COURT OF APPEALS
DECISION
DATED AND FILED

January 21, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP103 **Cir. Ct. No. 2011FA4866**

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

IN RE THE MARRIAGE OF:

DONALD E. GOELZ,

PETITIONER-APPELLANT,

V.

KAREN M. GOELZ,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: MARSHALL B. MURRAY, Judge. *Affirmed.*

Before Kessler and Brennan, JJ., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Donald E. Goelz, *pro se*, appeals a judgment of divorce awarding his wife, Karen M. Goelz (now known as Karen Geis), one half of his Wisconsin Retirement System pension. Goelz's primary objections are to

the circuit court's invalidation of a premarital agreement and the subsequent division of the pension. Goelz also appears to take issue with the circuit court's division of other property and the decision on child support for the parties' minor child. We discern no erroneous exercise of discretion by the circuit court, so we affirm the judgment.

BACKGROUND

¶2 Goelz, a West Allis firefighter since 1980, married Geis, a realtor, on July 4, 1992. Based on facts found by the circuit court following an evidentiary hearing, Goelz presented Geis with a premarital agreement approximately two days before the wedding. The agreement, in most relevant part, purported to designate Goelz's pension as individual property so as to keep it out of the marital estate and protect it from division upon any divorce. Geis testified that Goelz said he would not marry her if she did not sign the agreement. Geis also testified that Goelz promised her the agreement would only be in effect for a year; his prior marriage had ended after only six months, and he wanted to avoid a repeat experience. Geis signed the agreement the day before the wedding.

¶3 During the marriage, the parties adopted A.M.G., Geis's biological granddaughter. A.M.G.'s birth mother was Geis's daughter from a prior relationship. In December 2003, Goelz left the fire department and began receiving disability payments. Goelz filed for divorce on August 1, 2011.

¶4 The first main disputed issue in the divorce was the enforceability of the premarital agreement. After an evidentiary hearing in November 2012, the circuit court found the agreement unconscionable and, as a result, unenforceable. The second main disputed issue was the division of Goelz's pension; most of the other property was covered by a partial marital settlement agreement. Goelz

initially advocated for a 60/40 split in his favor. He pointed out that his income as a firefighter had not been subject to social security tax, so his social security payout would be significantly lower than Geis's. Consequently, Goelz argued, he should receive a greater share of the pension. In addition, Goelz argued that he had put in twelve years as a firefighter prior to the marriage, and only eleven during the marriage before going on disability. The circuit court, however, concluded that a 50/50 split of the pension was more appropriate. Among other things, it commented that Geis had saved less for her own retirement, spending her income to support the family, because she expected to share in Goelz's retirement benefits. The circuit court also found that Goelz encouraged Geis to spend her income during the marriage by promising to take care of things during retirement.

¶5 Subsequently, Geis, whose attorney was tasked with drafting the divorce judgment, sought clarification of the circuit court's oral ruling to deal with certain additional retirement accounts not expressly addressed by the settlement agreement or the circuit court. Goelz attempted to have the circuit court reconsider its determination on the premarital agreement, but the circuit court declined to do so.

¶6 Once the judgment was entered, Goelz formally moved for reconsideration, again asking the circuit court to reconsider its decision on the premarital agreement. Goelz claimed he had new evidence—another draft of the agreement that purportedly had notes in Geis's handwriting, showing she understood it would make his pension unavailable for division. He also asked the circuit court to reconsider its 50/50 split of the retirement account, averring that none of his income went straight into the pension. The circuit court declined to reconsider—it determined that the unsigned document had no import because it

was not an agreement. Further, the arguments that Goelz was advancing about division were largely a rehash of his prior arguments. Goelz appeals.

DISCUSSION

I. The Premarital Agreement

¶7 WISCONSIN STAT. § 767.61 (2011-12)[1] controls property division upon divorce. Save for property acquired by gift, death, or with funds obtained by gift or death, the assets and debts acquired by either spouse before or during the marriage are divisible. *See* ***Derr v. Derr***, 2005 WI App 63, ¶10, 280 Wis. 2d 681, 696 N.W.2d 170. Equal division is presumed. *See* § 767.61(3). The circuit court may alter the presumption upon consideration of various factors, including any "written agreement made by the parties before or during the marriage concerning any arrangement for property distribution[.]" *See* § 767.61(3)(L). However, any such agreement is not binding if its terms are inequitable as to either party. *See* ***id.***

¶8 A premarital agreement is inequitable if it fails to satisfy any one of three requirements: "each spouse has made fair and reasonable disclosure to the other of his or her financial status; each spouse has entered into the agreement

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Prior to 2005, WIS. STAT. § 767.61 was numbered WIS. STAT. § 767.255. *See* 2005 Wis. Act 443, § 109 (renumbering); *see also* 1993 Wis. Act 422, §§ 1-2 (prior revisions and renumbering). Section 767.255 is referenced in many of the cases cited in this opinion, as the opinions predate the renumbering. The substance of the statutes, however, is unchanged.

voluntarily and freely; and the substantive provisions of the agreement dividing the property upon divorce are fair to each spouse." *See* ***Button v. Button***, 131 Wis. 2d 84, 89, 388 N.W.2d 546 (1986). The first two requirements are assessed as of the agreement's execution; the third requirement is assessed at the time of execution but also, if circumstances change significantly, at the time of the divorce. *See* ***id.***

¶9 Premarital agreements are presumed equitable. *See* WIS. STAT. § 767.61(3)(L). The burdens of production and persuasion are on the challenger. ***Button***, 131 Wis. 2d at 93-94. The determination of equity requires an exercise of the circuit court's discretion. *See* ***Greenwald v. Greenwald***, 154 Wis. 2d 767, 780, 454 N.W.2d 34 (Ct. App. 1990), *abrogated in part on other grounds by* ***Meyer v. Meyer***, 2000 WI 132, ¶37, 239 Wis. 2d 731, 620 N.W.2d 382. We do not reverse the circuit court's discretionary decision unless discretion was erroneously exercised. *See* ***id.*** A proper exercise of discretion contemplates examining relevant facts and application of proper legal principles. *See* ***id.***

¶10 First, "[a]n agreement is inequitable if either spouse has not made fair and reasonable disclosure to the other of his or her assets, liabilities and debts." *See* ***Button***, 131 Wis. 2d at 95. Geis testified that she and Goelz never exchanged such information.[2] Goelz argued generally that Geis should have known about his assets. The primary purpose of the agreement was, supposedly,

[2] On appeal, Goelz asserts that we should not believe Geis's facts. However, we must defer to the circuit court's findings of fact, particularly when they hinge on a determination of witness credibility. *See* ***Greenwald v. Greenwald***, 154 Wis. 2d 767, 781, 783, 454 N.W.2d 34 (Ct. App. 1990), *abrogated in part on other grounds by* ***Meyer v. Meyer***, 2000 WI 132, ¶37, 239 Wis. 2d 731, 620 N.W.2d 382. Regarding the circumstances of the premarital agreement, the circuit court basically found Geis's testimony credible and Goelz's incredible.

to keep Goelz's pension as his personal property but, with respect to that asset, Goelz admitted that he intentionally did not tell Geis of its value at the time. Specifically, he said he did not tell her the value because the death benefit she might be entitled to was worth less than the full amount of the pension, and he did not want her to think she would be entitled to the full amount.

¶11 In his reconsideration motion, Goelz asked the circuit court to compare two versions of the premarital agreement—the one signed and entered as an exhibit at the November 2012 evidentiary hearing and an amended unsigned version that Goelz found in a box in his home well after the hearing. The circuit court rejected the unsigned version, noting that it could not be a contract if unsigned when there was a signed version. It was not erroneous for the circuit court to reject the "new" evidence.

¶12 Goelz suggests that the unsigned version shows their meeting of the minds, because Geis allegedly mapped out her understanding that Goelz would get his pension and she would get nothing upon divorce, and he urges this court to consider that evidence. However, the portion of the "new" document Goelz would have us consider is a handwritten table that merely indicates Goelz will receive his "pension" while Geis will receive "0." There is still no indication that Goelz ever disclosed, or that Geis had any awareness of, the pension's value. We thus discern no erroneous exercise of discretion in the circuit court's determination that there was no evidence of a fair and reasonable disclosure.

¶13 Second, each spouse must enter into a premarital agreement voluntarily and freely. *See* ***id.*** Factors a circuit court should consider in this regard are whether each party has independent counsel and whether each party had adequate time to review the agreement. *See* ***id.*** at 95-96.

¶14 Goelz initially testified that his union attorney, a man, had drafted the agreement. Geis testified that she met with no attorney. Further, the signed agreement represented that only Goelz had consulted with an attorney and that she (the drafting attorney) had explained to Geis that she could not represent Geis's interests. On reconsideration, Goelz insisted that he and Geis had both met the female attorney. The circuit court, however, mindful of the inconsistencies, rejected Goelz's testimony and accepted Geis's testimony that she had not consulted any lawyer about the agreement.

¶15 The circuit court also believed Geis's testimony that she had received the agreement just days before the wedding. Indeed, the agreement was signed on July 3, 1992. The circuit court also considered Geis's testimony that she was concerned about the out-of-town guests expecting a wedding; that she had already sold her home to move in with Goelz; and that Goelz had told her the agreement should not last more than six months to a year in case the marriage ended quickly. Based on Geis's testimony, the circuit court concluded that she had been coerced and had not signed the agreement freely or voluntarily.

¶16 Having failed to satisfy at least two of the ***Button*** factors, the agreement is inequitable and unenforceable. *See* ***id.*** at 95. We therefore need not discuss the third factor, the substantial fairness of the agreement at the time of the execution and at the time of divorce.[3]

[3] The circuit court's decision on the division of the pension, however, could arguably be viewed as at least an implicit explanation of the premarital agreement's unfairness at the time of the divorce.

¶17 In an attempt to escape the circuit court's invalidation of the premarital agreement, Goelz emphasizes the parties' right to contract, claiming the document entitled "PRE-MARITAL AGREEMENT" "was not a prenuptial agreement according to statute 767, but a legally binding contract." However, while WIS. STAT. § 767.61(3)(L) "embodies the public policy of freedom of contract, it also empowers a divorce court to override the parties' agreement if the agreement is inequitable." *See* ***Button***, 131 Wis. 2d at 94. In other words, "parties are free to contract, but they contract in the shadow of the court's obligation to review the agreement on divorce to protect the spouses' financial interests on divorce." ***Id.*** It was not an erroneous exercise of discretion for the circuit court to invalidate the premarital agreement.

II. The Pension

¶18 Wisconsin courts generally treat a pension as property, not income, and divide it as part of the marital estate. *See* ***Waln v. Waln***, 2005 WI App 54, ¶9, 280 Wis. 2d 253, 694 N.W.2d 452. The circuit court's division of property is a discretionary decision. *See* ***id.***, ¶7. The presumption is that property will be divided equally. *See* ***Grumbeck v. Grumbeck***, 2006 WI App 215, ¶7, 296 Wis. 2d 611, 723 N.W.2d 778. There may be both questions of fact and questions of law underlying a discretionary decision. *See* ***Covelli v. Covelli***, 2006 WI App 121, ¶13, 293 Wis. 2d 707, 718 N.W.2d 260. We review questions of law *de novo*, but we do not disturb factual findings unless clearly erroneous. *See* ***id.***

¶19 Goelz makes several arguments regarding the circuit court's division of his pension. One of these is that the circuit court erroneously exercised its discretion in dividing the entire pension because half of it was earned before the marriage. It is not wholly clear whether Goelz is referring to the fact that half of

his time as a firefighter was put in before the marriage, or if he is arguing that half of the pension's value was obtained before the marriage.

¶20 It is true that more than half of Goelz's tenure—twelve years—with the West Allis Fire Department occurred before the marriage, and Goelz cites ***Hokin v. Hokin***, 231 Wis. 2d 184, 605 N.W.2d 219 (Ct. App. 1999), to claim that the circuit court erroneously exercised its discretion in dividing the pension. ***Hokin*** discusses the use of the coverture fraction—a fraction where the numerator is the length of the marriage and the denominator is the total amount of time put into the pension plan. *See* ***id.*** at 189. The coverture fraction is used to determine what part of property is personal, or individual, property. *See* ***id.*** at 192-93.

¶21 While individual property brought to a marriage is a factor for the circuit court to consider, *see* WIS. STAT. § 767.61(3)(b), the entirety of the pension remains subject to division. *See* ***Hokin***, 231 Wis. 2d at 193. In exercising its discretion, the circuit court may or may not use the coverture fraction to divide property. *See* ***id.*** at 194. In other words, it is not necessarily an erroneous exercise of discretion if the circuit court decides against using the coverture fraction to divide property.

¶22 With respect to the pension's value, we note that at the time of the 1992 marriage, the pension, when adjusted to current dollars, was worth about $228,000. Its value at the time of divorce was at least $880,000. Therefore, it cannot be said that the pension earned more than half its value before the marriage.

¶23 In settling on a 50/50 division of the pension, the circuit court considered whether to exclude Goelz's premarital, $228,000 portion of the pension but, ultimately, decided not to exclude it. The circuit court believed Geis's

testimony that Goelz had told her that if she took care of the family during the course of the marriage, he would take care of them during retirement. Dividing the pension in accord with that promise was not clearly erroneous.[4]

¶24 Goelz contends that it was error for the circuit court to award a 50/50 split of the pension without considering each party's projected social security benefits, noting that Geis's benefits will be much greater than his because firefighters do not contribute to the social security program. However, social security is not considered property the way a pension is.[5] *See* ***Mack v. Mack***, 108 Wis. 2d 604, 611 n.1, 323 N.W.2d 153 (Ct. App. 1982). Rather, "[i]t is a system of social insurance." ***Id.*** While Goelz asserts that his pension is also social insurance, he does not develop this argument further, and we will not develop it for him. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987). In any event, we think it self-evident that social security and a pension are not equivalent programs, so the circuit court did not erroneously exercise its discretion when it declined to factor prospective social security benefits into its property division.

¶25 Goelz also argues that under WIS. STAT. § 66.81 the circuit court could not divide his pension. First, Goelz does not show where this argument was

[4] The circuit court also stated that Goelz was "able to put money into [the pension] because there was money coming into the family[.]" In his reconsideration motion, Goelz asserted that all of his pension contributions were employer-paid; he did not make any additional contributions with income freed up by Geis's income. However, while the circuit court's statement might have been technically incorrect, its overall reasoning for evenly dividing the marital estate, including the pension, is ultimately sound: Geis saved less of her income during the marriage in anticipation that she would be able to share Goelz's pension during retirement.

[5] Additionally, federal law preempts apportionment of social security benefits in state courts. *See* ***Mack v. Mack***, 108 Wis. 2d 604, 613, 323 N.W.2d 153 (Ct. App. 1982).

raised in the circuit court. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). Second, the statute is now WIS. STAT. § 62.63(4),[6] and it provides in part that "all moneys and assets of a retirement system … may not be seized, taken, detained or levied upon by virtue of any executions, or any process or proceeding issued out of or by any court of this state[.]" However, this statute "does not usurp the court's ability to effectuate an equitable division of the parties' assets, including the pension." ***Waln***, 280 Wis. 2d 253, ¶17.

III. Remaining Property

¶26 Geis perceives Goelz to also be objecting on appeal to the circuit court's division of the remaining property. The circuit court incorporated into the divorce judgment a partial marital settlement agreement, which divided much of the parties' personal property. The parties are free to enter a stipulation dividing property, subject to the circuit court's approval. *See* ***Hottenroth v. Hetsko***, 2006 WI App 249, ¶12, 298 Wis. 2d 200, 727 N.W.2d 38. Goelz demonstrates no erroneous exercise of the circuit court's adoption of the partial settlement agreement. *See* ***id.***, ¶25. Goelz also fails to show any erroneous exercise of discretion in the circuit court's division of the parties' two timeshare properties as the parties agreed; their debts as listed on their financial disclosure statements; or the remaining retirement accounts as proposed by Geis when no counterproposal was made by Goelz.

[6] The title of WIS. STAT. § 62.63 is "Benefit funds for officers and employees of 1st class cities."

IV. Child Custody and Support

¶27 The parties also signed an agreement regarding the custody and support of A.M.G. On appeal, Goelz appears to take issue with his child support obligation—the statutory 17%—and his obligation to keep A.M.G. on his health insurance. Goelz asserts that A.M.G.'s biological mother "could be a custodian, or re-adopt her daughter, to supply Insurance benefits and support." Goelz cites no authority for this absurd proposition, so we consider it no further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

By the Court.—Judgment affirmed.

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