COURT OF APPEALS
DECISION
DATED AND FILED

SEPTEMBER 29, 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. 98-3001

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

IN RE THE MARRIAGE OF:

DIANNE LYNN REDENIUS,

PETITIONER-RESPONDENT,

V.

ROY CARL REDENIUS,

PETITIONER-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

PER CURIAM. Roy Carl Redenius appeals from a judgment of divorce from Dianne Lynn Redenius. He argues that the circuit court failed to make adequate findings that property he had sold or disposed of years before the

divorce was marital property subject to division and that debt Dianne incurred while the action was pending should not have reduced the divisible marital estate. We affirm the judgment.

After thirteen and one-half years of marriage, Dianne commenced an action for divorce. Two children were born to the marriage. Both parties worked for General Motors Corporation in Janesville but they had accumulated very few assets. They owned a home in Indiana which was ordered to be sold and the equity equally divided. The remaining marital property was also divided equally by requiring Roy to make a $26,441.20 balancing payment to Dianne.

Roy challenges the following findings of the circuit court:

> Most of the property was appraised and the values agreed upon. Petitioner presented testimony regarding a list of approximately 30 items that she claims Respondent is hiding (P. Exh. 19). Respondent says these items are "missing." The property in question consists of farm machinery, guns, and numerous tools. Respondent testified that some of these items are given away, and some are broken and unusable. Regardless of whether these items still exist and are usable, they are marital assets which the Court finds Respondent has wasted. Petitioner values these items at $18,285; Respondent disputes this and believes they are worth $1,000 at the most.
>
> The Court finds Respondent's testimony with regard to these items to be incredible and awards the value of these items at $18,285 to Respondent.

Section 767.275, STATS., creates a presumption that property "transferred for inadequate consideration, wasted, given away or otherwise unaccounted for by one of the parties within one year prior to the filing of the petition" is marital property subject to the presumption of equal division under § 767.255, STATS. Roy argues that the circuit court failed to consider whether the

transfer of the thirty items of personal property was made within one year of the commencement of the divorce action and to consider, as to each individual item, the relevant factors under § 767.255 that might call for a deviation from the equal division of that item of personal property.

An appraiser went to look over the personal property in Roy's possession. Dianne testified that a number of items appeared to be missing from the appraiser's list. She made a list of things Roy owned when the parties separated in February 1996, including farm tractors Roy kept at his brother's property, tools, chain saws, guns and a snowmobile. She testified that the items had been in the couple's possession when Roy moved out. She estimated the value of each item.

Roy contradicted Dianne's testimony on nearly every point. He testified that he had shown the appraiser everything that he owned but that he did not have any tools or chain saws. He proclaimed, "I don't have very much stuff." He testified that he sold a backhoe in 1989, but he did not produce proof of any payment for that item. He said he did not own any tractors and that he had given his brothers the tractors that he did not sell when he went to work for GM in Indiana in March 1988. Roy admitted that some items—tool sets, power tools, drills, battery charger, cooler, electric boards and gas cans—were at the residence when he moved out, but he claimed to have left them in the garage. He acknowledged that his boat motor was in the repair shop and that a mantle clock was in his possession in Janesville. He said a twelve-row corn planter was given away and that he had just left his snowmobile in the repair shop. Roy had taken the appraiser to at least four places to show him various items of property. Roy denied hiding or secreting away property.

Whether the parties still owned all of the items of personal property at the time of their separation and whether Roy took possession of certain of those items is a finding dependent on the testimony of either Dianne or Roy. When a finding of fact is premised on the court's assessment of the competing credibility of the parties, we must give due regard to the circuit court's opportunity to make this assessment. *See* ***Jacquart v. Jacquart***, 183 Wis.2d 372, 386, 515 N.W.2d 539, 544 (Ct. App. 1994). The circuit court specifically found that Roy was not credible with respect to his disclosure and use of personal property. We cannot conclude that this finding was clearly erroneous. Roy's testimony was self-contradictory on certain points. Many of the items were related to tractor pulling, farming, cement and wood cutting endeavors Roy engaged in. Another witness confirmed Dianne's testimony that Roy had backed his truck up to the garage and removed property.[1] Having found Dianne's testimony to be more credible, there was a sufficient evidentiary basis for the circuit court to find that the items of personal property Dianne identified had been owned by the parties within one year of the commencement of the divorce action[2] and that Roy had committed waste with respect to these items.

Having properly concluded that the items of personal property were part of the marital estate, the circuit court was not required to consider the factors under § 767.255(3), STATS., in deciding how to divide each individual item of

[1] Roy's brother testified that Roy had given him one of the tractors in 1988. Although this confirmed Roy's testimony, the brother's testimony also confirmed that the tractors Roy had purchased were at the farm to which Roy had access.

[2] The one-year time period is not critical in this instance because § 767.275, STATS., does not prevent the court from including in the property division assets transferred or disposed of more than one year prior to the commencement of the action. *See* ***Zabel v. Zabel***, 210 Wis.2d 336, 339 n.3, 565 N.W.2d 240, 242 (Ct. App. 1997).

personal property. The division of the marital estate is within the discretion of the circuit 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(3). Here, despite dual employment at the GM plant, the parties' net marital estate was very modest. Because the circuit court did not vary from an equal division of the marital property, we see no reason why it is required to consider the factors set out in § 767.255(3).

Moreover, Roy has not provided any citation to the record where he advanced any application of the factors that suggests that his credit side of the balancing equation not include all of the disputed items of personal property. The claim is deemed waived. *See* ***Preuss v. Preuss***, 195 Wis.2d 95, 105, 536 N.W.2d 101, 104-05 (Ct. App. 1995). We conclude that the equal division of property effected by crediting Roy with the items of personal property which he subjected to waste was a proper exercise of discretion.[3]

Roy argues that $6498.60 of the debt assigned to Dianne was not marital debt because it was incurred by her after commencement of the divorce

[3] Even if Roy raised the issue with prominence in the circuit court, we would affirm the circuit court's ruling. *See* ***Rodak v. Rodak***, 150 Wis.2d 624, 632 n.6, 442 N.W.2d 489, 493 (Ct. App. 1989) (we may independently review the record to determine whether the discretionary result is proper). We deem the court's finding that Roy had committed waste as implicitly rejecting any claim that Dianne was in possession of some of the items of personal property and that she should be awarded those items. Further, given the court's finding that Roy had committed waste against marital assets, a deviation from an equal division would have resulted in a greater award to Dianne. *See* ***Anstutz v. Anstutz***, 112 Wis.2d 10, 12, 331 N.W.2d 844, 846 (Ct. App. 1983) (in considering each party's contribution to the marriage, the court may consider the depletion of the marital assets because of squandering or neglect).

action.[4] *See* ***Weiss v. Weiss***, 122 Wis.2d 688, 699, 365 N.W.2d 608, 614 (Ct. App. 1985). Roy contends that Dianne's increase in credit card debt was a violation of the September 16, 1996 temporary order which restrained the parties "from borrowing on existing credit accounts or incurring additional debt."[5]

Weiss does not mandate that all postcommencement debt be classified as nonmarital debt. Here Dianne testified that the debts increased for a marital purpose. For example, the Sears credit card balance increased when Dianne purchased a computer which the children use for school work. Additional debt was incurred, with Roy's knowledge, for stereo equipment for the children. Dianne also indicated that the debt was incurred on items of personal property that were appraised and included as part of the marital estate. It was a proper exercise of discretion to include as marital debt the debt on marital assets and debt incurred for marital purposes.

In addressing Roy's claim that Dianne violated the temporary order, the circuit court adamantly noted that "exploration of the debts that were incurred in violation of this September 16, 1996 [order], that's going to cut both ways." The circuit court's finding that accounting for violations of the temporary order was going to be a wash with respect to the property division is not clearly

[4] As proof of the increased debt, Roy cites to Dianne's financial disclosure statement dated March 14, 1997, as compared to the statement dated June 11, 1997. Although these statements were offered as exhibits, the exhibits are not part of the record transmitted on appeal. It is the appellant's responsibility to assure that the record is complete. *See* ***Fiumefreddo v. McLean***, 174 Wis.2d 10, 26, 496 N.W.2d 226, 232 (Ct. App. 1993).

[5] The circuit court's opinion indicates that "the allocation of debts is agreed upon." We do not hold Roy to a waiver of his claim that some of the credit card debt was nonmarital because it does not appear that a stipulation was placed on the record regarding the allocation of debt. The question of whether some of the debt was nonmarital or incurred in violation of the temporary order was raised on a motion to clarify the decision. That motion was decided before entry of the final findings of fact, conclusions of law and judgment of divorce.

erroneous. The temporary order permitted Roy to trade in his 1996 vehicle for a 1997 vehicle, subject to the existing debt. The record demonstrates that Roy, in violation of the temporary order, upgraded to a new 1998 truck while the action was pending.[6] Also, child support was not paid as anticipated because Roy went on disability pay while the divorce was pending. We see no error in the exercise of the circuit court's discretion.

By the Court.—Judgment affirmed.

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

[6] In valuing the marital property, the vehicle in Roy's possession was valued as the previously owned 1997 vehicle.