COURT OF APPEALS
DECISION
DATED AND FILED

March 28, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP896 **Cir. Ct. No. 2008FA190**

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

IN RE THE MARRIAGE OF:

ANDREW J. WALLOCK,

PETITIONER-RESPONDENT,

V.

JENNIFER L. WALLOCK,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Jennifer Wallock appeals from a judgment of divorce and challenges the unequal property division effected by removing from the marital estate a $55,782 inheritance Andrew Wallock received but put into the

marital home.[1] We conclude that the circuit court properly exercised its discretion and affirm the judgment.

¶2 After fourteen years of marriage, the Wallocks divorced. They stipulated that Andrew would have sole legal custody and primary placement of their two minor children. At the time of the divorce, Jennifer was incarcerated in a Wisconsin prison and her child support obligation was set using the percentage guidelines based on imputed annual income of $17,400. The judgment of divorce requires that during her incarceration Jennifer's child support obligation and her share of uninsured medical expenses be paid from the deposit of her equalization payment.

¶3 Andrew was awarded the marital home, along with the existing mortgage. The circuit court found that a $55,782 inheritance Andrew received was commingled with marital funds and put into the jointly titled marital home. The court declared the inheritance to be part of the marital estate. However, as a deviation from an equal property division, the $55,782 inheritance was deducted

[1] We initially questioned whether upon its entry the judgment of divorce was final for purposes of appeal because it provided for the sale of any appraised personal property that Andrew elected not to keep and the addition of the sale proceeds to the "marital estate to equalize." The judgment does not determine the amount of the equalizing payment from Andrew to Jennifer. Subsequent to the filing of the notice of appeal, the parties submitted to the circuit court an "updated and mutually acceptable" balance sheet, calculating a final equalization payment of $7921.84. By its inclusion in the record, we deem the circuit court to have adopted the parties' stipulation of the required payment and conclude that the divorce litigation was terminated. *See* WIS. STAT. § 808.03(1) (2009-10) (an appeal as of right can be taken only from a final judgment or final order; a judgment or order is final if it disposes of the entire matter in litigation as to the parties); *see also* WIS. STAT. § 808.04(8) (if the record discloses that the judgment or order appealed from was entered after the notice of appeal was filed, the notice of appeal is treated as filed after entry of the judgment or order).

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

to arrive at the determination that the parties' equity in the marital home was $37,597. The result was an 80%/20% division of the equity in favor of Andrew. That division is the sole focus of Jennifer's appeal, and she does not challenge the valuation of the remaining marital assets and debts or the equal division of those assets and debts.

¶4 Jennifer first argues that it was error for the circuit court to exempt the inheritance from the marital estate in light of the evidence that the money had been comingled with marital funds and used for a marital purpose. Whether property acquired during the marriage is exempted from division under WIS. STAT. § 767.61(2)(a) involves both fact finding and questions of law. *See* ***Derr v. Derr***, 2005 WI App 63, ¶45, 280 Wis. 2d 681, 696 N.W.2d 170. Here, it is not necessary to parse out the standards of review applicable to the various components of the determination that certain assets are part of the marital estate. The circuit court explicitly found that the inheritance was comingled, Andrew had donative intent to add it to the marital estate, it had changed character from individual to marital property, and it was part of the marital estate. Jennifer's lengthy argument on the issue is unnecessary because the ruling that the inheritance was marital property was made.[2]

[2] Not until her reply brief does Jennifer argue that the circuit court made a "de facto" exclusion of the inheritance and that the facts of this case align with ***Grumbeck v. Grumbeck***, 2006 WI App 215, ¶1, 296 Wis. 2d 611, 723 N.W.2d 778, where we held that the circuit court may not divide the marital estate to work a de facto split of gifted assets. We will not, as a general rule, consider arguments raised for the first time in a reply brief. ***Schaeffer v. State Pers. Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989).

(continued)

¶5 What is really at issue is the circuit court's determination that an unequal division of marital property, particularly the marital home, was appropriate. The division of the marital estate is within the circuit court's discretion. *See* ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. The court is to presume that all marital property is to be divided equally between the parties, but it may alter this distribution after considering the various factors set forth in the property division statute, WIS. STAT. § 767.61(3). *See* ***LeMere***, 262 Wis. 2d 426, ¶4. We will sustain the circuit court's discretionary decision if 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.***, ¶13.

¶6 Jennifer argues that the circuit court did not consider enough of the factors listed in WIS. STAT. § 767.61(3). However, the circuit court is only required to consider the relevant factors and the failure to address factually inapplicable factors is not an erroneous exercise of discretion. ***LeMere***, 262 Wis. 2d 426, ¶26. Additionally, the weight to be given to the relevant factors is within the circuit court's discretion. ***Settipalli v. Settipalli***, 2005 WI App 8, ¶12, 278 Wis. 2d 339, 692 N.W.2d 279.

We reject Jennifer's contention that by extracting from the equity of the marital home the same amount as the inheritance, the circuit court made a de facto exclusion of the inheritance. The strained construction Jennifer gives to the selected portions of the circuit court's comments cannot undo the explicit finding that the inheritance was part of the marital estate. ***Grumbeck***, 296 Wis. 2d 611, ¶¶3, 8, and 10, involved the division of individual property without the requisite finding of hardship necessary to pull the asset back into the marital estate and divide it. Here, the circuit court included the inheritance in the marital estate but went on to make an unequal division of the marital estate. ***Grumbeck*** does not apply.

¶7 Here, the circuit court's decision to deviate from an equal division of the marital property was based, in part, "on the balance of the orders … concerning the property division, and the award of child support going forward and retroactively." This comment reflects the circuit court's implicit recognition that the marital home was the parties' largest asset and its value would generate an equalizing payment. At the same time, the court's reference to child support reflects its concern with the financial burden Andrew bears as the sole income producing parent during Jennifer's incarceration. The court observed that, "at least in the near future," Andrew would bear the brunt of providing for the children with regard to day-to-day expenses and parenting time. In addition, the circuit court noted that, as a result of Jennifer's conviction of a crime, she lost her nursing license and gainful employment. Jennifer was no longer contributing as much to the support and welfare of the children. The court's focus was the connection between maintaining the marital home and the children's support and well being. These were appropriate considerations under WIS. STAT. § 767.61(3)(d), (h), (j) and (m).[3] Given the unique circumstances of this case, these were the relevant factors and demonstrate a proper exercise of discretion. No magic words were required.

¶8 The impermissible purpose Jennifer tries to assign to the extraction of the exact amount of the inheritance from the home equity fails. It was entirely permissible for the circuit court to consider the "bygone inherited" status of the money used to purchase the marital home when deciding the property division.

[3] WISCONSIN STAT. § 767.61(3)(d), (h), (j), and (m) allows the circuit court to consider the contribution of each party to the marriage, the desirability of awarding the family home to the party having physical placement of the children for greater periods, other economic circumstances of each party, and such other factors the court determines to be relevant.

See ***Schwartz v. Linders***, 145 Wis. 2d 258, 259, 262-63, 426 N.W.2d 97 (Ct. App. 1988). In ***Schwartz***, the bulk of the marital estate was initially inherited money, and the husband claimed allowing an equal division would give his spouse a financial windfall after their short marriage. ***Id.*** at 260-61. This court concluded that the circuit court made an error of law in rejecting the suggestion that it could consider the prior inherited status of the divisible property and remanded with direction that the circuit court consider the inherited status. ***Id.*** at 263. Here, the circuit court's consideration of the amount of the inheritance was a shortcut to determining a fair deviation from the equal division of the property. It was a readily accessible figure tied to the parties' home equity, the only large marital asset easily divided unequally. We conclude the circuit court did not erroneously exercise its discretion in effecting an unequal property division by reducing the home equity by the inheritance amount.

By the Court.—Judgment affirmed.

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