COURT OF APPEALS
DECISION
DATED AND FILED

November 2, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1801 **Cir. Ct. No. 2008FA106**

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

IN RE THE MARRIAGE OF:

JOEL T. BRUNNER,

PETITIONER-APPELLANT,

V.

CHRISTINE A. CIUCCI,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Joel Brunner appeals a divorce judgment. He argues the circuit court erroneously exercised its discretion by ordering an unequal division of the marital estate. We disagree and affirm.

BACKGROUND

¶2 Joel Brunner and Christine Ciucci were married in 1996. At the time of the divorce hearing, Brunner was forty-six and Ciucci was forty-nine. No minor children were born of the marriage. Brunner and Ciucci never entered into any prenuptial or postnuptial agreement.

¶3 Brunner and Ciucci had each been married once before. When his first marriage ended in divorce, Brunner received various items of personal property and was allocated various debts. Consequently, his net worth following his first marriage was "very limited." In contrast, when Ciucci's prior marriage ended in divorce, she received assets with a net value of approximately $1.2 million.

¶4 As part of the divorce judgment following her first marriage, Ciucci became the sole shareholder of RiverShire Excavating Company. Shortly after Brunner and Ciucci married, they liquidated RiverShire and used the proceeds to open Red River Ranch, Inc., a deer farm. Ciucci was the president of the corporation, and Brunner was secretary. Brunner tended to the animals, and Ciucci maintained the business's books. Red River Ranch, Inc., was forced to liquidate all of its animals following a chronic wasting disease scare, resulting in significant financial loss.

¶5 At the divorce hearing, Brunner proposed an equal division of all property. He suggested that the marital residence be sold and that, after the mortgage was satisfied, any remaining profit from the sale should be split evenly between Ciucci and himself. He also proposed that the Red River Ranch property be awarded to him, which would have required him to make an equalization payment to Ciucci in the amount of $103,116.77.

¶6 Ciucci proposed an unequal property division, allocating a net marital estate of $238,153 to herself and a net marital estate of $11,135 to Brunner. She would receive the marital residence, the mortgage debt on it, and the Red River Ranch property, while Brunner would receive his tools and equipment.

¶7 The circuit court adopted Ciucci's proposal. Brunner now appeals.

DISCUSSION

¶8 The division of property at divorce 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 will uphold the court's decision if it "'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.*** (citation omitted). We generally look for reasons to sustain a discretionary decision of the circuit court, *see* ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968), and "we may search the record to determine if it supports the court's discretionary decision," ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737.

¶9 WISCONSIN STAT. § 767.61(3)[1] sets forth a presumption that the divorcing parties' marital estate is to be divided equally. However, a court may deviate from an equal distribution after considering the factors set forth in § 767.61(3)(a)-(m).[2] The court is not "precluded from giving one statutory factor

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] WISCONSIN STAT. § 767.61(3) states:

(continued)

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 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. 767.56 granting maintenance payments to either party, any order for periodic family support payments under s. 767.531 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.

(continued)

greater weight than another, or from concluding that some factors may not be applicable at all." ***LeMere***, 262 Wis. 2d 426, ¶25.[3] Failure to address factually inapplicable statutory factors does not constitute an erroneous exercise of discretion. ***Id.***, ¶26. Furthermore, a court's failure to consider all the statutory factors may be harmless, particularly where the overlooked factors are marginally or not at all relevant. ***Id.***, ¶27.

¶10 Brunner argues the circuit court erroneously exercised its discretion by ordering an unequal division of the marital estate without considering all the statutory factors.[4] Brunner concedes the court discussed the statutory factors during the divorce hearing, but he asserts it "made no specific factual findings relative to those statutory factors or how they affected [its] determination." Brunner may be correct that the circuit court's decision was not a model exercise

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> (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.

[3] ***LeMere v. LeMere***, 2003 WI 67 ¶17, 262 Wis. 2d 426, 663 N.W.2d 789, refers to WIS. STAT. § 767.255(3)(a)-(m), which was subsequently renumbered as WIS. STAT. § 767.61(3)(a)-(m). *See* 2005 Wis. Act 443, § 109.

[4] Brunner's brief states that the circuit court "abused its discretion." The Wisconsin Supreme Court changed the terminology used in reviewing a circuit court's discretionary act from "abuse of discretion" to "erroneous exercise of discretion" in 1992. *See* ***City of Brookfield v. Milwaukee Metro. Sewerage Dist.***, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992).

We also note that Ciucci's brief refers to the parties by their designations, rather than by their names. We remind counsel that WIS. STAT. RULE 809.19(1)(i) requires "[r]eference to the parties by name, rather than by party designation, throughout the argument section."

of discretion in terms of linking the unequal property division to the statutory factors. However, we conclude the record supports the court's property division. *See* ***Randall***, 235 Wis. 2d 1, ¶7.

¶11 The circuit court noted the parties had a long-term marriage of twelve years. *See* WIS. STAT. § 767.61(3)(a). It noted the parties had contributed equally during the marriage. *See* WIS. STAT. § 767.61(3)(d). It commented that the parties were about the same age and had not complained of any health problems. *See* WIS. STAT. § 767.61(3)(e). It also noted the parties had "close to equal" earning capacities. *See* WIS. STAT. § 767.61(3)(g).

¶12 However, the court also noted that Ciucci had come into the marriage with substantially greater assets than Brunner. *See* WIS. STAT. § 767.61(3)(b), (h). Specifically, the court found Ciucci brought property valued at $1.2 million into the marriage, while Brunner came into the marriage with a "negative balance."

¶13 The court concluded the remaining statutory factors were not relevant. It found that: (1) neither party had substantial assets not subject to division; (2) neither party contributed to the other's education, training, or increased earning power; (3) maintenance was not being awarded; (4) neither party had relevant pension benefits or future interests; (5) there were no relevant tax consequences; and (6) the parties had not made any written agreements concerning property distribution. *See* WIS. STAT. § 767.61(3)(c), (f), (i), (j), (k), (L); *see also* ***LeMere***, 262 Wis. 2d 426, ¶26 (noting that a court need not address factually inapplicable statutory factors).

¶14 After discussing the statutory factors, the court stated:

> [T]he only factor in this case that I have heard noted that has a great deal of importance to me and a great deal of persuasion to me is what each party brought into the marriage. I never had a case quite this disproportional. I have had situations where people bring different amounts into the marriage … [a]nd those are probably easier to deal with than when you have one person bringing everything into the marriage and the other person bringing just some personal property into the marriage.
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> … I know it's a tough call to say that he walks out of this with nothing other than what he has in personal property, but on the other hand, I am being asked to take away—give her roughly … going from [$1.2 million] to about probably $125,000.00. That doesn't seem right either.…
>
> I'm going with [Ciucci's] argument.

¶15 Although not explicitly stated in the court's decision, it is implicit that the court determined one statutory factor favoring unequal division—property brought into the marriage—was so compelling as to outweigh other factors that would tend to favor equal division. Particularly telling are the court's statements that it had never seen a case "quite this disproportional" and that it "[didn't] seem right" to leave Ciucci with only about ten percent of her premarital assets. The court apparently concluded the disparity between the parties' assets at the time of their marriage was so large that an unequal property division was the only way to reach a fair result.

¶16 Brunner argues it was unfair for the court to allocate ninety-five percent of the net marital estate to Ciucci, leaving him with only five percent. However, Ciucci points out that under the unequal division adopted by the court, she is leaving the marriage with less than twenty percent of the assets she brought into it. She also notes that applying the presumption of equal division would result in her walking away with only ten percent of her premarital assets, while

Brunner, who came into the marriage with a "negative balance," would walk away with about $125,000. Ciucci contends, and the circuit court agreed, that such a result would be more unfair than dividing the property unequally. The court's decision was not an erroneous exercise of discretion.

¶17 Brunner also argues Ciucci's circumstances are similar to those of the wife in ***Lang v. Lang***, 161 Wis. 2d 210, 215-16, 467 N.W.2d 772 (1991), who sought an unequal property division because she had entered the marriage with $18,000 in cash, a residence, and insurance policies with cash value. The supreme court affirmed the circuit court's discretionary decision to divide the marital estate equally, "notwithstanding the fact that the [wife] brought a significant amount of assets to the marriage, given the length of the marriage." ***Id.*** at 230.

¶18 However, that an equal division was a proper exercise of discretion in ***Lang*** does not automatically mean that an unequal division was improper in this case. In ***Lang***, the parties had been married twenty years, whereas Brunner and Ciucci were only married twelve years. Also, while the ***Lang*** court found that the wife brought "a significant amount of assets" into the marriage, it did not precisely state the value of those assets. ***Id.*** Nor did the ***Lang*** court determine the value of the property the husband brought into the marriage. Thus, it is impossible to say whether the gross disparity in premarital assets that is present in this case was also present in ***Lang***. Furthermore, the ***Lang*** court did not hold that an equal division was the only acceptable result under the circumstances. It merely held that the circuit court's decision to divide the property equally was a proper exercise of discretion. Likewise, in this case, the circuit court properly exercised its discretion by ordering an unequal division of property.

By the Court.—Judgment affirmed.

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