COURT OF APPEALS
DECISION
DATED AND FILED

May 5, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1601 **Cir. Ct. No. 2008FA327**

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

IN RE THE MARRIAGE OF:

ELIZABETH MARY VOLKMANN,

PETITIONER-RESPONDENT,

V.

JACOB FREDRICK VOLKMANN,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Reversed and cause remanded with directions.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Jacob Volkmann appeals from a judgment of divorce from Elizabeth Volkmann. He argues that it was error to decide a

disputed custody issue without input from the guardian ad litem (GAL) and that the property division was not a proper exercise of discretion. We reverse those parts of the judgment challenged on appeal and remand for the appointment of a GAL to represent the child's best interest on the issue of whether Jacob's placement with the child should be supervised or unsupervised and for findings of fact and conclusions of law with respect to the property division.

¶2 After just a little more than four years of marriage, Elizabeth filed for divorce and sought joint legal custody and primary placement of the parties' eight-month-old daughter. On December 18, 2008, a temporary order for Jacob's placement with the child to be supervised was entered. At the same time a GAL was appointed, "subject to payment of the required deposits."[1] By February 1, 2009, each party was required to make a deposit toward GAL fees and expenses by either paying the full $1000 deposit or paying $200 and thereby electing an installment payment option. Elizabeth made the required $200 deposit on

[1] The family court commissioner's order appointing the GAL also provided:

> Appointment of the *guardian ad litem* shall be deferred and the *guardian ad litem* shall defer commencement of any duties pending payment by both parties of the required deposit as provided above. Payment of the deposits as ordered above shall require strict compliance and any breach with regard to same will, absent further Court Order, result in the services of the *guardian ad litem* being terminated. If it is determined that a party's failure to pay the deposits is unreasonable or is an attempt to delay or hinder the evaluation process, that party may waive the right to object to the moving party's Motion/Order to Show Cause or other party's Parenting Plan, or any previous Court orders regarding custody and/or placement may be reaffirmed and reinstated. Furthermore, if one party does not pay the required deposit as provided above in an attempt to frustrate or delay the placement assessment, the other party may pursue the failure to abide by this Order as punishable by contempt of court, pursuant to Chapter 785, Wis. Stats.

February 2, 2009. Jacob made no payment of the required deposit. The guardian ad litem did no work and did not appear at trial.

¶3 Trial was held February 18, 2009. The parties agreed to joint legal custody and primary placement of the child with Elizabeth. The circuit court ordered that Jacob's placement with the child be supervised. Each party was awarded the personal property in their possession with the exception of the wedding rings which Elizabeth was ordered to return to Jacob. Elizabeth was responsible for one credit card debt and the loan on the vehicle she retained. She was also awarded the value of her deferred compensation account and retirement account with the State of Wisconsin. Jacob was held responsible for one credit card debt. The parties' home was in foreclosure and, because it was expected to be surrendered to the bank, the circuit court did not address it. On reconsideration, Jacob asked that he be awarded one-half of Elizabeth's deferred compensation and retirement accounts regardless of the value of those accounts. The circuit court denied the motion for reconsideration, concluding that with the limited information it had before it, it had made an appropriate and reasonable division of the assets.

¶4 WISCONSIN STAT. § 767.407(1)(a)2. (2007-08),[2] requires the circuit court to appoint a GAL for a minor child whenever the physical placement of the child is contested. ***State v. Freymiller***, 2007 WI App 6, ¶11, 298 Wis. 2d 333, 727 N.W.2d 334 (WI App 2006). ***Freymiller*** recognizes that the requirement for appointment of a GAL also requires the participation of the GAL:

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

> The statutorily mandated presence and participation of a guardian ad litem in a contested custody or placement proceeding is intended to benefit the interests of the child or children whose future circumstances the parties are contesting, not the interests of the parties to the proceeding. The requirement also provides a benefit to the circuit court, which receives from the guardian ad litem an arguably more objective and detached presentation of what arrangements would be in the child's best interests than the court is likely to receive from either contestant-parent.

Id., ¶17.

¶5 Here, a GAL was appointed but the appointment was made conditional on the payment of a deposit for GAL fees. By the time the parties got to trial, the only contested issue was whether Jacob's periods of physical placement with the child would be supervised or unsupervised. There still existed a contested issue with respect to physical placement and the GAL's participation was required. Neither party objected to the nonparticipation of the GAL. However, ***Freymiller*** explains why the waiver or invited error rule does not apply. *See* ***id.***, ¶¶16-19.

¶6 The present placement order with respect to supervised or unsupervised placement cannot remain in place unless or until the statutory mandate for a GAL's participation and input is satisfied. *See* ***id.***, ¶19. We reverse the determination that Jacob's periods of physical placement be supervised and remand for the appointment of a GAL and for further proceedings necessary to

ensure the GAL's participation on the contested issue of whether Jacob's placement be supervised or unsupervised.[3]

¶7 Jacob argues the division of property was an erroneous exercise of discretion because the circuit court never made findings of fact regarding the value of any marital property and did not state the percentage of the martial estate it was assigning to each party. *See* ***Pelot v. Pelot***, 116 Wis. 2d 339, 346, 342 N.W.2d 64 (Ct. App. 1983) ("a property division normally consists of determining the total value of the marital estate, determining the percentage of that value distributable to each spouse, and assigning enough property to each spouse to satisfy that percentage"). The division of property in a divorce is within the circuit court's discretion, and we review for an erroneous exercise of that discretion. ***Parrett v. Parrett***, 146 Wis. 2d 830, 843, 432 N.W.2d 664 (Ct. App. 1988). The circuit court must begin with the presumption that all marital property is to be divided equally between the parties. WIS. STAT. § 767.61(3). "A circuit court may deviate from the presumption of equal property division, but only after considering a lengthy and detailed list of statutory factors." ***LeMere v. LeMere***, 2003 WI 67, ¶16, 262 Wis. 2d 426, 663 N.W.2d 789.

¶8 Although there was very little marital property to divide, it does not relieve the circuit court from the obligation of making findings of fact as to the value of the marital property. Here, the value of certain property was contested or unknown. For example, Elizabeth opined that the two vehicles Jacob retained

[3] The parties are not precluded from resolving the contested issue by stipulation. Further, we direct that the determination of supervised placement shall remain in effect as a temporary placement order until the circuit court completes its action on the remanded placement issue. *See* ***State v. Freymiller***, 2007 WI App 6, ¶21, 298 Wis. 2d 333, 727 N.W.2d 334.

were worth $5000 to $6000; Jacob testified that the cars were worth nothing because neither ran and they needed repairs. Jacob acknowledged that he had possession of all the appliances in the home, but indicated that the refrigerator was broken and suggested that the appliances would be left in the home. Jacob also indicated that it was not fair for the parties to simply keep the personal property in their possession because Elizabeth took away a $1300 bed. Jacob wanted back the wedding rings and, in his financial disclosure, assigned a $1300 value to them. The circuit court ordered that the rings be returned to Jacob because they had been a gift from his family, but it did not make a specific finding that the nature of the gift excluded the rings from marital property. *See* WIS. STAT. § 767.61(2)(a)1. (marital property does not include property received as a gift from someone other than the spouse). We simply do not know whether or not the circuit court treated the rings as marital property.

¶9 The failure to make findings of fact as to the value of the marital property is most significantly reflected in the manner in which Elizabeth's deferred compensation and retirement accounts were handled. Elizabeth's accounts represented the most significant marital asset. Jacob specifically sought to have those accounts divided equally. The value of the accounts was set forth in Elizabeth's financial disclosure but she testified at trial that the value was significantly less because of declines in the stock market. No value was assigned. The circuit court rested its decision to not divide the accounts on the fact that a significant amount of the accounts was "premarital."[4] However, the premarital component of the accounts cannot be excluded from marital property, absent

[4] On the motion for reconsideration, Elizabeth indicated that forty percent of the value of the accounts was premarital. The circuit court never made that finding.

hardship, since they were not acquired by gift, bequest, devise or inheritance as described in WIS. STAT. § 767.61(2)(a).[5] *See* ***Fowler v. Fowler***, 158 Wis. 2d 508, 515, 463 N.W.2d 370 (Ct. App. 1990). If the circuit court intended to exclude the premarital portion of the accounts due to hardship under § 767.61(2)(b), it made no findings of hardship. Further, without a finding of fact as to the current value of the accounts and the premarital portion that might be excluded due to hardship, the circuit court's conclusion that only a de minimus amount was subject to division has no support in the record.

¶10 The lack of findings of fact means it is unknown whether the marital property was divided equally or unequally. Even on the motion for reconsideration, the circuit court did not clarify whether an equal or unequal division was made; it only stated that it had made an appropriate and reasonable division of the assets. If the circuit court made an unequal division of marital property,[6] it did not identify what factors under WIS. STAT. § 767.61(3) supported an unequal division. The circuit court, in denying maintenance, recognized that the marriage was short-term. Even if the circuit court relied on the short-term nature of the marriage in making an unequal division of property, § 767.61(3) does not permit a circuit court to deviate from the presumption of equal property division after considering one factor alone. *See* ***LeMere***, 262 Wis. 2d 426, ¶22. "Circuit courts must subject requests for unequal division of property to the proper

[5] Property that the parties brought into the marriage is one factor a court may consider in determining whether to deviate from the statutory presumption of equal division. *See* WIS. STAT. § 767.61(3)(b). However, the court must first presume to divide property brought into the marriage, rather than presume to not divide it as the court did here.

[6] We agree with Jacob that the award of the entire amount of Elizabeth's deferred compensation and retirement accounts to one party makes it implausible that the circuit court make an equal division of property.

statutory rigor. The failure to do so is an erroneous exercise of discretion." ***Id.***, ¶25.

¶11 The circuit court failed to make necessary findings of fact as to the value of the marital property. It erroneously exercised its discretion in dividing the property. We reverse the property division in the judgment of divorce and remand for entry of findings of fact and reconsideration of the property division in accordance with the statutory standards. We leave it to the circuit court's discretion whether to complete the property division based upon the facts already of record or to take additional evidence and/or argument from the parties.

By the Court.—Judgment reversed and cause remanded with directions.

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