COURT OF APPEALS
DECISION
DATED AND FILED

March 11, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2430 **Cir. Ct. No. 2011FA204**

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

IN RE THE MARRIAGE OF:

TERI J. ZSCHAECHNER,

PETITIONER-RESPONDENT,

V.

GARY R. ZSCHAECHNER,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Shawano County: WILLIAM F. KUSSEL, JR., Judge. *Reversed and cause remanded for further proceedings*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Gary Zschaechner challenges the circuit court's division of property and maintenance determination in his divorce judgment. We reverse on both issues and remand for further proceedings.

¶2 Gary and Teri Zschaechner were married thirty-five years. At the time of the divorce, the parties had no minor children. The couple had owned and operated a farm since 1986. At the final hearing, the circuit court adopted Teri's proposed property division as set forth in trial Exhibit 3. Teri was awarded the primary farm properties along with other assets. Gary was awarded a third parcel of real estate together with other assets. Teri was ordered to pay Gary $350,000 for his interest in the farm properties, consisting of a $50,000 payment within sixty days and $1,500 monthly for 200 months. Maintenance was denied to both parties. The court also found financial waste to the farm business during the first half of 2012 and ordered Gary to repay $16,431.05.

¶3 The division of property and the awarding of maintenance rest 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 sustain a discretionary decision if the circuit 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. ***Liddle v. Liddle***, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987).

¶4 At the outset, Teri insists Gary waived the issues concerning property division and the denial of maintenance in the trial court. Whether we review an issue raised here for the first time depends on the facts and circumstances disclosed by the particular record. *See* ***State ex rel. Gen. Motors v. Oak Creek***, 49 Wis. 2d 299, 319, 182 N.W.2d 481 (1971). In the present case the

issues were adequately articulated to the circuit court. *See* ***State v. Holland Plastics Co.***, 111 Wis. 2d 497, 504-05, 331 N.W.2d 320 (1983). This is not a situation of blindsiding the circuit court with reversals based on theories that did not originate below. *See* ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995). Therefore, we address the merits.

¶5 We turn first to the issue of property division. Property division in divorce is subject to WIS. STAT. § 767.61(3),[1] which establishes a presumption in favor of equal division of marital property. A circuit court may deviate from the presumptive equal division of property, but only after considering a lengthy and detailed list of statutory factors. ***LeMere***, 262 Wis. 2d 426, ¶16. The record must at least reflect the court's consideration of all applicable statutory factors before a reviewing court can conclude that the proper legal standard has been applied to overcome the presumption of equal division under § 767.61(3).

¶6 Gary asserts that the circuit court erred by merely adopting Teri's proposed property division. Among other things, he argues the court intended an equal division of the marital estate, but "adjudged a division that contained significant calculation errors resulting in a split of 59% to Teri, 41% to Gary." He insists the court "simply failed to look behind the misleading representations contained in Trial Exhibit 3 …."[2] Gary alleges Exhibit 3 attributed assets to him that did not in fact exist, and contained appraisals that were materially inaccurate

[1] All references to the Wisconsin Statutes are to the 2011-12 version.

[2] We note both parties use the phrase "abuse of discretion." We have not used the phrase "abuse of discretion" since 1992, when our supreme court replaced that phrase with "erroneous exercise of discretion." *See, e.g.*, ***Shirk v. Bowling, Inc.***, 2001 WI 36, ¶9, n.6, 242 Wis. 2d 153, 624 N.W.2d 375.

and outdated. Gary asserts the appraiser himself conceded that an updated appraisal would be required to provide an appropriate value.

¶7 Conversely, Teri argues that Gary attempts to supplement evidence on appeal that was never presented to the circuit court to further his contention that the property division was unequal. Teri further asserts, "[I]f Gary is permitted to supplement the appellate record … then Teri should be equally entitled to do so."

¶8 Here, the record contains no meaningful analysis of the statutory factors, and we cannot discern whether, or to what extent, the court intended to deviate from the presumption of equal property division. We therefore reverse on the issue of property division and remand for further proceedings.[3]

¶9 We further conclude an insufficient basis exists on appeal to review Exhibit 3. Upon remand, the circuit court may in its discretion determine whether it is appropriate to set forth more complete reasoning on the record concerning Exhibit 3, or simply reopen the proceedings for further testimony or other evidence, as it so elects. *See* ***Button v. Button***, 131 Wis. 2d 84, 100, 388 N.W.2d 546 (1986).

¶10 We also find insufficient support in the record for the circuit court's maintenance determination. Again, we have no basis to review to what extent the court considered the statutory maintenance factors. The court's entire analysis regarding maintenance was as follows:

[3] Gary also argues the circuit court erred by failing to award him interest on the installment payments concerning the "buyout" for his interest in the farm properties. Upon remand, the circuit court shall also revisit the issue of interest as relevant.

> Based upon that, there would be no basis for maintenance to be paid by the wife–I'm sorry, by the husband to the wife, and since there is a cash flow of $1,500 a month due the husband, there should be no maintenance necessary for the wife to pay for the husband.

¶11 Significantly, the court denied maintenance solely on the ground that Gary would receive $1,500 monthly as a "buy-out" of his interest in the farm properties. However, the court counted these installment payments (a payout of the asset itself) as an asset in making its property division and also as a "cash flow" item to be considered in the maintenance determination. This implicates the rule against "double counting." *See* ***Seidlitz v. Seidlitz***, 217 Wis. 2d 82, 90-91, 578 N.W.2d 638 (Ct. App. 1998). Accordingly, we conclude the court erroneously exercised its discretion in determining maintenance. Upon remand, the court shall also revisit the issue of maintenance.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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