COURT OF APPEALS
DECISION
DATED AND FILED

November 29, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0028 **Cir. Ct. No. 99-FA-56**

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

IN RE THE MARRIAGE OF:

JAMES L. BUZZELL,

PETITIONER-RESPONDENT,

V.

KAREN J. BUZZELL,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed*.

Before Roggensack, Deininger and Lundsten, JJ.

¶1 DEININGER, J. Karen Buzzell appeals the property division awarded in a judgment divorcing her from James Buzzell. Karen claims the trial court erred in awarding James the entire value of his 401(k) plan, instead of

dividing the increase in the plan's value during the marriage equally between the parties. She also cites as error the trial court's awarding each of the parties a motor vehicle without placing values on them. We conclude that the trial court did not erroneously exercise its discretion in treating the two disputed items as it did. Accordingly, we affirm the judgment of divorce.

BACKGROUND

¶2 Karen and James Buzzell divorced after six years of marriage. The marriage was Karen's fourth and James's second. There are no children from the marriage. At the time of the divorce, Karen was forty-nine years of age and James was fifty-nine. Throughout the marriage, James worked for Alliant Energy, where he had worked for thirty-nine years as an engineering technician. Shortly before the couples' divorce, James took an early retirement from Alliant and began receiving a net monthly payment of $1,789 from his pension plan. In addition to the pension payments, James also began receiving a net monthly payment of $540 from his 401(k) plan.

¶3 Prior to the marriage, James had acquired stock in his employer under an employee stock ownership plan (ESOP). Alliant discontinued the ESOP and rolled it into James's 401(k) plan the same year James and Karen were married. The amount transferred from the ESOP to the 401(k) plan was $21,139, and shares representing $1,219.02 in James's employee contributions went into his "Dividend Reinvestment Account." During the marriage, James initially made the maximum allowable employee contributions to his 401(k), which amounted to approximately $5,000 to $6,000 annually. His employer made matching contributions. James reduced his contributions later in the marriage. At trial, the parties stipulated that the increase in the value of James's 401(k) plan during the

marriage was $97,893.15. After his retirement, payments from his pension and 401(k) became James's sole income.

¶4 Karen held several jobs during the marriage, and at the time of the divorce, she was working half-time for the Department of Corrections, earning net monthly income of $702.55. Karen testified that she could only work half-time due to back problems. She had worked for the state for approximately fifteen years prior to the marriage.

¶5 The parties stipulated to numerous matters. They agreed that James would receive the homestead, with its equity divided equally. A vacant lot would be awarded to James, with its value also divided equally. The increase in value of James's pension plan during the marriage was stipulated to be $30,720, while Karen's pension account increased by $47,020. The parties also agreed to the amount of increase in the values of their respective 401(k) plans, $97,893.15 for James's, and $2,175 for Karen's.[1] They agreed further that only the post-marriage increases in their respective pension and retirement accounts would be subject to division, but they did not agree on how these assets should be divided. Finally, they stipulated to the value of certain other assets and to the amount of their respective credit card debts, and to a joint waiver of maintenance.[2]

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[1] It appears that what was sometimes referred to as Karen's "401(k)" plan may actually have been a "deferred compensation" plan.

[2] The parties contested the division of James's "AMCAP fund" and the division of the credit card debts. The court concluded that "whichever party proposed to divide unequally the AMCAP fund and petitioner's credit card debt, failed in their respective proof and each will be shared 50-50." James further claimed that the couple owed his father $16,000, which he argued should be divided equally as a marital obligation. The court, however, found that James failed to prove this debt to be a marital obligation. These aspects of the property division are not challenged on appeal.

¶6 The parties were unable to agree on the values of their vehicles, each wanting their own valued lower and the other's higher. Both testified that James's 1956 Ford "street rod" had been appraised at $13,000. James, however, introduced a subsequent appraisal from a "classics" car dealer who appraised its value at $4,800 due to repairs it needed. Karen maintained that the first appraisal was correct. She also argued that her 1992 Pontiac, which had been appraised at $3,100, was worth only $500 due to repairs that it needed, based on an estimate from a car dealer. Neither party produced witnesses to testify as to the fair market value of the vehicles.

¶7 The trial court generally divided the parties' marital assets and debts equally between them. However, the court deviated from an overall equal division by awarding James the entire value of his 401(k) plan (and Karen hers), without offsets of other assets, instead of dividing the increases in the plans' values during the marriage equally between the parties.[3] The trial court also concluded that neither party had presented credible appraisal evidence regarding the vehicles, and it awarded each party his or her own vehicle "without regard to value." Karen appeals these two aspects of the property division.

ANALYISIS

¶8 The division of the parties' property in a divorce lies within the sound discretion of the trial court. ***Brandt v. Brandt***, 145 Wis. 2d 394, 406, 427

[3] The court was apparently under the impression that the parties had agreed to this same treatment of the increases in their respective pension accounts, and ultimately, that is how the pension accounts were treated in the judgment of divorce: each party retained his or her pension account, with no offsets for the imbalance in their values. Karen does not challenge the treatment of the pension accounts. Her pension account increased some $16,000 more than James's during the marriage.

N.W.2d 126 (Ct. App. 1988). We will not reverse a discretionary determination absent an erroneous exercise of discretion. ***King v. King***, 224 Wis. 2d 235, 248, 590 N.W.2d 480 (1999). "'[A] discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.'" ***LaRocque v. LaRocque***, 139 Wis. 2d 23, 27, 406 N.W.2d 736 (1987) (citation omitted).

¶9 WISCONSIN STAT. § 767.255(3) (1999-2000)[4] begins with a presumption that the marital estate is to be divided equally between the parties, but then permits the court to deviate from an equal division after considering certain factors:

> (3) The court shall presume that all property not described in sub. (2)(a) is to be divided equally between the parties, but may alter this distribution without regard to marital misconduct after considering all of the following:
>
> (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.

[4] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

> (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. 767.26 granting maintenance payments to either party, any order for periodic family support payments under s. 767.261 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.

A trial court need not necessarily consider all twelve factors, but it may not ignore those factors which are clearly relevant on the record before it. ***Arneson v. Arneson***, 120 Wis. 2d 236, 254, 355 N.W.2d 16 (Ct. App. 1984). What weight and effect should be given to the various considerations, however, is a matter for the trial court to determine. ***Fuerst v. Fuerst,*** 93 Wis. 2d 121, 131, 286 N.W.2d 861 (Ct. App. 1979).

¶10 Karen claims the trial court based its decision on an erroneous view of the facts, and that it improperly applied the factors under WIS. STAT. § 767.255(3). First, Karen contends that the trial court erred in finding that "[t]his 401(k) is [James's] primary means of support for the remainder of his life. If the Court took half of it away, his position would be drastically weakened." Karen argues the court then relied "primarily" on this "error of fact" in awarding James his entire 401(k). We disagree.

¶11 When asked at trial why the court should award him his "whole 401(k)," James responded: "Well, like I said, I was the primary contributor, and that was all set up based on my living after retirement. That's my only source of income, that and pension." James's financial disclosure statement similarly showed his post-retirement income as coming from both his pension and his 401(k) payout, with the latter providing approximately 25% of his net income. [Ex 1] We conclude that the disputed finding is essentially a recognition by the court that James was living entirely on retirement income. We do not believe that the court misunderstood that James's 401(k) was only a part of his retirement income, and its determination that the 401(k) provided a significant portion of that income was not clearly erroneous.

¶12 Karen next claims the trial court erroneously relied on a finding that James's 401(k) "has a substantial premarital component." Although it is true that Karen only sought to share in the growth of this asset which occurred during the marriage, it was undisputed that James brought the asset to the marriage. He had accumulated the "seed money" for his 401(k) in his ESOP during the thirty-three years of his employment which preceded the marriage. The premarital component of James's 401(k) was only one of the factors on which the court based its decision, and it is one which a court may consider. WIS. STAT. § 767.255(3)(b).

¶13 Other errors of fact which Karen cites include the trial court's findings that she was "capable of earning as much as [James], and working," and that both parties have health problems "but [James's] are long term and disabling." Karen claims these findings are without basis in the record. We again disagree. As for the parties' medical problems, Karen testified that she could only work twenty hours per week pursuant to a "doctor's restriction." She also testified that she might need surgery on her back, which may impact her ability to work in the future. James testified that he will likely need knee replacements in both knees. Neither party presented any documentation or medical testimony regarding their health conditions. We conclude that, based on the evidence presented by the parties, the trial court could reasonably infer that James's health problems, compounded by his age, represented the more significant impediment to future earning potential.

¶14 In regard to the earning capacity of the parties, the court stated that Karen "is 10 years younger, capable of earning as much as petitioner, and working." We conclude that this finding could also reasonably be inferred from the evidence presented to the trial court. Karen is in fact ten years younger, still in the workforce, and she will not reach retirement age for another ten years. James, meanwhile, was retired and living on a fixed income. Although the court could have made additional or different inferences based on the evidence presented it, the trial court is the sole arbiter of the credibility of the witnesses and the weight of the evidence. Where more than one inference may reasonably be drawn from the evidence, we are obliged to accept the one drawn by the trier of fact. ***Holbrook v. Holbrook***, 103 Wis. 2d 327, 334, 309 N.W.2d 343 (Ct. App. 1981).

¶15 Concluding, as we do, that the trial court's factual findings were not clearly erroneous, we next consider its exercise of discretion. Karen contends that

the "unequal division in favor of [James] is excessive." We conclude, however, that the court complied with WIS. STAT. § 767.255(3) by considering the relevant factors. In particular, the relatively short duration of the marriage, the age and health of the parties, their earning capacities, and the economic circumstances of each party, were all appropriate considerations on the present record. Specifically, the court wrote in its decision:

> The big issue in this case is the status of [James's] 401(k). [Karen] argues that the increase in value during the marriage is marital property and should be divided equally (although the parties have agreed to treat their pension accounts as individual accounts). It is marital property, of course, and if the presumption of equal division holds, it gets divided equally.
>
> [James] argues that the presumption should, in consideration of all the statutory factors, be overcome in the Court's discretion, and the [4]01(k) should be his. The Court has considered each of the factors, including the short-term length of the marriage, the property division to this point and the lack of maintenance (waived) either way.
>
> This is the situation as the Court sees it. She is 10 years younger, capable of earning as much as petitioner, and working. He retired before the end of the marriage, as was basically the plan during the marriage. This 401(k) is his primary means of support for the remainder of his life. If the Court now took half of it away, his position would be drastically weakened, while the benefit to her, while not a windfall, would make her situation relatively comfortable financially.
>
> The other factors are rather equal; neither party's contribution to the marriage outweighs the other. Neither party made unusual sacrifice; the 401(k) has a substantial premarital component. Neither party has substantial individual—as against marital—assets to help; both have some health problems, but his are long term and disabling; and no other factors seem to be prominent here.

¶16 We conclude that the trial court did not erroneously exercise its discretion in deciding to deviate from an equal division of the marital estate by

awarding James his entire 401(k). The court awarded approximately 68% of the agreed-upon marital estate to James, and 32% to Karen, expressly stating the facts and factors upon which it relied in making its decision. The supreme court has acknowledged that an unequal division of the parties' marital estate in favor of primary financial contributor following a relatively brief marriage entered into "late in life" is not inherently unreasonable. ***Jasper v. Jasper***, 107 Wis. 2d 59, 68, 318 N.W.2d 792 (1982). A trial court's discretionary determination in a divorce judgment may encompass a result "which another judge or another court," including this one, might not have reached on the present facts. ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). Nonetheless, if it is a result "which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning," we will not disturb it. ***Id***. That is the case here.

¶17 We next turn to Karen's claim that the trial court erroneously exercised its discretion "in failing to place a value on each of the motor vehicles" before allocating them between the parties. The court concluded, however, that "[n]either party presented credible evidence of the value of the vehicles." The court therefore awarded James his vehicle and Karen hers without assigning values to either. As we have noted, matters of weight and credibility are firmly within the trial court's purview, not ours. If the trial court deemed it impossible to assign reliable values to the vehicles based on the evidence the parties presented, we conclude that it was not an erroneous exercise of discretion for it to award them as mutually offsetting assets in the fashion it did.

CONCLUSION

¶18 For the reasons discussed above, we affirm the appealed judgment.

By the Court.—Judgment affirmed.

Not recommended for publishing in the official reports.

¶19 ROGGENSACK, J. (*dissenting*). While I agree with the conclusion of the majority that the circuit court did not err in the manner in which it divided the parties' automobiles, I conclude that the circuit court did erroneously exercise its discretion in awarding $149,460 of the marital estate to James and only $70,041 to Karen. Accordingly, I must respectfully dissent.

¶20 Both parties had been married before, and both brought property into the marriage. Neither party requested division of any pre-marital property. Instead, they agreed to the value of the marital components of their assets and to divide only those marital components. The assets that had both pre-marital and marital components are the pensions, the 401(k) plans and the AMCAP.[5] The following represents a balance sheet of the agreed marital property components of the parties' assets and how those assets were awarded in the circuit court's decision:

[5] The parties agreed that the values of the real estate and cars were entirely marital property.

Property	**James**	**Karen**
Homestead	$160,000	
Land	4,400	
Pensions[6]	30,720	$47,020
401(k) plans	97,893	2,175
AMCAP	8,704	
Vehicles	Unvalued	Unvalued
Personal Property	10,686	2,974
Mortgage	(132,649)	
Credit Card Debt	(5,331)	(4,791)
Credit Union Debt	(2,300)	
Court-Ordered Payment	(22,663)	22,663
Net Marital Property Award	$149,460	$70,041

¶21 The division of the marital estate is entrusted to the circuit court's discretion. ***Brandt v. Brandt***, 145 Wis. 2d 394, 406, 427 N.W.2d 126, 130 (Ct. App. 1988). A circuit court erroneously exercises its discretion when it bases it on an error of fact or an error of law. ***Guerrero v. Cavey***, 2000 WI App 203, ¶9, 238 Wis. 2d 449, 617 N.W.2d 849. We will support a circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2); ***Brandon Apparel Group, Inc. v. Pearson Properties, Ltd.***, 2001 WI App 205, ¶10, __ Wis. 2d __, 634 N.W.2d 544. However, we review the court's legal conclusions *de novo*.

[6] The court seemed to believe that the parties had agreed to each keep their own pensions without valuing them. While they did agree to retain their own pensions as part of the property division, the record does not support an agreement to do so without accounting for the amount each increased during the marriage. At trial, James submitted exhibit 8 and Karen submitted exhibit 12, both of which included the marital components of the pensions valued for the property divisions each party proposed to the court. The first time a balance sheet appears in the record that shows the pensions without values is in the balance sheet submitted by James's attorney with his proposed findings of fact and conclusions of law, subsequent to the court's written decision. Karen's attorney objected to this balance sheet, as he did to some of the proposed findings of fact and conclusions of law.

Ansani v. Cascade Mountain, Inc., 223 Wis. 2d 39, 45-46, 588 N.W.2d 321, 324 (Ct. App. 1998).

¶22 In my view, the court erred by awarding the $97,893 marital component of the 401(k) plan in James's name to James by removing its value from the marital balance sheet. I conclude this was an erroneous exercise of discretion for three reasons: (1) it based the property division on factual findings which are clearly erroneous; (2) it erroneously applied the law to penalize Karen for what it characterized as a short-term marriage and to reward James for that same statutory factor; and (3) the record is insufficient to overcome the presumption of a 50:50 property division.

¶23 In regard to errors of fact, the circuit court based the award of the 401(k) plan[7] to James on its finding that, while both parties had health problems, James's "are long term and disabling." There is nothing in the record to support that finding. James's testimony about his health was as follows:

> Q: You are going to be 59 in November; is that right?
>
> A: No, 59 and a half.
>
> Q: I'm sorry, 59 and a half. How is your health right now?
>
> A: Generally speaking, it is good. I just had knee surgery last week, and I am looking forward to knee replacement.
>
> Q: One knee or both?
>
> A: It looks like both.

[7] The parties agreed the marital property component of the plan in James' name was $97,893 and that it had a total value of $109,691 (exhibit 6) on the date of divorce.

Karen testified about her health as follows:

> Q: How is your health?
>
> A: I have been having some medical problems with my back.
>
> Q: Do those problems keep you from working?
>
> A: Yes.
>
> Q: You are working half-time; are you not?
>
> A: Yes, I am.
>
> ….
>
> Q: What is your health condition with your back? What's the problem?
>
> A: Currently, I am going to physical therapy. They are looking at possible surgery and—come this fall.
>
> Q: All right. Could that impact your ability to work in the future?
>
> A: Yes.

¶24 Neither party presented medical testimony and the quotations above are the total of the information that was presented to the court at the divorce trial. Therefore, the court had no reasonable basis for finding that James's health problems are "long term and disabling" or even that they are more significant than Karen's. James said his health was "good." A factual finding that is not supported by reasonable inferences from the testimony in the record is clearly erroneous. *See* ***Elmakias v. Wayda***, 228 Wis. 2d 312, 319, 596 N.W.2d 869, 873 (Ct. App. 1999).

¶25 The circuit court also made a factual error when it stated that: "The 401(k) is [James's] primary means of support for the rest of his life. If the Court took half of the 401(k) away, [his] position would be drastically weakened, while

the benefit to [Karen], while not a windfall, would make her situation relatively comfortable financially." There is no support in the record for this finding. At trial, the uncontested testimony showed that James received a pension from his former employer, which paid him $2,272.33 per month and that that pension would continue for the rest of his life. He also received monthly payments of $600 from the 401(k) plan, which is the major focus of Karen's appeal. Therefore, at the time of the divorce, James had monthly income of $2,872.33, which was derived primarily from the pension his former employer provided.

¶26 In contrast, Karen's gross monthly income was $919.53, working twenty hours per week. If I were to double that for her wages on a full-time basis, her earnings would be $1,839 per month. The parties stipulated that the marital portion of James's 401(k) plan was $97,893 and that the total value of the fund was $109,691, at the date of divorce. What Karen requested was one-half of the marital portion, or forty-five percent of the total amount of the fund. Therefore, dividing the marital portion in half would reduce the $600 per month James was receiving to $330 per month, bringing his total monthly income to $2,602. Such a reduction in his overall monthly income is simply not "a drastically weakened" position for James. Additionally, adding $270 per month to Karen's income would provide her with no more than $2,109, if she were able to resume work on a full-time basis, $500 less per month than James would have after the reduction.

¶27 The court also relied on its conclusion that this was a short-term marriage. (The parties were married on May 18, 1994 and divorced on June 20, 2000, a period of six years.) While it is true that this was not a long-term marriage, the marriage was just as much a short-term marriage for James as it was for Karen, and the property divisions proposed by the parties did not involve the

pre-marital components of the parties' assets. Additionally, the circuit court found that both parties contributed equally to the marriage.[8] Both parties also waived maintenance. Therefore, the property division awarded by the court could not have been in lieu of maintenance to James. Furthermore, while Karen was still working part-time, the court seemed to believe that James's retirement was health-related, but that is not what the testimony showed. Instead, when asked about his early retirement, the transcript shows James responded as follows:

> Q: Mr. Buzzell, why did you take an early retirement?
>
> A: Well I have been there about 39 years, 39 and a half years, had the opportunity to get out and figured that I could make it.

Therefore, at 59 and a half years of age, there is nothing in the record to show that James could not work for some other employer if he found his income less than he would have liked to have had.

¶28 Because I conclude that the circuit court made factual findings which are unsupported by the record and used the statutory factor of a short-term marriage that relates equally to each party to Karen's detriment and to James's reward, I would reverse the judgment. In my view there is nothing in the record sufficient to overcome the presumption of a 50:50 property division. Therefore, I must respectfully dissent.

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[8] The majority relies on ***Jasper v. Jasper***, 107 Wis. 2d 59, 318 N.W.2d 792 (1982), as authority for the unequal property division chosen by the circuit court. However, that reliance is misplaced. In ***Jasper***, the wife did not work outside the home or prepare the evening meal for the family more than one or two nights per week, while the husband provided child care as well as the economic support of the family. ***Jasper***, 107 Wis. 2d at 67-68, 318 N.W.2d at 796-97. The Jaspers' contributions to the marital partnership were not equal.