

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-2078-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

DEBORAH J. VAN ASTEN,

**PETITIONER-RESPONDENT-CROSS-
APPELLANT,**

V.

LYLE J. VAN ASTEN,

**RESPONDENT-APPELLANT-CROSS-
RESPONDENT.**

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed in part; reversed in part, and cause remanded with directions.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Lyle Van Asten appeals a judgment of divorce and challenges the property division and maintenance award.¹ He argues that the trial court erroneously included mutual funds and retirement accounts in the property subject to division, contrary to the intent of the marital agreement. He further argues that his former wife, Deborah Van Asten, is not entitled to the award of \$450 per month maintenance for twenty-five months.

Deborah cross-appeals. She contends that the trial court erroneously double counted \$18,500 received in gifts over the years from Lyle's parents when it subtracted that sum from the property subject to division, thus reducing the equalization payment to be paid to her.

The record is unclear which sections of the marital agreement the court relied upon to determine that the mutual funds and retirement accounts were not subject to division. Additionally, the trial court did not make specific findings regarding what evidence it relied on to determine that \$18,500 in gifts from Lyle's parents were invested in mutual funds and therefore should be subtracted from the equalization payment. Therefore, we reverse the portion of the judgment relating to property division and remand for further proceedings consistent with this opinion. With respect to maintenance, however, we conclude that the record reflects a reasonable exercise of discretion. Nonetheless, because maintenance and property division are intertwined, the trial court should have the opportunity to review its maintenance award in light of potential changes made to the property division. Therefore, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

¹ This is an expedited appeal under RULE 809.17, STATS.

The parties were married in September 1989.² The following month, they signed a marital agreement that listed seven items that were to remain nonmarital property. The agreement states:

The PARTIES intend that this Agreement will apply during the term of their marriage and additionally beyond their marriage in the unfortunate event that their marriage shall terminate by divorce.

....

3. Nonmarital Property. It is agreed that the PARTIES desire that the following items shall remain nonmarital and shall not be classified as marital property under the Wisconsin Marital Property statutes. This means that the following items of property shall remain individually owned by each respective party to the extent the same is acquired and maintained in the separate names. The only circumstances under which any of the following property shall become marital property is in the event these assets are placed in the joint names of the PARTIES or funds or proceeds connected therewith are deposited in joint bank accounts or other joint accounts bearing both names of the PARTIES. This separate and individual property classification shall apply to property whether acquired before or during the marriage of the PARTIES. The property that is to remain separate and individual property and shall not be classified as marital property are the following items for each respective party shown as follows:

LYLE

1. Homestead
2. Real Estate
3. Automobile(s)
4. Wages & Salary
5. Bank accounts

² Appellant's statement of facts has no record citations, contrary to RULE 809.19(1)(d), STATS. We have held that when a party fails to comply with rules of appellate procedure, "it is not the duty of this court to sift and glean the record *in extenso* to find facts which will support an [argument]." *Tam v. Luk*, 154 Wis.2d 282, 291 n.5, 453 N.W.2d 158, 162 n.5 (Ct. App. 1990).

6. Life Insurance policies
7. Interest earnings and appreciation in value of all of the above

DEBORAH

1. Homestead
2. Real Estate
3. Automobiles
4. Wages & Salary
5. Bank accounts
6. Life Insurance policies
7. Interest earnings and appreciation in value of all of the above

4. Other Property. Any other property not falling into the categories in the preceding paragraph shall be treated and classified by the Wisconsin Marital Property laws if no agreement were made in regard to those other items.

During the marriage, Lyle deposited money in bank accounts and certificates of deposit. In 1996 and 1997, as the certificate of deposits matured, he placed the proceeds in a money market account. Subsequently, he used the money to purchase mutual funds in his own name. Both parties were employed during the marriage, and each obtained an interest in retirement accounts. In addition, Deborah had an individual retirement account from her previous employer which she invested in a mutual investment fund.

The trial court found that the marital agreement was fair and binding under the circumstances that the parties entered into it. *See* § 767.255(3)(L), STATS. The trial court concluded, however, that the mutual funds and retirement accounts were not included within the terms of the marital property agreement. The trial court explained:

I'm also satisfied that these mutual funds are outside the scope of the agreement I think that she had a right to look at the list of seven items and consider the common and familiar usage of those terms, and when she looked at bank accounts, I don't think that mutual funds are a common and familiar usage of the term bank accounts, and, in fact ... are an investment of a different nature, and the Court should not enlarge the marital agreement beyond the common familiar usage of the terms.

As a result, the court divided the mutual funds and retirement accounts pursuant to § 767.26, STATS., without regard to the agreement. Deborah was awarded household goods, her IRA and interest in her thrift plan, her car, bank account, life insurance policy and an equalization payment of \$39,072.03. Lyle received the residence, valued at \$100,000; household items; his cars; bank account; life insurance policy; retirement account and mutual funds. He was ordered to pay the equalization payment within sixty days, secured by a lien on the residence.

On Lyle's reconsideration motion, the trial court found that \$18,500 in gifts to Lyle from his parents were invested in mutual funds. It accordingly subtracted \$18,500 from the total of the marital property subject to division and amended the judgment to reflect an equalization payment of \$29,822.03.

1. Lyle's Appeal

Lyle argues that the trial court erroneously included the mutual funds and retirement accounts in the property subject to division, contrary to the intent of the marital agreement. In general, a property division is addressed to the trial court's discretion. *In re Peerenboom*, 147 Wis.2d 547, 551, 433 N.W.2d 282, 284 (Ct. App. 1988). A trial court erroneously exercises its discretion when it fails to consider legally relevant factors, acts on mistaken facts, makes an inadequate or excessive division or acts on an erroneous view of the law. *See In re Duffy*, 132 Wis.2d 340, 343, 392 N.W.2d 115, 116 (Ct. App. 1986).

Lyle's argument addresses the effect of the marital property agreement. We begin with the statute governing marital agreements, § 767.255, STATS., which provides:

(1) Upon every judgment of annulment, divorce or legal separation ... the court shall divide the property of the parties and divest and transfer the title of any such property accordingly.

(2) ... any property shown to have been acquired by either party prior to or during the course of the marriage any of the following ways shall remain the property of that party and is not subject to a property division under this section:

1. As a gift from a person other than the other party.

2. By reason of the death of another, including, but not limited to, life insurance proceeds; payments made under a deferred employment benefit plan ... and property acquired by right of survivorship, by a trust distribution, by request or inheritance or by a payable on death or a transfer on death arrangement

....

(3) 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:

....

(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.

A marital agreement constitutes a contract, and its construction is a legal question reviewed independently of the trial court's determination. *Gardner v. Gardner*, 190 Wis.2d 216, 240, 229, 527 N.W.2d 701, 709 (Ct. App. 1994). The determination whether contract language is ambiguous is similarly a question of law we review independently. *Old Tuckaway Assocs. v. City of Greenfield*, 180 Wis.2d 254, 280, 509 N.W.2d 323, 333 (Ct. App. 1993). If the contract language is unambiguous, it must be enforced as written, *Wilke v. Wilke*, 212 Wis.2d 271, 274, 569 N.W.2d 296, 297 (Ct. App. 1997), and the parties' subjective intent is irrelevant. *Wright v. Wright*, 92 Wis.2d 246, 257, 284 N.W.2d 894, 900 (1979).

We agree with the trial court that paragraph three, entitled "Nonmarital Property," is unambiguous. That paragraph expressly sets out seven specific assets to be categorized as nonmarital property: homestead, real estate, automobiles, wages and salary, bank accounts, life insurance policies, interest earnings and appreciation in value of all of the above. Paragraph three does not expressly provide for the classification of mutual funds and retirement accounts. Therefore, we agree with the court's analysis with respect to paragraph three.

Nonetheless, Lyle argues that the retirement accounts and mutual funds should be treated as individual property because the parties treated them as such during their marriage. We must look at the language of the document to

determine ambiguity. If there is no ambiguity on the face of the agreement, the subjective intent of the parties is irrelevant. *Id.* Lyle does not demonstrate that the agreement is ambiguous. If it were, the parties' subjective intent would be a factual matter for the trial court, not this court, to determine. See *Patti v. Western Machine Co.*, 72 Wis.2d 348, 353, 241 N.W.2d 158, 161 (1976). As a result, Lyle's contention does not present a valid reason to overturn the court's analysis of paragraph three of the marital agreement.

However, paragraph four of the marital agreement provides: "Any other property not falling into the categories in the preceding paragraph shall be treated and classified by the Wisconsin marital property laws if no agreement were made in regard to those other items."³ The record is unclear whether Lyle relied on paragraph four at the trial. The trial court did not address whether mutual funds and retirement accounts fall under paragraph four. As a result, on remand, the trial court should consider whether Lyle brought paragraph four to the trial court's attention and, if so, whether its application would have a different result.

If the court decides to apply paragraph four, it also must determine whether paragraph four is equitable in its application. No agreement is binding if the terms are inequitable to either party. Section 767.255(3)(L), STATS. The trial court must consider the circumstances at the time the parties entered into the agreement, and at the time of the divorce.

Clearly an agreement fair at execution is not unfair at divorce just because the application of the agreement at divorce results in a property division which is not equal between the parties or which a court might not order under

³ We recognize that the Marital Property Act was not intended to alter divorce law. *Abitz v. Abitz*, 155 Wis.2d 161, 176, 455 N.W.2d 609, 615 (1990).

sec. 767.255. *If, however, there are significantly changed circumstances after the execution of an agreement and the agreement as applied at divorce no longer comports with the reasonable expectations of the parties, an agreement which is fair at execution may be unfair to the parties at divorce.*

Brandt v. Brandt, 145 Wis.2d 394, 415, 427 N.W.2d 126, 134 (Ct. App. 1988) (citation omitted; emphasis added). The trial court concluded that the agreement was equitable under the circumstances and "entered into knowingly." If the court, however, applies paragraph four on remand, it is directed to reexamine whether its application is fair.

Next, Lyle argues that the trial court erroneously exercised its discretion when it awarded Deborah \$450 per month maintenance for twenty-five months. He contends that the trial court erroneously burdened Lyle with the duty to support Deborah's children, whom Lyle has no obligation to support, failed to consider the parties' separate financial arrangements, and unfairly focused on the issue of housing. The record does not support Lyle's argument.

The determination of maintenance is addressed to the trial court's discretion, and this court will not reverse absent an erroneous exercise of discretion. **Forester v. Forester**, 174 Wis.2d 78, 85, 496 N.W.2d 771, 774 (Ct. App. 1993). The trial court erroneously exercises its discretion if it misapplies the statutory factors set out in § 767.26, STATS., or if it fails to consider the dual objectives of maintenance. **Forester**, 174 Wis.2d at 86, 496 N.W.2d at 774. The dual objectives of maintenance are support and fairness. **LaRocque v. LaRocque**, 139 Wis.2d 23, 33, 406 N.W.2d 736, 739 (1987).

We must consider whether a trial court's consideration of the statutory factors achieves both objectives. **Id.** at 33, 406 N.W.2d at 740. The

support objective serves to support the recipient spouse in accordance with the parties' needs and earning capacities. The fairness objective ensures a fair and equitable financial arrangement between the parties and to "compensate the recipient spouse for contributions made to the marriage, give effect to the parties' financial arrangements, or prevent unjust enrichment of either party." *Id.*

Deborah was thirty-nine years old at the time of the divorce and earned \$19,000 per year at Jack's Pizza. Lyle was forty-eight and earned approximately \$41,000 per year as a truck driver. Both had high school educations. There were no children of the marriage, although Deborah had two children, one of whom was a minor. Both parties were in good health. They had been married approximately nine years.

In setting maintenance, the trial court considered the parties' respective earning abilities and the length of the marriage. The trial court stated that \$450 a month for twenty-five months meets the support and fairness objectives. Lyle brought a motion to reconsider, arguing that through the maintenance award, Deborah received a higher standard of living than she enjoyed during the marriage due to the parties' separate financial arrangements. The trial court reiterated its reasons for the maintenance award:

A review of the transcript indicates this Court failed to properly consider all of the factors set forth at § 767.26. The Court did consider the length of the marriage in awarding a limited-term maintenance. The Court did not make findings regarding the age, physical and emotional health of the parties, but finds that those factors are not remarkable in this case. I find that the property division strongly favors the Respondent and supports the maintenance previously ordered. ...

This Court previously set forth the earning capacity of the parties. ... This Court finds that even if both parties strictly separated all income, the Petitioner would have recognized

a higher standard of living during the marriage due to the Respondent's ability to afford housing based upon his higher income. Therefore, I do not find the separation of income [during the marriage] a compelling factor to deny maintenance.

The record reflects that the trial court considered the parties' ages, health, length of marriage, disparate incomes, the standard of living during the marriage and the property division. These are appropriate factors under § 767.26, STATS. The court placed a great deal of weight on the property division being favorable to Lyle. Implicit in the trial court's reasoning was that Lyle was awarded the family home, which carried no mortgage, resulting in lower housing costs than Deborah was expected to incur. Because the marriage was not long term, the court limited maintenance to twenty-five months.

The court considered proper factors and examined the support and fairness objectives. The record does not indicate, as Lyle suggests, that the court attempted to burden him with the support of Deborah's children. The court's decision reflects an appropriate exercise of discretion. Nonetheless, because maintenance and property division are intertwined, on remand the court may reexamine and make adjustments to maintenance as necessitated by a change in the property division. *See* § 767.26(3), STATS.

2. Deborah's Cross-Appeal.

Deborah argues that the trial court's property division erroneously resulted in Lyle receiving double credit on the portion of the gifted monies that were used to pay off the residence. Double counting an asset is not permitted. *See Chen v. Chen*, 142 Wis.2d 7, 16-17, 416 N.W.2d 661, 665 (Ct. App. 1987). Deborah relies on Lyle's testimony. Lyle testified that he received \$18,500 in gifts from his parents that he saved in savings accounts or mutual funds. He also

testified that he used some of the money to pay off the land contract and mortgage on the residence. When asked whether he could trace what he did with the gifts, he testified that he "can't come up with any, you know, documentation on it, no." He testified that the gifts of money went to pay off the home "or savings, one of those two things." When asked: "But you don't know which one?" Lyle replied, "No."

Deborah testified that she was aware that Lyle's parents made annual gifts and agreed that his money "went into his accounts." In its decision, the trial court did not acknowledge the conflict in the testimony. Instead, it stated:

I did not give proper consideration nor make any specific findings regarding the annual gifts of \$2,000 to Respondent from his parents from the years 1989 through 1996, and the gift of \$2,500 given in 1997. These monies were initially held by the Respondent in Certificates of Deposit and subsequently rolled over to a Mutual Fund. This Court finds that the amount of \$18,500 does represent individual property of the Respondent received through gift, which is not subject to division.

As a result, the trial court subtracted \$18,500 from the total of the marital property subject to division and amended the judgment to reflect an equalization payment of \$29,822.03.

It is Lyle's burden to show how much of the gifts he used to pay for the house or used to invest in mutual funds. See *Brandt*, 145 Wis.2d at 408, 427 N.W.2d at 131. The issue of tracing the gifts presents a question of fact. We do not overturn questions of fact unless they are clearly erroneous, giving deference to the trial court's determinations of weight and credibility. Section 805.17(2), STATS. Whenever witnesses give contradictory versions of facts, the trier of fact

has the duty to resolve conflicts in the testimony. See *Fuller v. Riedel*, 159 Wis.2d 323, 332, 464 N.W.2d 97, 101 (Ct. App. 1990).

Here, the trial court did not make particularized findings to resolve the conflicts in the testimony. It does not appear that the court took into account Lyle's statements that he could not trace the gifts. If the trial court does not make particularized findings of fact, we may remand for findings. *In re T.R.M.*, 100 Wis.2d 681, 689, 303 N.W.2d 581, 584 (1981). On remand, we direct the trial court to make specific findings indicating what evidence the court relied on to reach its determinations with respect to tracing the gifts.

In summary, we reverse the trial court's determination that the marital agreement fails to include the retirement accounts and mutual funds. We remand for a determination whether Lyle waived his claim that paragraph four applies and, if not, for an application of paragraph four. If it applies paragraph four, the court is further directed to determine if it is equitable as applied. In addition, and in the event the mutual funds are determined to be property subject to division based upon the court's interpretation and application of the marital agreement, we further instruct the court to determine whether Lyle met his burden of tracing the gifts. If so, the court should consider whether an award to Lyle of the gifts results in double counting any part of that asset. In the event the trial court alters the property division, it may in its discretion determine whether maintenance needs to be adjusted. Section 767.26(3), STATS.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. No costs on appeal.

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

