COURT OF APPEALS
DECISION
DATED AND FILED

October 13, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP84 **Cir. Ct. No. 2005FA122**

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

IN RE THE MARRIAGE OF:

JAMES FLAVIAN EMERSON,

PETITIONER-RESPONDENT-CROSS-APPELLANT,

V.

WANDA LEE EMERSON,

RESPONDENT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Wanda Lee Emerson appeals and James Emerson cross-appeals a divorce judgment. Wanda argues the circuit court erred by

excluding from the property division crops that were planted but not yet harvested, as well as prepaid expenses for next year's crop. James challenges the court's determination on maintenance and an award of attorney fees to Wanda.[1] We affirm.

¶2 The parties were married on April 9, 1983, and divorced on December 8, 2008. They had two children, and one son was still a minor at the time of the divorce.[2] Wanda was a beautician with a stipulated annual income of $30,000. James operated a farm called Vossemer Farms, Inc. The circuit court found that James had a wage income of $42,000 from the farm, and "other income" available from the farm corporation of $83,400,[3] for a total annual income of $125,400.[4]

¶3 The circuit court declined to consider crops in the field as a marital asset subject to property division. The court found the yield and price of un-harvested crops was speculative and, further, that James's standard practice was to sell the crops the spring and summer following the harvest. The court also indicated it did not want to double-count the crops in the field as an asset and as anticipated income. Furthermore, the court found James's income was "almost

[1] In his cross-appeal, James argues the court "abused its discretion." We have not used the term "abuse of discretion" since 1992, when our supreme court replaced "abuse of discretion" with "erroneous exercise of discretion." *See*, *e.g.*, ***Shirk v. Bowling***, 2001 WI 36, ¶9 n.6, 242 Wis. 2d 153, 624 N.W.2d 375.

[2] That son has now reached the age of majority.

[3] The "other income" was apparently from rental income received from the farm corporation for personally owned acreage and irrigation equipment, as well as distributive corporate income.

[4] The matter was tried over three days between June and October 2008.

solely due to the sale of crops, and if I took this away … he wouldn't have this income next year to pay both child support and maintenance."

¶4 The court therefore treated the crops as income in determining maintenance and declined to consider James's prepaid expenses as a marital asset subject to division. The court also initially ruled each party was responsible for their own attorney fees, but after a mathematical error was discovered resulting in Wanda receiving almost $73,000 less than anticipated in property division, the court required James to pay $20,000 toward her attorney fees.

¶5 The division of property and the awarding of maintenance rest within the sound discretion of the circuit court. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We will sustain a discretionary decision if the circuit 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. ***Liddle v. Liddle***, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). We generally look for reasons to sustain the court's discretionary decision, and we search the record for reasons to sustain the circuit court's findings of fact. *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).[5] When 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, 249-50, 274 N.W.2d 647 (1979).

[5] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶6 Wanda insists that the circuit court erred by failing to include crops in the field as marital assets subject to property division. Here, the court concluded it would be speculative to attempt to value the crops still in the field. The court stated,

> and that's been the practices of the crops in the field were sold the following year, and recognized as income in the year that monies received for this year income. It's the 2008 that's being sold and the expenses were spent the year before for this crop, many of them, and that's been the way it goes, year by year, and so one problem is the difficulty in putting an exact figure. First, there's two problems. One that yield is difficult, until its actually harvested. There was lots of testimony as to what the yield would be, so I'd be speculating what the yield would be plus I'm speculating on what the value of the bushels yielded are, and there's a request that I place the profit at $1,200,865. That if I did that, I would just be speculating as to what the value is. The court's not allowed to guess, so that's one reason for not including it. I don't feel it's fair to just guess at a value. Even though there was some testimony, it was very difficult for anyone to peg as to exactly what it would be worth. There was some testimony that just within the last few months the price has gone down as much as Two Dollars a bushel ….

¶7 The court recognized a number of factors could interfere with the crop's yield and price before harvest. Evidence on valuation varied greatly, and testimony indicated weather and other factors could greatly affect the value of the crops. As the court noted, even during the few months the parties were in court from June through October 2008, the price of corn had gone down several dollars per bushel. The court also found James's standard business practice was to include the crops as income in the year they were sold, and to include the expenses paid in the prior year. The court's findings were not clearly erroneous. WIS. STAT. § 805.17(2).

¶8 Wanda insists the circuit court "did err in its double-counting analysis given the circumstances of this case." She also claims it is unfair to exclude the crops from the property division because James "will receive a $1,000,000 windfall from his last crop when he sells the farm in a few years or retires." However, the record fails to support Wanda's conjecture regarding a windfall in the future and we decline to consider it further.

¶9 Moreover, a court may in its discretion choose to exclude accounts receivable from the marital estate if the evidence shows there is a link between the receivables and salaries and if dividing the receivables would adversely affect the ability to pay support or maintenance. *See* ***Sharon v. Sharon***, 178 Wis. 2d 481, 495, 504 N.W.2d 415 (Ct. App. 1993). Here, the record reflects the circuit court understood this principle by relying upon ***Peerenboom v. Peerenboom***, 147 Wis. 2d 547, 553, 433 N.W.2d 282 (Ct. App. 1988), to conclude the present case was "kind of an account receivable case." The court also properly concluded that a division of the crops would adversely affect James's ability to pay support and maintenance. As the court stated:

> His income is almost solely due to the sale of crops and if I took this away, as Mr. Morrison recognized, he wouldn't have this income next year to pay both child support and maintenance.
>
> … I did not want to get into a situation where he was harmed by counting both as an asset and then turning around and saying you got to sell this, and I expect you to make so much money next year in order to pay maintenance.

Contrary to Wanda's perception, it does not follow because the court found the value of the crops speculative there was an unequal property division between the parties. The court properly exercised its discretion by declining to include the crops and prepaid expenses as a marital asset subject to division.

¶10 In his cross-appeal, James contends the circuit court awarded excessive maintenance. James asserts "the Trial Court misused DWD 40.02(13)(a), WIS. ADMIN. CODE, in determining [James's] gross income."[6] However, James's maintenance argument is improperly premised on an administrative code provision applicable to child support. *See* WIS. ADMIN. CODE Preface, ch. DCF 150 (Nov. 2009). In any event, James's arguments primarily involve a dispute over the expert testimony and go to the weight of the evidence, rather than its admissibility.

¶11 James also contends the circuit court failed to fulfill the objectives of support and fairness in the award of maintenance. However, it is apparent from the court's decision that support and fairness were the objectives in its maintenance award. The record demonstrates the court considered the proper statutory factors under WIS. STAT. § 767.56, employed a process of reasoning based upon the facts of record, and reached a conclusion a reasonable judge could reach. The court's maintenance decision was a proper exercise of discretion.

¶12 Finally, James argues the circuit court erred in ordering him to pay a contribution to Wanda's attorney fees. Allowance of attorney fees in a divorce case is a matter within the discretion of the circuit court and is subject to reversal only when the court has erroneously exercised its discretion. ***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

[6] WISCONSIN ADMIN. CODE ch. DWD 40 was renumbered to ch. DCF 150 under s. 13.92(4)(b)1., Stats., Register November 2008. *See* WISCONSIN ADMIN. CODE, Note to ch. DCF 150 (Nov. 2009).

the reasonableness of the fees.[7] ***Van Offeren v. Van Offeren***, 173 Wis. 2d 482, 499, 496 N.W.2d 660 (Ct. App. 1992).

¶13 Here, there is no dispute that Wanda incurred more than $68,000 in fees. She testified that she could not pay those fees. When the circuit court originally determined that the parties should pay their own fees, it understood Wanda was receiving $311,968.01 as a property division payment. Because Wanda was receiving almost $73,000 less than anticipated because of the court's mathematical error, the court attempted to compensate by requiring James to pay $20,000 toward her attorney fees. Wanda's need, coupled with James's ability to pay, was clearly altered by the decrease in the property division payment James was required to make. We conclude the award of fees was an appropriate exercise of discretion.

By the Court.—Judgment affirmed.

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

[7] We do not discern an argument that the fees were unreasonable, and we therefore do not reach that issue.