COURT OF APPEALS
DECISION
DATED AND FILED

June 10, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1980 **Cir. Ct. No. 01FA000291**

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

IN RE THE MARRIAGE OF:

THERESA MARIE THRUN,

PETITIONER-RESPONDENT,

V.

JAMES ANTHONY JAMINSKI,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County: THOMAS T. FLUGAUR, Judge. *Affirmed in part, as modified; reversed in part and cause remanded.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. James A. Jaminski appeals a judgment of divorce, seeking reversal of the trial court's decision to include within the marital

estate two investment accounts and to exclude from the marital estate a purported loan from Jaminski's parents. Jaminski argues that the trial court erroneously concluded that the investment accounts, titled jointly by Jaminski and his former wife Theresa Thrun but purchased with funds Jaminski received in a personal injury settlement, belonged in the marital estate. We conclude that the trial court erroneously concluded there was insufficient evidence of the amount of the personal injury settlement and applied the improper standard of law in determining that the two investment accounts were part of the marital estate. We further conclude, however, that because Jaminski conceded at trial and in his closing arguments that the investment accounts were marital property and left it to the court's sound discretion to determine the equitable distribution of that property, the court's reliance on an improper standard of law constituted harmless error. We therefore affirm on this issue.

¶2 Jaminski also argues that the trial court erred in concluding that the $11,500 provided to him by his parents was not part of the marital estate but was his sole responsibility. We conclude that the trial court erred by determining that the loan was not a marital loan without explaining why, under the applicable law, it was assigned to Jaminski. In addition, we conclude the trial court erred by failing to explain why it implicitly concluded the loan existed. We therefore reverse the trial court's decision on this point and remand for proceedings consistent with this opinion.

FACTS[1]

¶3 Jaminski and Thrun were married on February 18, 1988 in Wisconsin Rapids, Wisconsin. On November 6, 2001, Thrun petitioned for divorce. A trial was held on October 3, 2002. Among the issues contested at trial were whether assets purchased with Jaminski's 1995 personal injury settlement monies and an alleged $11,500 loan from Jaminski's parents should be considered part of the marital estate. The trial court rendered its oral decision on November 18, 2002, concluding that assets purchased with Jaminski's personal injury settlement, jointly titled in Jaminski's and Thrun's names, were part of the marital estate; in addition, the trial court concluded that the alleged $11,500 loan was Jaminski's sole responsibility and not part of the marital estate. The Findings of Fact, Conclusions of Law and Judgment of Divorce was entered on June 13, 2003. Jaminski appeals. Additional facts will be discussed later in this opinion.

DISCUSSION

¶4 Marital assets and debts (collectively, the marital estate) include all of the property and obligations of either party that were acquired before or during the marriage unless specifically exempted by statute. ***McLaren v. McLaren***, 2003 WI App 125, ¶8, 265 Wis. 2d 529, 665 N.W.2d 405; *see also* WIS. STAT.

[1] WISCONSIN STAT. RULE 809.19(1)(d) and (e) (2001-02) require the parties to provide in their briefs separate sections for their "statement of facts relevant to the issues presented for review" and their argument. Jaminski's record citations are confusing, sporadic and inconsistent and occasionally cite to his appendix as opposed to the record. In addition, both parties have, inappropriately, interspersed legal argument and "spin" into what should have been an objective recitation of the factual occurrences of this case. "[F]acts must be stated with absolute, uncompromising accuracy. They should never be overstated-or understated, or 'fudged'-in any manner." Judge William Eich, *Writing the Persuasive Brief*, Wisconsin Lawyer Magazine, Vol. 75, No. 2 (Feb. 2003). The fact section of a brief is no place for argument.

§ 767.255 (2001-02). The division of the marital estate lies within the sound discretion of the trial court. ***McLaren*****,** 265 Wis. 2d 529, ¶8. We must sustain discretionary determinations if we find that the trial court 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. ***Id*****.**

INVESTMENT ACCOUNTS

¶5 Jaminski first argues that the trial court erred in concluding that the assets purchased with his personal injury settlement monies are marital property and thus subject to division. Jaminski contends that the trial court erred by requiring him to specifically identify each individual component of his personal injury settlement in order to determine what is marital property and nonmarital property. We agree.

¶6 It is presumed that a person awarded personal injury settlement funds owns those funds individually; the injured spouse is presumably entitled to the entire amount recovered for loss of bodily function, future earnings, pain and suffering, *see* ***Richardson v. Richardson***, 139 Wis. 2d 778, 780-81, 407 N.W.2d 231 (1987), future payments under a structured settlement of a personal injury claim, ***Krebs v. Krebs***, 148 Wis. 2d 51, 57, 435 N.W.2d 240 (1989), and to payments already made. ***Weberg v. Weberg***, 158 Wis. 2d 540, 548-49, 463 N.W.2d 382 (Ct. App. 1990). The settlement remains the property of the injured person although the settlement does not distinguish the various elements of damages. *See* ***Krebs v. Krebs*****,** 148 Wis. 2d at 57. A trial court may alter this presumed distribution after considering any special circumstances of the personal injury claim and of the parties under the statutory factors listed in WIS. STAT. § 767.255. ***Krebs***, 148 Wis. 2d at 58.

¶7 The trial court concluded that the two investment accounts created by the funds Jaminski received from his personal injury settlement were marital property. The court reached this conclusion by determining there was insufficient evidence documenting the amount of the personal injury settlement and that Jaminski failed to identify the individual components of the settlement, such as pain and suffering, medical expenses and other economic losses. As a result, according to the trial court, Jaminski failed to establish that he was entitled to receive the assets in the investment accounts as his individual property.

¶8 We conclude the trial court erroneously exercised its discretion by finding that there was insufficient evidence of the amount of the personal injury settlement. The unrefuted evidence establishes, and the parties concede, that the personal injury settlement was $72,600. Jaminski testified that the funds used to create the two investment accounts came from the proceeds of his personal injury settlement. Although Jaminski did not provide any documentation to support his testimony, Thrun did not provide any evidence, documentary or otherwise, to refute Jaminski's testimony. Furthermore, Thrun concedes in her brief in this appeal that the proceeds used to create the accounts came from the personal injury settlement. The evidence of record does not support the trial court's findings that Jaminski failed to prove that the funds in the investment accounts came from Jaminski's personal injury settlement. The trial court erroneously exercised its discretion by finding otherwise.

¶9 We also conclude that the trial court erroneously exercised its discretion by concluding that Jaminski was required to establish the individual components of the personal injury settlement in order to establish his right to receive the assets in the investment accounts as his individual property. *See* ***Weberg***, 158 Wis. 2d at 549-50 n.3. The previous rule under ***Richardson*** was that

a detailed delineation of damages was necessary in order to determine how to distribute the settlement proceeds at the time of divorce. *See* ***Richardson***, 139 Wis. 2d at 786.[2] That rule no longer applies. The current rule under ***Krebs*** and ***Weberg*** does not require an injured spouse to delineate the various settlement components to establish entitlement to those assets. "[T]hat fact is immaterial and the presumption that the settlement remains the property of the injured person is fully applicable." ***Weberg***, 158 Wis. 2d at 549-50 n. 3.

¶10 The trial court's erroneous finding of insufficient evidence of the amount of the settlement proceeds and its erroneous application of the law is, however, harmless. During questioning at trial, Jaminski acknowledged that by placing the personal injury settlement money into a joint investment account, the proceeds were converted to marital property, thereby losing its individual character. Furthermore, Jaminski conceded in his closing argument brief to the trial court that the assets were marital property and essentially consented to the court's exercise of its "equitable powers" in determining the proper distribution of these accounts. Jaminski cannot now argue otherwise. Jaminski argues on appeal that the "record does not indicate that James 'expressly or impliedly indicated that he wished or intended to convert this account to marital property.'" (Citing to ***Weberg***, 158 Wis. 2d at 551). Jaminski incorrectly characterizes the record.

[2] The court in ***Richardson v. Richardson***, 139 Wis. 2d 778, 780-81, 407 N.W.2d 231 (1987), stated,

> Instead of presuming equal distribution of a personal injury claim, the court should presume that the injured party is entitled to all of the compensation for pain, suffering, bodily injury and future earnings. With regard to other components of a personal injury claim, such as those that compensate for medical or other expenses and lost earnings incurred during the marriage, the court should presume equal distribution

Jaminski clearly and plainly conceded that the two accounts were marital, both at trial and in his closing argument brief to the trial court. Jaminski's only possible argument here relates to whether the trial court failed to distribute the property equitably. But he fails to make that argument.

THE LOAN

¶11 Jaminski next argues that the trial court erred in finding that the $11,500 loan from Jaminski's parents was a nonmarital debt. The trial court, while skeptical that the loan did, in fact, exist, found that the obligation was not part of the marital estate and assigned the debt solely to Jaminski. We conclude the trial court failed to reasonably explain why, despite impliedly concluding that the loan existed, it assigned the loan to Jaminski. This constitutes an erroneous exercise of discretion. We therefore reverse and remand to afford the trial court an opportunity to allocate the loan responsibility and explain its allocation.

¶12 There are few facts concerning the loan. Both parties testified that the loan existed. Thrun testified that "There was a loan of $11,500 in cash to Jim and I" and that the purpose of the loan was to buy a vehicle. She also testified that she first discovered the existence of the loan the day of trial and that she was not aware of any payments made on that loan. The record shows the absence of any documentary evidence of the loan. Jaminski testified that his parents lent him and his wife $11,500 for a vehicle. He also testified that the loan was without interest and did not have a payment schedule.

¶13 The division of property in divorce actions is entrusted to the sound discretion of the trial court and will not be disturbed on review unless there is an erroneous exercise of discretion. ***LeMere v. LeMere,*** 2003 WI 67, 262 Wis. 2d 426, ¶13, 663 N.W.2d 789. "[A] discretionary determination must be the product

of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). We will uphold a trial court's discretionary decision as long as the court "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." ***Long v. Long***, 196 Wis. 2d 691, 695, 539 N.W.2d 462 (Ct. App. 1995).

¶14 At the oral decision hearing the trial court stated

> The $11,500 that has been talked about as a loan to the husband's parents, if it is a loan, it is not a marital loan, it's one that the husband is going to be responsible for, and it's not going to be considered a loan against the duplex.
>
> And I agree with Ms. Klessig's assessment that it's probably a loan that's never going to be paid.[3]
>
> In any event, it has nothing to do with the duplex, and I'm not going to find that that needs to be paid out of the proceeds. $28,804.13 is that amount that needs to be paid.

¶15 This is the extent of the trial court's rationale for not including the "loan" in the marital estate. No further explanation was provided for assigning the loan to Jaminski; nor did the trial court explain why it concluded that the loan existed. The trial court's explanation for excluding the loan from the marital estate does not reflect a "rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving

[3] Jaminski argues the trial court erred by concluding that he was not likely to repay the loan because there was insufficient evidence upon which the court could make this conclusion. We agree the record does not support this conclusion. However, this part of the trial court's reasoning does not serve as the central focus of its decision. We therefore do not attach any significance to it and base this decision on the more dispositive theme that the trial court failed to explain why it concluded the loan existed and why it assigned the loan to Jaminski.

a reasoned and reasonable determination." ***Hartung,*** 102 Wis. 2d at 66. A reasonable judge must provide more. In this case, the trial court's failure to do so constitutes an erroneous exercise of discretion.

CONCLUSION

¶16 We conclude that the trial court erroneously determined that Jaminski failed to prove the amount of the personal injury settlement and erroneously determined that Jaminski was required to delineate the components of that settlement in order to establish an entitlement to those assets. However, because Jaminski conceded at trial and in his written closing arguments that the funds in the two investment accounts were marital property and left the determination of how that property was to be divided to the court's sound discretion, the trial court's error was harmless. We further conclude that the trial court failed to explain the basis for its conclusion that the purported loan from Jaminski's parents existed and for its assignment of the loan to Jaminski rather than inclusion in the marital estate. For that reason we reverse and remand for proceedings consistent with this opinion.

By the Court.—Judgment affirmed in part, as modified; reversed in part and cause remanded.

Not recommended for publication in the official reports.

¶17 VERGERONT, J. (*dissenting*). I agree with the majority decision on the issue of the personal injury settlement. I disagree, however, with the analysis and conclusion regarding the $11,500 from Jaminski's parents. Although the trial court's explanation of its decision on this point is not as clear as it might be, in my view we are to read the explanation, if possible, in a manner that supports the trial court's decision. I read the explanation as a determination that the $11,500 is not a loan because neither Jaminski nor Thrun is legally obligated to repay it. I conclude the record supports this determination. Therefore, I conclude the court properly exercised its discretion in not considering this payment as a marital debt. Because I would affirm on this issue, I respectfully dissent.