COURT OF APPEALS
DECISION
DATED AND FILED

June 5, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2692 **Cir. Ct. No. 01-FA-290**

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

IN RE THE MARRIAGE OF:

BRIAN SCOTT HALL,

PETITIONER-RESPONDENT,

V.

SUK-HEE SARAH HALL,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed*.

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Suk-Hee Hall appeals the property division component of her judgment of divorce from Brian Hall. Suk-Hee claims the trial court erroneously exercised its discretion by ordering her to reimburse Brian for

attorney fees incurred during the marriage, by admitting prior bad act evidence from her ex-husband, by valuing Brian's retirement fund at the date the petition was filed rather than the date of the divorce, and by failing to offset the difference in appreciation between the parties' two homes from the equalization payment. We conclude that most of the trial court's decisions were within its discretion and that any errors it may have made were harmless. Accordingly, we affirm.

STANDARD OF REVIEW

¶2 The valuation and division of the marital estate are both within the sound discretion of the circuit court. ***Long v. Long***, 196 Wis. 2d 691, 695, 539 N.W.2d 462 (Ct. App. 1995). Therefore, we will affirm a property division if it represents a rational decision based on the application of the correct legal standards to the facts of record. ***Id***.

DISCUSSION

¶3 Brian and Suk-Hee were married on June 26, 1999 and divorced on August 27, 2002. They had no children together. The facts relevant to each issue raised will be set forth as necessary below.

Attorney Fees

¶4 During the marriage, Suk-Hee was charged with physical abuse of her son and hired an attorney to represent her. The total cost of the attorney's representation was $6,807.35, of which $1,307.35 remained unpaid at the time of the divorce.

¶5 The trial court decided that the attorney's bill was not a marital debt because it arose from a deliberate and intentional act by Suk-Hee that was not

related to the marriage. It ordered the paid portion of the bill to be treated as an advance distribution to Suk-Hee and the outstanding bill to be paid by her. Suk-Hee argues that this was error because debts incurred during the marriage are presumed to be marital obligations under WIS. STAT. § 766.55(1) and (2)(b) (2001-02),[1] and also because the greater part of the debt was no longer in existence by the time of the divorce.

¶6 Brian counters that the attorney's bill could be analogized to an obligation incurred as the result of a tort committed by one of the spouses during the marriage, which is a non-marital obligation under WIS. STAT. § 766.55(2)(cm). Alternately, he suggests that the bill could be considered under the waste doctrine as an unjustified depletion of marital assets by one spouse, warranting deviation from an equal property division under WIS. STAT. § 767.255(3). *See* ***Anstutz v. Anstutz***, 112 Wis. 2d 10, 12-13, 331 N.W.2d 844 (Ct. App. 1983) (concluding that the court's statutory authority to consider the contributions of each party to the marriage under WIS. STAT. § 766.55(3) includes negative contributions, and thus allows application of the waste doctrine).

¶7 We agree with Brian's second contention that, even if the attorney's bill was properly classified as a marital obligation under WIS. STAT. § 766.55, the trial court could properly have deducted the amount of the bill from Suk-Hee's share of the marital estate based on its view that the bill resulted from a unilateral act on Suk-Hee's part which did not further any marital objective and resulted in depletion of marital resources. That is to say, the trial court could properly have

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

considered the attorney's bill as a negative contribution to the marriage by Suk-Hee under WIS. STAT. § 767.255(3)(d). Because our review of the transcripts persuades us that this is the sort of equitable result the trial court was attempting to achieve, we will affirm its decision even though it did not cite the correct statute. *See* ***State v. Gray***, 225 Wis. 2d 39, 51, 590 N.W.2d 918 (1999) (Even if the trial court has relied upon the wrong rationale, we may affirm the decision if we can determine for ourselves that the facts of record provide a basis for the trial court's decision.).

Prior Bad Act Evidence

¶8 At the divorce hearing, Brian introduced testimony from Suk-Hee's former husband that Suk-Hee had destroyed certain items during her divorce from the former husband, rather than allowing the former husband to have them. The purpose of the evidence was apparently to support Brian's claim that Suk-Hee had also destroyed about $4,470 worth of Brian's personal property out of spite. Suk-Hee objected to the testimony as prior bad act evidence, but the trial court allowed it.

¶9 We agree with Suk-Hee that her former husband's testimony was prior bad act evidence offered to show propensity and should have been excluded. We are satisfied, however, that even without the evidence, the trial court still would have found that Suk-Hee had destroyed some of Brian's property based on Brian's testimony and that of a neighbor who observed Suk-Hee and two men remove several boxes from the marital residence during the pendancy of the divorce. We are further satisfied that the trial court's negative view of Suk-Hee's credibility was based on considerably more than just the former husband's testimony. We therefore conclude that the admission of the former husband's

testimony was harmless error, and will uphold the trial court decision to subtract the value of Brian's missing items from Suk-Hee's share of the marital estate.

Valuation of the Retirement Fund

¶10 Brian had two retirement funds, only one of which is at issue on appeal. Brian established by requests for admissions that the Retirement and Security Program had a present value of a future benefit (PVAB) of $52,694.37 on the date of marriage and a PVAB of $62,855.82 shortly after the commencement of the divorce. Those figures were documented by Brian's employer.

¶11 At the divorce hearing, Brian testified that the PVAB of the Retirement and Security Program account was worth about $24,000 more than it had been at the start of the marriage. He also said, however, that the pension had never before increased that significantly in a given year, and that the drastic change was due in part to a change in the way the lump sum payment was calculated, as well as to market conditions and interest rates.

¶12 The trial court ended up using the figures from shortly after the divorce petition was filed. It is true that marital assets are generally to be valued as they exist at the date of the divorce. ***Sommerfield v. Sommerfield***, 154 Wis. 2d 840, 851, 454 N.W.2d 55 (Ct. App. 1990). Here, however, the trial court adopted the earlier figures for both retirement accounts because it considered them to be the most reliable. We are satisfied that the trial court could properly take into account the dramatic fluctuations of the pension accounts as well as the change in the method of valuing the account when considering the reliability of various figures before it. Indeed, the trial court was in the position of having to compare apples and oranges, and was not required to calculate the marital appreciation of Brian's retirement account by subtracting a date of marriage valuation produced

under one method of calculation from a date of divorce valuation produced by a different method of calculation. Given the evidence before it, we see no misuse of discretion in the trial court's decision to include in the marital estate $10,161.45 of increased value in the Retirement and Security Program account.

Appreciation of the Houses

¶13 Brian brought into the marriage a house that was valued at $61,100 at the time of the marriage and $68,200 at the time of the divorce, resulting in $7,100 in marital appreciation. Suk-Hee brought into the marriage a house that she had purchased for $46,500 the year before the marriage that was sold eleven months into the marriage for $54,500. There was no evidence as to what percentage of the $8,000 appreciation in Suk-Hee's house occurred prior to the marriage and which part occurred during the marriage, although Suk-Hee claims a proportional distribution would result in $4,631.59 of marital appreciation. The proceeds from Suk-Hee's house were used as a down payment on a marital residence. The trial court assigned Brian the house he had brought into the marriage and assigned Suk-Hee the entire amount of her down payment, each as individual property. It also awarded the marital residence to Suk-Hee, requiring an offset on the marital property. Suk-Hee claims the trial court should have reduced the offset by half of the amount that Brian's house had appreciated during the marriage, minus her proportional estimate of the marital appreciation on the house which she had sold—that is, by $1,234.21.

¶14 We are not persuaded, however, that the trial court was required to accept Suk-Hee's speculative estimate as to what proportion of the appreciation on her house was marital in nature. Given the lack of proof on this issue and the relatively small amount of difference given the total value of the houses, the trial

court's decision to call the appreciation on the houses Brian and Suk-Hee had brought into the marriage a wash was a reasonable exercise of discretion.

By the Court.—Judgment affirmed.

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