

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 26, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1751

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

DONALD R. STRINGER,

Petitioner-Appellant,

v.

JOYCE D. STRINGER,

Respondent-Respondent.

APPEAL from a judgment of the circuit court for Sauk County: VIRGINIA WOLFE, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Dykman, P.J., Paul C. Gartzke and Robert D. Sundby, Reserve Judges.

PER CURIAM. Donald Stringer appeals from both the maintenance award and the property division of his divorce judgment, claiming that the circuit court erroneously exercised its discretion. We conclude that:

(1) the trial court erroneously exercised its discretion in awarding maintenance because it failed to properly explain why the chosen amount was appropriate; and (2) the trial court did not erroneously exercise its discretion in its determination of the property settlement.

BACKGROUND

On June 15, 1994, Donald Stringer petitioned for a divorce from Joyce Stringer. The parties had one son, Timothy, who had reached the age of majority before the divorce proceedings began.

Since 1979, the Stringers operated a veal farm incorporated under the name of Oaklawn Farms in Neillsville, Wisconsin. At one time, Oaklawn Farms was successful and debt free. However, by the time of the Stringers' separation, the corporation was nearly bankrupt. The real estate was sold in full satisfaction of a \$160,000 debt to the bank. In July 1993, an auction was held for the sale of the corporation's machinery and equipment as well as other personal household furnishings. Joyce received approximately \$12,000 from the auction after all debts were satisfied. Donald had moved from the residence and did not take part in the auction or the sale of the farm.

When Donald moved from the parties' residence in May 1993, he took only his motorcycle, a pistol and the proceeds of his individual retirement account (IRA). Donald spent all the proceeds of his IRA before finding employment in August 1993 at the Underhill Veal Farm. At Underhill, Donald usually took care of 256 calves at a wage of \$1.15 per calf per week, earning a net of \$1,053.70 per month. Donald's job benefits included medical insurance, free living quarters and major utilities.

After the separation, Joyce moved to Phoenix, Arizona. Joyce used one of her IRAs valued at approximately \$7,600 to subsidize her living expenses before finding employment in the reservation department at America West Airlines on January 6, 1994. Joyce earned a net of \$978.56 per month and her monthly expenses were \$1,195.10.

The divorce trial was held on April 20, 1995. The court granted the divorce and ordered Donald to pay Joyce \$10,000 as a property settlement and \$250 per month indefinitely for maintenance. Donald appeals.

DISCUSSION

Donald first contends that the trial court erroneously exercised its discretion in its calculation of the maintenance award. The determination of the amount and duration of maintenance rests within the sound discretion of the trial court and will not be overturned unless the court erroneously exercised its discretion. *LaRocque v. LaRocque*, 139 Wis.2d 23, 27, 406 N.W.2d 736, 737 (1987). Discretion is properly exercised when the court arrives at a reasoned and reasonable decision by employing a rational mental process through which the facts of the record and the law relied upon are stated and are considered together. *Id.*

Section 767.26, STATS., governs maintenance.¹ This section is designed to further two objectives: to support the recipient according to the parties' needs and earning capacities and to ensure a fair and equitable financial arrangement in each case. *LaRocque*, 139 Wis.2d at 32-33, 406 N.W.2d at 740. Donald specifically contends that the circuit court failed to take the fairness objective of § 767.26 into account. We agree.

The circuit court must set forth the factors on which it relied in reaching the maintenance award. *Lacey v. Lacey*, 45 Wis.2d 378, 387, 173 N.W.2d 142, 147 (1970). The court offered the following explanation for its \$250 per month maintenance award:

¹ Section 767.26, STATS., provides that when granting a divorce, the court may order maintenance payments to either party for a limited or indefinite length of time after considering: (1) the length of the marriage; (2) the age, physical and emotional health of the parties; (3) the division of property made under § 767.225, STATS.; (4) the educational level of each party; (5) the earning capacity of the party seeking maintenance; (6) the feasibility that the party maintenance can become self-supporting; (7) the tax consequences to both parties; (8) any mutual agreements made by the parties; (9) the contribution by one party to the education, training or increased earning power of the other; and (10) other factors as the court may in each case deem relevant.

Regarding maintenance it is clear that Mrs. Stringer cannot meet her current needs. I find it reasonable, and that in addition as well as depleting her marital assets which were not appropriate, she has health difficulties that are going to involve major surgery.

This is a marriage of longstanding. Maintenance is appropriate. I will award maintenance in the amount of \$250 per month. That will commence May 1 and the first of every month thereafter.

This explanation is not sufficient to justify the court's award. Although the court indicates that Joyce must undergo surgery, it makes no finding that this surgery will diminish her ability to earn a living over the long term, thereby justifying indefinite maintenance. In making its determination, the court relied only on the length of the marriage and the fact that Joyce cannot meet her current needs. The court did not address the educational level of the parties, Joyce's earning capacity or the feasibility that she may become self-supporting. Nor did the trial court consider Donald's income and expenses to determine the fairness of awarding Joyce \$250 per month in maintenance. We conclude that the court erroneously exercised its discretion and, therefore, we reverse and remand to the trial court for a redetermination of the maintenance issue.

Donald next argues that the trial court erred in its division of the marital property. First, Donald contends that the court erred in the valuation of the assets. We disagree.

Property division generally rests within the sound discretion of the court. *Brandt v. Brandt*, 145 Wis.2d 394, 406, 427 N.W.2d 126, 130 (Ct. App. 1988). We will not overturn the trial court's decision unless it is premised on legal or factual errors. *Id.*

Assets must be valued as of the date of divorce unless special circumstances warrant deviation from this rule. *Id.* at 421, 427 N.W.2d at 136. Special circumstances will be found only in cases in which the parties have little, if any, control over the situation and have not caused or contributed to the special circumstances. *Id.* at 422, 427 N.W.2d at 136.

In this case, no special circumstances justify a different valuation date. Donald left the household in May 1993. He chose not to participate in the sale of the business or liquidation of its assets. Donald, as co-owner of the shares of the corporation, could have helped exercise control over the disposition of the marital assets. The court did not find that Joyce wasted or intentionally depleted the marital estate. Thus, Donald may not now argue that special circumstances existed which justified a different property valuation date. We conclude that the trial court did not erroneously exercise its discretion by concluding that the ultimate property division should be determined as of April 20, 1995, the date of the divorce.

Donald next claims that the court erred in charging him with the value of some guns because he testified that he does not have them in his possession or know of their location. The testimony of the parties is conflicting about who has present possession of the gun collection.

When there is a conflict in testimony, the trial court is the ultimate arbiter of the credibility of witnesses and the weight given to the testimony. *Gardner v. Gardner*, 190 Wis.2d 216, 243, 527 N.W.2d 701, 710 (Ct. App. 1994). We will not overturn the court's assessment of credibility unless the inferences drawn from the testimony were unreasonable. *Id.* Here, each party testified that the guns were in the other party's possession. Joyce testified that their son, Tim, took the guns because Donald told him "he could take whatever he wanted." It was her understanding that Donald had given the guns to Tim. After weighing the relative credibility of the parties, the court stated: "I grant the testimony is conflicting, but under the circumstances I believe Mrs. Stringer and the testimony that was given and that either they are in Mr. Stringer's possession or Tim's possession or have been disposed by them." The trial court's inference was reasonable based on the testimony. Thus, the court did not err in assigning the value of the guns to Donald.

Donald also argues that the trial court erred in assigning him the credit card debt that accumulated after the parties separated. We disagree. The court found that the visa bill covered legitimate living expenses and money for farm necessities during the parties' separation. Because Donald was not contributing to Joyce's living expenses or for farm costs and necessities during this period, it was within the court's discretion to charge Donald with these costs.

Donald last contends that the judge attempted to punish him for marital misconduct when she stated:

It is clear to the court that Mr. Stringer made no provisions or did not assist in any way in the marital property or the financial grave difficulties that were existing at the time he left in May of 1993. He walked out. He has to take the lumps that go along with that.

The court may not consider marital misconduct when determining the proper allocation of marital property. *Dixon v. Dixon*, 107 Wis.2d 492, 502, 319 N.W.2d 846, 851 (1982). Instead, the legislature intended property division to be based on the needs of the parties, rather than on the assignment of blame. *Id.* at 503, 319 N.W.2d at 851.

The trial judge's comments do not establish that she intended to penalize Donald. The judge was referring to the problems Joyce had with liquidating the marital assets. She merely noted that because Donald chose not to participate in the sale of the farm or marital property, he could not later complain about how the disposition was accomplished. Nor is there any indication that the judge did, in fact, improperly allocate property as a punishment for Donald walking out. Therefore, we reject Donald's claims that the judge improperly considered marital misconduct in calculating the property division.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.