COURT OF APPEALS
DECISION
DATED AND FILED

July 8, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0093 **Cir. Ct. No. 99FA001199**

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

IN RE THE MARRIAGE OF:

M. CAROL WEISSGERBER,

PETITIONER-APPELLANT,

V.

HANS WEISSGERBER, JR.,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County: MARIANNE E. BECKER, Judge. *Affirmed.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 VERGERONT, J. The issues in this divorce action between M. Carol Weissgerber and Hans Weissgerber relate to their prenuptial marital property agreement as amended during the marriage. The circuit court concluded that the prenuptial agreement and amendment were procedurally and substantively

equitable. Based on the terms of the agreement as amended, the court denied maintenance to Carol and did not include in the property to be divided any of the property defined as Hans's individual property. Carol appeals the divorce judgment, contending that the prenuptial agreement and amendment were neither procedurally nor substantively fair, that enforcement resulted in extreme hardship to her, and that the no-maintenance provision in the prenuptial agreement should be void.

¶2 We conclude the circuit court did not erroneously exercise its discretion in deciding that the prenuptial agreement as amended was procedurally and substantively fair and in adhering to it in the property division. We decline to address Carol's argument on the no-maintenance provision because she did not make that argument in the circuit court. Accordingly, we affirm the judgment of divorce and the order denying Carol's motion for reconsideration.

BACKGROUND

¶3 Hans and Carol were married on March 24, 1993, having been in a relationship for a number of years and having lived together in Hans's house on Lake Oconomowoc for approximately eight months. Hans was then fifty, had two young adult children from his first marriage and had substantial maintenance obligations to his former wife. He had ownership interests in a number of corporations and partnerships with family members that owned and operated restaurants and dining riverboats and bought and developed real estate. Carol was thirty-seven at the time of the marriage and had a minor child from her first marriage who lived with her and for whom she provided all support. Carol had begun employment in the recruiting business soon after college, and, at the time

she married Hans, had her own established business in which she secured employees for companies and negotiated the contracts of employment.

¶4 Two days before the marriage, on March 22, 1993, the parties signed the prenuptial agreement that is the subject of their dispute. It was drafted by Hans's lawyer and Carol was not represented. The agreement provided the following property would be classified and remain individual property: for Hans, a list of his partnerships and corporations, life insurance policies owned then or in the future, the residence on Lake Oconomowoc, and a list of personal property items; for Carol, her business, any pension or profit sharing plan she participated in, and a list of personal property items; and for both parties, all income from and appreciation of individual property, all property acquired with individual property, all gifted and inherited property whenever received, and all wages received during the marriage, as well as anything acquired with them.

¶5 The agreement provided that the parties would establish a common checking account to pay all common household expenses and "contribute to this common account in such amounts as they may from time to time agree." Upon a divorce, the parties agreed that each would retain the assets described as individual property. Each party waived any right to support or maintenance from the other during the marriage and upon divorce.

¶6 The agreement provided that, in consideration of the waiver of the rights that would otherwise accrue to Carol upon the marriage, Hans was to cause title to two residential lots in Arkansas that he owned to be titled jointly in his name and Carol's name, and, if there were a divorce, each party would own an undivided one-half interest in the two lots. In addition there was to be a $400,000

life insurance policy on Hans's life, designating Carol as the beneficiary, with the premiums to be paid out of the parties' common funds.

¶7 According to Hans's evidence, his net worth at the time he signed the agreement was $3,315,747 and, according to Carol's, hers was $62,608.

¶8 In January 1998, the parties signed an amendment to the agreement. Carol initiated this amendment and was represented by counsel; Hans was not represented. Under this amendment, the parties agreed to additional life insurance on Hans's life and to life insurance on Carol's life with Carol's daughter as a contingent beneficiary of all the policies. They also agreed that the two jointly owned lots in Arkansas, including one on which the parties had built a home occupied by Carol's parents, would be awarded to Carol in the event of a divorce; that if Carol predeceased Hans, her parents could continue living there; and that Hans would make certain changes in his will regarding the disposition of the Arkansas lots if Carol predeceased him, which benefited Carol's daughter. The amendment confirmed the terms of the prenuptial agreement except for the modifications made in the amendment.

¶9 Carol initiated this divorce action in October 1999 and moved for an order nullifying the marital property agreement. She asserted that there was no financial disclosure when the prenuptial agreement was signed, she did not sign it freely and voluntarily, and changes since the time it was signed—her illness making it impossible for her to work in an office environment and her investment of her individual property in Hans's individual property—made it unfair to enforce the agreement.

¶10 The circuit court heard three days of testimony on this motion and, in an extensive oral decision, determined the agreement was valid under the

standard established in ***Button v. Button***, 131 Wis. 2d 84, 99, 388 N.W.2d 546 (1986). The court found that Carol had known Hans wanted a marital property agreement for at least several months before the marriage, had the draft of the agreement for at least four or five days before she signed it, knew she could obtain her own attorney, had time to do so, and did not establish that she was unable to find one to represent her. The court credited Hans's attorney's testimony, which was that he sent two copies of the draft to Hans on March 12, 1993, and met with both Hans and Carol on March 15. At the meeting he went through the draft with Carol after making it clear he was representing only Hans, and he referred Carol to a copy of Hans's December 31, 1991 financial disclosure statement, which was not attached to the draft. The court also credited Hans's testimony that over the years he and Carol had been together before the marriage, he had discussed his business ventures with her and she was familiar with them. The court found that Carol did not want to sign the agreement and hoped she could change it later, but that she was an experienced businesswoman and understood what she signed. Based on these findings, the court determined there was procedural fairness in the signing of the agreement. With respect to the amendment, the court credited Carol's attorney's testimony that she had understood the amendment and the ratification of the prenuptial agreement, understood Han's financial situation, and was pleased with the changes.

¶11 As for the substance of the agreement, the court indicated it was not unfair simply because the value of Hans's property, which remained individual, was much greater than Carol's. Turning to the changes that Carol asserted made it unfair now, the court found that Carol had not established that her health prevented her from working now or was the reason for her decreased income from her business. Rather, in the court's view, the evidence showed that Carol was not

trying to work hard at her business and was not being responsible about money. The court also found that the exhibits did not support her contention that she made more than her share of contributions to the house and that it was her choice to spend so much of her time on landscaping the grounds.

¶12 Based on its decision that the agreement met the ***Button*** standards, the court entered an order stating that it would follow the agreement in determining the issues of maintenance and property division in the divorce. After a pretrial hearing, the court entered an order stating that maintenance would not be an issue in the divorce because of its decision on the validity of the marital property agreement, and the only issue for trial would be the property division based on the terms of the agreement.

¶13 For reasons not relevant to this appeal, the trial did not begin until a year after the court had rendered its decision on the validity of the agreement. Because of the court's view that it was required to consider whether the agreement remained equitable at this later date, it allowed testimony on the present financial and other circumstances of Carol, which, Carol contended, made it unfair to adhere to the agreement in the division of property. Carol's position at trial was that, in addition to the agreement and to her present financial circumstances, the court had to consider other relevant factors under WIS. STAT. § 767.255(3) (2001-02)[1]—the substantial property of Hans not subject to division, para. (3)(c), her

[1] WISCONSIN STAT. § 767.255 provides in part:

> **(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.

(continued)

(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 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 agreement 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.

(continued)

continued argument that she had contributed more than her share to the household expenses and her time and expenditure had increased the value of the house, para. (3)(d), and her poor health, para. (3)(e). The court allowed testimony on all these matters, with the result that during the six-day trial there was much evidence that repeated or overlapped with the evidence at the earlier hearing.

¶14 Hans testified that his net worth grew approximately $4 million during the marriage. His W-2 income, as reflected on his tax returns during the marriage, was approximately $180,000 annually. Carol's tax returns showed that her net profit from her business (income minus expenses) during the years 1993-98 averaged $80,508, with a high in 1998 of $174,491. She had filed no return for 1999, but testified that her gross income from her business was only $30,000 that year and she had no income from her business in the year 2000.

¶15 The court entered a written decision in which it concluded that under WIS. STAT. § 767.255(3)(L) the marital property agreement was binding because the court had found it equitable to both parties and that factor therefore controlled the other factors in § 767.255(3). However, recognizing that Carol disagreed, the court considered each factor in § 767.255 and the relevant evidence and concluded that none of the other factors warranted a deviation from the marital property agreement.

¶16 The court's analysis on the relevant factors of WIS. STAT. § 767.255(3) was as follows. The marriage was short. Hans brought a disproportionate amount of assets to the marriage and left the marriage with

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All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

substantial assets not subject to division, but both parties understood before the marriage that these assets would remain Hans's separate property and treated them so. While Carol did play an important role in decorating and furnishing the residence, contributing labor and time, she took most of those furnishings with her, and, contrary to her testimony, exhibits showed that Hans made substantial cash reimbursements to her. The court rejected Carol's contention that she was entitled to reimbursement for over $550,000 in expenditures she made from her own funds during the marriage. The court explained that some of the expenses did not relate to her marriage to Hans—such as the cost of her daughter's education in private school—and Carol did not take into account what she did not pay for—food and shelter for herself and her child, auto expenses, and other expenses assumed by Hans. The court also rejected Carol's contention that the home appreciated in value as a direct result of her decorating labor and instead found that the appreciation was due to the large size of the residence and its desirable location. The court also found that Carol had removed a substantial amount of the furnishings and "landscaping."

¶17 The court again found that Carol had not offered evidence to support her claim that her health precluded her from continuing to work as a corporate headhunter. Therefore, the court found her earning capacity remained approximately the same as it was before the marriage, as did Hans's. Finally, considering the "catchall factor," para. 3(m), the court determined there were no other circumstances that warranted a deviation from the terms of the marital property agreement. The court found that Carol's present debt was due to her persistence in litigating the marital property agreement, in essence, a second time, and to her spending lavishly on furnishings instead of paying her income taxes.

¶18 Carol moved for a reconsideration of this decision, making most of the same arguments as she had already made, and the court denied the motion. The court also ordered Carol to reimburse Hans for the temporary maintenance she received, the mortgage payments he had made on the Arkansas lots that she was to have paid, and payments he made on a loan that was her individual debt for her unpaid income tax obligations.

¶19 The final property division that resulted from adhering to the marital property agreement awarded Hans all the real estate and business interests that were his individual property under the marital property agreement. Carol was awarded all the interest in her business, various personal property, her checking and savings account and automobile, all the interest in the two Arkansas lots subject to the reimbursements to Hans, and one-half of the equity in the real property located on Brown Street in Oconomowoc, which had originally been Hans's separate property, but of which he made her a one-half owner.

DISCUSSION

¶20 On appeal, Carol renews her challenge to the marital property agreement on the ground that it is procedurally and substantively unfair and results in extreme hardship to her. She also makes a new argument that the no-maintenance provision is void.

I. *Background Law on Agreements within WIS. STAT. § 767.255(3)(L)*

¶21 WISCONSIN STAT. § 767.255(3) governs the division of property upon divorce and directs the circuit court to presume an equal division of all

property subject to division,[2] but also provides that the presumption may be overcome after consideration of a number of factors, including "[a]ny written agreement made by the parties before or during the marriage concerning any arrangement for property distribution," § 767.255(3)(L). "[S]uch agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable to either party. The court shall presume any such agreement to be equitable as to both parties." Section 767.255(3)(L).

¶22 As the circuit court and both parties recognize, ***Button*** established the standard for circuit courts to employ in deciding whether a written agreement concerning property distribution was equitable and therefore binding on the court. Such an agreement is equitable if: (1) each spouse made a fair and reasonable disclosure to the other of his or her financial status; (2) each spouse entered into the agreement voluntarily and freely; and (3) the substantive provisions of the agreement dividing the property upon divorce are fair to each spouse. ***Button***, 131 Wis. 2d at 89.

¶23 The first two components of the standard ensure fairness in the procurement, or "procedural fairness," and are to be assessed at the time the agreement is executed. ***Id.*** at 89, 95-96. With respect to the requirement of a "fair and reasonable disclosure," the court in ***Button*** explained that the parties must "know[] the facts" when they enter into the agreement. ***Id.*** at 95. When parties do not fairly and reasonably disclose their actual assets to one another, independent knowledge of one another's financial status may substitute for fair and reasonable

[2] All property is subject to division except that which comes under the exceptions in WIS. STAT. § 767.255(2)(a), such as property acquired by gift or inheritance.

disclosure. ***Id.*** at 95. However, in a case decided contemporaneously with ***Button***, the supreme court cautioned that "independent knowledge is not a general or imputed knowledge of the other's assets and their value." ***Schumacher v. Schumacher***, 131 Wis. 2d 332, 338, 388 N.W.2d 912 (1986).

¶24 With respect to the "voluntarily and freely" requirement, the ***Button*** court explained:

> An agreement is also inequitable if it is not entered into voluntarily and freely. In determining whether the agreement was entered into voluntarily and freely, the relevant inquiry is whether each spouse had a meaningful choice. Some factors a circuit court should consider are whether each party was represented by independent counsel, whether each party had adequate time to review the agreement, whether the parties understood the terms of the agreement and their effect, and whether the parties understood their financial rights in the absence of an agreement. If the agreement was not entered into voluntarily and freely, the agreement is inequitable under sec. 767.255(11) [now 767.255(3)(L)].

Button, 131 Wis. 2d at 95-96.

¶25 The third component—substantive fairness—is assessed as of the time of execution, and, if there have been significantly changed circumstances after the execution, at the time of the divorce. ***Id.*** at 98-99. An agreement that is fair at the execution may be unfair to a party at the time of divorce if "there are significantly changed circumstances after the execution of an agreement and the agreement as applied at divorce no longer comports with the reasonable expectations of the parties." ***Id.*** at 98-99.

¶26 Because WIS. STAT. § 767.255(3)(L) presumes the agreement is equitable to both parties, the party asserting it is inequitable—in this case, Carol—has the burden of proving it is inequitable.

II. *Standard of Review*

¶27 Whether an agreement within WIS. STAT. § 767.255(3)(L) is equitable is committed to the circuit court's discretion. ***Button***, 131 Wis. 2d at 99. When we review a discretionary decision, we affirm if the court properly exercised its discretion, which means that the court examined the relevant facts, applied the correct legal standard and, using a demonstrable rational process, reached a reasonable conclusion. ***Id.*** Our review of the circuit court's decision here is therefore not de novo, as Carol asserts.

¶28 Another critical element of our standard of review in this case has to do with the fact-finding function of the circuit court. We accept the factual findings of the circuit court unless they are clearly erroneous. WIS. STAT. § 805.17(2). When there is conflicting evidence, it is the role of the circuit court, not this court, to resolve the conflicts and to determine the weight and credibility of a witness's testimony. ***Krejci v. Krejci***, 2003 WI App 160, ¶25, 266 Wis. 2d 284, 667 N.W.2d 780.

¶29 We emphasize the circuit court's role in making credibility determinations because there were many significant points on which Carol's testimony conflicted with the testimony of Hans and of other witnesses. For the most part, the court resolved these conflicts against Carol, explaining in detail why it did not find her testimony credible. We reject Carol's suggestions that the court acted unfairly toward her in doing so. This was the circuit court's role and, having reviewed all the transcripts, we are satisfied there was a reasonable basis in the record for the credibility determinations the court made.

III. *Procedural Fairness*

A. Fair and Reasonable Disclosure

¶30 Carol contends that she was "never provided with a meaningful opportunity to review any of Hans's financial information," because no financial statement was attached to the draft of the agreement and Hans's attorney "did not allow her to take [the one on the table] from his office." She asserts that, contrary to ***Schumacher***, the court imputed knowledge to her that she did not have simply because she had known Hans for a number of years and may have had some general knowledge about his financial situation. She also calls the financial statement "outdated."

¶31 None of these arguments persuade us that the circuit court erroneously exercised its discretion in determining that Hans fairly and reasonably disclosed his financial situation before Carol executed the prenuptial agreement. As we have explained above, the court credited Hans's attorney's testimony on his office conference with Carol. According to his testimony, when he referred Carol to the financial disclosure statement, which was on the table between them, she indicated "either that she had seen it or had already had a copy of it." He explained to Carol the reason the statement was not attached to the agreement was that "[f]rom a confidentiality standpoint [Hans] did not want a copy of the personal financial statement floating around." This testimony, coupled with Hans's testimony that he discussed his financial affairs with Carol, which the court also credited, supports the court's finding that Carol was knowledgeable about his financial situation, and not simply in a general or imputed way.

¶32 The facts here are not similar to those in ***Schumacher***, which were that Mrs. Schumacher was never given the opportunity to review a complete list of

her husband's assets, but had simply "'always been around when he worked on his books.'" ***Schumacher***, 131 Wis. 2d at 336, 339.

¶33 Carol's argument that Hans's attorney "did not allow her to take [the financial disclosure statement] from the office" suggests that Carol wanted to take the financial statement from the office but was not permitted to. However, the record citation Carol provides is to Hans's counsel's explanation to Carol why the statement was not attached to the draft of the agreement. We have read all the transcripts and are not aware of any testimony that Carol asked for a copy of this statement to review. Indeed, Carol denied that she met with Hans's attorney at all, testimony that the court did not credit, and neither Hans nor his attorney testified that she asked to take a copy of the statement with her.

¶34 As for whether the financial statement was "outdated," Carol does not refer to any evidence other than the date handwritten on the statement—"Jan 1992." The statement is a detailed statement of Hans's finances as of December 31, 1991, prepared for First Wisconsin-Waukesha Bank. Hans's accountant testified that she prepared a statement for him and explained the information and documents she used in doing so. She also explained that banks generally ask for such statements on an annual basis and there is usually a 14-16 month interval between the preparation of each. The next dated personal financial statement in the record is June 30, 1993, which Hans's accountant also prepared. Because Carol points to no evidence that indicates that the December 31, 1991 financial statement did not make a reasonably accurate disclosure of Hans's financial situation as of March 1993, and because the court found that Carol had the opportunity to review this statement but did not, we decline to address the "outdated" argument further.

B. Voluntarily and Freely

¶35 Carol argues that she did not voluntarily and freely enter into the agreement because she did not have her own attorney, she had only a short time to review the agreement and was planning the wedding at the same time, and Hans's financial situation was too complicated to understand in that period of time.

¶36 The circuit court considered each of these arguments and resolved them against Carol, explaining its view of the evidence and its reasoning based on the evidence. The court's determination that Carol had the opportunity to obtain a lawyer but chose not to is supported by the record. There was evidence that she knew several months before the wedding that Hans wanted a prenuptial agreement, but no evidence that she had made an effort to obtain an attorney until she was provided with the draft. She testified that she made calls to attorneys after she got the draft but could not obtain one. However, the court could reasonably infer from the lack of detail in her testimony on this point and lack of corroboration that she had not made much, if any, effort. There was no evidence she told Hans or his attorney that she did not want to sign until she had the opportunity to speak to an attorney; there was evidence that she discussed the draft with others but no evidence she told anyone she wanted to talk to an attorney or was making efforts to find one. The evidence from the testimony of a close friend of Carol's, whom the court found credible, was that Carol did not like the agreement but intended to sign it. This same evidence supports the court's rejection of Carol's argument that she did not have sufficient time to review the agreement. Finally, as we have already explained, there was a reasonable basis in the evidence for the court's finding that Carol understood Hans's financial situation.

¶37 Carol appears to suggest that, because there was evidence she did not want to sign the agreement and the court so found, she did not voluntarily and freely sign it. However, the court also found Carol was an experienced businesswoman who understood what she was signing and had the opportunity to obtain an attorney and negotiate but chose not to, hoping she could change Hans's mind later. There is a reasonable basis in the record for these findings and the court's rationale is sound. The "voluntarily and freely" requirement insures that persons signing agreements will have the opportunity to make a meaningful choice. *See* ***Button***, 131 Wis. 2d at 95-96. Based on the facts found by the circuit court, it could reasonably conclude Carol had the knowledge and the opportunity to make a meaningful choice.

IV. *Substantive Fairness*

A. At the Time of Execution

¶38 Carol's main brief does not develop an argument that the prenuptial agreement was unfair when executed, although she may be suggesting that it was unfair because Hans's assets were so much greater than hers. We agree with the circuit court that this does not in itself make the agreement substantively unfair.

¶39 The court in ***Button*** explained that substantive fairness at the time of execution takes into account the circumstances existing then and those reasonably foreseeable, including

> the economic circumstances of the parties, the property brought to the marriage by each party, each spouse's family relationships and obligations to persons other than to the spouse, the earning capacity of each person, the anticipated contribution by one party to the education, training or increased earning power of the other, the future needs of the respective spouses, the age and physical and emotional health of the parties, and the expected contribution of each

> party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.

131 Wis. 2d at 97.

¶40 The record shows that both parties were in good health, had established careers, had been self-supporting and were supporting their own children when they married each other, and Hans had obligations to his first wife. A reasonable court could conclude there is nothing unfair about an agreement under which parties continue after marriage to maintain essentially separate finances, with each being responsible for himself or herself and the dependents of each, when each spouse has been doing that and is able to continue to do that. A disparity in the assets each party has to preserve as individual property does not in itself make such an agreement unfair.

¶41 In her reply brief, Carol argues that the agreement was unfair at the time of execution because the court described it as "harsh." We do not generally address issues raised for the first time in the reply brief. ***Schaeffer v. State Pers. Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989). However, Carol's first brief (in the factual background section) did refer to statements of the court that used the word "harsh" in connection with the agreement. We therefore choose to address these statements by the circuit court.

¶42 In deciding that the agreement was valid, the circuit court referred to the testimony of the attorney Carol had retained for the amendment: he thought the prenuptial agreement was "harsh." The court's statement that this was a "good term" directly follows its statement that the prenuptial agreement did "not create a fifty-fifty division of property." From reading the court's entire oral ruling, we are satisfied that what the court intended to convey at this point, and when it repeated

the word "harsh" later in this ruling, was that the agreement showed that Hans was not willing to share his assets with Carol beyond a limited and defined extent. However, the court was very clear that in its view this was neither procedurally nor substantively unfair. Therefore, we do not equate the court's use of the term "harsh" with a determination that the agreement was substantively inequitable.

¶43 We come to the same conclusion on the court's use of the term "harsh" in its decision on the motion for reconsideration. The context of Carol's reference here is Hans's request for attorney fees, which the court heard at the same time and denied. The court had already denied Hans's request for attorney fees based on overtrial, but at this hearing Hans was making an argument that he was entitled to fees under the marital property agreement, which provided for attorney fees when a party brought an action to enforce the agreement and received the relief requested. This time the court refers to the agreement as "extremely harsh, extremely harsh," again conveying, perhaps inartfully, that it was clear to Carol that she would not share in Hans's wealth under the agreement. The court's subsequent comments make clear that in the court's view the agreement was "fair going in, [and] fair coming out." When the court next uses the term "overly harsh terms" it appears to be referring to the attorney fee provision, which, it explains, it is not going to apply.

¶44 In short, Carol does not present a persuasive argument that the court erroneously exercised its discretion in deciding the agreement was substantively fair at the time it was executed.

B. At the Time of Divorce

¶45 Carol argues that the agreement was unfair at the time of the divorce because she contributed substantial amounts of time and money to the Lake

Oconomowoc residence during the marriage and its value is directly related to her contributions. In support, she refers to her testimony on the time and money she spent on the residence and to exhibit 58, which, she asserts, shows "detailed total financial contributions to the home, over the course of the marriage, in excess of $570,000."

¶46 Exhibit 58 details each check, with its date and payee, that Carol paid out of her individual account and considers a contribution to her marriage. The checks are placed in categories, and most of the categories have no relation to expenses that even arguably would affect the value of the residence. The four that arguably might are those labeled "House Construction/Materials" (totaling $30,052.45, with more than one-third dated before the marriage); "Window Treatments: Time & Materials" (totaling $18,782.90); "Landscaping/Yard Maintenance" (totaling $36,486.43 including, Carol testified, amounts paid to persons to work in the yard as well as materials, but not addressing her time); and "Furniture/Antiques/Lighting/Wallpaper" (totaling $111,125.16). However, Carol does not point to any testimony that relates these expenditures to an increased value in the residence, and it is self-evident that art and furniture, which are a substantial portion of the last category, would not increase the market value of the residence.

¶47 Carol did testify that she spent a substantial amount of time decorating the house and working on the landscaping, but she did not present any testimony that tied her efforts to an increased value in the residence. The court credited her testimony on her efforts. However, as noted above, the court found these efforts did not result in any significant appreciation of the value of the house, but, rather, its appreciation was substantially attributable to the size of the house and its location. This finding is not clearly erroneous. Hans's real estate appraisal

expert testified that the interior decor of a house does not enter into its fair market value in a significant way because people may not like what the owner has done, especially if its unusual, and they may redo it. She also testified that the house's location on a lake was a significant part of the value. The court's finding that Carol had removed "landscaping," meaning perennials and shrubs, is also supported by the record and works against her argument.

¶48 Carol relies on ***Krejci***, 266 Wis. 2d 284, ¶25, where the circuit court found that the appreciation of the value of the husband's resort business was due to a large degree to the efforts of both parties. The circuit court found the couple had operated the resort for eighteen years as a partnership, and that income from both their efforts was used to make significant improvements to the property and pay a portion of the land contract payments. ***Id.***, ¶¶25-27. The court also found the parties combined their inheritances, savings, and incomes and ignored the prenuptial agreement during the marriage, never discussing it and not mentioning it in their estate planning. ***Id.***, ¶29. This court concluded these findings were supported by the record and affirmed the circuit court's exercise of its discretion in deciding that it would be inequitable under these circumstances to adhere to the parties' agreement that the business and its appreciation remain the husband's separate property upon divorce. ***Id.***

¶49 The result in ***Krejci*** does not support Carol's position because the circuit court here found that Carol's efforts did not cause any significant increase in the value of the residence. Even if we were to ignore this finding, the evidence in this case does not begin to approximate the evidence on which the circuit court relied in ***Krejci*** in deciding it was inequitable to enforce the prenuptial agreement.

¶50 Carol does not appear to argue on appeal that she is entitled to reimbursement for any payments she made as identified on exhibit 58. In the event we have misunderstood, we address this point. We conclude the court did not erroneously exercise its discretion in determining that the expenditures on exhibit 58 did not make the marital property agreement unfair and Carol was not entitled to compensation from Hans based on those exhibits.

¶51 First, exhibit 58 does not identify the expenditures Carol made that are arguably included in the expenses that were to be shared under paragraph 5 of the prenuptial agreement, and many are clearly not included. It is therefore not possible to determine based on this exhibit, even in conjunction with other evidence, whether Carol paid more than her share for those expenses. Second, Hans testified that he reimbursed Carol for many payments she made, identifying significant ones, and the court credited this testimony, which was also supported by some exhibits. Third, exhibit 58 includes items Carol purchased that she retained as personal property in the divorce, and, without some testimony or exhibit correlating her unreimbursed purchases with the disposition of that property in the divorce action, there is no evidentiary basis for concluding that she is even arguably entitled to any reimbursement for those purchases. Finally, there was undisputed testimony that Hans provided a car for Carol, made the payments on the residence in which she and her daughter lived, and provided health insurance for her after the first two years, and that Carol had the benefit of running her business from the residence. In addition, he established with his own funds a stock account in their joint names that was divided equally during the divorce, with each receiving approximately $40,000. He also put the Brown Street property into joint ownership, the equity of which was divided equally in the divorce judgment.

¶52 A decision on whether Carol made financial contributions to the marriage beyond those contemplated by the agreement would need to take into account all the factors in the preceding paragraph. Exhibit 58 plainly does not do so. Carol may be suggesting that exhibit 58 together with other exhibits and testimony establishes the amount of her greater contribution. If so, she does not explain on appeal, and did not explain in the circuit court, how that might be done.

¶53 Carol also argues that the agreement is unfair because she has health problems.[3] She asserts that her testimony on this point was uncontroverted. However, there was no medical evidence that supported Carol's assertion that she was unable to work because of her health. There was evidence supporting the court's finding that she was not working for other reasons. Specifically, Hans testified that Carol told him she was having a problem with one of the major corporations she did business with and needed to pursue new contacts, but those were unsuccessful. Then, Hans testified, as it became evident their relationship was failing, she told him she did not intend to work but intended to concentrate on getting what she could out of the divorce.

¶54 Finally, Carol argues that adherence to the agreement will create a hardship for her. Carol makes this as a separate argument, analogizing it to the exception for hardship provided for in WIS. STAT. § 767.255(2)(b).[4] We need not

[3] This argument is in the factual background section of Carol's brief rather than in the argument section, but we address it nonetheless.

[4] WISCONSIN STAT. § 767.255(2)(b) provides:

> (b) [The above exceptions do] not apply if the court finds that refusal to divide the property will create a hardship on the other party or on the children of the marriage. If the court makes such a finding, the court may divest the party of the property in a fair and equitable manner.

decide whether the consideration of hardship is part of analyzing of whether the agreement is substantively fair at the time of the divorce or an additional factor for the court to take into account. In either case, the circuit court considered and rejected Carol's arguments of hardship based on her assertions that she had no income, was not able to work, and had debts that would greatly diminish the assets awarded her at the time of the divorce. As we have already explained, the court had a basis in the record for determining that Carol was able to work. The record also supports the court's finding that her debt was due to lack of financial responsibility as well as an unwillingness to work. We conclude the circuit court properly exercised its discretion in concluding there was not a hardship to Carol that justified not adhering to the agreement.[5]

V. *The No-Maintenance Provision*

¶55 Carol argues that the no-maintenance provision in the agreement is not entitled to the presumption of fairness that the provisions regarding property are, and moreover, it should be held void as against public policy. She points out that the court in ***Button*** did not address the enforceability of a prenuptial agreement to limit or waive maintenance.[6] WISCONSIN STAT. § 767.255(3)(L) governs only written agreements respecting "arrangement for property distribution," and WIS. STAT. § 767.26(8) governs agreements "concerning any

[5] Hans argues that the amendment to the prenuptial agreement is additional evidence that the agreement as a whole is equitable. Carol replies that the amendment does not cure the invalidity of the prenuptial agreement. Because we have rejected the premise of Carol's argument on the amendment—that the prenuptial agreement was invalid—it is unnecessary to separately discuss the amendment.

[6] In ***Button*** there was such a provision in the agreement, but the circuit court held it was void as against public policy, and neither party appealed that ruling. 131 Wis. 2d at 88.

arrangement for the financial support of the parties." Carol notes that the latter section does not contain a presumption of equitableness, unlike the former; rather an agreement on support is simply one factor to take into account.[7] Finally, Carol cites pre-***Button*** precedent for the proposition that a prenuptial agreement limiting a husband's liability in the event of divorce is void as against public policy. *See, e.g.,* ***Caldwell v. Caldwell***, 5 Wis. 2d 146, 155, 92 N.W.2d 356 (1958).

¶56 We have searched the record and find no indication that Carol raised this argument in the circuit court. It was clear from the circuit court's pretrial order eliminating maintenance as an issue at trial that the court did not view the no-maintenance provision as subject to an analysis distinct from that established in ***Button***, and we see nothing in the transcripts or briefs in the circuit court that suggested the analysis should be different.

¶57 The general rule is that we do not address issues raised for the first time on appeal. ***Cashin v. Cashin***, 2004 WI App 92, ¶26, No. 03-1010. While we have the discretion to do so, we generally do so only when the issue is one of law and there are no factual disputes. ***Id.*** In this case, although the issue Carol raises is one of law, if we decide the no-maintenance provision is either void or not subject to a presumption, the decision whether to award maintenance is a

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[7] WISCONSIN STAT. § 767.26(8) provides:

> **(8)** Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, where such repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.

discretionary decision for the circuit court. *See* ***Hefty v. Hefty***, 172 Wis. 2d 124, 133, 493 N.W.2d 33 (1992). We would therefore need to reverse and remand for the circuit court to make that determination. We see no compelling reason to take up this issue now when Carol had ample opportunity to raise it in the circuit court.

CONCLUSION

¶58 We conclude the circuit court did not erroneously exercise its discretion in deciding that the prenuptial agreement as amended was procedurally and substantively fair and in adhering to it in the property division. We decline to address Carol's argument on the no-maintenance provision because she did not make that argument below. Accordingly, we affirm the judgment of divorce.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.