COURT OF APPEALS
DECISION
DATED AND FILED

November 10, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP3064 **Cir. Ct. No. 2008FA10**

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

IN RE THE MARRIAGE OF:

MARGARET JENNY KONLOCK, P/K/A MARGARET JENNY KNEPFEL,

PETITIONER-RESPONDENT,

V.

BRUCE ALAN KNEPFEL,

RESPONDENT-APPELLANT.

APPEAL from judgment of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed.*

Before Neubauer, P.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Bruce A. Knepfel appeals from the property division and maintenance components of the judgment of divorce from the former

Margaret J. Knepfel, now Margaret J. Konlock. He contends that the trial court erroneously: (1) failed to determine that Margaret committed marital waste; (2) considered his pension at its present value as a property asset; and (3) held maintenance open rather than making an award in his favor. We disagree, and affirm the trial court's thorough and well-reasoned decision.

¶2 Bruce and Margaret married in 1984. The two children born of the marriage are emancipated. Margaret moved out of the marital residence in October 2007 and filed for divorce in January 2008.

¶3 The evidence showed that the parties led separate financial lives since 1992. Each maintained separate bank accounts, although Bruce's were nominally joint accounts. Bruce paid the mortgage and insurance and Margaret paid for basically everything else.[1] They reimbursed each other for items one purchased for the other. For example, Margaret testified that if she "picked up his insulin and it cost[] $30, I'd tell him that he owes me $30…. If he bought a part for my car and it cost[] $40, he would tell me I owed him $40." They lived according to their contrasting financial philosophies: Bruce spent money as it came in; Margaret considered saving important. Margaret testified that it "was kind of a marriage of convenience. He did what he wanted with his money. I did what I wanted with my money." Neither consulted with nor accounted to the other for their outlays.

¶4 Margaret worked at various jobs throughout the marriage and as a laborer at the Kohler Company since 1997. Bruce retired as a laborer from Kohler

[1] The parties did not provide the court an exact breakdown of their respective expenditures. Bruce testified that the mortgage was paid off in October 2007.

in 1999 and received a Social Security disability determination due to myriad significant health problems stemming from Type-1 diabetes. He opted to receive his pension payments as a single-life annuity. The court found that Margaret's net monthly income was $2537 and that Bruce's monthly income, consisting of his pension, disability payments and Social Security, was approximately $2329.

¶5 At the time of trial, Bruce was fifty years old; Margaret was forty-eight. The main issues related to property division and maintenance. The court concluded that it would not include in the marital estate funds Margaret withdrew from her various bank accounts after she moved out, that Bruce's Kohler pension should be treated as divisible property at its present value and that, rather than granting Bruce maintenance as he had requested, maintenance would be held open indefinitely. Bruce appeals.

¶6 The first two issues relate to property division. At divorce, all property not acquired by gift or inheritance is part of the marital state and is presumed subject to equal division. ***Hokin v. Hokin***, 231 Wis. 2d 184, 191-92, 605 N.W.2d 219 (Ct. App. 1999); *see also* WIS. STAT. § 767.61(3) (2007-08).[2] The court may alter the equal distribution after considering various factors. ***Hokin***, 231 Wis. 2d at 193; § 767.61(3)(a)-(m). Property division is a matter within the sound discretion of the trial court and we will uphold its decision if the court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion a reasonable judge could reach. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We accept the trial court's findings of fact if not clearly erroneous. WIS. STAT.

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

§ 805.17(2). Whether property is subject to division involves the application of a statute to uncontested facts and thus presents a question of law that we review independently. ***Waln v. Waln***, 2005 WI App 54, ¶7, 280 Wis. 2d 253, 694 N.W.2d 452.

¶7 Bruce first contends the trial court should have included in the marital estate money that Margaret withdrew from various Kohler Credit Union accounts in the year before the divorce. Asserting that the withdrawals were made without his knowledge and that Margaret could not precisely account for how it all was spent, Bruce argues that the court should have deemed Margaret to have committed waste against the marital estate.

¶8 The trial court may deviate from the presumed equal division of property after considering other factors. WIS. STAT. § 767.61(3). In particular, it may consider each party's contribution to the marriage, § 767.61(3)(d), and, more particularly, "each party's efforts to preserve marital assets." *See* ***Covelli v. Covelli***, 2006 WI App 121, ¶29, 293 Wis. 2d 707, 718 N.W.2d 260 (citation omitted). Assets that would have been in the marital estate but for a party's waste are rebuttably presumed to be subject to equal division. WIS. STAT. § 767.63. The court may include the value of such assets in the marital estate. ***Noble v. Noble***, 2005 WI App 227, ¶18, 287 Wis. 2d 699, 706 N.W.2d 166.

¶9 Based on the testimony and financial exhibits admitted into evidence, the court found that between November 2006 and January 2008 Margaret withdrew approximately $80,000 from her various Kohler Credit Union accounts. It found that she purchased a vehicle for $29,000, moved $13,050 to an account at another credit union and was able to substantiate approximately $29,000 in other expenditures. The court also noted that some disbursements were

not precisely explained and that Margaret acknowledged "spending as she had never before." She testified that she spent money stocking the marital home before she left, such that "[Bruce] probably did not have to buy groceries for two or three years." The evidence also showed that Bruce changed the locks after Margaret left. She testified that was unable to retrieve household items, "not even … [a] bottle of bleach" and had to buy furnishings and supplies for her apartment.

¶10 The court found it significant that the parties led separate financial lives for two-thirds of their marriage. They acknowledged living according to divergent economic credos and acting unilaterally. The court took note of two particular examples of the parties' unique financial relationship. The first was Bruce's choice at retirement of a single-life annuity rather than an option that would have provided support for his family in the event of his death. The second was the withdrawal Margaret made from her account to purchase a car from Bruce which she then gave to their son. The court determined that the parties understood all along that they operated the financial aspects of their atypical marital relationship separately and independently.

¶11 This case is similar to ***Schmitt v. Schmitt***, 2001 WI App 78, 242 Wis. 2d 565, 626 N.W.2d 14. There, when Arnold and Kathleen divorced after thirty-eight years, Arnold sought approximately $2500 monthly maintenance. ***Id.***, ¶¶2, 11. Although residing in the same house, the parties "lived basically separate lives" for about fifteen years, and "came and went as they saw fit." ***Id.***, ¶13. In examining the WIS. STAT. § 767.26 (1999-2000) factors to make its maintenance determination, the court gave most weight to subsec. (10), which allowed consideration of "such other factors as the court may in each individual case determine to be relevant." ***Schmitt***, 242 Wis. 2d 565, ¶¶16, 18. It discounted the

length of the marriage due to the parties' arrangement and awarded the husband $500 a month for three years. ***Id.***, ¶11. We found no error. ***Id.***, ¶¶17-18.

¶12 Although ***Schmitt*** involved the maintenance statute, the property division statute contains the identical catchall provision. *See* WIS. STAT. § 767.61(3)(m). This broad catchall provision exemplifies the flexibility a trial court has in fashioning an equitable remedy. ***Schmitt***, 242 Wis. 2d 565, ¶18. We agree with the trial court that the rationale of ***Schmitt*** also applies here to Bruce's and Margaret's separate financial lives. The court concluded that Margaret did not unjustifiably deplete marital assets. In other words, it implicitly determined that she satisfactorily rebutted the presumption that the imprecisely accounted-for withdrawals in the year before the divorce were subject to division under WIS. STAT. § 767.61. *See* WIS. STAT. § 767.63. The court's findings are not clearly erroneous, and we see no erroneous exercise of discretion.

¶13 The second property division issue involves Bruce's pension. The trial court included both parties' pensions and Margaret's 401k plan in the marital estate. Bruce contends that the inclusion of his pension at its present value is unnecessarily speculative. He argues that the court instead should have valued his pension by determining a fixed percentage of future payments to Margaret.

¶14 A pension interest is very difficult to value, which is why circuit courts retain such broad discretion in that complex task. ***Olski v. Olski***, 197 Wis. 2d 237, 248-49, 540 N.W.2d 412 (1995). One valuation method is not necessarily better than any other. *See* ***Steinke v. Steinke***, 126 Wis. 2d 372, 384-85, 376 N.W.2d 839 (1985). The court here used a recognized valuation method that involves a series of discounting calculations to arrive at the present value of the pensioned spouse's retirement benefits. *See* ***id.***

¶15 Certified public accountant Todd Mueller, Margaret's expert, testified that the present value of Bruce's pension was $90,477. The trial court observed that Mueller assumed certain facts that may or may not prove to be accurate. For example, Mueller relied on actuarial tables to calculate that Bruce's life expectancy was approximately twenty-eight more years and anticipated no tax consequence to Bruce's receipt of the pension. Bruce opined that he does not believe he will live to the actuarial life expectancy but he offered no medical testimony in that regard or evidence of an alternative valuation.

¶16 The trial court concluded that Bruce's decision to elect the single-life annuity option "and other facts and circumstances" made it appropriate to consider his pension as a property item at the present value Mueller put forth. As fact finder, the court was not bound to accept Mueller's opinion, even if it was uncontradicted. *See* ***Krueger v. Tappan Co.***, 104 Wis. 2d 199, 203, 311 N.W.2d 219 (Ct. App. 1981). Had the court rejected Mueller's opinion, there was no other evidence from which it could determine the pension's present value. Since properly valuing pension rights is a "complex task" and since Bruce offered no evidence disputing Margaret's evidence of the present value of those rights, we will not fault the trial court for accepting the evidence before it. We see no erroneous exercise of discretion.

¶17 The last issue is whether the trial court erred in holding maintenance open without a present order to either party. Bruce argues the refusal to award him maintenance results in an inequitable budget shortfall and was based on considerations not in the record, such as that he could supplement his income by repairing vehicles. We are not persuaded.

¶18 The amount and duration of a maintenance award are matters within the trial court's sound discretion. ***King v. King***, 224 Wis. 2d 235, 247, 590 N.W.2d 480 (1999). A court may hold open a final maintenance determination until a future date if it provides appropriate and legally sound reasons, based on the facts of record, for doing so. ***Grace v. Grace***, 195 Wis. 2d 153, 158, 536 N.W.2d 109 (Ct. App. 1995). The explanations here were satisfactory.

¶19 The parties provided the court little information as to their respective lifestyles during the marriage or the costs to maintain them. Still, the court endeavored to pay close heed to the WIS. STAT. § 767.56 factors and the support and fairness objectives. *See* ***LaRocque v. LaRocque***, 139 Wis. 2d 23, 32-33, 406 N.W.2d 736 (1987). It examined the parties' earning capacities, what expenses it provided and tax considerations. It noted that Margaret's employment and Bruce's retirement led to an income disparity between the two, so that it awarded Bruce significantly more of the marital estate. One purpose in holding maintenance open was to see whether, despite Bruce's significant health issues, his interest in and aptitude for mechanics could become a viable source of income. Bruce's testimony that he buys and sells vehicles, at times profitably, and has done mechanic work for friends allowed the court to reasonably draw that inference.

¶20 Here, again, the court observed that the parties' unique and long-term marital arrangement was an "other factor[]" relevant to its maintenance decision. *See* ***Schmitt***, 242 Wis. 2d 565, ¶18; *see also* WIS. STAT. § 767.56(10). It is for the trial court to determine the weight to be given a particular factor. *See* ***Schmitt***, 242 Wis. 2d 565, ¶18. The unequal property division, coupled with the parties' marital arrangement, supported the court's conclusion.

By the Court.—Judgment affirmed.

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