

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 20, 2016

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. 2015AP2472

Cir. Ct. No. 2012FA129

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

JOHN A. SANDERSON,

PETITIONER-APPELLANT,

V.

PAMELA B. SANDERSON,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Columbia County:
W. ANDREW VOIGT, Judge. *Affirmed.*

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

¶1 PER CURIAM. John Sanderson appeals a judgment of divorce that divided marital property and awarded Pamela Sanderson an equalization payment

of \$92,113.26.¹ John contends that the circuit court erroneously exercised its discretion by setting aside the parties' premarital property agreement. For the reasons set forth below, we conclude that we have no basis to disturb the circuit court's exercise of discretion. We affirm.

¶2 John and Pamela were married in June 1995. Prior to the marriage, John and Pamela entered a marital property agreement. The agreement provided that, in the event of divorce, each party would retain his or her own personal property, whether acquired before or during the marriage.

¶3 John filed for divorce in April 2012. Pamela moved to set aside the marital property agreement, arguing that the agreement was no longer equitable. She asserted that the parties' circumstances had significantly changed since they entered the agreement, rendering the agreement unfair. At a motion hearing, both Pamela and John testified as to the circumstances surrounding the marital property agreement and the parties' marriage.

¶4 Pamela asserted the following facts to support her motion to set aside the marital property agreement. At the time the agreement was entered, John had a net worth of \$158,803, including his house and employee retirement account, and Pamela had a net worth of \$23,911.75, including her house and car. John and Pamela intended the marital property agreement to protect their personal assets.

¶5 John and Pamela discussed having children before they were married. Pamela told John she wanted to have children and wanted to be a stay-at-

¹ Because the parties share a surname, we refer to them by their first names for clarity.

home mother. John and Pamela had two children during their marriage, and both children suffered serious medical problems from birth. Pamela stayed home from work for a full year after their first daughter was born, and worked on a limited basis until their second daughter started kindergarten, at which time Pamela began working part-time. Pamela worked as much as she was able given the children's health concerns, and her income covered family expenses that John did not cover.

¶6 Several years into the marriage, John insisted that Pamela sell her separately owned property under threat of divorce. Pamela sold the property and used the proceeds to cover personal and family expenses. By the time of the divorce proceedings, Pamela's net worth had eroded to zero while John's had grown to over \$500,000.

¶7 John argued that the parties' circumstances at the time of divorce were reasonably foreseeable and that the marital property agreement remained fair to both parties. He asserted the following facts in favor of enforcing the agreement. While the children were born with health problems, those problems did not require that Pamela stay home with them. Rather, Pamela had already decided she would be a stay-at-home mother before the children were born. John never threatened to divorce Pamela if she did not sell her house. John encouraged Pamela to sell the house, but Pamela sold it and used the proceeds on her own. John paid all of the household expenses, and did not encourage Pamela to use any of her own money for that purpose.

¶8 The circuit court found that it was not reasonably foreseeable to John and Pamela that they would have children born with serious health problems and that Pamela would sell her personal property and use the proceeds to cover family expenses. The court also found that the marital property agreement was no longer

equitable to the parties based on the disparity in their current net worth and current ages.² The court issued a judgment of divorce dividing the parties' property and ordering an equalization payment to Pamela. John appeals.

¶9 Under WIS. STAT. § 767.61(3) (2013-14),³ a circuit court must start with the presumption that divisible property is to be divided equally upon divorce. However, a marital property agreement providing for an unequal division of property “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.” See § 767.61(3)(L). The court presumes that the marital property agreement is equitable as to both parties, *id.*, and the party challenging the agreement has the burdens of persuasion and production to overcome that presumption. *Gardner v. Gardner*, 190 Wis. 2d 216, 230, 527 N.W.2d 701 (Ct. App. 1994).

¶10 One way in which a marital property agreement may be inequitable is if the substantive provisions of the agreement dividing the property are not fair to each spouse. See *Button v. Button*, 131 Wis. 2d 84, 89, 388 N.W.2d 546 (1986). If there has been a significant change in circumstances after the parties entered the marital property agreement and the agreement no longer comports with the reasonable expectations of the parties, then “an agreement which is fair at execution may be unfair to the parties at divorce.” *Id.* at 98-99. The question is whether the parties were able to reasonably predict events such that the circumstances at the time of divorce are within a range of circumstances

² At the time of the divorce, John was sixty-one and Pamela was fifty-three.

³ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

anticipated by the parties at the time they entered into the marital property agreement. *Warren v. Warren*, 147 Wis. 2d 704, 709-10, 433 N.W.2d 295 (Ct. App. 1988).

¶11 We review a circuit court’s determination that an agreement is inequitable to discern whether the court properly exercised its discretion. *See Button*, 131 Wis. 2d at 99. We will affirm the circuit court’s exercise of discretion “if it examined the relevant facts, applied the correct standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *Randall v. Randall*, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. Moreover, “[a]lthough the proper exercise of discretion contemplates that the circuit court explain its reasoning, when the court does not do so, we may search the record to determine if it supports the court’s discretionary decision.” *Id.* We defer to the circuit court’s credibility determinations. *See Noll v. Dimiceli’s, Inc.*, 115 Wis. 2d 641, 644, 340 N.W.2d 575 (Ct. App. 1983) (explaining that the circuit court “is the ultimate arbiter of the credibility of the witnesses”) (quoted source omitted).

¶12 John argues that there was no significant change in circumstances after the parties entered the marital property agreement and that the circumstances at the time of divorce were reasonably foreseeable to the parties. He argues that the parties’ having children born with serious health problems, and Pamela’s staying home with the children when they were young, did not qualify as a change in circumstances because Pamela had indicated to John prior to the marriage that she wished to have children and stay home with them. He argues that Pamela’s sale of her house was not a change in circumstances because Pamela received the proceeds from the sale and retained them as her personal property, and made the decision on her own how to spend those funds. He argues that it was reasonably

foreseeable to the parties that they would have children and that Pamela would be a stay-at-home mother, that Pamela would sell her separate residence after moving into John's house, and that Pamela would help contribute financially to the care of the children.

¶13 We conclude that the record supports the circuit court's decision that the marital property agreement was inequitable at the time of divorce as a proper exercise of its discretion. To the extent that John relies on conflicts between his testimony and Pamela's, or conflicts within Pamela's testimony, we reiterate that credibility determinations are left to the circuit court. *See Noll*, 115 Wis. 2d at 644. When the circuit court determined that the children's health problems and Pamela's sale of her house were unforeseeable to the parties, it implicitly found credible Pamela's testimony as to facts supporting that decision. *See Jacobson v. American Tool Cos.*, 222 Wis. 2d 384, 390, 394, 588 N.W.2d 67 (Ct. App. 1998) (explaining that, if a circuit court fails to make specific findings of fact to support its judgment, we may search the record for facts to support the decision; moreover, "[i]f a circuit court does not expressly make a finding about the credibility of a witness, we assume it made implicit findings on a witness' credibility when analyzing the evidence").

¶14 Pamela testified that she wanted to stay home with the children she and John would have, and that she had told him as much. However, she also testified that she worked to generate income to support the family even after the children were born, but that she worked very limited hours so that she could be home with the children. This included staying home full-time the first year after her daughter was born with a congenital heart defect, and working on an as-needed basis only after her second daughter was born with cystic fibrosis. Pamela testified that she kept her second daughter home from preschool because she

believed it was healthier for her daughter, and began working part-time when her daughter started part-day kindergarten. She testified that she sold her home under pressure from John, and that she then used the proceeds of the sale for family expenses, which she had not anticipated she would need to do.

¶15 Pamela's testimony supports the circuit court's finding that the circumstances at the time of divorce were not reasonably foreseeable to the parties at the time they entered the marital property agreement. A reasonable judge could reach the conclusion that the unforeseen change in circumstances—Pamela's need to stay at home to care for children with serious health problems and the sale of her separately owned property and use of at least part of the proceeds to pay for family expenses—rendered the agreement inequitable and unenforceable. We affirm.

By the Court.—Judgment affirmed.

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

