COURT OF APPEALS DECISION DATED AND FILED

September 22, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 98-2886

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

IN RE THE MARRIAGE OF:

MARCIE ELENE MILLER,

PETITIONER-RESPONDENT,

V.

PAUL GREGORY MILLER,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH D. McCORMACK, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. Paul Gregory Miller appeals from the child support order and property division made by a judgment of divorce. He argues that the circuit court should have adhered to the percentage standards for shared-time payors in determining the amount of child support and that he should have been

awarded a greater portion of the marital assets because the marriage was of such short duration. We conclude that the circuit court properly exercised its discretion and affirm the judgment.

Paul and Marcie Elene Miller were married for three years before separating. The divorce proceeding took two and one-half years to finish. The parties' one child was born in 1993. The parties stipulated to joint custody and a physical placement schedule which results in the child's placement with Paul 42% of the time. Paul's monthly gross income is $3228. He was ordered to pay $650 per month for child support.

Paul argues that using the percentage standards in the Shared Time Payor Table found in WIS. ADM. CODE § DWD 40, his child support obligation should have been set at $314 per month. The determination of child support is committed to the discretion of the circuit court. *See* ***Mary L.O. v. Tommy R.B.***, 199 Wis.2d 186, 193, 544 N.W.2d 417, 419 (1996). While the circuit court is required to determine child support according to the percentage standards, the circuit court may deviate from the percentage standards if it finds by the greater weight of the credible evidence that the use of the standards would be unfair to the child or party requesting deviation. *See* ***id.*** at 193-95, 544 N.W.2d at 420. Before making a modification, the trial court must consider factors under § 767.25(1m), STATS., such as the financial resources of both parents, the earning capacity of each parent and the best interests of the child. *See* ***Hubert v. Hubert***, 159 Wis.2d 803, 814, 465 N.W.2d 252, 256 (Ct. App. 1990). When this court reviews such decisions, we determine if the court examined the relevant facts, applied the correct standards and reached a rational decision. *See* ***Luciani v. Montemurro-Luciani***, 199 Wis.2d 280, 294, 544 N.W.2d 561, 566 (1996).

Paul contends that the circuit court failed to articulate a sufficient reasonable basis for deviating upward from the percentage standards. We disagree. The circuit court could not have been more clear in its finding that "the child's needs cannot be met by simply entering a percentage order." The court noted the disparity in income between the parties, even with imputing additional income to Marcie. It articulated its concern that the child would have a good standard of living with Paul 42% of the time but live in poverty the rest of the time. Although the amount of the deviation was to approximate a fifty-fifty division of income, this was not a disguised maintenance award. The court had already considered and denied maintenance. The determination of the amount was to benefit the parties' child. The articulation on the record satisfies the requirements of § 767.25(1n), STATS., and constitutes a proper exercise of discretion.

As to the property division, Paul claims that in light of the short term nature of the marriage and the fact that he brought substantial assets to the marriage, the circuit court erroneously exercised its discretion by awarding Marcie one-half the value of his pensions, retirement plans and life insurance policy. The division of the marital estate is within the discretion of the trial court. *See* ***Liddle v. Liddle***, 140 Wis.2d 132, 136, 410 N.W.2d 196, 198 (Ct. App. 1987). The circuit court must begin with the presumption that all marital property is to be divided equally between the parties. *See* § 767.255, STATS.

Paul's complaint about the property division stems from the misconception that because he brought the assets to the marriage, he is entitled to them. However, none of the assets were exempted from the marital estate by any agreement between the parties. Neither the parties' discussions nor the bankruptcy schedules Marcie filed give rise to an agreement to classify Paul's assets as his

individual property. There is no claim that the assets brought to the marriage were acquired by gift, bequest, devise or inheritance, or with funds so acquired. Accordingly, the assets were part of the marital estate and subject to equal division under § 767.255, STATS. *See* ***Lang v. Lang***, 161 Wis.2d 210, 229, 467 N.W.2d 772, 779-80 (1991); ***Rodak v. Rodak***, 150 Wis.2d 624, 627-28, 442 N.W.2d 489, 491 (Ct. App. 1989).

Paul asserts that the circuit court ignored Marcie's "fraudulent creation of marital debt." The court made no finding of fraud on Marcie's part. Rather, it found that "both sides were engaging in some game playing" with respect to the retention of assets. The credibility of each party with respect to his or her conduct while the divorce was pending was solely for the circuit court to determine. *See* ***Jacquart v. Jacquart***, 183 Wis.2d 372, 386, 515 N.W.2d 539, 544 (Ct. App. 1994). Further, the court made each party responsible for debts incurred while the divorce was pending, thus negating potential ill effects of Marcie's conduct.

Paul argues that the circuit court failed to articulate the factors upon which it based the property division. The record reflects that the court considered Paul's argument for an unequal division. It excluded from division a $30,000 individual retirement account because Paul had maintained the separate character of that asset. In response to Paul's claim that he had brought the assets to the marriage, the court found that a great portion of value of some of the assets had been earned during the marriage. Having addressed Paul's arguments and having adhered to the presumption of equal division, the court was not required to say more. *See* ***Rodak***, 150 Wis.2d at 631-32, 442 N.W.2d at 492-93. We conclude that an equal division of the marital assets was a proper exercise of discretion.

By the Court.—Judgment affirmed.

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