COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2565 **Cir. Ct. No. 2013FA342**

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

IN RE THE MARRIAGE OF:

SUE E. MARTINSON-ZYHOWSKI,

PETITIONER-RESPONDENT,

V.

KARL A. ZYHOWSKI,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

Before Kloppenburg, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Karl Zyhowski appeals a judgment of divorce. The issues relate to property division. Based on a concession of respondent Sue

Martinson-Zyhowski as to one issue, we reverse and remand with directions to amend the judgment. Beyond that, we affirm.

¶2 As to the first contested issue, Karl argues that the circuit court erred by including in the marital estate his pension and Sue's 401k account. He argues that the parties' pre-marriage marital property agreement is ambiguous as to how to classify these assets, and the most reasonable interpretation is to conclude that they are individual assets, and therefore should not be included in the marital estate for division.

¶3 As relevant to this issue, the marital property agreement provides: "Deferred employment benefits arising from either party's employment … shall not be classified by this agreement. Instead, all such benefits shall be classified as provided in ch. 766, Stats. ...." The parties appear to agree that both the pension and 401k account fall under this provision.

¶4 Karl argues that the agreement is ambiguous "because there are two outcomes in Ch. 766, Stats. – one that classifies the property as individual income, and one that classifies the property as marital." We first reject the assertion that the *agreement* is ambiguous. The agreement unambiguously provides that the property in question shall be classified as provided in WIS. STAT. ch. 766 (2013-14).[1] There is nothing ambiguous about that provision. To the extent that any ambiguity exists, it would be in the statutes of ch. 766, not the agreement.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶5 As we stated, Karl asserts that two different results are possible under WIS. STAT. ch. 766. The first is that, quoting WIS. STAT. § 766.62(1) and (2), "a deferred employment benefit attributable to employment of a spouse" is either marital property or mixed property, depending on when the benefit occurred in relation to the marriage. He argues that this provision applies here because the pension and 401k account are deferred employment benefits attributable to employment.

¶6 Karl also proposes a second possible result. He notes that the marital property statute defines "income" to include "deferred employment benefits." WIS. STAT. § 766.01(10). He asserts that *under the marital property agreement*, the parties' incomes are treated as individual property. Therefore, he argues, application of WIS. STAT. ch. 766 can also lead to the conclusion that the assets are individual property. According to Karl, these two readings mean that the statute is ambiguous as to the pension and 401k account.

¶7 Sue responds that Karl's readings are incorrect because the term "deferred employment benefit," as used in both of the above statutes, is defined differently from "deferred employment benefit plan." *See* WIS. STAT. § 766.01(3m) and (4). Sue argues that the definition of "benefit" refers to benefits that are being paid out to the recipient, while the definition of "plan" refers to plan accounts that are not yet in pay status. Therefore, she argues, when the definition of "income" includes "deferred employment benefits," it is including only payments coming out of accounts in pay status, rather than assets still held in plan accounts.

¶8 Sue's argument is not tenable. The distinction being drawn in the two definitions is between the benefits from the plan and *the plan itself*, as an

administrative entity. It is not a distinction between accounts in pay status and those that are not. Our reading is consistent with the definitions themselves, but is also compelled by the fact that, if Sue is correct, WIS. STAT. ch. 766 fails to provide a marital property classification for the assets held in accounts that are not yet in pay status. While WIS. STAT. § 766.62 provides classifications for deferred employment benefits, there is no similar provision setting forth classification for deferred employment benefit *plans*. We read the term "deferred employment benefit" under § 766.62 as including the account assets.

¶9 Our reading is also consistent with the classification of income provision that states "income earned or accrued by a spouse … during marriage … is marital property." WIS. STAT. § 766.31(4). Because the definition of "income" includes only deferred employment benefits, and not also deferred employment benefit *plans*, Sue's argument would mean that the assets held in accounts before they are in pay status would not qualify as income. This result would, again, appear to leave the assets held in the account in an unclassified status. We see no reason to believe that the definition of "income" would have been written to include only payments out of accounts, and not the account assets themselves.

¶10 Although Sue's argument is untenable, Karl's argument also fails, but for a different reason. We return to Karl's two proposed conflicting outcomes under WIS. STAT. ch. 766 that he asserts create an ambiguity. His first proposed outcome was that, under WIS. STAT. § 766.62(1) and (2), "a deferred employment benefit attributable to employment of a spouse" is either marital property or mixed property, depending on when the benefit occurred in relation to the marriage. Applying our above conclusion that "deferred employment benefit" includes plan account assets, we agree that under this provision Karl's pension and Sue's 401k account are marital property or mixed property.

¶11 However, Karl fails to establish that a second proposed outcome is possible under WIS. STAT. ch. 766. Karl's second proposed possible outcome is that, under the statutory definition of "income," the pension and 401k account are deferred employment benefits that qualify as income, and therefore are individual assets. Because the "income" definition causes, according to Karl, a different result under ch. 766, an ambiguity is present. However, as we discussed above, under ch. 766, income is *not* individual property, but is classified as marital property under WIS. STAT. § 766.31(4). This is the same result that was reached in Karl's first proposed outcome. Therefore, no ambiguity exists within ch. 766.

¶12 Karl's argument here actually relies on a different, but not fully stated, concept. Karl wants us to use the fact that even though WIS. STAT. ch. 766 does not classify income as individual property, *the marital property agreement does*. Once we determine that the account assets meet the definition of income under ch. 766, Karl wants us to take the additional step of returning to the marital property agreement to conclude that because those assets qualify as income, they are individual property under the agreement. To state this another way, Karl wants us to import the ch. 766 definition of "income" into the marital property agreement, where that term otherwise appears to be undefined.

¶13 We decline to take this additional step because it would be contrary to the terms of the marital property agreement. Before the agreement states that the parties' deferred employment benefit assets shall be classified under WIS. STAT. ch. 766, it first states that those assets "shall not be classified by this agreement." If we were to adopt Karl's argument, the assets *would* be classified by the agreement, because we would be using the *agreement's* classification of income as individual property, rather than the statute's classification. For this

reason, we reject Karl's argument and conclude that the circuit court properly classified his pension and Sue's 401k account as marital property.

¶14 Karl also argues that the circuit court erred by classifying two 403(b) annuities as part of the marital estate. He argues that because these accounts are annuities, they should be treated under the marital property agreement's provision that applies specifically to annuities, rather than under the provision that applies to deferred employment benefits. Sue responds that Karl is raising this argument for the first time on appeal. In reply, Karl cites several places in the record to show that the argument was made. After reviewing that material, we see no sign that Karl argued in circuit court that these accounts should be handled under the annuity provision. We usually do not address issues that are raised for the first time on appeal, ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), and we see no reason to do that in this case.

¶15 Finally, Karl argues that the circuit court erred by treating two mutual fund accounts as part of the marital estate. In response, Sue concedes that these items should not be part of the marital estate, and that the divorce judgment should be amended accordingly. Therefore, we reverse the judgment and remand with directions to amend the judgment to award Karl the entirety of the T.Rowe Price Equity Income and Dodge & Cox International accounts. We otherwise affirm the judgment.

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

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