COURT OF APPEALS
DECISION
DATED AND FILED

February 9, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0937 **Cir. Ct. No. 02FA000206**

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

IN RE THE MARRIAGE OF:

JONAS DOYLE CARTER,

PETITIONER-APPELLANT,

V.

CRYSTAL MARIE CARTER,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Kenosha County: MARY KAY WAGNER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

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

¶1 PER CURIAM. Jonas Doyle Carter appeals from a judgment of divorce from Crystal Marie Carter. He raises seven issues regarding the property

division, argues that the award of $900 per month maintenance is an erroneous exercise of discretion, contends that Crystal should not have been awarded a contribution toward her attorney fees, and charges that the circuit court failed to address the income tax dependency exemptions. We affirm the judgment except for the required contribution toward Crystal's attorney fees. That portion of the judgment is reversed and remanded for further consideration. We also conclude that on remand the circuit court should address which party may claim the children as income tax exemptions since that issue was not resolved.

¶2 The parties were married on July 22, 1992. The divorce action was commenced on February 27, 2002. At the time the divorce was granted, the parties' two children were ages eight and six. The parties agreed that primary placement of the children would be with Crystal. Jonas was continuing service in the Navy and Crystal was attending school part time. Jonas was ordered to pay maintenance in the amount of $900 per month for five years. Crystal was awarded the family home which was determined to have a negative net value in light of the mortgage, which was also assigned to Crystal. Jonas was required to assume responsibility for the remaining balance of a $15,000 loan (hereafter "the American Express loan") he procured in January 2002.

¶3 Jonas first argues on appeal that the circuit court erred when it concluded that the parties had stipulated to the division of household furniture, furnishings, and personal property. Jonas testified during the trial about items of jewelry, tools, children's movies, DVDs, furniture and electronic equipment in the marital home that he wanted. He indicated the value of the things he wanted to be $1,100 and the value of remaining household furniture and furnishings to be $10,000. When questioned by the court as to whether he would accept all of the household furniture and furnishings and be "charged for it," Jonas said he would.

Crystal's attorney indicated he could have everything. The court remarked, "So that settles that issue." However, during her testimony Crystal indicated that she was not willing to give Jonas everything in the house. She offered an exhibit of a proposed equal division of household furniture and furnishings. She was not questioned about her proposed division during cross-examination. Jonas's posttrial brief argued that if Crystal was awarded all of the household furniture and furnishings in her possession, she should be charged one-half Jonas's estimation of their value. Crystal's posttrial brief did not address the issue except to state that the household furnishings should be divided equally.

¶4 The circuit court's written decision entered on November 22, 2003, stated, "The household furniture, furnishing[s] and personal property have been divided equally by the parties by stipulation." The final findings of fact, conclusions of law, and judgment of divorce, a document drafted by Jonas's attorney, did not mention the division of personal property, did not make any provision for the transfer of any items of personal property, and merely incorporated by reference the property division made in the November 22, 2003 decision.

¶5 The circuit court overlooked that the value and division of household furniture, furnishings and personal items were disputed. The record demonstrates that at the end of trial the value and division of the household furniture and furnishings were still issues. There was in fact no stipulation as to the division of such items. But the circuit court's error in so stating was a manifest factual error—that is, an error which immediately reveals itself as such to reasonable legal minds. *See* ***Schinner v. Schinner***, 143 Wis. 2d 81, 92-93, 420 N.W.2d 381 (Ct. App. 1988). The circuit court should have been given the opportunity to correct the error. Failure to bring a motion before the circuit court to correct such a

manifest error constitutes a waiver of the right to have such an issue considered on appeal. ***Id.*** at 93. *See also* ***Rodak v. Rodak***, 150 Wis. 2d 624, 634, 442 N.W.2d 489 (Ct. App. 1989). We conclude that any claim that the circuit court erred with respect to the division of household furniture, furnishings and personal property is waived by Jonas's failure to raise it in the circuit court.

¶6 We turn to consider Jonas's other arguments regarding the property division. The division of the marital estate is within the discretion of the circuit court. ***Liddle v. Liddle***, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). We will sustain the court's decision if it 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.*** The valuation of a particular marital asset is a finding of fact which we will not upset unless clearly erroneous. ***Id.***

¶7 At trial Crystal testified that the family home was worth $138,700, as reflected as the fair market value on the property tax bill that was an exhibit to her financial disclosure statement.[1] Jonas claims that the tax bill constituted hearsay evidence and the circuit court erred in allowing it to be admitted into evidence as a regularly kept business record. We summarily reject his contention. The property tax bill was admissible as a public record, an exception to the hearsay rule. WIS. STAT. § 908.03(8) (2003-04).[2] The only foundation necessary to introduce the tax bill was identification by a competent witness. *See* ***State v.***

[1] The circuit court found that the family home actually had a negative value of $8,179 since the mortgage exceeded $138,700.

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Keith, 216 Wis. 2d 61, 77, 573 N.W.2d 888 (Ct. App. 1997). Since Crystal's name was on the bill and it was sent to her residence, she was competent to identify it. Additionally, the assessed value of properties is information available to the public. The circuit court could take judicial notice of the information on the tax bill since it contained information "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *See* WIS. STAT. § 902.01(2)(b).

¶8 Jonas further claims that Crystal's testimony about the value of the family home did not provide a sufficient basis for a determination of its value. An owner is competent to give an opinion of value of real property. ***Perpignani v. Vonasek***, 139 Wis. 2d 695, 737, 408 N.W.2d 1 (1987). The weight to be afforded that opinion is for the circuit court to decide. ***Id.*** Jonas offered no evidence of the value of the home. He cannot now complain that the court adopted Crystal's valuation when he offered no contradictory evidence and left an evidentiary vacuum. *See* ***Popp v. Popp***, 146 Wis. 2d 778, 796, 432 N.W.2d 600 (Ct. App. 1988). *See also* ***Fowler v. Fowler***, 158 Wis. 2d 508, 519, 463 N.W.2d 370 (Ct. App. 1990) (the court is not required to provide evidence and decides on the evidence actually presented). Based on the only evidence available to it, the valuation of the family home is not clearly erroneous.

¶9 The circuit court found that a $4,500 re-enlistment bonus was a marital asset that Jonas received in 2002. Whether an asset constitutes a marital asset is a question of law we review independently. *See* ***Hubert v. Hubert***, 159 Wis. 2d 803, 811-12, 465 N.W.2d 252 (Ct. App. 1990). Jonas argues that it was error to count the bonus as an asset since it was considered part of his annual income. Jonas's argument is based on a misrepresentation of the record. Jonas testified that in the month he received his re-enlistment bonus his paycheck was

$9,242.23. Upon hearing that Jonas would receive the bonus annually, the court remarked that the yearly bonus would be part of his annual income. The court's remark was not a finding of fact. The court's ultimate finding was that Jonas earned more than $5,000 monthly with all benefits. Since the monthly figure utilized by the court is substantially less than the $9,242 amount earned when the bonus was paid, the bonus was not included in the court's income finding. Including the bonus as an asset was accounting for its receipt in 2002 and did not double count that sum.

¶10 Jonas challenges how the circuit court accounted for the parties' 2001 and 2002 tax refunds. The 2001 refund of $4,322 was included as an asset awarded to Jonas. Crystal was awarded the 2002 refund of $4,823. We must first dispel Jonas of his notion that by awarding one to each party, the refunds were not treated as marital assets.[3] The inclusion of the refunds in the property division reflects the circuit court's finding that they were marital assets. Jonas was credited with having received the 2001 refund because he had placed the money in a separate account and did not establish that the money was spent for marital purposes. It had nothing to do with compliance or noncompliance with the temporary order that was entered after the refund was received. Because Jonas commandeered the refund check, Crystal had no access to that marital asset. It was not an erroneous exercise of discretion to treat the 2001 refund as an asset received by Jonas. *See* ***Forester v. Forester***, 174 Wis. 2d 78, 95, 496 N.W.2d 771 (Ct. App. 1993).

[3] Jonas argues that because the 2001 tax returns were filed prior to the commencement of the divorce action, the refund was marital property and his depositing the refund into a separate account did not reclassify the money as his separate property.

¶11 Jonas argues that the award of the 2002 refund to Crystal was an erroneous exercise of discretion based on errors the court made with regard to the division of household and personal property, the valuation of the family home, and the awarding of the re-enlistment bonus and 2001 tax refund to Jonas. We have found no error with respect to those items and therefore cannot single out the award of the 2002 tax refund to Crystal as an erroneous exercise of discretion. Awarding that sum to Crystal served to partially equalize the property division.

¶12 Jonas next argues that the circuit court failed to enumerate any factors to support a deviation from the presumption of an equal division of property. WISCONSIN STAT. § 767.255 creates a presumption in favor of equal division of marital property but the circuit court may deviate from the presumption after considering the lengthy and detailed list of statutory factors. ***LeMere v. LeMere***, 2003 WI 67, ¶16, 262 Wis. 2d 426, 663 N.W.2d 789. "The statute … does not permit a circuit court to deviate from the presumption of equal property division after considering one factor alone." ***Id.***, ¶22. ***LeMere*** indicates that the circuit court's failure to subject a request for the unequal division of property to the "proper statutory rigor" is an erroneous exercise of discretion. ***Id.***, ¶25. However, that charge is tempered by the recognition that it is not an erroneous exercise of discretion to ignore factually inapplicable statutory factors and that the error, if any, may be harmless because the overlooked factors are only marginally relevant or not relevant at all. ***Id.***, ¶¶26, 27.

¶13 We first question whether the property division was really unequal. Although the circuit court noted that it was an unequal division of property, it also

characterized the difference to be "slight" and "insignificant."[4] We agree. The parties had a net marital estate of $237.09. Since the difference in the division is de minimus, a deviation from the presumption of a fifty-fifty division did not occur and we need not address whether the court properly exercised its discretion in deviating from the presumption. *See* ***Modrow v. Modrow***, 2001 WI App 200, ¶20 n.8, 247 Wis. 2d 889, 634 N.W.2d 852. *See also* ***Rodak***, 150 Wis. 2d at 635 n.8 ($1,000 "imbalance" was de minimus when dealing with a marital estate valued at nearly $187,000).

¶14 Even accepting that an unequal division was made and inadequate reasons given, we will search the record for reasons to sustain a discretionary determination. ***Long v. Long***, 196 Wis. 2d 691, 698, 539 N.W.2d 462 (Ct. App. 1995). The circuit court found it more appropriate to assign Jonas responsibility for the $11,969.68 balance on the American Express loan because he is more financially able to deal with the debt, the loan was taken without Crystal's knowledge, and $5,000 had been used by Jonas for attorney fees. Jonas takes issue with the court's consideration of those circumstances. Contrary to Jonas's contention, the court did not treat the American Express loan as nonmarital debt. The reasons given for assigning the debt to Jonas illustrate that the court was fashioning a division particular to the parties' circumstances—that Crystal is not employed and that the family home was the other significant asset but with a value less than the mortgage. *See* ***Modrow***, 247 Wis. 2d 889, ¶25 (approving of provision that addresses the particular circumstances of the case). Further, the

[4] The circuit court's written decision misstates that the unequal division was in favor of "Mr. Carter." The net award of marital property to Jonas was a negative sum of $1,184.86. Crystal's net award was $1,421.95.

court recognized that a portion of the loan had been used to pay off household bills. It was undisputed that Crystal took $2,700 of the loan proceeds to obtain a divorce attorney and that Jonas used $5,000 of the loan towards his attorney fees for the divorce and other litigation and expenses he had after moving out of the home. Thus, the record shows that Jonas used at least $2,300 more of the American Express loan than Crystal did. Had the circuit court chosen to do so, that portion of the debt could have been designated as nonmarital. The consequential adjustment to the marital estate would result in an unequal property division in Jonas's favor. This reaffirms that the perceived unequal division is de minimus and that there was no erroneous exercise of discretion in the division of the marital estate.

¶15 Regarding the award of maintenance, Jonas first argues that because of errors in the division of marital property and debts, maintenance should be reconsidered. *See* ***Bahr v. Bahr***, 107 Wis. 2d 72, 80, 318 N.W.2d 391 (1982) ("a substantial error in the property division necessitated reconsideration of the maintenance award"). Since we have not found error in the property division, we do not consider this aspect of Jonas's challenge to the maintenance award.

¶16 The determination of the amount and duration of maintenance rests within the sound discretion of the trial court and will not be upset absent an erroneous exercise of discretion. *See* ***Wikel v. Wikel***, 168 Wis. 2d 278, 282, 483 N.W.2d 292 (Ct. App. 1992). Discretion is exercised properly when the court arrives at a reasoned and reasonable decision through a rational mental process by which the facts of record and the law relied upon are stated and considered together. ***Id.*** Maintenance is designed to further two objectives: to support the recipient according to the parties' needs and earning capacities, and to ensure a fair and equitable financial arrangement in the individual case. ***Id.***

¶17 The circuit court addressed each of the factors under WIS. STAT. § 767.26 bearing on the award of maintenance.[5] Jonas does not argue that these factors do not support the decision to award maintenance. Rather, he contends that the maintenance award was an erroneous exercise of discretion simply because it was in excess of the amount Crystal requested at trial. While Crystal's trial testimony included a request for $700 per month maintenance, her posttrial brief requested $900 per month maintenance. So Jonas is simply wrong to claim that maintenance was awarded in excess of that requested. In any event, as with any discretionary determination, the circuit court was not bound by a party's position on the issue. The court indicated that the amount of maintenance was based on its consideration of child support, the budgets of each party, and Jonas's income. Crystal's budget reflected expenses far in excess of the amount she would receive as child support (calculated to be roughly $950 in Jonas's posttrial brief) and the $900 requested monthly maintenance.

¶18 Jonas argues that the evidence does not support the circuit court's finding that his monthly income exceeds $5,000. The court indicated that it had difficulty getting "the basic information about his income" from Jonas. During the trial, the court expressed its concern that Jonas was unable to present an accurate calculation of his income. Indeed, after Jonas's trial testimony that his paychecks in the months before trial were in error, the circuit court held the evidence open and required Jonas to submit his more recent pay stubs. As the arbiter of

[5] It observed that the marriage lasted eleven years, that Crystal suffers from ongoing kidney and blood problems and also has asthma, that there was little difference in the division of property, that it would take Crystal six years to complete a college degree whereas Jonas has his degree or could complete it quickly, and that Crystal left jobs for the convenience of the family and to nurture the children while Jonas pursued his Navy career.

credibility, the court could reject Jonas's explanations of the various components of his income and how those components might change after the divorce. *See* ***Lellman v. Mott***, 204 Wis. 2d 166, 172, 554 N.W.2d 525 (Ct. App. 1996). Where, as here, there is incomplete information, "[t]he test to be applied by the appellate court must, of necessity, involve a determination whether the … finding of fact could reasonably be made based upon the available information." ***Id.*** at 173. Inasmuch as the pay stubs submitted after trial showed income in excess of $5,000, the court's finding regarding Jonas's income is not clearly erroneous.

¶19 Jonas questions why the circuit court made maintenance payable for five years when Crystal indicated that she could receive her college degree in three years' time and then earn between $40,000 to $80,000 a year. Again, Jonas misrepresents the record. Crystal indicated in her direct examination that it would take her four years to complete her college degree attending school three-quarter time and with one class in the summer. On cross-examination she was asked, "You believe you can complete that in three years part-time?" Although Crystal answered yes to that question, the circuit court was free to reject what may have been an inconsistent response.[6] Crystal also testified as to the amount of time she devoted to pursuing her degree while the children were in school and that it did not leave time for employment. If Crystal found a job, there would be less time for her to pursue her degree. It was within the court's discretion to provide maintenance for a sufficient number of years to assure that the college degree was

[6] The response is not necessarily inconsistent with Crystal's original testimony that it would take her four years to complete her degree. On cross-examination, Crystal explained that she was currently taking general occupation and occupational support classes at a technical college and that she had not yet started classes at the university where she hoped to obtain a degree. She may have understood the question regarding three years to completion to refer to the college attendance necessary to obtain a degree.

obtained even if the best-laid plan was derailed. We conclude the maintenance award was a proper exercise of discretion.

¶20 Jonas argues that the record does not support the circuit court's findings with respect to requiring him to contribute to Crystal's attorney fees. The court ordered Jonas to pay $7,000 towards Crystal's attorney fees, finding that Jonas's "half answers and failure to produce information caused the cost of this proceeding to be exacerbated and the length of trial to be extended." "When attorney's fees are sought in an overtrial situation … there is no need to make findings of need and ability to pay. The policy underpinning an overtrial attorney's fees award is to compensate the overtrial victim for fees unnecessarily incurred because of the other party's litigious actions." ***Johnson v. Johnson***, 199 Wis. 2d 367, 377, 545 N.W.2d 239 (Ct. App. 1996) (citations omitted).

¶21 We find Jonas's claim that no additional hearings were caused by his failure to produce documents or his uncooperativeness curious in light of the fact that after two days of trial the matter was held open and two additional hearings conducted to get from Jonas evidence of his income. At the end of the second day of trial, the court expressed its frustration that Jonas had not been able to produce evidence of his income, a matter within his ability to easily obtain. When Jonas failed to produce the records needed at the first pretrial hearing, the second hearing was scheduled. The record also contains an October 2002 motion to compel discovery and motion for contempt alleging that Jonas failed to timely pay bills. Similar motions were filed in the days before the trial in January 2003. Although those motions may not have gone to a separate hearing, that they were filed demonstrates that Crystal incurred extra attorney fees. At the conclusion of the second day of trial, the pending contempt motion was addressed. The circuit court

found that Jonas was in contempt for his failure to pay certain bills and that his excuse for not doing so was "absolutely unacceptable and ridiculous."

¶22 While the record supports a finding that Jonas's conduct resulted in "overtrial," nothing suggests why the attorney fees contribution was set at $7,000. Crystal's posttrial brief requested a contribution of $7,500 to her attorney fees. Her financial statement included her attorney's bill up to the date of trial. However, the circuit court did not relate contribution to a reasonable hourly rate or the number of extra hours expended because of Jonas's conduct. This was error because it does not permit this court to review the reasonableness of the contribution. *See* ***id.*** at 378. We also question the amount of fees in light of evidence that $2,700 of the American Express loan was applied to Crystal's attorney fees. We reverse the requirement that Jonas contribute $7,000 to Crystal's attorney fees and remand the case to the circuit court with directions to conduct further proceedings on this question if Crystal still seeks a contribution.

¶23 The final issue is the circuit court's failure to determine which party could claim the children as tax dependents. Jonas testified that he wanted to claim the children as tax dependents, as long as he was current in support. He repeated the request in his posttrial brief. Crystal did not address the issue in her posttrial brief. The circuit court's failure to make the determination is a manifest error which Jonas should have brought to the circuit court's attention before appeal. *See* ***Schinner***, 143 Wis. 2d at 93. However, because the error affects the parties and their tax returns for years to come, we do not hold Jonas to a complete waiver of the issue. Rather, we direct that on remand the circuit court resolve the outstanding issue of which party may claim the children as tax dependents.

¶24 No costs to either party.[7]

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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

[7] There was a complete lack of appellate advocacy provided in the respondent's brief. The brief is wholly lacking in any substance in response to Jonas's arguments. At some points only a paragraph is written in response to arguments demanding at least a minimum recitation of the proper standard of review. The brief's mere reliance on and recitation of the circuit court's decision without any analysis provided little assistance to this court.