COURT OF APPEALS
DECISION
DATED AND FILED

October 21, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1148-FT **Cir. Ct. No. 2013FA608**

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

IN RE THE MARRIAGE OF:

ANDREW MARC LENTZ,

PETITIONER-RESPONDENT,

V.

CARRIE MARIE HICKMANN, F/K/A CARRIE MARIE LENTZ,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Reversed and cause remanded for further proceedings consistent with this opinion*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Carrie Marie Hickmann appeals from an amended judgment of divorce effecting an unequal property division in favor of Andrew Marc Lentz and ordering an equalization payment to Carrie of $19,918. She argues that the trial court erroneously exercised its discretion by using a previously rejected formula to divide the marital estate and affording Andrew a credit for her nonmarital child's private school tuition. Alternatively, she argues that the trial court improperly used its WIS. STAT. § 805.17(3) (2013-14)[1] reconsideration authority in amending the judgment. Pursuant to a presubmission conference and this court's order of June 30, 2015, the parties submitted memorandum briefs. *See* WIS. STAT. RULE 809.17(1). Upon review of those memoranda and the record, we reverse.

¶2 Following a divorce trial, the parties submitted written briefs outlining their property division proposals. On December 3, 2014, the trial court issued a written decision and order for maintenance and the division of property, which included a $40,074.11 equalization payment to Carrie, and was made part of the final divorce judgment. Based on the manner in which the parties handled their finances, Andrew's contributions to the support of Carrie's nonmarital children, and the value of the parties' premarital assets, the trial court determined that an equal property division would be unfair to Andrew and awarded him sixty-five percent of his Alliant pension and an additional $101,900 credit for premarital

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

assets.[2] Excluding the Alliant pension but taking into account the equalization payment, Andrew received assets totaling $287,784 while Carrie's totaled $83,981.[3]

¶3 Carrie filed a motion asking the court to clarify how it determined the equalization payment and to reduce by twenty percent the premarital credit awarded Andrew for his Alliant 401(k) savings account. As to equalization, Carrie asserted that the common method for assigning premarital credits was to exclude them from the net marital estate which, in this case, would have resulted in an equalization payment to Carrie of $91,000. At the hearing, she explained that both parties had used this common methodology in calculating their proposals and that the court's method awarded Andrew one and one-half times the value of his credit.[4] Acknowledging she did not "know exactly the court's intention[,]" Carrie explained that her motion sought clarification because "perhaps the Court

[2] The marital estate includes both Andrew's Alliant pension plan and his Alliant 401(k) savings account. The trial court divided the Alliant pension up front, awarding sixty-five percent to Andrew and thirty-five percent to Carrie. The court did not consider the Alliant pension when valuing the marital estate or the parties' assets. In contrast, the Alliant 401(k), valued at $205,275.80 after a twenty-percent deduction for taxes, is included in the net estate and assets, and its premarital value constitutes a portion of the $101,900 credit to Andrew. Though it is unclear which numbers the court used in determining Andrew's premarital credit, we arrive at a total of $101,900 if we consider a $55,000 credit for the home, $1500 for the sailboat, and $45,400 for the premarital value of the 401(k) account.

[3] In calculating the equalization amount, the trial court first divided the net estate in half, determining that each party would receive about $185,882 in an equal split. From Carrie's half, the trial court subtracted (1) $101,900 to represent Andrew's premarital credits, and (2) $43,907.89 to account for the assets awarded to Carrie. Andrew was ordered to make a payment equal to the remainder of $40,074.11.

[4] By leaving the premarital assets in the estate, Andrew received not only the full value of his credits, but also the one-half interest in the asset he would have received in an equal property division.

inadvertently did the calculations in a way that I think are contrary to what was usually expected, or what we would have expected in this going into the hearing."

¶4 The trial court first addressed the premarital credit awarded to Andrew based on his 401(k) account and agreed that for purposes of consistency and fairness, Andrew's premarital 401(k) credit should be reduced by twenty percent:

> With regard to the figure, then, would come out to then $35,200 at 80 percent of the $44,000 credit that the Court gave. So there would be a net reduction there of, I believe, $8800 to be put back into the estate and then divided equally.

¶5 Next, the trial court agreed that the appropriate methodology for determining Carrie's equalization payment would be to subtract Andrew's premarital credits from the total estate amount "and come up with a net figure there, and then take that figure by one half and then take out from that the amount that was awarded to the wife in assets."[5] After acknowledging it was not "exactly sure where that was missed in the decision," the trial court determined that with the additional $4400 resulting from the reduction of Andrew's 401(k) credit, the equalization amount should be changed to $95,424.55. Carrie's attorney agreed to prepare a new order.

¶6 Thereafter, Andrew filed a reconsideration motion contesting, in large part, the premarital 401(k) credit reflected in Carrie's draft order. Pointing to the court's original December 2014 decision, Andrew asserted that it intended

[5] Another method to avoid double counting would be to calculate Andrew's net assets by deducting any credit from the assets he actually received. Then, as is commonly done, the court could calculate the equalization amount as half of the difference between Andrew's [postcredit] net assets and Carrie's assets.

to award a premarital 401(k) credit of $80,000 rather than $44,000,[6] and that Carrie's equalization payment should therefore be $81,166.[7] The motion attached as Exhibit B a supporting worksheet with Andrew's calculations. At the hearing, Andrew confirmed his understanding that the court corrected its equalization payment methodology and stated "but now the question is what is the total amount of credit," asserting "we think that what we have in Exhibit B is correct." He summarized:

> So we are asking the court to once again change the order to reflect what we have in our Exhibit B based on the statements I made in my affidavit, and then to address how to make the equalization payment. And, again, if Mr. Lentz just doesn't have the funds to do that he is going to have to borrow money on his house to either do that which comes at a consequence to him or again have this taken from the 401(k). And he would be again the only one responsible then for the penalties and the taxes related to that ….

Carrie stipulated that Andrew was entitled to recoup car payments totaling $5374, but maintained that the December 2014 order awarded Andrew a premarital credit for his 401(k) of $44,000.[8]

[6] At various points, the December 2014 order provided three different values for Andrew's premarital 401(k) credit: $44,000; $45,400; and $88,000.

[7] The motion also asserted that certain car payments Andrew made on Carrie's behalf should be deducted from the equalization amount, Carrie's draft order failed to account for another small credit, and the court should consider increasing Andrew's sixty-five percent interest in his Alliant pension. The motion further alleged that Andrew did not have the ability to make the increased equalization payment within ninety days and, therefore, the court should consider awarding Carrie a larger portion of the 401(k) account in lieu of cash, or in the alternative, order Carrie responsible for any taxes and penalties incurred as a result of Andrew's withdrawal of that cash from his retirement account.

[8] Because Carrie had since remarried, she stipulated to the termination of maintenance and the return to Andrew of any maintenance paid since her remarriage.

¶7 The trial court acknowledged that its written December 2014 decision contained inconsistencies that needed to be clarified and worked through. Though it believed its intent was to award Andrew a premarital 401(k) credit of around $44,000 and that the reference to $80,000 was most likely a mistake, the court stated that given the larger equalization amount, it needed to determine how best to effectuate the equalization and would take the matter under advisement:

> The numbers need to be worked on here, and then we can get you something that I believe will clarify the issue, and we will have it clear what needs to be done and how the payments will have to be made, and whether or not there is going to be some other way of dividing assets to get to that equalization.
>
> Obviously, if we are equalizing, and we're looking at issues of 401(k), if we're talking a large payment it would be the intention of the court that quite probably I will divide 401(k) assets in part to do that because that is the big asset. That is a big asset that would be there to be divided. And we can take those and the tax, reduce for taxes for each of the parties as to those particular values.

¶8 The trial court's subsequent written decision valued the net marital estate at $384,763.77, maintained the 65/35 division of Andrew's pension in his favor, determined that Andrew was entitled to premarital credits totaling $116,567.20,[9] and awarded to Carrie an equalization payment of $19,918. In calculating the equalization amount, rather than excluding the premarital assets from the net divisible estate or from Andrew's assets, the trial court reverted back

[9] The trial court calculated Andrew's premarital credits as follows: $55,000 for the house; $35,208.31 for the Alliant 401(k) or $44,010.39 less twenty percent; $1500 for the sailboat; $5373.95 for Carrie's car payments as stipulated; and $25,000 to account for the private school tuition of Carrie's nonmarital child. From this amount, which totals $122,082.26, the trial court subtracted Carrie's premarital credit of $5515.06.

to the methodology used in its December 2014 decision.[10] As a result, taking the equalization payment into account, Andrew received $308,949.08 in assets, and Carrie received $75,814.69. Thus, Andrew was awarded eighty percent of the marital estate, and Carrie received twenty percent.

¶9 Property division in divorce is governed by WIS. STAT. § 767.61, and there is a presumption that marital property will be equally divided. Sec. 767.61(3). This presumption is rebuttable and a trial court may deviate from an equal property division after considering all enumerated statutory factors. *See* § 767.61(3)(a)-(m); ***LeMere v. LeMere***, 2003 WI 67, ¶¶24, 34, 262 Wis. 2d 426, 663 N.W.2d 789. The division of the marital estate is entrusted to the trial court's sound discretion and will not be disturbed absent an erroneous exercise of that discretion. ***LeMere***, 262 Wis. 2d 426, ¶13. "[T]he exercise of discretion is not the equivalent of unfettered decision-making." ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). A discretionary decision "must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." ***Id.*** An erroneous exercise of discretion occurs "when

[10] The court valued the net marital estate at $384,763.77 and found Andrew received $328,867.08 in assets, and Carrie received $55,896.69. The court divided the net estate in half to determine that in an equal split, each party would receive $192,381.88. From Andrew's assets ($328,867.08), the trial court subtracted $116,567.20 (premarital credits) and found that the balance of $212,299.88 represented the net marital assets awarded to Andrew. The court calculated the equalization payment as the difference between Andrew's postcredit assets and the amount he would have received in an equal property division.

Had the court used the two-step method it previously approved, after awarding Andrew a premarital credit of $116,567.20, the equalization payment to Carrie would have been $78,201.55. Similarly, had the court divided in half the difference between Andrew's postcredit assets and Carrie's assets, the equalization amount would have been $78,201.60. These numbers are similar to the equalization amount proposed by Andrew on reconsideration.

the trial court has failed to consider proper factors, has made a mistake or error with respect to the facts upon which the [property] division was made, or when the division itself was, under the circumstances, either excessive or inadequate." ***Perrenoud v. Perrenoud***, 82 Wis. 2d 36, 46, 260 N.W.2d 658 (1978).

¶10 Carrie first challenges the trial court's property division method, specifically, the manner in which it factored in Andrew's premarital credits to arrive at the equalization amount. She points out that on reconsideration, the trial court approved and agreed to adopt the methodology used by the parties, which was to exclude premarital assets from the net marital estate to avoid double-counting, thus ensuring that no party would receive duplicate credit for their interest in an asset. *See* ***Jasper v. Jasper***, 107 Wis. 2d 59, 62, 318 N.W.2d 792 (1982) (approving a two-step method in which the trial court first returned to each party the assets brought to the marriage and then divided the remaining net marital estate).[11] Andrew concedes that both he and the trial court agreed to use this method, but argues that the trial court's decision was discretionary and therefore it was not required to abide by the ***Jasper*** two-step method. Andrew states "it is irrelevant that Andrew's counsel agreed with the methods proposed by Carrie's counsel."

¶11 We conclude that the trial court erroneously exercised its discretion when, without explanation, it calculated the equalization amount using a concededly flawed and previously rejected method which ultimately awarded

[11] Though the propriety of this two-step method was not the central issue in ***Jasper v. Jasper***, 107 Wis. 2d 59, 62, 318 N.W.2d 792 (1982), the parties' briefs often cite to ***Jasper*** as shorthand for the practice of excluding premarital assets from the divisible estate. To simplify, we will also refer to ***Jasper***'s two-step method.

Andrew one and one-half times the amount of credit the court deemed appropriate.[12] The trial court's last word on the subject manifested its intent to correct the numeric errors, accurately determine the amount of Andrew's premarital credits and, using the two-step method, calculate an equalization amount. While it is true that the statute does not require use of the ***Jasper*** method, we cannot discern from the trial court's decision whether it intentionally discarded this approved formula and if so, the reason for its change of heart. Further, the trial court's decision does not explain why Andrew was entitled to receive one and one-half times the value of the court's specifically enumerated premarital credits, or whether this result was inadvertent. Similarly, though the trial court explained its intent to deviate from the fifty-fifty presumption, we are unable to determine from the record why, in this ten-year marriage, an eighty-twenty split was intended or appropriate. Finally, we observe that while the statute does not prescribe a method for assigning credit for premarital assets, guidance is provided by way of WIS. STAT. § 767.61(2) and relevant case law. Under § 767.61(2), a party's gifted or inherited assets "shall remain the property of that party and is not subject to a property division under this section." Such nondivisible property is excluded from the marital estate prior to a court's property division. *See, e.g.*, ***Anstutz v. Anstutz***, 112 Wis. 2d 10, 12, 331 N.W.2d 884 (Ct. App. 1983).

¶12 Carrie next challenges as without record support the trial court's decision to provide Andrew with a $25,000 credit for the private school tuition of Carrie's nonmarital child. The trial court's original December 2014 decision stated: "Respondent had two children not of this marriage who lived with the

[12] For his premarital credit of $116,567.20, Andrew received a value of $174,850.80.

parties. One child attended private school and the tuition paid by the parties was $25,000." Presumably, the basis for this statement was Carrie's trial testimony in response to a question asking how frequently she supported her adult children:

> [Wife]: Periodically if they came and asked me. Our son went through private school during our marriage so that was $25,000. There is plenty of expenses that might have been incurred for two children putting through school.
>
> Q: But as adults you continue to support them?
>
> [Wife]: I do occasionally. Not like I used to be able to obviously. Obviously, not like I used to be able to.

¶13 Although the trial court considered Andrew's contribution to the support of Carrie's children as a factor justifying an unequal property division, Andrew did not request and the court did not originally order a credit for the private school tuition. The tuition was not referenced or discussed in reconsideration proceedings. The trial court's final written decision stated that Andrew should receive "a credit of $25,000 for private school tuition he paid for respondent's child" and that the omission of this credit from its original December 2014 decision was "an oversight."

¶14 We agree that on this record, the $25,000 credit is an erroneous exercise of discretion.[13] The court's original finding that the parties paid the tuition along with Carrie's testimony does not sufficiently establish that Andrew, himself, paid the tuition or the circumstances of any contribution. Here, the trial court did consider Andrew's support of the nonmarital children up front in determining that a deviation from the presumptive equal division was appropriate.

[13] As to both issues, we reverse based on the trial court's erroneous exercise of discretion. Therefore, we need not reach and will not address Carrie's argument that the trial court exceeded the scope of its WIS. STAT. § 805.17(3) reconsideration authority.

See ***Fuerst v. Fuerst***, 93 Wis. 2d 121, 131, 134-35, 286 N.W.2d 861 (Ct App. 1979) (in an individual case, a party's contribution to the support of a stepchild may be a relevant consideration in property division, but not if the stepparent stood in loco parentis to the child because such support is presumed gratuitous). However, this does not automatically justify the award of an additional $25,000 credit, especially in the absence of any request or input from the parties or findings concerning the circumstances of this particular contribution.

¶15 We observe that at the end of the final motion hearing, the parties and the court were in general agreement about the overall property division scheme, including the allocation of large assets, and how to determine the appropriate equalization amount. Carrie did not then and does not now contest the notion of an unequal property division. The parties' proposed equalization amounts were in the same ballpark. This case having come so close to final resolution, we are perplexed as to what went awry. We reverse and remand to allow the trial court to effectuate a perhaps unequal but fair property division, using a rational and explainable method that indisputably reflects the trial court's process and intent.

By the Court.—Judgment reversed and cause remanded for further proceedings consistent with this opinion.

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