COURT OF APPEALS DECISION DATED AND FILED

April 29, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 97-2269

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

IN RE THE MARRIAGE OF:
CONNIE L. BOSS N/K/A CONNIE L. WIESENBERG,

JOINT-PETITIONER-APPELLANT,

V.

JERRY E. BOSS,

JOINT-PETITIONER-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Green County: JAMES R. BEER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Dykman, P.J., Roggensack and Higginbotham,[1] JJ.

[1] Circuit Judge Paul B. Higginbotham is sitting by special assignment pursuant to the Judicial Exchange Program.

DYKMAN, P.J. Connie L. Wiesenberg appeals from a divorce judgment and from an order denying her motion for reconsideration. She contends that the trial court erred by not deducting various promissory notes from the gross marital estate when the six-year statute of limitations for suing on those notes had passed. She also argues that the trial court erred in failing to consider all the relevant factors enumerated in § 767.255, STATS., when it divided the marital estate. We disagree. Finally, she contends that the trial court erroneously exercised its discretion in determining the amount and duration of her maintenance award. We agree. Accordingly, we affirm in part and reverse in part, and remand for further proceedings regarding maintenance.

BACKGROUND

Jerry Boss and Connie Wiesenberg were married on October 8, 1982, and divorced on April 15, 1997. Jerry is a farmer, who began farming as a percentage renter with his father, Eugene Boss. Connie was primarily a homemaker, but periodically held low-paying part-time jobs. During the marriage, the parties purchased cattle, machinery, feed and farm land from Jerry's parents. The parties purchased the farm through a land contract with Jerry's parents, and they signed three promissory notes on June 5, 1986, as consideration for the purchase of the feed and livestock. These three notes were for $37,742.25, $8,400.00 and $14,125.00, and were all due on June 1, 1991. Each of the notes stated that if the parties failed to make any payments, Eugene had the option of accelerating the date that the amounts owing on those notes would be due. And while the parties made their last payment on these notes on December 31, 1990, Eugene never accelerated payment.

Eugene also loaned Jerry $10,000 on February 1, 1989, in exchange for another promissory note. This note was to be repaid by August 1, 1989. The interest on this note was eight-percent per year, which was approximately sixty-seven dollars a month. The parties made monthly payments on this note from February 1989 to August 1989, and then again from January 1991 to December 1991.

In 1989, Eugene recognized that his son and daughter-in-law were having financial difficulty, so he allowed them to stop making payments on these notes until they regained their financially stability. Eugene, however, testified at trial that he never forgave any of the amounts owing on the notes, and that he fully expected to be repaid the principal and any interest that accrued on them.

In dividing the marital property, the trial court determined that the parties had assets totaling $415,257.25 and debts totaling $394,681.06, including $82,872.31 owed on the four promissory notes. The court awarded Connie the 1990 Plymouth Voyager van ($6,300.00) and the 1996 state and federal tax refunds ($1,928.50). The court awarded Jerry the remaining marital assets ($407,028.75) and all of the marital debt ($394,681.06), and it required him to pay Connie $250 for a stove and safe and $2,094.69 to equalize the property division.

The court awarded physical placement of two of the parties' children to Connie and one to Jerry, and ordered Jerry to pay $417 a month in child support. The court determined Jerry's gross income for the purposes of child support to be $30,561, which was computed by adding the following amounts from the parties' 1996 income tax return: interest income of $122; capital gain of $749; 4797 gain of $4,061; farm income of $5,850; add back depreciation of $18,779; and an add back of $1,000 for farm expenses that were improperly

deducted twice. The court then applied the criteria set out in WIS. ADM. CODE § HSS 80 to set support at $5,005 per year, or $417 per month. Connie's share of the children's medical insurance premiums in the amount of $70 was then deducted from this amount for a total of $347 per month.

For the purpose of awarding maintenance, however, the court did not include the $18,779 depreciation, which lowered Jerry's income to $11,782. It then added in Connie's income, which was $6,527 in 1996, and divided that amount by two. Connie's income was then subtracted from one-half of the total income of the parties, resulting in a maintenance award of $220 a month. The court also limited maintenance to one year.

DISCUSSION

1. *Property Division*

Connie first contends that the trial court erred when it included the four promissory notes as debt in the property division. Property division in a divorce judgment is within the trial court's sound discretion. *See* ***Bahr v. Bahr***, 107 Wis.2d 72, 77, 318 N.W.2d 391, 395 (1982). A trial court's property division will be sustained if the court examines the relevant facts, applies a proper standard of law and, using a demonstrable rational process, reaches a conclusion that a reasonable judge could reach. *See* ***Liddle v. Liddle***, 140 Wis.2d 132, 136, 410 N.W.2d 196, 198 (Ct. App. 1987).

Connie also contends that according to the terms of the February 1, 1989 note, the parties were to repay the full $10,000 amount by August 1, 1989,

which they failed to do.[2] Connie argues that six-year statute of limitations for filing a breach of contract action began to accrue on August 1, 1989, *see* § 893.43, STATS.; ***CLL Assocs. Ltd. Partnership v. Arrowhead Pacific Corp.***, 174 Wis.2d 604, 607, 497 N.W.2d 115, 116 (1993) ("contract cause of action accrues at the moment the contract is breached, regardless of whether the injured party knew or should have known that the breach occurred."), and expired on August 1, 1995. She points out that because Eugene did not sue before August 1, 1995, he was barred from collecting on the 1989 note at the time of the divorce. She therefore argues that the trial court erred in including the balance and interest still owing on the note as a marital debt. We disagree.

As to most of the indebtedness on the notes, Connie is incorrect that the applicable statute of limitations, § 893.43, STATS., barred collection on the debt. At trial, Eugene Boss testified that he recognized that Jerry and Connie were having some financial difficulty in late 1989 and 1990, so he allowed them to miss a few payments. However, Jerry and Connie again began making (interest) payments on the 1989 note, in the amount of sixty-seven dollars a month, from January to December 1991. Eugene's acceptance of these interest payments tolled the statute of limitations. *See* ***Davison v. Hocking***, 3 Wis.2d 79, 86, 87 N.W.2d 811, 815 (1958). In ***Davison***, the supreme court held that:

> A partial payment, to operate as a new promise and avoid the bar of the statute of limitations, must be made under such circumstances as to warrant a clear inference that the debtor recognized the debt as an existing liability, and indicated his willingness, or at least an obligation, to pay the balance.

[2] Connie argues that she was not aware of this note and does not believe it should be considered marital debt. The trial court rejected this assertion after concluding that Connie wrote and signed some of the checks to pay interest on this loan. We reject it as well.

Id.; *See also* ***Cornell Univ. v. Roth***, 149 Wis.2d 745, 748-49, 439 N.W.2d 154, 156 (Ct. App. 1989); ***St. Mary's Hosp. Med. Ctr. v. Tarkenton***, 103 Wis.2d 422, 424, 309 N.W.2d 14, 16 (Ct. App. 1991).

Eugene testified that he was aware that the monthly payments of sixty-seven dollars were Jerry and Connie's attempt to make partial payment on the 1989 note. The result is that these partial payments tolled the statute of limitations until the payments stopped on December 31, 1991. The statute of limitations began to run anew as of that date and did not expire until December 30, 1997. Eugene's ability to sue on the note was therefore not barred until well after the judgment for divorce was rendered.

Connie makes the same argument regarding the three June 5, 1986 promissory notes. She points out that the parties stopped making payments on these three notes in 1990, and the note explicitly stated that "[f]ailure to pay any principal installment or interest when due shall, at the option of the holder, cause all sums then remaining unpaid to become due and payable." But Eugene never exercised this option. Therefore, a breach occurred on the date that the 1986 notes were due, June 1, 1991. The six-year statute of limitations began running on June 2, 1991, and did not expire until June 1, 1997, which is after the judgment of divorce in this case was rendered. Therefore, because the trial court is to determine the value of the marital property as of the date of the divorce, it did not err in including the amount owed on the 1986 notes, plus interest, when it determined the property division.

Connie, however, points out that even though Eugene did not choose to accelerate the date that the notes were due, the parties were still required to make their monthly payments on those notes from January 1991 to April 1991,

which they failed to do. She argues that these missed monthly payments constitute partial breaches, and that the statute of limitations on those partial breaches began running as early as the first missed payment, which was January 1991. We agree that if a contract provides for the payment of money in installments, an action will lie for each installment as it falls due. 4 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 948, at 817 (1951). This means that the six-year statute of limitations for suing on these individual breaches, *i.e.*, missed monthly payments, expired in February through April 1997, before the judgment for divorce in this case was entered. As a result, Connie contends that because Eugene is barred under the statute of limitations from collecting on these missed monthly payments, those amounts plus any interest accrued on those amounts should be subtracted from the marital debt.

The trial court, however, rejected Connie's statute of limitations argument because it determined that the parties were fortunate that Eugene chose not to sue on the notes, and it was unwilling to punish Eugene for his kindness and generosity by negating his ability to sue on those notes.[3]

We have considered the public policy issues that would arise were we to require trial courts to reduce a couple's marital debt by amounts of money owed to a family member that could be barred by a statute of limitations. A rule such as this would conflict with the discretion given to courts to divide marital property equitably, on a case-by-case basis. It would also require trial courts to assert an affirmative defense of a statute of limitations on behalf of the parties to

[3] We have held that the trial court is in a far better position to weigh evidence, particularly the credibility of witnesses. *See* ***Brandt v. Witzling***, 98 Wis.2d 613, 618, 297 N.W.2d 833, 836 (1980).

claims that have not yet been made. While a statute of limitations defense may be likely in a commercial setting, it is speculative in inter-family financial dealings, such as the one presented in this case. A rigid rule such as this would adversely affect families by requiring parents to sue their children or forfeit loans made for the benefit of their children. We conclude that the better rule is to leave to the trial court's discretion the decision whether a debt is appropriate to offset assets in a divorce context. Trial courts have had no trouble in determining which debts in a divorce case are real and which are developed for the purpose of the litigation. We conclude that the trial court did not erroneously exercise that discretion by considering the missed payments on the notes as an offset to the Bosses' assets.

2. *Section 767.225, STATS.*

Connie also contends that the trial court erroneously exercised its discretion when it failed to consider all the relevant factors set out in § 767.255(3), STATS.,[4] when it divided the marital estate. *See* ***Gardner v. Gardner***, 175 Wis.2d

[4] Section 767.255(3), STATS., reads as follows:

> The court shall presume that all property not described in sub. (2)(a) is to be divided equally between the parties, but may alter this distribution without regard to marital misconduct after considering all of the following:
>
> (a) The length of the marriage.
>
> (b) The property brought to the marriage by each party.
>
> (c) Whether one of the parties has substantial assets not subject to division by the court.
>
> (d) The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.
>
> (e) The age and physical and emotional health of the parties.

(continued)

420, 432, 499 N.W.2d 266, 271 (Ct. App. 1993) (holding that court need not consider all factors recited in the statute, but must consider all the relevant factors). She argues that the trial court did not consider under § 767.255(3)(f), STATS., 1995-96, that at the time the parties were married, the parties did not own any land and were only milking around eighteen cows, but when the marriage ended, the parties had acquired a 187 acres of land and were milking fifty to fifty-five cows. Connie also points out that in addition to helping out on the farm, she was responsible for raising the children and doing a majority of the housekeeping;

> (f) The contribution by one party to the education, training or increased earning power of the other.
>
> (g) The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.
>
> (h) The desirability of awarding the family home or the right to live therein for a reasonable period to the party having physical placement for the greater period of time.
>
> (i) The amount and duration of an order under s. 767.26 granting maintenance payments to either party, any order for periodic family support payments under s. 767.261 and whether the property division is in lieu of such payments.
>
> (j) Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.
>
> (k) The tax consequences to each party.
>
> (l) Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements 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. The court shall presume any such agreement to be equitable as to both parties.
>
> (m) Such other factors as the court may in each individual case determine to be relevant.

yet, the trial court failed to accord her any credit for these contributions under § 767.255(3)(d). Finally, she argues that the trial court failed to consider under § 767.255(3)(m), that more of the 1989 note to Eugene could have been paid off during the marriage from other available assets, such as selling land or cashing in one of their mutual funds.

After reviewing the trial court's property division, we conclude that it did not erroneously exercise its discretion. The trial court carefully reviewed the marital property and divided it equally. It awarded Jerry $407,028.75 of the marital assets and $394,681.06 of the marital debt, for a total of $12,347.69 of the marital property. The trial court awarded $8,228.50 of the marital assets and none of the marital debt to Connie. It also ordered Jerry to pay Connie an additional $2,094.69 to equalize the property division. As a result, Connie receives $10,323.19 and Jerry receives $10,253.00. Connie does not argue that she should receive more of the assets and more of the debt. She only asserts that the net value of what she received was less than what she deserved. But we know of no rule that permits a court to divide non-existent property unless one party has squandered assets. The difficulty both parties faced is that despite hard work, their net marital estate was very modest. And because the trial court did not vary from a equal division of the marital property, we see no reason why it is required to consider the factors set out in § 767.255(3), STATS.

As for Connie's assertion that Jerry was given all the income-producing property, we echo the trial court's statement that it was doing Jerry no favor by awarding him the farm assets and debts. The parties' incomes in years prior to the divorce steadily declined, and the farm's production was so minimal that the court went so far as question whether there should be any effort to

continue the farming operation. We therefore conclude that the trial court did not erroneously exercise its discretion when dividing the marital estate.

3. *Maintenance*

The determination of the amount and duration of maintenance rests within the sound discretion of the trial court and will not be disturbed absent an erroneous exercise of that discretion. *See* ***LaRocque v. LaRocque***, 139 Wis.2d 23, 27, 406 N.W.2d 736, 737 (1987). An erroneous exercise of discretion occurs when "the trial court has failed to consider the proper factors, has based the award upon a factual error, or when the award itself was, under the circumstances, either excessive or inadequate." ***DeLaMatter v. DeLaMatter***, 151 Wis.2d 576, 582-83, 445 N.W.2d 676, 679 (Ct. App. 1989). Therefore, the "court's 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.'" ***Trieschmann v. Trieschmann***, 178 Wis.2d 538, 541-42, 504 N.W.2d 433, 434 (Ct. App. 1993) (quoted source omitted).

The dual objectives of maintenance are support and fairness. *See* ***LaRocque***, 139 Wis.2d at 32-33, 406 N.W.2d at 740. The support objective is to maintain "the recipient spouse in accordance with the needs and earning capacities of the parties." ***Id.*** The fairness objective is meant to ensure a fair and equitable financial arrangement in each individual case. *See* ***id.*** Thus, maintenance is to be calculated not at "bare subsistence levels," *see* ***Forester v. Forester***, 174 Wis.2d 78, 89, 496 N.W.2d 771, 775 (Ct. App. 1993), but at a standard of living the parties enjoyed in the years immediately preceding the divorce. *See* ***LaRocque***, 139 Wis.2d at 36, 406 N.W.2d at 741. In determining the amount of maintenance,

the trial court should begin with an equal division of the total earnings of both parties. *See* ***Bahr***, 107 Wis.2d at 85, 318 N.W.2d at 398.

Connie argues that the trial court erroneously exercised its discretion in the manner in which it determined her maintenance award. Section 767.26, STATS., sets out several factors that the court should consider, if relevant, when determining the amount and duration of maintenance. *See* ***Trattles***, 126 Wis.2d at 228, 376 N.W.2d at 384. Connie cites several factors contained in § 767.26, such as her education and the property division to support her contention that the maintenance award was unfair. However, the factor that we find most significant is that the trial court included $18,779 of depreciation when it determined Jerry's gross income for child support purposes, but it did not include that amount when determining his income for maintenance purposes.

The reason the court gave for this variation was that it believed that it was in the best interests of the children that they be supported at the maximum level possible. While the children's interests should be protected, it is contrary to logic to include depreciation for one purpose and not the other. In a given fact situation depreciation is either an appropriate deduction, in whole or in part, or it is not.[5] That decision is made for reasons having nothing to do with the amount of maintenance and child support ordered. Child support and maintenance are set by using a payor's income available for those purposes. It is not appropriate to manipulate income to achieve a predetermined result. If Jerry's income is

[5] Farm equipment wears out. Farm buildings sometimes appreciate. Depreciation schedules can be accurate or inaccurate compared to actual equipment life. Replacement can sometimes be delayed. Depreciation is a fact of life. How closely depreciation taken on income tax returns conforms to reality is one of the factors a trial court should consider when deciding what, if any, tax depreciation will be used for maintenance and child support determinations.

insufficient to pay maintenance and still meet his other obligations, that can be a factor the court considers in setting maintenance.

As for Connie's argument that the court failed to consider the statutory factors contained in § 767.26, STATS., we are satisfied that the trial court considered the length of the marriage, the age and physical and emotional health of the parties, the division of property and the educational level of each party. The court also considered the earning capacity of each party and the contributions each made to the education, training or increased earning power of the other.

However, the trial court did not consider the tax consequences to either party. Also, it made no findings regarding the parties' marital standard of living and the basis on which it found Connie was capable of approaching that standard based on her current earning capacity and budget. The trial court also did not explain how Connie would be able to earn a sufficient income to be self-supporting, after one year of maintenance. The court found that one year would be sufficient for Connie to transition from receiving maintenance to not receiving maintenance,[6] but it did not explain why this would be true. Connie also asserts that the trial court erred with respect to a Home Interior products bill of $290, the accounting for heating costs, and a double deduction for a quality premium discount for milk sales. On remand, the trial court should calculate Jerry's income after considering these issues, and it should articulate what factors it relies upon, if it awards limited-term maintenance.

[6] The court also erroneously believed that if Connie still needed maintenance after one year, she could petition to extend it without showing a substantial change in circumstances since the divorce. *See* § 767.32, STATS.

CONCLUSION

We conclude that the trial court did not erroneously exercise its discretion in including the promissory notes as debt when it divided the marital property. We also conclude that the trial court did not erroneously exercise its discretion by failing to consider some of the factors set out in § 767.255(3), STATS. However, we conclude that the trial court erroneously exercised its discretion when it used a different gross income for determining maintenance than it used in setting child support, and when it did not explain why it set a one-year period for maintenance. Accordingly, we affirm in part and reverse in part with directions.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.