COURT OF APPEALS
DECISION
DATED AND FILED

August 7, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2039-FT **Cir. Ct. No. 2008FA53**

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

IN RE THE MARRIAGE OF:

TANYA SCHULZ,

PETITIONER-RESPONDENT,

V.

JOSHUA SCHULZ,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County: TIMOTHY L. VOCKE and THOMAS CANE, Reserve Judges. *Affirmed and cause remanded with directions.*

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

¶1 PER CURIAM. Joshua Schulz appeals a divorce judgment, alleging the circuit court erroneously exercised its discretion concerning property

division and child support.[1] We affirm and also conclude the appeal is frivolous. We therefore remand for a determination of attorney fees and costs incurred on the appeal.

¶2 Joshua and Tanya Schulz were married on December 16, 2003 and divorced on June 9, 2011.[2] The marriage produced two minor children.[3] At the time of divorce, Tanya's earning capacity was determined to be $9.00 hourly and Joshua's earning capacity was $15.00 hourly. The parties agreed on custody and placement, and Tanya waived maintenance. Issues remaining for trial included property division, child support and arrearages. The court allocated the parties' property and ordered Joshua to pay $150 monthly child support and $50 monthly toward accumulated arrearages of $18,404.43. This appeal follows.

¶3 Property division and child support decisions are entrusted to the circuit court's sound discretion, and are not disturbed on appeal unless the court has erroneously exercised its discretion. ***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 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 circuit court's decision.

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2009-10 version.

[2] A previous divorce action was apparently commenced in 2004 but dismissed in 2005.

[3] While the divorce action was pending, Tanya gave birth to another child. The circuit court determined this was not a child of the parties' marriage.

Loomans v. Milwaukee Mut. Ins. Co., 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968).

¶4 Joshua challenges the circuit court's division of the homestead. He argues the circuit court erroneously exercised its discretion[4] by:

> failing to give proper weight to the fact that Mr. Schulz brought the homestead to the relatively short marriage, the property was kept separate by the parties, Mr. Schulz made all payments on the mortgage on the homestead while the parties were living together and Mrs. Schulz substantially increased her education and earning capacity during the marriage.

¶5 Joshua's argument is undeveloped and unsupported. On appeal, he essentially continues his basic argument that property he brought to the marriage remains his individual property, not subject to division. He suggests the circuit court erred by determining that *any* portion of the value of the residence could be considered divisible. However, he does not even attempt to address the well-established maxim that all property at divorce except that acquired by gift or inheritance is part of the marital estate presumed subject to equal division. *See* ***Hokin v. Hokin***, 231 Wis. 2d 184, 191-92, 605 N.W.2d 219 (Ct. App. 1999). Thus, it was within the circuit court's prerogative to include all of the equity in the homestead in the property division.

¶6 However, after consideration of appropriate factors, the court awarded Joshua the equity in the homestead at the time of the marriage but also determined the parties should share equally any increase in value during the

[4] We note Tanya uses the phrase "abused its discretion." In 1992, our supreme court replaced the phrase, "abuse of discretion," with the phrase, "erroneous exercise of discretion." *See* ***Shirk v. Bowling***, 2001 WI 36, ¶9 n.6, 242 Wis. 2d 153, 624 N.W.2d 375.

marriage. It is noteworthy that the court, without objection, also determined that certain retirement accounts in which Joshua had an interest would be divided into marital and pre-marital components, and only that portion of the total value accumulated during the marriage would be divided equally.

¶7 Joshua insists that a circuit court "may consider [whether divisible] property was generated in whole or in part by one party's donation of non-[divisible] property to the marriage." Joshua relies upon ***Schwartz v. Linders***, 145 Wis. 2d 258, 426 N.W.2d 97 (Ct. App. 1988). That case involved the prior inherited status of divisible property. *See* ***id.*** at 263. Here, Joshua admitted at trial that he purchased the homestead. In any event, the circuit court was cognizant that property brought to the marriage is a factor that allows, but does not compel, the court to deviate from the presumption of equal division in divorce. *See* WIS. STAT. § 767.61(3)(b). The court rationally and reasonably analyzed the property brought into the marriage and properly exercised its discretion.

¶8 Joshua also argues the circuit court erroneously exercised its discretion concerning child support. He insists the court erred "in setting the earning capacities of both parties." However, Joshua fails to develop any argument whatsoever regarding his own earning capacity and therefore we will not consider the issue. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

¶9 Joshua claims the court erred by determining Tanya's earning capacity at $9.00 hourly because she "previously had a job earning approximately $17.00 per hour." However, it was undisputed that Tanya earned $9.00 per hour at the time of the divorce trial. Tanya also provided the following unrefuted testimony at trial:

> The jobs that I come across that are hiring with only the requirement of an Associate degree really don't pay more than what I make now. The ones that would be – that I would commit myself to full time require a Bachelor's degree, and I don't have it yet.

Significantly, Joshua offered no expert testimony regarding the value of Tanya's associate degree, any work that may be available to her, or the hourly rate.

¶10 Joshua also argues the circuit court erred, in some unspecified manner, by "failing to consider any of the child support and family support arrearages in its property division." This appears to be a rehashing of an argument made at trial that the court should "do equity" and modify or eliminate the arrearages. In any event, Tanya responds that under WIS. STAT. § 767.59(1m), a court may not retroactively revise child support or family support arrearages other than to correct previous errors in calculations. Joshua does not reply to this argument and we therefore deem it conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶11 Finally, Tanya's motion for frivolous appeal is granted because of Joshua's failure to acknowledge bedrock law, and the cause is remanded for a determination of attorney fees and costs incurred in the appeal.

By the Court.—Judgment affirmed and cause remanded with directions.

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