

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 13, 2011**

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. 2010AP2195-FT**

**Cir. Ct. No. 2009FA202**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN RE THE MARRIAGE OF:**

**SUSAN MARIE MILLER,**

**PETITIONER-RESPONDENT,**

**V.**

**GERALD JOSEPH MILLER,**

**RESPONDENT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Dane County:  
MARYANN SUMI, Judge. *Affirmed.*

Before Vergeront, P.J., Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. Gerald Joseph Miller appeals a divorce judgment granting an unequal division of marital property in favor of Susan Marie Miller.<sup>1</sup> Gerald contends that the circuit court erroneously exercised its discretion by failing to explain its reasoning, failing to consider the required statutory factors before deviating from an equal property division, and relying on factual findings unsupported by the record. We conclude that the record supports the court's property division as a proper exercise of discretion, and affirm.

### *Background*

¶2 Gerald and Susan were married in October 2002. Susan filed for divorce in January 2009. The parties reached a partial marital settlement agreement, but disputed the equalization payment due upon division of property and responsibility for attorney fees. Susan and Gerald both testified at trial on the disputed issues.

¶3 The court assigned the following assets to Gerald: a home with an equity value of \$319,000; commercial property with an equity value of \$58,216; bank accounts with a balance of \$42,793; automobiles with a total value of \$15,038; and personal items valued at \$30,000; for a total value of \$465,047. The court assigned the following assets to Susan: retirement accounts valued at \$153,631, excluding their combined premarital balance of \$316,548; a bank account with a balance of \$6,761; stocks and bonds valued at \$287; and an automobile valued at \$7,825; for a total value of \$168,504. The court assigned \$14,536 in liabilities to Gerald, reducing the value of his portion of the marital

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<sup>1</sup> Because the parties share a surname, we will refer to them by their first names.

estate to \$450,511, and assigned \$2,425 in liabilities to Susan, thus valuing her portion of the estate at \$166,079. Accordingly, the court valued the divisible marital estate at \$616,590. It ordered Gerald to pay Susan \$142,216 as an equalization payment, so that each party would receive a value of \$308,295. The court also determined that each party would pay his or her own attorney fees. Gerald appeals.

### *Standard of Review*

¶4 We review a circuit court’s division of marital property on divorce for an erroneous exercise of discretion. *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. “A circuit court’s discretionary decision is upheld as long as 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.” *Id.* (citation omitted).

### *Discussion*

¶5 Gerald argues that the circuit court erroneously exercised its discretion in ordering Gerald to pay Susan an equalization payment of \$142,216. He contends that the court deviated from the presumption of an equal division of marital property by excluding the substantial premarital value of Susan’s retirement accounts from the divisible estate, while not similarly excluding the property Gerald brought to the marriage, including his commercial property and personal items. Gerald contends that the court failed to expressly consider the factors enumerated in WIS. STAT. § 767.61(3) (2007-08)<sup>2</sup> before deviating from an

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

equal division of property, as mandated under *LeMere*. He contests the basis for doubts expressed by the court regarding Gerald's credibility. He asserts that the court did not sufficiently explain why it deemed Gerald less credible than Susan, particularly since the court adopted some of Gerald's testimony in its findings. Finally, Gerald contests the court's factual findings that there was insufficient evidence to support Gerald's assertion that he paid the balance of the mortgage on the marital home, and that Gerald did not prove that he did not take his \$5,000 advance under a temporary order.

¶6 Susan responds that the circuit court's written findings of fact and conclusions of law reflect that the court considered the required statutory factors before deviating from the presumption of an equal division of property. She also asserts that the court was entitled to make credibility determinations, and that its factual findings were supported by the record. We agree, and discern no erroneous exercise of the court's discretion in the property division.

¶7 Under WIS. STAT. § 767.61(3), a circuit court must consider the following factors before deviating from an equal division of marital property:

- (a) The length of the marriage.
- (b) The property brought to the marriage by each party.
- (c) Whether one of the parties has substantial assets not subject to division by the court.
- (d) The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.
- (e) The age and physical and emotional health of the parties.
- (f) The contribution by one party to the education, training or increased earning power of the other.

(g) The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.

(h) The desirability of awarding the family home or the right to live therein for a reasonable period to the party having physical placement for the greater period of time.

(i) The amount and duration of an order under s. 767.56 granting maintenance payments to either party, any order for periodic family support payments under s. 767.531 and whether the property division is in lieu of such payments.

(j) Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.

(k) The tax consequences to each party.

(L) Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable as to either party. The court shall presume any such agreement to be equitable as to both parties.

(m) Such other factors as the court may in each individual case determine to be relevant.

In order to establish a proper exercise of discretion in awarding an unequal division of property, “the record must at least reflect the court’s consideration of all applicable statutory factors .... 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.” *LeMere*, 262 Wis. 2d 426, ¶25.

¶8 In this case, the court, in its “Findings of Fact and Conclusions of Law,” considered that: the marriage was relatively short; each party brought

assets to the marriage, but the record was unclear as to the value of assets Gerald brought to the marriage; Susan had assets not subject to division, which she would need to support herself after the divorce; the parties shared household expenses to different degrees over the years, and Susan contributed uncompensated work and \$50,000 to a business operated out of Gerald's commercial property; at the time of divorce, Gerald was 67 and retired, and Susan was 60 and planning to retire at 62; Gerald receives \$5,028 in monthly income and Susan receives \$1,365.43; and the parties had entered into an agreement as to division of property and waiving maintenance. *See* WIS. STAT. §§ 767.61(3)(a), (b), (c), (d), (e), (g), (i), (L). Thus, the court considered the relevant statutory factors. The following factors each supported the court's decision to award an unequal division of property: Gerald's greater monthly income, the parties' agreement to waive maintenance, the unclear value of Gerald's premarital assets, and Susan's significant contribution of uncompensated work and cash to a business located in Gerald's commercial property.

¶9 Turning to Gerald's request that we conclude that the circuit court should have deemed all of Gerald's testimony credible, Gerald has not provided adequate grounds for this request. As Gerald points out, the court did not find Gerald's testimony patently incredible, and did rely on parts of Gerald's testimony in its findings. However, this does not preclude the court from finding that not all of Gerald's testimony was credible. When the court is the trier of fact, it is the ultimate arbiter of the credibility of witnesses. *See Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979). We do not agree with Gerald that the court was required to explain explicitly why it deemed some of Susan's testimony more credible than Gerald's, and he provides no basis to disturb the court's finding that parts of Gerald's testimony were not credible.

¶10 Finally, we reject Gerald’s argument that the record does not support the circuit court’s factual findings. See *Royster-Clark, Inc. v. Olsen’s Mill, Inc.*, 2006 WI 46, ¶11, 290 Wis. 2d 264, 714 N.W.2d 530 (we will “defer[] to the circuit court’s findings of fact unless they are unsupported by the record and are, therefore, clearly erroneous”). Gerald argues that the court erred in finding that there was insufficient evidence that Gerald paid the balance of the mortgage on the marital home, because both parties testified that Gerald used his own funds to pay off the balance of the mortgage on the home. However, the record supports the court’s finding that “[a]lthough [Gerald] may have paid off the mortgage in 2001, no documentation was presented to the Court to substantiate the mortgage pay off.” While the parties both testified Gerald paid off the mortgage on their home, their testimony as to the amount differed: Susan testified that Gerald put between \$180,000 and \$200,000 toward the house, and Gerald testified that he put \$444,886 towards the house. Gerald does not identify any documentation presented to the court to support a mortgage pay-off amount by Gerald. On this record, the court’s finding that the evidence as to the mortgage pay-off was insufficient is not clearly erroneous.

¶11 Similarly, Gerald contends that the court’s finding that Gerald received the \$5,000 advance authorized under the temporary order was clearly erroneous because he testified that he did not take the advance, and there was no contradictory evidence in the record. However, Gerald admitted on cross-examination that he had access to the account from which he was authorized to draw \$5,000 under the temporary order, that he used that account, and that it was impossible for him to determine whether or not he had actually drawn the authorized \$5,000. We therefore discern no error in the court’s finding that Gerald did not prove that he did not take his \$5,000 advance under the temporary order.

Accordingly, because the record supports the court's exercise of discretion in dividing the marital estate, we affirm.

*By the Court.*—Judgment affirmed.

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



