

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 20, 2001

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0688

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

CHERYL A. BASTEN,

PETITIONER-RESPONDENT,

v.

DALE M. BASTEN,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Dale Basten, pro se, appeals his judgment of divorce. He argues that the trial court erroneously exercised its discretion when it

awarded his former wife, Cheryl Basten, his entire pension fund. Because the record discloses a rational basis for the court's ruling, we affirm the judgment.

¶2 The parties were married in 1985 and have two minor children of the marriage. At the time of the divorce, Dale was serving a life sentence in prison and Cheryl was unemployed. Before and during the marriage, Dale worked at a mill and earned slightly more than \$36,000 per year before he left his job in 1995 due to his criminal conviction. Cheryl occasionally held part-time jobs during the marriage. The parties had significant debts, and their property consisted of furniture, jewelry, a 1990 minivan, and Dale's pension from his employment at the mill.¹

¶3 The trial court awarded Cheryl sole legal custody of the minor children. Because of Dale's prison sentence, no child support was ordered. The court denied maintenance to both parties. The court ordered that the furniture and the jewelry be placed in trust for the children with Cheryl as trustee. The court awarded the pension and minivan to Cheryl and ordered Dale to pay the debts.

¶4 Dale argues that the trial court erroneously awarded Cheryl his pension fund because a large part of it was earned before the marriage. He contends that Cheryl depleted the marital estate, neglected the children, and lied about her activities. He alleges that she does not work and collects welfare. He claims that the trial court erroneously based the lopsided property division on inappropriate considerations of fault. He also contends that the property division violates the parties' prenuptial agreement. In addition, Dale points out that his

¹ Neither the record nor the parties' briefs provide a present value of the fund and, accordingly, we must conclude that the parties do not believe its value is a material factor.

contributions to the marriage vastly outweighed Cheryl's. He argues that because the trial court used improper legal standards, the property division should be reversed.

¶5 The division of the marital estate is discretionary. *Sharon v. Sharon*, 178 Wis. 2d 481, 488, 504 N.W.2d 415 (Ct. App. 1993). This court will sustain the decision if the trial 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.* Underlying discretionary determinations may be questions of fact, to which we apply a deferential standard of review. WIS. STAT. § 805.17(2).

¶6 With the exception of items acquired by gift, bequest, devise or inheritance, WIS. STAT. § 767.255 requires the court to presume that all property is to be divided equally between the parties. *Mack v. Mack*, 108 Wis. 2d 604, 607-08, 323 N.W.2d 153 (Ct. App. 1982). The court may alter this distribution only after considering the relevant factors listed in § 767.255.² *See Mack*, 108 Wis. 2d

² WISCONSIN STATS. § 767.255(3), entitled "Property division" provides:

(3) The court shall presume that all property not described in sub. (2) (a) is to be divided equally between the parties, but may alter this distribution without regard to marital misconduct after considering all of the following:

- (a) The length of the marriage.
- (b) The property brought to the marriage by each party.
- (c) Whether one of the parties has substantial assets not subject to division by the court.
- (d) The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.
- (e) The age and physical and emotional health of the parties.
- (f) The contribution by one party to the education, training or increased earning power of the other.
- (g) The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities

(continued)

at 607. While the trial court must consider relevant factors, it is not necessary that each factor be discussed in making a property division. *Dean v. Dean*, 87 Wis. 2d 854, 879, 275 N.W.2d 902 (1979). If a judge fails to address relevant factors but there are facts in the record that would support his discretionary decision if discretion had been exercised on the basis of those factors, we are required to uphold the decision. *Conrad v. Conrad*, 92 Wis. 2d 407, 414-15, 284 N.W.2d 674 (1979).

¶7 Here, the trial court found that Dale incurred some \$105,000 in attorney fees defending himself on murder charges and, as a result of his conviction and imprisonment, he lost his lucrative job and his family faced financial ruin. The court noted that many assets, including real estate, had been liquidated to pay attorney fees. The court ruled that because Dale was imprisoned, he was unable to pay Cheryl any sums for child support.

for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.

(h) The desirability of awarding the family home or the right to live therein for a reasonable period to the party having physical placement for the greater period of time.

(i) The amount and duration of an order under s. 767.26 granting maintenance payments to either party, any order for periodic family support payments under s. 767.261 and whether the property division is in lieu of such payments.

(j) Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.

(k) The tax consequences to each party.

(L) Any written agreements made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable as to either party. The court shall presume any such agreement to be equitable as to both parties.

(m) Such other factors as the court may in each individual case determine to be relevant.

¶8 We conclude that the record discloses that the court reasonably exercised its discretion and provided a reasonable basis for its decision. It is evident that the court was not impressed with Cheryl's contribution to the marital estate, and that earlier in the marriage Dale had made significant financial contributions. *See* WIS. STAT. § 767.255(3)(d). The court could find, however, that the financial effects of Dale's voluntary participation in activities resulting in his imprisonment and job loss outweigh his earlier contributions.³ The court apparently agreed with Cheryl's position: "While [Dale] may not be faulted for attempting to defend himself from [criminal charges], nonetheless, the fact remains that the depletion of assets went solely and entirely to his benefit, was unsuccessful, and of course, has left his former wife and children penniless."

¶9 The court undoubtedly determined that to the extent the prenuptial agreement provided otherwise, it was inequitable under the circumstances presented. Additionally, WIS. STAT. § 767.255 does not require the court to exclude premarital assets from a property distribution. The record fails to demonstrate an erroneous exercise of discretion.

¶10 To the extent that Dale attempts to raise other issues, his arguments are inadequately developed and referenced to permit response. We permit pro se incarcerated litigants leeway in complying with appellate rules of procedure. Nonetheless, we may not abandon our neutrality and develop arguments for them. *See State v. Flynn*, 190 Wis. 2d 31, 58, 527 N.W.2d 343 (Ct. App. 1994).

³ We do not endorse all of the court's comments. For example, the court discredited Dale's defense strategy at the criminal trial. Nonetheless, because the record supports the other reasons the court provided to reach the unequal property division, we do not disturb its decision on appeal.

By the Court.—Judgment affirmed.

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

