

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 3, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 99-0061

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

TRACY LYNN McCABE,

PETITIONER-RESPONDENT,

V.

GERALD ROBERT McCABE,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Gerald Robert McCabe has appealed from a judgment of divorce from Tracy Lynn McCabe. The sole issue on appeal is whether the trial court erroneously exercised its discretion when it included the parties' home in Gerald's share of the property division. The home was titled in

the name of Gerald's sister, and Gerald testified at the divorce trial that she refused to transfer title to the parties. We conclude that the trial court properly exercised its discretion when it included the house in Gerald's share of the marital estate and affirm the trial court's judgment.

¶2 The division of marital property lies within the sound discretion of the circuit court. See *Cook v. Cook*, 208 Wis. 2d 166, 171, 560 N.W.2d 246 (1997). A property division award will be sustained by this court when the trial court has examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. See *Sharon v. Sharon*, 178 Wis. 2d 481, 488, 504 N.W.2d 415 (Ct. App. 1993).

¶3 Gerald contends that the trial court erred as a matter of law when it awarded property to which the parties did not have legal title. He also contends that litigation is going to be required to determine legal ownership of the home, and that the interest in the home should have been assigned equally to the parties, thus ensuring that neither of them bore the cost or risk of litigation alone.

¶4 The record reveals that prior to trial, Tracy brought a motion to compel Gerald to respond to her discovery requests. Tracy's motion was withdrawn at a hearing held on July 24, 1998, after Gerald stipulated that despite the fact that the house was titled in his sister's name, it was a marital asset. At that hearing, Tracy's counsel stated:

On the house, it's very important to us, and we have received this agreement that ... there is no dispute that the house is a marital asset. A hundred percent fair market value is also on the marital estate value. So we are not, not debating that. And I say that because the house is actually titled in, in the sister's name, or done as an accommodation. So no issue on that.

¶5 When asked for further comment, Gerald's counsel replied that "on the house, there is no problem." The trial court then accepted the parties' agreement, stating that "however it's titled, it's a marital asset."

¶6 A hearing was subsequently held on September 22, 1998, on Tracy's claim that Gerald was failing to adequately comply with discovery requests, despite an agreement made by him in July 1998 to do so. At that hearing Gerald, by counsel, reaffirmed the stipulation that the house was a marital asset, but disputed that the house should be assigned solely to him as part of his share of the estate. The trial court then issued a written order stating:

The Court has previously accepted and will enforce the stipulation with respect to the marital residence that the marital residence is a marital asset and all equity in and to the marital residence is equity in the marital estate. The Court will determine which party will be awarded the house at the trial of the matter.

¶7 At the trial held on October 13, 1998, Gerald acknowledged that he had stipulated that the house should be included in the marital estate. However, Gerald testified that his sister had refused his request that she transfer title to the parties. He stated that he was intending to file an action against her to obtain title and had consulted a lawyer for this purpose but had not yet commenced a lawsuit. He requested that the house be divided equally so that each party bore the cost and risk of the litigation.

¶8 At the conclusion of the trial, the trial court divided the parties' property equally but included the equity in the home in Gerald's share of the estate, valuing it at \$85,359 after deducting the unpaid mortgage from the home's stipulated fair market value. The trial court assigned all right, title and interest in the home to Gerald, subject to the mortgage.

¶9 Because Gerald stipulated that the equity in the home was properly part of the marital estate, and never moved the trial court for relief from that stipulation, no basis exists to conclude that the trial court erred when it included the home in the marital estate. The trial court's action was particularly appropriate because Gerald was aware that his sister held title to the house when he entered into the stipulation. Although Gerald appears to contend on appeal that the trial court should have set aside the stipulation after Gerald informed the court that his sister was refusing to transfer title, he did not seek relief from the stipulation in the trial court and has therefore waived this argument on appeal.¹ See *Allen v. Allen*, 78 Wis. 2d 263, 270, 254 N.W.2d 244 (1977). Instead, he simply argued at trial that the value of the house should be assigned equally to both parties so that the cost of pursuing litigation to obtain title and the risk of losing that litigation would be borne equally by them.

¶10 We conclude that the trial court also properly exercised its discretion in assigning the home to Gerald. Testimony at trial indicated that the home was titled in the name of Gerald's sister at the time it was purchased because Gerald and Tracy had not filed income tax returns for several years and therefore could not obtain financing. In addition, Tracy testified that Gerald did not want the house titled in his name because he was concerned that his former wife would take him back to court to seek more money. The parties also testified that they made all mortgage payments on the house, that Gerald's sister lived with them rent free

¹ The closest Gerald came to challenging the stipulation was at the October 15, 1998 hearing at which the trial court rendered its decision after trial. At that hearing, Gerald's counsel appeared to dispute that he had stipulated that the equity in the home was a marital asset and attempted to limit the stipulation to an agreement that the equity was marital if the parties possessed or obtained title to the house. However, Gerald's stipulation was not limited in this manner when made and adopted by the trial court, and counsel did not pursue the argument or seek relief from the stipulation.

in the home for one year, and that she then moved into an apartment above the restaurant owned and operated by Gerald where she lived rent free for the next five or six years. During those years, Tracy provided free daily child care for the sister's young son.

¶11 Although Gerald testified that his sister did not get along with them and was refusing to transfer title, he did not call her as a witness at trial. In addition, he acknowledged that at the time of trial he continued to reside in the home, and his sister continued to live rent free in the apartment above his restaurant. Moreover, while he testified that he had consulted a lawyer for purposes of commencing a lawsuit against her to recover the title, he admitted that no lawsuit had actually been commenced.

¶12 In assigning the home to Gerald, the trial court concluded that Gerald was primarily responsible for the manner in which the house was titled. It found that he wanted to avoid titling the property in his name to prevent his former wife from taking him to court and claiming that his financial circumstances had improved. Although both parties were responsible for filing income tax returns, the trial court noted that Tracy was very young at the time the home was purchased, while Gerald was twenty years older with a degree in accounting and experience in running a business. To the extent that the parties' tax returns related to Gerald's restaurant business, it concluded that Gerald was in a better position than Tracy to handle the filing of them, but he failed to do so. The trial court also considered that title was held by a member of Gerald's family rather than Tracy's and concluded that he was most responsible for the arrangement with his sister, along with its attendant complications. It also concluded that he was in the best position to rectify the title problems.

¶13 The trial court's findings of fact are not clearly erroneous and cannot be disturbed by this court. *See Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983). Moreover, its conclusion that Gerald was more responsible for the manner in which the home was titled and better able to rectify the situation is reasonable under the circumstances, particularly in light of the sister's continued rent-free residence above Gerald's restaurant. Because nothing in the evidence presented by Gerald compels the conclusion that he will be unable to secure title to the home from his sister, we affirm the trial court's assignment of the home to him.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

