COURT OF APPEALS
DECISION
DATED AND FILED

November 8, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-3152

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

IN RE THE MARRIAGE OF:

SHIRLEY YVONNE ROBINSON,

PETITIONER-RESPONDENT-CROSS-APPELLANT,

V.

GORDON CHARLES ROBINSON,

RESPONDENT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Eau Claire County: WILLIAM M. GABLER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Dykman, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Gordon Robinson appeals from the judgment divorcing him from Shirley Robinson. He challenges a requirement that he pay a substantial portion of Shirley's attorney fees, a lump sum payment in lieu of a maintenance obligation, a finding regarding a maintenance delinquency, and the double-counting of an IRA account in the computation of the marital estate. Shirley cross-appeals, claiming that maintenance should have been held open, that interest received on certain bank accounts should have been included in the marital estate, that the trial court should have found that Gordon squandered assets, that the trial court should have taken taxes into account before counting rental money as an asset in the marital estate, that the trial court failed to account for several bank accounts in the division of the estate, and that the trial court miscalculated the equalization payment. We affirm the lump sum award in lieu of maintenance, but, for the reasons discussed below, remand for a recalculation of the property division and attorney fees.

BACKGROUND

¶2 Gordon and Shirley were married for nearly forty years. During the marriage, Gordon was the primary wage-earner, working for the United States Postal Service until a settlement package induced him to take early retirement. Shirley was the primary homemaker and caregiver for the couples' own children and between twenty and thirty foster children. She also occasionally worked outside of the home until retirement. By the time of the divorce, Gordon was sixty-five, Shirley was sixty, and all of their children were adults. Shirley was in good health, but Gordon had undergone multiple hip replacement surgeries and was in need of another one. The parties had combined assets in excess of $400,000. More specific details regarding disputed financial matters will be set forth on an issue-by-issue basis below.

STANDARD OF REVIEW

¶3 All of the issues raised on the appeal and cross-appeal fall within the discretionary standard of review we apply to divorce determinations. ***Sellers v. Sellers***, 201 Wis. 2d 578, 585, 549 N.W.2d 481 (Ct. App. 1996) (maintenance); ***Long v. Long***, 196 Wis. 2d 691, 695, 539 N.W.2d 462 (Ct. App. 1995) (valuation and division of the marital estate); ***Bisone v. Bisone***, 165 Wis. 2d 114, 123-24, 477 N.W.2d 59 (Ct. App. 1991) (attorney fees). The trial court properly exercises its discretion when it states its reasons and bases its decision on relevant law applied to the facts in the record. *See* ***Luciani v. Montemurro-Luciani***, 199 Wis. 2d 280, 294, 544 N.W.2d 561 (1996).

ANALYSIS

¶4 For the sake of convenience, we have combined and reorganized the parties' issues from the appeal and cross-appeal into the general categories of maintenance, property division, and attorney fees.

Maintenance

¶5 Gordon argues that the trial court erroneously exercised its discretion by awarding Shirley a lump sum of $54,000 in lieu of maintenance, while Shirley argues that the trial court erroneously exercised its discretion by not leaving maintenance open. We are not persuaded by either argument.

¶6 The trial court reasoned that it could award maintenance, taking into account that the marriage had been of significant length, that Shirley had made substantial homemaking and child-rearing contributions to the family, and that Shirley needed a way to pay for health insurance similar to that which she enjoyed

during the marriage. These were all appropriate factors supporting a maintenance award under WIS. STAT. § 767.26 (1999-2000).[1]

¶7 However, the trial court also recognized that ongoing periodic payments could be problematic both because of the parties' fixed incomes and because of Gordon's history of noncompliance with prior court orders. The trial court's resulting decision to adjust the property division with a lump sum payment in lieu of maintenance was permissible under WIS. STAT. §§ 767.255(3)(i) and 767.26(3). *See* ***Bahr v. Bahr***, 107 Wis. 2d 72, 78-80, 318 N.W.2d 391 (1982) (although maintenance is conceptually distinct from property division, the two often must be considered together in order to achieve a fair and equitable result).

¶8 The trial court provided a reasoned explanation for the amount of its award, based upon an estimate of the amount of money needed by Shirley to obtain health insurance for the next fifteen years. There was evidence in the record to support the figure of $300 per month. The trial court's refusal to hold open the issue of maintenance on the ground that there was unlikely to be any significant change in the parties' financial circumstances was also reasonably grounded in the record, and was practical given the hostile and protracted nature of the litigation. In sum, we see no misuse of discretion regarding the lump sum awarded in lieu of maintenance.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Property Division

¶9 We begin our analysis of the property division by addressing several items which the parties agree represent mistakes in the calculation and division of the marital estate.

¶10 First, it is undisputed that the American Century IRA account was listed twice with different values. We remand this issue to the trial court to determine whether the $6946 or $5990 figure should be deducted from Gordon's side of the property division.

¶11 Second, the trial court mistakenly found that Gordon had failed to pay $2400 for April, May, and June 2000 maintenance payments. That amount should be removed from his list of assets and credits.

¶12 Third, the trial court failed to include the two American Bank accounts and the Mutual Savings Bank account in the valuation of the marital estate, and did not assign them to either party.[2] We remand this issue to the trial court as well.

¶13 Fourth, it appears the trial court erred in its calculation of the equalization payment by neglecting to divide the difference between the assets awarded to each party in half. We do not attempt to determine the proper amount of the payment here, however, because the trial court will need to recalculate the

[2] It is unclear from the record whether the American Bank and Mutual Savings Bank accounts listed in the stipulation are the same accounts Shirley claims the trial court failed to address. Based on the concession made by Gordon, we presume the accounts are different than those listed in the stipulation.

payment on remand anyway to account for the other adjustments identified in this opinion.

¶14 We turn next to the disputed property division issues.

¶15 Shirley first contends that the trial court erroneously exercised its discretion by awarding Gordon the interest accumulated on the Lutheran Church Extension Funds without assigning a value to those assets (thus increasing her equalization payment). She claims to have proven that the accounts were credited with $1072.34 of interest in 1997 and 1998, and to have shown by a reasonable extrapolation that they would have been credited with an additional $1462.67 of interest in 1999 and 2000. Gordon counters that the actual amount of interest he received on the accounts is irrelevant because there was an order in effect which would have allowed him to withdraw up to $3000 without reporting how the money was used. However, the fact that Gordon did not have to account for how he *used* the money does not mean that he did not have to account for *how much* money was still in the account at the date of divorce. It appears from the record that the $1072.34 figure was documented and uncontested, and therefore that amount should have been included in Gordon's assets for the purpose of the property division. The trial court was not required to accept the extrapolated figure for the latter years.

¶16 Shirley next disputes the trial court's finding that she failed to prove Gordon had squandered marital assets. She claims this finding conflicts with the trial court's comments that Gordon's credibility was subject to question and that he seemed to have selective memory about the missing assets. She also complains that the trial court failed to discuss the missing assets on an item-by-item basis. However, although the record includes testimony and a chart summarizing what

assets Shirley believes are missing, she has offered no analysis on appeal of the evidence which she believes renders the trial court's finding clearly erroneous with regard to any specific item. We need not consider arguments which are undeveloped. ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). Moreover, contrary to Shirley's apparent contention, it was not necessary for Gordon to "disprove" her claims of squandering, but rather, it was her burden to prove them. Gordon's credibility notwithstanding, we see no reason why the trial court would have been required to accept Shirley's testimony to the effect that she didn't know what had happened to a number of assets throughout the years of the marriage as sufficient proof that Gordon had squandered them.

¶17 Shirley also claims the trial court erred in crediting her asset column with $2016.00 which she received in land rent, without offsetting that figure by the $1476.44 she had already used to pay that year's real estate taxes, as well as the $713.01 remaining on the real estate bill. Gordon concedes that an offset would be appropriate, but contends the amount should be limited to that portion of the real estate bill which Shirley had already paid that Gordon would otherwise have been obligated to pay. Because Shirley has not responded to Gordon's counter-argument, we deem it conceded. ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994). Gordon also asserts that the amount of the rent should be increased by $400.00 in light of the testimony. We note, however, that the $2016.00 figure was taken from a stipulation by the parties and was not, therefore, clearly erroneous. Accordingly, the property division should be adjusted by reducing Shirley's credit for the land rent from $2016.00 to $1277.78 to account for the $738.22 Gordon should have paid on the real estate taxes.

Attorney Fees

¶18 The trial court ordered Gordon to pay $21,296.12 of Shirley's $27,196.62 attorney fees because it found Gordon's conduct during the divorce — including his refusal to comply with provisions of the temporary order, his hostile tone and desire "to inflict the 'sting of litigation,'" his "selective memory" regarding assets, and his unreasonable withdrawal from three settlement agreements negotiated on his behalf — had unnecessarily protracted the litigation. Gordon concedes that the trial court had the authority to make an award of attorney fees based upon a finding of overtrial, but argues that Shirley failed to demonstrate how his conduct caused her to incur additional attorney fees, beyond the $1630.00 which was attributable to attempting to obtain his compliance with the temporary order, particularly since he prevailed on the issue of missing assets.

¶19 Gordon misconstrues the nature of an overtrial determination. It is not necessary that Shirley prevail on each issue in order for the trial court to find that Gordon's evasions and refusals to cooperate unnecessarily extended the litigation. It could well be that Shirley would not have spent the time litigating the issue of missing assets if Gordon had simply been more forthcoming in the first place. In ***Ondrasek v. Ondrasek***, 126 Wis. 2d 469, 483-84, 377 N.W.2d 190 (Ct. App. 1985), for example, we concluded that the trial court had properly ordered a contribution to attorney fees because one party's self-representation and refusal to stipulate to matters which would not ordinarily have required rulings by the court resulted in unnecessarily high litigation costs.

¶20 Nonetheless, it does appear that Shirley's request for attorney fees highlighted only those fees which resulted from obtaining compliance with the temporary order and did not mention the settlement withdrawals. Thus, although

there could well be support in the record for the amount of the trial court's award, Gordon was not afforded a fair opportunity to comment on all of the fees for which he was required to compensate Shirley. We therefore reverse the attorney fee award and remand the matter to allow the parties to more specifically address the issue of what portions of the litigation were unnecessarily required by Gordon's conduct.

CONCLUSION

¶21 We affirm the trial court's award of $54,000 in lieu of maintenance. However, we reverse portions of the property division and the award of attorney fees and remand the case with directions that the trial court: (1) remove one of the two American Century IRA figures from Gordon's list of assets; (2) remove the $2400 maintenance figure from Gordon's list of assets; (3) value and assign the American Bank and Mutual Savings Bank accounts; (4) add $1072.34 for interest on the Lutheran Church Extension Funds to Gordon's list of assets; (5) offset Shirley's credit for land rent by $738.22 in real estate taxes; (6) allow the parties to address the issue of attorney fees in greater detail and enter an award specifically linked to those portions of the litigation which were unnecessarily caused by Gordon's conduct; and (7) recalculate the equalization payment, remembering to divide the difference between the parties' assets in half.

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

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