COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2005AP2809 **Cir. Ct. No. 2002FA351**

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

IN RE THE MARRIAGE OF:

RICHARD M. LEVEY,

PETITIONER-RESPONDENT-CROSS-APPELLANT,

V.

AMY Z. LEVEY,

RESPONDENT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Amy Levey appeals a judgment of divorce. Amy contends the circuit court erred by: (1) not awarding family support retroactive to

the date of the final hearing; (2) finding she was liable for one-half the debt incurred by Richard from the date of the temporary order; (3) finding Amy failed to sufficiently show her inheritance was non-divisible, and (4) not finding Richard in contempt of court. Richard cross-appeals and challenges: (1) the award of family support; (2) the property division; (3) the denial of his request for sanctions; and (4) an award of attorney fees to Amy. We affirm the judgment.

¶2 The parties were married in 1989 and have two minor children. The parties stipulated to share joint custody of the children and equal periods of physical placement. Richard is a physician. The circuit court ordered Richard to pay family support in the amount of $16,333 per month effective August 15, 2005, through August 15, 2015, based upon his most recent annual salary of $447,108. The court found Amy had an earning capacity of $22,000, and had not been employed outside the home for over fifteen years. Amy is currently forty-six years old.

¶3 The court ordered an equal property division. The court concluded Amy had not met her burden of proof with regard to her claim that her inheritance was non-divisible. Various marital debt was included in the property equalization calculation and new debt on lines of credit was ordered to be shared equally. The court had previously ordered that $45,994.89 be paid to Amy's attorneys from marital funds, but the court declined to award any additional attorney fees to either party in litigating the case.

¶4 A circuit court's division of property and its family support award will be overturned only if an erroneous exercise of discretion has occurred. ***Jasper v. Jasper***, 107 Wis. 2d 59, 63, 318 N.W.2d 792 (1982). In reviewing discretionary decisions, our task is to determine whether a court could reasonably

come to the decision it reached. A reviewing court is obliged to uphold a discretionary determination if it can conclude the facts of record applied to the proper legal standard support the court's decision. *See* ***Andrew J.N. v. Wendy L.D.***, 174 Wis. 2d 745, 767, 498 N.W.2d 235 (1993). When reviewing findings of fact, we search the record for reasons to sustain the court's discretionary decision, not for evidence to support findings the court could have reached but did not. *See* ***Steiner v. Steiner***, 2004 WI App 169, ¶18, 276 Wis. 2d 290, 687 N.W.2d 740. Findings of fact will be affirmed unless clearly erroneous. WIS. STAT. § 805.17(2).[1] Where there is conflicting testimony, the circuit court is the ultimate arbiter of the credibility of witnesses. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979).

¶5 Amy does not appeal the amount of the family support award. However, she contends the circuit court erred in not ordering family support retroactive to November 24, 2004, the date of the final hearing. Amy insists that she experienced financial difficulties in the nearly nine-month period between the final hearing and the court's decision. Amy claims she was receiving "a meager $5,000 per month temporary spousal maintenance" payments and incurred over $30,000 in credit card debt during this period to pay expenses for her children. We are unpersuaded.

¶6 Amy acknowledges the circuit court was not obligated to make the family support award retroactive. Amy also concedes that she continued to receive $5,000 monthly as directed by the temporary order. The record

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

demonstrates that on June 10, 2005, Amy filed a notice of motion and motion to modify temporary order, with an accompanying affidavit alleging the temporary maintenance award was inadequate. The notice indicated the hearing was to be held on June 23, 2005. The record does not contain a transcript from the June 23, 2005 hearing, but Richard argues the court minutes suggest that Amy was not present in court to present testimony at her own hearing to justify a modification of the temporary order. Amy does not reply to this argument. Arguments not refuted are deemed admitted. ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶7 Moreover, the court found in its decision and order that Richard has paid and continues to pay for the majority of the variable costs incurred by their children, Avalon and Elliot. The court also stated that "[e]ven though the parties enjoy shared placement, Richard has assumed the yeoman's share of costs and expenses.…" The court's findings in that regard are not clearly erroneous. Amy has failed to demonstrate hardship or inequity in the commencement of the family support on August 15, 2005. The court did not erroneously exercise its discretion in not ordering family support retroactive to the date of the final hearing.

¶8 Amy next argues the circuit court erred by finding that she was responsible for new debt on various lines of credit incurred by Richard. In the alternative, Amy insists the lines of credit should be valued from the date of the temporary order. However, despite Amy's accusations of misconduct, the court did not find that Richard engaged in financial impropriety in this regard. Rather, the court agreed with Richard that the credit lines increased because of joint expenses which Amy was unable to pay. Those expenses included general bills, home mortgages, taxes, and maintenance of the home. This dispute largely came down to a question of credibility and the court was entitled to agree with Richard.

¶9 Amy next argues the court erred in finding that funds from her inheritance were divisible. We disagree. When a party to a divorce asserts that property, or some part of the value of property, is not subject to division, that party has the burden of showing the property is non-marital at the time of divorce. *See* ***Derr v. Derr***, 2005 WI App 63, ¶11, 280 Wis. 2d 681, 696 N.W.2d 170.

¶10 The court in the present case stated:

> Here, Amy has failed to meet her burden of proof showing her inheritance is non-divisible. She has not provided sufficient evidence to show how her inherited funds were actually used; the identity of the inherited money is unknown. Moreover, Amy's inability to identify the destination of the inheritance infers [sic] that she had no intention of maintaining the inheritance's character, but rather intended the funds to go towards general marital expenses. Consequently, the Court holds that Amy's inheritance shall not be reimbursed.

¶11 A party asserting that an asset is non-divisible has the burden to provide evidence that permits the tracing of the asset to an original non-divisible asset. *See* ***Id.***, ¶17. If the non-marital assets can be traced, the issue becomes whether the party had a donative intent. ***Id.***, ¶23. When an owning spouse acts in a manner that would normally evince an intent to gift property to the marriage, donative intent is presumed, subject to rebuttal by "sufficient countervailing evidence." ***Id.***, ¶33. Moreover, donative intent is presumed when an owning spouse transfers non-divisible property to joint tenancy. ***Id.***, ¶35.

¶12 Amy neither disputes the marital home was titled in joint tenancy nor that significant landscaping, redecorating, repair and construction was done on the home. Amy testified that Richard promised to repay her but case law reflects "a healthy skepticism of self-serving, after-the-fact assertions on this topic." ***Id.***, ¶32. Amy also insists a ten-year-old Quicken software accounting report is

dispositive but the circuit court obviously did not consider the exhibit persuasive and the passage of time with no further efforts by Amy to affirm the alleged promise to repay further erodes her contention. The court's conclusion that the rebuttable presumption of donative intent was not sufficiently overcome is not erroneous.

¶13 Finally, Amy contends the circuit court erred as a matter of law by not finding Richard in contempt of court for willfully terminating health and dental coverage for Amy's benefit contrary to the temporary order. Amy relies upon our decision in ***Haeuser v. Haeuser***, 200 Wis. 2d 750, 767, 548 N.W.2d 535 (Ct. App. 1996), for the proposition that a person may be held in contempt of court if that person refuses to abide by an order made by a competent court of jurisdiction. However, in the following paragraph of that decision we stated: "The principal findings are that the person is able to pay and the refusal to pay is willful and with intent to avoid payment." ***Id.***

¶14 Amy provides no transcript of a circuit court decision but merely appends a copy of the court's minutes of a hearing apparently conducted on April 8, 2005. Amy purports the minutes of the hearing were provided because "the court reporter lost the transcript." The court minutes state: "Crt reserves on resp. motion due to needing the 11/24/04 transcript." The minutes further provide: "Atty Bartholomew states the JMT of divorce was ordered and pet. has been paying insurance." Absent a transcript, we decline to hold Richard was in contempt of court as a matter of law.

¶15 Richard cross-appeals, claiming the amount and duration of the family support award were "an abuse of the Trial Court's discretion."[2] We disagree. The family support alternative to child support and maintenance encompasses the support objectives of its component parts in a single obligation. Here, the court concluded family support was well-suited to this case for a variety of reasons, including the length of the marriage, considerable gap in earning capacities, the lifestyle enjoyed during the marriage, and the property division.

¶16 The court considered that Richard was forty-six years old, seemingly healthy, earned an excellent salary and had a significant working life ahead of him. His support obligation was based upon his most recent annual salary of $447,108 even though that amount was substantially less than Richard earned prior to the divorce proceedings. By contrast, the court found that Amy had "a meager earning capacity of $22,000 per year and has a clear need for support." The marriage was fourteen years and eleven months in duration.[3] The court also took into consideration that Amy had not been employed outside the home for approximately fifteen years. The court stated: "In short, the earning capacity of both parties, length of the marriage, shared placement schedule, monthly expenses, and property settlement all point to family support as an appropriate choice in this case."

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[2] Appellate courts have not used the term "abuse of discretion" since 1992 because of its unjustified negative connotation. *See* ***Hefty v. Hefty***, 172 Wis. 2d 124, 128 n.1, 493 N.W.2d 33 (1992).

[3] Richard makes much of the statement in the court's decision that the marriage was fifteen years and eleven months at the time of the divorce. It appears the error was typographical, because the court was clearly aware of when the parties were married and divorced. Moreover, the decision ordered Richard to submit new findings of fact, conclusions of law and judgment of divorce within ten days. Richard's counsel did not correct the error in the document he drafted, nor make any effort to address the error. Regardless, we conclude the error is of no significance.

¶17 Richard insists there is no support in the record for a duration of ten years. Richard argues the judgment requires him to pay family support for almost four full years past Avalon's attaining the age of majority and two years after Elliot turns eighteen. Richard contends the court offered no explanation as to why Amy would need "such an exorbitant sum of money per month after the children's emancipation." Richard is mistaken.

¶18 Aside from the child support component of family support, the circuit court considered the nearly fifteen-year marriage a significant factor in awarding a maintenance component and determining the length and amount of that component. In the court's opinion, $16,333 monthly for ten years "is certainly in line with what she could have expected by way of maintenance." The court stated:

> As noted above, in assessing all the relevant factors, the Court orders a family support award, including child support and a maintenance component, of $16,333 per month. This award insures substantial financial support for Avalon and Elliot, until they reach the age of maturity. Moreover, this award affords Amy a significant window of time in which to structure her assets, adapt her spending and saving habits consistent with her new reality, obtain additional training and education, and find gainful employment. Amy should be able to sustain a lifestyle of considerable comfort, roughly comparable to her lifestyle during the marriage. At the same time, Richard will not suffer greatly from this limited-term financial obligation, given his significant assets and earning capacity.

¶19 The court gave lengthy explanations concerning the amount and duration of the family support award. The record demonstrates a rational process that a reasonable judge could reach. The court's decision was not an erroneous exercise of discretion.

¶20 Richard insists the circuit court erred by relying on a Ketubah[4] the parties executed just prior to their marriage. Richard submits "the Trial Court has clearly attempted to use the Ketubah as some bootstrap justification for an excessive family support award." Richard contends "[t]he court views the Ketubah from Amy's perspective only, to the exclusion of the overwhelming credible evidence leading to the contrary result."

¶21 Given our conclusion that the family support award was not excessive, we need not reach the issue concerning the Ketubah as a bootstrap justification for an excessive award. However, we are compelled to comment on Richard's misrepresentation of the record with regard to the rationale of the circuit court relating to the Ketubah. Amy argued below that the Ketubah was essentially a prenuptial agreement whereby Richard agreed to pay her permanent maintenance in the event of divorce. The circuit court noted in its decision and order that, among other provisions, husbands agree in a Ketubah to "support and maintain their wives."[5] However, the court received into evidence excerpts from the deposition of Rabbi Chaim Goldberger, who testified on behalf of Richard to the effect that the Ketubah never refers to ongoing maintenance to be paid to a wife. The court stated:

> Simply put, Rabbi Chaim Goldberger's testimony was persuasive, and Amy's suggesting that this Ketubah is an enforceable agreement under Wis. Stat. § 767.26(8), 767.255(3)(L), and 766.58(6) was not.

[4] In general terms, a Ketubah is a Jewish marriage document evidencing the present intentions of a husband and wife at the time of their marriage.

[5] A translation of the Ketubah was received into evidence as Exhibit 1. Richard was questioned as to various aspects of the Ketubah, including the statement: "I will cherish, honor, support and maintain you in accordance with the custom for Jewish husbands who honestly, cherish, honor and support and maintain their wives."

> Although lacking the requisite specificity of an agreement, the sweeping provisions of the Ketubah are significant enough to be considered relevant as an "other factor" for purposes of a maintenance award to Amy under Wis. Stat. § 767.26(10). The Ketubah, however, is not the dispositive factor as suggested by Amy. Rather, the Court simply includes the Ketubah in its maintenance and property division analysis below.

¶22 Contrary to Richard's insistence, the circuit court did not view the Ketubah from Amy's perspective only. Nor did the court place erroneous reliance upon the Ketubah.

¶23 Richard next argues the circuit court erred in its findings regarding property division. An equal division of property is presumed under WIS. STAT. § 767.255(3). A court may deviate from an equal division after consideration of the factors enumerated in § 767.255(3). Here, the court considered the proper factors and gave appropriate weight to factors supporting the presumption that the property be divided equally between the parties.

¶24 Richard insists the court ignored the value of substantial personal property listed on trial exhibits 15 and 16. Amy responds that the parties stipulated to the equitable distribution of personal property and the court approved the stipulation. Amy further states that, although the document stipulated the date by which the personal property was to be distributed, it did not provide that either party was to pay the other any monetary sums and the court was not asked to so determine at the following hearing. Amy asserts there was no testimony as to unequal value and no findings as to unequal value because of the parties' stipulation and the court's approval regarding the equitable distribution of personal property. Amy argues that Richard's "attempt to resurrect an issue on the equitable distribution of personal property given the parties' stipulation and the Trial Court's approval is disingenuous."

¶25 After reviewing the trial testimony concerning exhibits 15 and 16, Richard's proposed findings of fact, conclusions of law and judgment, as well as the post-trial memorandums, we conclude that Richard's argument on appeal is insufficiently explained, underdeveloped, and improperly supported by citation to the record and we will therefore not consider it. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). Moreover, we fail to see how Richard was prejudiced by this issue considering Richard's proposed equalization payment and the equalization payment as found by the court.

¶26 Richard next argues the circuit court "demonstrated a lack of judicial reasoning in deciding separation expenses." We are unpersuaded. Richard wished to retain possession of the homestead and in order to do so Amy was obligated to relocate, living first at a bed and breakfast, and then at an apartment in St. Paul, Minnesota. The court was within its discretion in treating the moving and relocating expenses as a marital debt.

¶27 Richard next argues the circuit court erred by finding that dental work performed on Amy during the pendency of the divorce was marital debt. The temporary order required each party to be responsible for their own future uninsured medical, dental and other healthcare expenses. However, Richard conceded at trial that Amy requested "probably in the two years preceding the commencement of the action" to have the dental work performed. Richard testified that he responded to Amy's request as follows: "I said let's make a plan on how we can afford as a family for you to get this cosmetic dental work done

which you believe has been troubling you since you were a child due to Tetracycline burns on your teeth which have bothered you."[6]

¶28 We conclude the parties contemplated the dental expenses long before the divorce proceedings commenced. The circuit court found Amy provided evidence that the dental expense was not simply cosmetic. The court was well within its discretion in evaluating the testimony of Richard and Amy on the subject of the dental work and its necessity.

¶29 Furthermore, Richard argues that his principal objection to including dental expenses into the division of property centered on his right to rely upon the temporary order. Richard insists that he "objected to the notion that his wife could run up a debt without his knowledge and consent, without the authority of a court order, and unilaterally place half the debt with him." However, the same argument could be applied to the very substantial sum of new debt on various lines of credit incurred by Richard after the temporary order. The circuit court observed that the temporary order stated, "both parties are hereby restrained from making any further debts against the credit of the other party. Further, unless otherwise ordered, any debt incurred after the date of this order is the sole responsibility of the party incurring the debt."

¶30 The court agreed with Richard that the new debt on the lines of credit should be shared equally between the parties notwithstanding the temporary

[6] Richard claims in his brief that "the parties concluded that it was not affordable unless other expenses were eliminated." However, there is no indication in the citation to the record provided that Amy was in agreement.

order. Richard will not be heard to argue the same should not apply to the dental work.

¶31 Richard next argues the circuit court erred by not sanctioning Amy for the introduction of the Ketubah. Richard claims Amy introduced the Ketubah into the litigation with no legal authority, but Amy cited authority from other jurisdictions with respect to the enforceability of a Ketubah under state law. These cases were discussed by the court in its decision and order although the court did not find them persuasive. Furthermore, Richard himself testified at trial about the Ketubah and issues of Jewish law: "As I say, more than anything the Ketubah was a symbol of our Jewish marriage." Richard also testified that adultery by his wife compelled a divorce and forfeiture of any Ketubah rights. Indeed, Richard continues to argue issues of Jewish law in his brief to this court: "At best, the wife would receive a fixed lump sum or support for one year, the value of 200 Zuzim. In the worst case scenario, if the Ketubah is relied on for what it truly stands for under Jewish law, the Trial Court would have justification to deny any financial payment based on adultery." Under these facts, Richard will not be heard to complain the trial court erred by declining to sanction Amy.

¶32 Finally, Richard argues the court erred in awarding $45,994.89 towards Amy's attorney fees, in addition to the fees she received under the temporary order. We are not persuaded. The matter of allowance of attorney fees in a divorce case is discretionary with the circuit court. ***Ondrasek v. Ondrasek***, 126 Wis. 2d 469, 483-84, 377 N.W.2d 190 (Ct. App. 1985). Fees may be awarded upon a showing of need by one party, ability to pay by the other, and the reasonableness of the fees. ***Van Offeren v. Van Offeren***, 173 Wis. 2d 482, 499, 496 N.W.2d 660 (Ct. App. 1992).

¶33 Here, the record demonstrates the court considered the appropriate factors. The court stated:

> Although it is clear that Richard clearly makes more money than Amy, she is clearly not in a position of need. The substantial equalization and family support payments ordered by this Court establish the monetary wellbeing [sic] of Amy. Furthermore, based on its February 27, 2004 Order, the Court already ordered that $45,994.89 be paid to Amy's attorneys from marital funds. The court will not award further attorney fees to either of the parties. Each party has the ability to pay and will therefore be responsible for his or her own legal expenses in litigating this case.

¶34 As set forth in the court's decision, the parties stipulated to the amount of fees owing as to the respective law firms, although they disagreed as to their distribution. We conclude the court did not erroneously exercise its discretion in awarding $45,994.89 towards Amy's attorney fees.[7]

[7] In conclusion, we admonish both counsel in this case based upon the briefs as a whole as to rules of appellate briefing and the requirements of civility toward their adversarial party, other counsel and the court. *See* Preamble: A Lawyer's Responsibilities, SCR ch. 20 (2006). As an example, counsel for Richard on numerous occasions refers to the circuit court findings and conclusions as "bizarre," "irrational," and "this disjointed decision," among other things. A cardinal rule of appellate practice is to avoid disparaging the lower court and other counsel. *See* ***State v. Rossmanith***, 146 Wis. 2d 89, 89-90, 430 N.W.2d 93 (1988). Moreover, our review in this case has been unnecessarily complicated by the parties' misstatements of the record, citations that do not always support the allegations of fact made in the briefs, and the continuation of the "self-serving arguments" that the circuit court noted caused it delay, confusion and frustration. Additionally, the parties fail to conform to the requirements of WIS. STAT. RULE 809.19. The parties often cite generally to a document, such as "R.133" or provide no record citation whatsoever. It should be clear to all lawyers that appellate briefs must give references to pages of the record on appeal for each statement and proposition made in appellate briefs. ***Haley v. State***, 207 Wis. 193, 198-99, 240 N.W. 829 (1932); *see also* WIS. STAT. RULE 809.19(1)(c),(d), and (e). It should also be clear to all lawyers that appellate briefs must give pinpoint cites for each legal proposition in each case relied upon. We remind the attorneys that the rules of appellate practice are designed in part to facilitate the work of the court and when counsel, by disregarding the rules, fails in rendering to the court the aid contemplated, this court has not hesitated in summarily rejecting their arguments or otherwise sanctioning their conduct.

By the Court.—Judgment affirmed

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