by Robert's argument that his gambling was not intentional conduct. While we recognize that gambling can be compulsive and a disease in some situations, Robert has made no such argument here. Gambling is self-evidently intentional conduct. We conclude that the circuit court did not erroneously exercise its discretion when it considered Robert's gambling losses in dividing the marital estate.

¶9 Robert also asserts that the circuit court penalized him for making a bad investment decision. The court charged him with a withdrawal of \$40,000 that he made from a joint account within one year of the divorce. Robert eventually lost the money in the stock market. The reason the court charged him with this loss, however, was in part because he made the investment without

Marion's knowledge. As the court noted, this was a substantial sum of money to risk without Marion's knowledge. We again see no misuse of discretion by the circuit court in considering this lost investment.

¶10 Robert also contends that the circuit court overvalued the amount of money in a business checking account at Firstar. Robert argues that his testimony established the value of this account at a lesser amount. The court, however, relied on Robert's valuation of this account in his financial disclosure statement. It was for the court to determine the weight and credibility of the evidence and decide what value to place on this account. We see no misuse of discretion by the court.

¶11 We conclude that the circuit court properly exercised its discretion when it considered Robert's waste of assets through gambling and other actions. The court properly considered the factors and supported its decision not to divide the property equally.

¶12 Robert also argues that the court erred when it awarded him maintenance. The amount and duration of maintenance awards rests within the sound discretion of the trial court and will not be disturbed absent an erroneous exercise of that discretion. *LaRocque v. LaRocque*, 139 Wis. 2d 23, 27, 406 N.W.2d 736 (1987). An erroneous exercise of discretion occurs when "the trial court has failed to consider the proper factors, has based the award upon a factual error, or when the award itself was, under the circumstances, either excessive or inadequate." *DeLaMatter v. DeLaMatter*, 151 Wis. 2d 576, 582-83, 445 N.W.2d 676 (Ct. App. 1989).

¶13 First, Robert argues that the court erroneously exercised its discretion when it found that Marion's income was \$61,212 per year.

The trial court's findings of fact are reviewed under a clearly erroneous standard. Under this standard, even though the evidence would permit a contrary finding, findings of fact will be affirmed on appeal as long as the evidence would permit a reasonable person to make the finding. To command reversal, the evidence supporting a contrary finding must constitute the great weight and clear preponderance of the evidence.

*Sellers v. Sellers*, 201 Wis. 2d 578, 586, 549 N.W.2d 481 (Ct. App. 1996) (citations omitted).

¶14 Marion's financial disclosure statement supports the circuit court's finding that her income was \$61,212. To the extent that this figure varies from the statement of her gross income on her W-2 form, it was the court's responsibility to determine the actual amount of her income. Based on the evidence in the record, we cannot conclude that this finding was clearly erroneous. The court, therefore, did not erroneously exercise its discretion when it determined the amount of Marion's income.

¶15 Robert also argues that the court did not give appropriate weight to fairness and support components of maintenance. See *LaRocque*, 139 Wis. 2d at 32-33. His argument, however, is based on his first argument that the court erred when it determined Marion's income. Further, contrary to Robert's argument, the court's award is reasonable and based on the facts in the record. We conclude that the court did not erroneously exercise its discretion when it determined the amount of maintenance to be awarded to Robert. For the reasons stated, we affirm the judgment of the circuit court.

*By the Court.*—Judgment affirmed.

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

