

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 12, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP444

Cir. Ct. No. 2012FA178

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

HEATHER E. BREHM,

PETITIONER-APPELLANT,

V.

JONATHON M. BREHM,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Clark County:
JOHN V. FINN, Judge. *Affirmed.*

Before Kloppenburg, P.J., Sherman, and Blanchard, JJ.

¶1 PER CURIAM. Heather E. Brehm appeals from a judgment of divorce. She challenges two aspects of the property division and the circuit

court's refusal to retroactively modify Jonathon M. Brehm's child support obligation for the twelve months between the temporary order and the divorce hearing. Because Heather has not shown that the circuit court erroneously exercised its discretion, we affirm.

FACTS

¶2 Heather and Jonathon were married for eight-and-one-half years and have two young daughters. The parties have joint legal custody of the children, and Heather has primary placement. Heather teaches kindergarten and Jonathon is a mechanic/laborer. In 2012, Heather's income was \$27,555.66, and her 2013 income was \$28,415.35. Jonathon's 2012 income was \$17,555.52 and his 2013 income was \$23,853.75. The parties did not own any real estate. The majority of marital assets were various retirement accounts, some in Jonathon's name and some in Heather's name. Jonathon presented evidence of both the premarital and present value for the accounts titled in his name. Heather did not provide the court with any valuation evidence for her accounts. Prior to the final hearing, Jonathon filed a motion to compel discovery and for sanctions, based on Heather's failure to respond to his request for the production of documents. *See* WIS. STAT. §§ 804.09 and 804.12(1)(a) (2013-14).¹

¶3 The parties agreed that the marital property should be divided equally. Jonathon submitted a proposed division, Exhibit 5, which resulted in an equalization payment, from him to Heather, of \$39,729. Because he lacked liquid assets for the payment, Jonathon asked that he be permitted to transfer the funds

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

from one of his retirement accounts to Heather using a Qualified Domestic Relations Order. Further facts will be stated below as necessary.

DISCUSSION

¶4 Property division rests within the circuit court’s discretion. *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We will affirm as long as 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.” *Id.* (quoting *Long v. Long*, 196 Wis. 2d 691, 695, 539 N.W.2d 462 (Ct. App. 1995)). We generally look for reasons to sustain discretionary decisions. *See Steiner v. Steiner*, 2004 WI App 169, ¶18, 276 Wis. 2d 290, 687 N.W.2d 740. In addition, we will not set aside the circuit court’s factual findings unless they are clearly erroneous. WIS. STAT. § 805.17(2).

¶5 Heather’s primary argument on appeal concerns the circuit court’s treatment of the parties’ retirement accounts. The circuit court’s ruling is as follows:

There’s evidence of the various retirement accounts and evidence sufficient to show the premarital values as presented by [Jonathon]. [Heather] has ... provided no proof whatsoever as to ... any values, and we’re not going to postpone this for any time to modify the evidence that’s been put on the record today.

....

As far as the property division, I’m satisfied that Exhibit 5 ... is well supported by the documentation that’s been presented by [Jonathon]. Each one of these things has been documented. There’s been testimony as to premarital value, and I think that I’m satisfied that this is an accurate reflection of the assets of the parties, and I believe that the proposal by [Jonathon] ... [is] appropriate There should be a tax effect on the accounts, and there is, so it’s tax effected in order to get to the equation. Then he’s going to

have an equalization payment of thirty-nine-seven-twenty-nine.

¶6 Heather argues that the circuit court awarded the premarital portions of Jonathon’s retirement accounts to him and did not do the same for her retirement accounts. She also argues that the circuit court applied a twenty percent tax discount to the present value of Jonathon’s retirement accounts without doing the same for her accounts.²

¶7 The circuit court was required to consider the tax consequences of the property division. WIS. STAT. § 767.61(3)(k). However, Heather did not provide the court with the present value of her retirement accounts. Thus, the court “was faced with an evidentiary vacuum from which to address the present value of [her] retirement plans, a decidedly nebulous area.” See *Laribee v. Laribee*, 138 Wis. 2d 46, 52, 405 N.W.2d 679 (Ct. App. 1987). If the circuit court “sets forth the underlying rationale for its consideration of tax consequences on a retirement or pension plan,” we will uphold the circuit court’s decision unless “the result is unconscionable under the circumstances of the case.” *Id.* at 52-53.

¶8 In this case, the circuit court awarded Jonathon’s retirement accounts to him. Any tax consequences for those accounts will be Jonathon’s responsibility alone and, therefore, the court properly included a tax discount before reaching the present value of those accounts. Heather’s unvalued retirement accounts, however, were divided evenly between the parties, and each person will receive

² Heather asserts that Exhibit 5 includes assets that she does not have, namely accounts with Western Reserve Life and Section 529 college funds. Jonathon counters that Heather’s counsel acknowledged that Section 529 accounts existed. More importantly, however, each of the assets that Heather claims she does not have were divided equally between the parties. Thus, the overall property division and equalization payment is not affected by the existence, or not, of the assets.

one-half of the proceeds and be responsible for any tax consequences arising from that person's half share. The parties are in the same tax positions with regard to Heather's accounts. The evidentiary void created by Heather prevented the circuit court from determining what part of the accounts were premarital and from determining an appropriate present value for her retirement accounts. Given that Heather was responsible for the predicament facing the circuit court, we cannot say that the result reached is inequitable under the facts of the case. Therefore, the discretionary decision must be upheld.

¶9 Heather's next appellate argument concerns the circuit court's response to her request, made on the day of the final hearing, to modify Jonathon's child support obligation for the preceding year. The circuit court refused to retroactively modify child support, noting that "[i]f that was to be done, that should have been done by the family court commissioner prior to today."

¶10 The circuit court's decision to decline to retroactively modify child support was a proper discretionary decision. Under WIS. STAT. § 767.59(1m), the revision of a support obligation must be prospective; past obligations cannot be revised "except to correct previous errors in calculation." Heather knew that Jonathon's actual 2013 income had increased before the final hearing. She did not request any modification of support from the family court commissioner. The circuit court reasonably refused to revisit the terms of the Temporary Order.³

³ Heather's position on the merits is similarly unavailing. Jonathon has earned \$10 per hour since 2006. On direct examination, Heather testified that Jonathon's support obligation had been based on an annual income of \$17,500. On cross-examination, however, Heather conceded that the support obligation had been based on an annual income of \$20,800. Jonathon's actual income in 2013 was \$23,853. Jonathon testified that his \$10 hourly wage had not changed, but he was able to work overtime hours because he had fewer child care responsibilities. The Temporary Order required Jonathon to notify the county child support agency of "any substantial

(continued)

¶11 Heather’s final appellate argument consists of a single paragraph in which she refers to a \$5,000 withdrawal during the marriage from one of Jonathon’s retirement accounts and then argues that this amount “should have been included in Jonathon’s assets and an equal portion distributed to Heather as an equal division of the marital estate.” Heather cites generally to *Anstutz v. Anstutz*, 112 Wis. 2d 10, 331 N.W.2d 844 (Ct. App. 1983).

¶12 Heather fails to adequately develop this assertion into a legal argument. A court may consider dissipation of assets and rectify damage resulting from a spouse’s mismanagement of or waste to marital property. *Anstutz*, 112 Wis. 2d at 13. However, Heather does not point us to any evidence to suggest that the withdrawn money was used for anything other than marital expenses. We are presented only with a conclusory reference to a case that is apparently not relevant under the facts. Heather has not shown that the circuit court erred in not charging the \$5,000 withdrawal against Jonathon.

By the Court.—Judgment affirmed.

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

change in the amount of his ... income.” The difference between the premise for the Temporary Order and Jonathon’s actual income in 2013 was just over \$3,000, all attributable to overtime. Neither Jonathon nor Heather testified that overtime hours were always available to Jonathon. The amount of overtime that may be available to an employee is inherently unpredictable. We cannot say that the increase in Jonathon’s income, due to overtime, was sufficiently “substantial” so as to trigger an obligation to notify.

