COURT OF APPEALS
DECISION
DATED AND FILED

February 17, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1456 **Cir. Ct. No. 2008FA10**

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

IN RE THE MARRIAGE OF:

LARRY J. KUNDINGER,

PETITIONER-APPELLANT,

V.

DIANE K. KUNDINGER,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Price County: DOUGLAS T. FOX, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Larry Kundinger appeals a judgment of divorce. Larry's principal argument is that property he brought into the marriage is not subject to division. We reject his arguments and affirm.

¶2 Larry and Diane Kundinger were married on October 2, 2004. At the time of the divorce on December 29, 2008,[1] he was sixty-two years old and she was forty-seven years old. Larry retired from his job as a route salesman in June 2004. Diane had a cleaning business and also worked thirty-two hours weekly at a hardware store. The parties brought various assets into the marriage, although Larry brought far more property to the marriage than Diane.

¶3 Larry argued in the circuit court that property he brought into the marriage was individual property, not subject to division. The court was unpersuaded, although the court's property division and assignment of debt favored Larry in recognition of the disproportionate amount of property he brought to the marriage. This appeal follows.

¶4 The division of property rests within the sound discretion of the circuit court. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We generally look for reasons to sustain the circuit court's discretionary decisions. ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968). We will sustain discretionary decisions if the court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion a reasonable judge could reach. ***Liddle v. Liddle***, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). Findings of fact will be affirmed unless clearly erroneous. WIS. STAT. § 805.17(2).[2]

[1] In its Findings of Fact, Conclusions of Law and Judgment of Divorce, the circuit court reserved for further proceedings the issue of property division. The court ordered each party to submit a spreadsheet setting forth their position concerning property division. Both parties waived maintenance and they had no minor children.

[2] Reference to Wisconsin Statutes are to the 2007-08 version.

¶5 On appeal, Larry continues his basic argument that property he brought to the marriage remains his individual property, not subject to division. He argues the circuit court erred by concluding that only property acquired by gift or inheritance, or property acquired with funds from such sources, was not subject to division at divorce. We disagree.

¶6 All property at divorce except that acquired by gift or inheritance is part of the marital estate and is presumed subject to equal division. ***Hokin v. Hokin***, 231 Wis. 2d 184, 191-92, 605 N.W.2d 219 (Ct. App. 1999). The court may alter the equal distribution after considering various statutory factors. WIS. STAT. §§ 767.61(3)(a)-(m). Here, the court considered the proper statutory factors, one by one. The court reasoned that Larry had retired before the marriage ended and enjoyed an income only slightly greater than the amount of his home mortgage payment. The parties' lifestyle was therefore financed almost entirely out of Diane's earnings from her hardware store job and her cleaning business and it would be unfair to place undue emphasis upon the disproportionate amount of property Larry brought into the marriage. Diane's earnings supported the parties at a comfortable standard of living while allowing Larry to maintain the assets he brought into the marriage largely intact. The court's findings are not clearly erroneous. WIS. STAT. § 805.17(2). The court came to a conclusion a reasonable judge could reach.

¶7 Relying upon ***Steinmann v. Steinmann***, 2008 WI 43, 309 Wis. 2d 29, 749 N.W.2d 145, Larry appears to insist "the principles of tracing and transmutation" may operate to reclassify nearly all the property from divisible to non-divisible in divorce. However, as the circuit court correctly observed, ***Steinmann*** has no application to this case.

¶8 ***Steinmann*** concerned the division of property where there was a valid marital property agreement that was binding upon the court. ***Id.***, ¶¶5-6. The wife argued that all of the assets that could be traced to property that was classified as her individual property under the marital property agreement remained her individual property despite being jointly titled. ***Id.***, ¶¶23-24. She also argued that donative intent principles (also referred to as transmutation) were limited to gifted and inherited property, generally exempt from division in divorce.[3] ***Id.***, ¶32.

¶9 The ***Steinmann*** court concluded the fact that property is classified as individual property under a marital property agreement does not preclude a donative intent or transmutation inquiry to determine if the property had become joint property. *See* ***id.***, ¶38. The court also concluded that tracing and transmutation principles may be applied to transfer property into the marital estate that would otherwise be retained as the spouse's separate property and, further, that those principles were not limited to gifted and inherited property. ***Id.***, ¶¶30-36. The court stated:

> There is nothing in the language of the Agreement generally requiring tracing principles to be applied, or more specifically, requiring that property classified as individual property under the Agreement must remain individual property. More importantly, there is no language in the Agreement prohibiting division of such property upon divorce.

Id., ¶44.

[3] The husband argued that tracing principles applied only to gifted and inherited property, while donative intent and transmutation inquiries may be applied in the absence of gifted or inherited property. *See* ***Steinmann v. Steinmann***, 2008 WI 43, ¶¶31-32, 309 Wis. 2d 29, 749 N.W.2d 145.

¶10 Larry in effect attempts to apply ***Steinmann*** backwards in the context of a WIS. STAT. ch. 767 property division. Larry suggests that tracing and transmutation principles may be applied backwards to a time before the marriage when he owned the property separately. ***Steinmann*** does not support his contention and Larry cites no other legal authority for this proposition. ***Steinmann*** does not operate backwards to benefit Larry.

¶11 Significantly, ***Steinmann*** makes clear that "marital property classification, governed by [WIS. STAT. ch.] 766, is generally a separate inquiry from equitable property division, governed by Ch. 767." ***Id.***, ¶28 (citing ***Lloyd v. Lloyd***, 170 Wis. 2d 240, 258, 258 n.6, 487 N.W.2d 647 (Ct. App. 1992)). Chapter 766 provides the rules which govern ownership, management and control of property during marriage and disposal of property at death. By contrast, property division at divorce is governed by WIS. STAT. § 767.61, which provides that unless acquired by gift or inheritance, property brought to the marriage is subject to division.

¶12 ***Steinmann*** stated:

> Although we conclude that tracing and transmutation principles may be employed outside the context of gifted and inherited property, the application of these principles in the present case does not affect the ultimate determination regarding equitable property distribution.

Id., ¶39.

¶13 As did the parties in ***Steinmann***, Larry blurs these distinctions. Here, the circuit court correctly determined that property brought to the marriage is a factor that allows, but does not compel, the circuit court to deviate from the presumption of equal division in divorce. *See* WIS. STAT. § 767.61(3)(b).

¶14 Larry also complains the circuit court "abused it discretion" in determining valuations, but fails to show the court's findings are clearly erroneous.[4] Indeed, the court noted Diane's arguments concerning how the marital estate should be divided and valued were "largely unrefuted by Larry." The court stated:

> Larry … made no specific proposal as to how the court ought to divide the marital estate or assign responsibility for debt. Neither did he advance any argument refuting Diane's claims concerning her efforts and her financial contributions to the marriage. To the extent that his arguments make reference to asset valuations different than those claimed by Diane, he did not articulate any basis upon which the court ought to find his valuations to be more credible. Rather, Larry chose to base his argument entirely upon his contention that nearly all of the property, with the exception of Diane's home and car and a few miscellaneous items of property, was nonmarital property not subject to division.

¶15 We conclude Larry has not sufficiently demonstrated how the circuit court allegedly erred. We decline to sift through the record for evidence allegedly supporting Larry's contentions of error. *See* ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463.

¶16 In this regard, we emphasize that Larry's counsel once again failed to provide any appropriate citations to the record in his appeal briefs to this court. We have on several prior instances admonished counsel that WIS. STAT. RULES 809.19(1)(d) and (e) require appropriate citations to the record on appeal, and references to the brief's appendix is not in conformity with the rules. Indeed, we

[4] Appellate courts have not used the phrase "abuse of discretion" since 1992. Because that phrase carries an unjustified negative connotation, the term "erroneous exercise of discretion" is now used. *See* ***Hefty v. Hefty***, 172 Wis. 2d 124, 128 n.1, 493 N.W.2d 33 (1992).

sanctioned counsel several weeks ago for the same conduct. *See* ***Stuckenberg v. Stuckenberg***, No. 2009AP825, unpublished slip op. ¶¶11-12 (Ct. App. Feb. 2, 2010). In that case, we noted counsel failed to provide citations in a brief signed on July 16, 2009, just weeks after being warned on June 30, 2009, that future violations would result in sanctions. The principal brief in the present case was signed on August 16, 2009.

¶17 We again admonish counsel that the rules of appellate practice are designed in part to facilitate the work of the court. All appellate briefs must give references to the pages of the record for each statement and proposition made in the appellate briefs. *See* ***Haley v. State***, 207 Wis. 193, 198-99, 240 N.W.2d 829 (1932). A reviewing court is not required to search the record for facts to support a party's contentions, where the rules make it clear that a party's brief must make appropriate references to the record. *See* ***Siva Truck Leasing v. Kurman Distribs.***, 166 Wis. 2d 58, 70 n.32, 479 N.W.2d 542 (Ct. App. 1991). If counsel continues to disregard the rules, this court will not hesitate in summarily rejecting his arguments or otherwise sanctioning his conduct as this court deems appropriate.

By the Court.—Judgment affirmed.

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