

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

February 16, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

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**No. 98-1726-FT**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**IN RE THE MARRIAGE OF:**

**JEAN SHARAFINSKI,**

**PETITIONER-RESPONDENT,**

**V.**

**LEROY SHARAFINSKI,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
WILLIAM J. HAESE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

WEDEMEYER, P.J. Leroy Sharafinski appeals from an order in a divorce action, wherein the trial court decided that the settlement agreement was ambiguous with respect to an equalizing payment due to Jean Sharafinski and required Leroy to reimburse Jean out of his half of the residence proceeds. Leroy

claims the trial court erred in concluding that the agreement is ambiguous and he posits that his interpretation of the equalizing payment provision is the only reasonable construction. Because the agreement is ambiguous and the trial court's interpretation is consistent with the intent of the parties, we affirm.

## I. BACKGROUND

On July 8, 1996, a judgment of divorce was entered which incorporated the Marital Settlement Agreement (agreement). The parties' total assets, not including the residence, totaled \$119,107.83. From these assets, the husband was to receive \$98,291.56 and the wife was to receive \$20,811.27. Because the parties agreed to divide the assets equally, the wife was to receive an equalizing payment from the sale of the real estate. The parties determined that Jean was owed an equalizing payment of \$38,737.64. They arrived at this figure by dividing the \$119,107.83 in half, which is \$59,553.91, and then subtracting the wife's \$20,811.27 from this figure.<sup>1</sup> The equalizing payment was to come from the sale proceeds of the real estate.

The agreement provided for the equalizing payment and explained how the remainder of the real estate proceeds would be divided. It stated in part II. A.:

As a full, final, complete and equitable property division and in lieu of any and all maintenance, maintenance being specifically denied and terminated to both parties, each party is awarded the following property:

[Wife] ...

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<sup>1</sup> Using this formula, the equalizing payment should actually have been \$38,742.65. However, the parties attribute the difference to a math error in one of the assets Jean was to receive, which accounts for the \$5.01 difference.

A cash payment from the net sale proceeds of the real estate, division of said proceeds in the amount of \$38,737.64.

One half of the remaining net proceeds from the sale of the real estate.

[Husband] ...

One half of the net sale proceeds from the sale of the real estate after deducting therefrom the \$38,737.64 equalizing payment set forth above.

....

The residence shall be immediately placed on the market for sale. The proceeds from the sale shall be subject to the usual costs of sale and prorations, and any balance on the existing mortgage(s). Upon payment of all the foregoing, the net proceeds shall be divided between the parties as follows: 50-50 subject to the equalizing payment set forth in ¶2 hereof.

After the residence was sold, a dispute arose as to how the real estate proceeds were to be divided. Leroy claimed that the equalizing payment should have been deducted from the sale proceeds and any remaining money split fifty-fifty. The residence sold yielding net proceeds of \$95,318.74. Employing Leroy's construction would involve awarding Jean \$38,737.64 off the top, leaving \$56,581.10 to be split equally between the parties. Running these numbers would give Leroy a total settlement of \$126,582.11 after adding the \$98,291.56 together with half of the \$56,581.10 (\$28,290.55). Using Leroy's construction would give Jean a total settlement of \$87,839.46 after adding together her \$20,811.27, the equalizing payment of \$38,737.64, and half of the remaining real estate proceeds of \$28,290.55.

Jean contends a different interpretation of the division of the house proceeds was intended. She suggests that the net proceeds from the sale of the residence should be split in half first, and then the equalizing payment should be subtracted from Leroy's half. In other words, Jean would get her fifty percent of the real estate proceeds plus \$38,737.64 from Leroy's half of the real estate

proceeds for the equalizing payment, plus \$20,811.27 from other assets. Employing this approach would leave Leroy with \$107,213.29 and Jean with \$107,208.28.

The trial court found the agreement provisions relative to division of the real estate proceeds to be ambiguous and further found that the parties intended an equal split of the assets. Therefore, the trial court ruled that Jean's interpretation of the agreement would be the more appropriate construction. Leroy now appeals.

## II. DISCUSSION

This case involves interpretation of a contract, which is a question of law that we review independently. *See Demerath v. Nestle Co., Inc.*, 121 Wis.2d 194, 197, 358 N.W.2d 541, 543 (Ct. App. 1984). Further, the issue is whether the provision regarding division of the real estate proceeds was ambiguous. Whether an ambiguity exists is a question of law. *See Zimmerman v. DHSS*, 169 Wis.2d 498, 507, 485 N.W.2d 290, 293 (Ct. App. 1992). A term is ambiguous if it is reasonably or fairly susceptible to more than one meaning. *See Borchardt v. Wilk*, 156 Wis.2d 420, 427, 456 N.W.2d 653, 656 (Ct. App. 1990). The trial court's factual findings as to the agreement's meaning, however, will not be set aside unless they are clearly erroneous. *See Insurance Co. of North America v. DEC Int'l, Inc.*, 220 Wis.2d 840, 845, 586 N.W.2d 691, 693 (Ct. App. 1998).

Having reviewed the relevant documents, we agree with the trial court that the provisions at issue are ambiguous. The language of the agreement supports both Leroy's and Jean's interpretations. The language cited above with respect to what Jean receives lends itself to Leroy's interpretation. That is, Jean was to receive "[a] cash payment from the net sale proceeds of the real estate" plus

“[o]ne half of the remaining net proceeds.” This language implies that the equalizing payment was to be subtracted first and the remainder split equally.

The language describing Leroy’s portion, however, supports Jean’s interpretation. The language states that Leroy is to receive “[o]ne half of the net sale proceeds from the sale of the real estate after deducting therefrom the ... equalizing payment.” This language can reasonably be interpreted to require that the equalizing payment be subtracted from Leroy’s half of the real estate proceeds.

Because both interpretations are reasonable, the provision is ambiguous and thus, the trial court had to ascertain the intent of the parties. The trial court found that the intent of the parties was to split the assets equally. Because Jean’s construction of the agreement rendered an equal division, while Leroy’s construction resulted in a less than equal split, the trial court employed the former construction. The trial court’s findings in this regard are supported by the record and, therefore, are not clearly erroneous. Both parties testified that each intended the assets to be split equally. Further, it is evident from the two proposals submitted on Leroy’s behalf that the parties intended an equal fifty-fifty split.<sup>2</sup>

Accordingly, we affirm the order.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.

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<sup>2</sup> Although we conclude that the trial court did not err and affirm the order, we are perplexed by the manner in which the attorneys drafted the agreement splitting the assets. It would seem wiser for the parties to have simply agreed to an equalizing payment of \$77,480.29, which is the difference between Leroy’s \$98,291.56 and Jean’s \$20,811.27. Any remaining amount from the real estate proceeds could then have been split equally between the parties.



**No. 98-1726-FT(D)**

FINE, J. (*dissenting*). Unlike the majority, I believe that the pertinent part of the parties' marital agreement is not ambiguous; accordingly, it must, in my view, be applied as it is written. Moreover, contrary to the majority's conclusion, applying the marital agreement as it is written does not result in an unfair division of the parties' property.

Paragraph two of the parties' marital agreement provides, as material to the division of their home:

Jean Sharafinski was to receive:

- “• A cash payment from the net sale proceeds of the real estate, division of said proceeds in the amount of \$38,737.64.
- One half of the remaining net proceeds from the sale of the real estate.”

Leroy Sharafinski was to receive:

- “• One half of the net sale proceeds from the sale of the real estate after deducting therefrom the \$38,737.64 equalizing payment set forth above.”

Additionally, the paragraph in the marital agreement that discusses the parties' home provides:

The residence shall be immediately placed on the market for sale. The proceeds from the sale shall be subject to the usual costs of sale and prorations, and any balance on the existing mortgage(s). Upon payment of all the foregoing, the net proceeds shall be divided between the parties as follows: 50-50 subject to the equalizing payment set forth in ¶2 hereof.

Thus, as we can see, Jean Sharafinski was to receive \$38,737.64 (which was to come from the sale proceeds) and *then* she was to receive one-half of the *remaining* net sale proceeds (“One half of the remaining net proceeds from the

sale of the real estate.”). On the other hand, Leroy Sharafinski was to receive his half of the net sale proceeds “after deducting therefrom the \$38,737.64.” Reading the marital agreement as a whole, there is no way, in my view, that the “therefrom” can be fairly read to refer to anything other than the “net sale proceeds.”

It is black-letter law that contracts must be applied as they are written. *Dykstra v. Arthur G. McKee & Co.*, 92 Wis.2d 17, 38, 284 N.W.2d 692, 702–703 (Ct. App. 1979), *aff’d*, 100 Wis.2d 120, 301 N.W.2d 201 (1981). This is also true of marital agreements. *Gardner v. Gardner*, 190 Wis.2d 216, 240, 527 N.W.2d 701, 709 (Ct. App. 1994). Although extrinsic evidence may not either be used to create an ambiguity or contradict any of the contract’s terms, *Erickson v. Gundersen*, 183 Wis.2d 106, 117, 515 N.W.2d 293, 299 (Ct. App. 1994), the extrinsic evidence here *supports* what the unambiguous language provides. First, Jean Sharafinski testified at a hearing before the trial court that she, contrary to her position on this appeal, understood that the \$38,737.64 was to come before the fifty-fifty split:

Q Was there any doubt in your mind that 38,737.64 was going to come off the top before the sale proceeds were divided, based upon [the marital agreement] and language contained therein?

A On the advice of my attorney I -- I guess I -- yes, I agreed to that.

...

“Q You understand that when the home is sold, your husband is going to be paying to you \$38,000, you will receive the first \$38,000 from property, from the proceeds from the sale of the home?

A Correct.

Q And the remaining portion will be split equally between your husband and you; is that correct?

A That’s correct.”

Second, the marital agreement was reached after Leroy Sharafinski agreed that Jean Sharafinski would either receive directly or receive credit for some \$53,750 (\$38,000 in a life annuity plus her alleged diversion of \$31,500 of marital property [ $38,000 + 1/2 \cdot 31,500 = 53,750$ ]). The table of divided property excludes these “off the book” credits. Adding them back in, gives a pre-“equalization payment” total of:

Jean Sharafinski:	\$74,561.27 (\$20,811.27 shown on the table, plus \$53,750)
Leroy Sharafinski:	\$98,291.56.

Adding the “equalization payment” of \$38,737.64 to Jean Sharafinski’s side of the ledger gives her \$113,298.91, which is *more* than Leroy Sharafinski’s \$98,291.56. The majority’s disregard of the clear language in the marital agreement increases the disparity. I respectfully dissent.

