COURT OF APPEALS
DECISION
DATED AND RELEASED

September 6, 1995

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.

NOTICE

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No. 94-1712

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

In re the Marriage of:

CARSON J. WARD,

Petitioner-Respondent-Cross Appellant,

v.

ROSEMARY J. WARD,

Respondent-Appellant-Cross Respondent.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

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

SNYDER, J. This is an appeal and cross-appeal from the terms of a judgment of divorce. The issues raised are: (1) maintenance, (2)

marital waste, (3) division of the marital estate and (4) division of the property interests in three life insurance policies.

At the time of the trial, Carson and Rosemary Ward had been married for thirty-four years. Until the birth of their first child, Rosemary had worked to support Carson while he earned undergraduate and graduate degrees. Rosemary and Carson ultimately had four children. During the years that the children were growing up, Rosemary worked outside the home occasionally, but never earned more than $12,000 per year. Carson was successful in industry, and at the time of the trial was the president and chief operating officer of Star Manufacturing Company, earning in excess of $100,000 annually.[1]

Prior to the divorce, Carson and Rosemary had enjoyed a high standard of living and had amassed considerable assets. Among these was an interest in Bell's Store, a convenience store in Williams Bay, Wisconsin. Rosemary was largely responsible for managing the store, but ceased her involvement when Carson announced that he was going to commence a divorce action. For the next fifteen months, Carson oversaw the daily operation of the store, until the store went out of business.

Bell's Store was subsequently sold at a loss. Prior to its closing, Carson borrowed $25,000 against an annuity and used the money to pay off the

[1] While Carson reports his salary is set at $76,800, he also receives fees for consulting, which totaled approximately $2000 per month in 1992. The trial court made a finding that Carson's gross income exceeded $100,000 per year and used $100,000 as the touchstone for the maintenance calculations.

corporate debt of the store. The family court commissioner found this to be in violation of a temporary order, held Carson in contempt and recommended that the marital estate be reimbursed. Trial on that issue was de novo; the trial court determined that the borrowing and expenditure were an attempt to protect the parties' investment and in furtherance of the marital estate.

Rosemary raises three issues on appeal. She disputes the grant of a $20,192 tax credit to Carson, argues that the $25,000 borrowed and infused into Bell's Store should not have been characterized as in furtherance of the marital estate, and claims the trial court abused its discretion when it did not divide the marital estate sixty/forty in her favor. We address each issue in turn.

A court's distribution of property is discretionary and will not be reversed unless a misuse of discretion is evident. *See* ***Lang v. Lang,*** 161 Wis.2d 210, 230, 467 N.W.2d 772, 780 (1991). The trial court does not misuse its discretion if a determination reflects a reasoned approach based upon proper considerations and articulable reasons. *See* ***Enders v. Enders***, 147 Wis.2d 138, 142, 432 N.W.2d 638, 640 (Ct. App. 1988). The trial court must attempt to ensure a fair and equitable financial arrangement. ***Brabec v. Brabec,*** 181 Wis.2d 270, 277, 510 N.W.2d 762, 764 (Ct. App. 1993).

Rosemary first contends that the trial court erred when it granted a $20,192 tax credit to Carson before determining maintenance. A trial court properly considers the tax consequences to the parties. *See* ***Sommerfield v. Sommerfield,*** 154 Wis.2d 840, 854, 454 N.W.2d 55, 61 (Ct. App. 1990). Section 767.26(7), STATS., lists tax consequences to the parties as one factor the court

may consider. The court addressed the tax issue by determining that Carson's state and federal tax liability should be subtracted from his gross income before Rosemary's maintenance was calculated.[2] The trial court appropriately reviewed the statutory guidelines, determined that the tax consequences were relevant and the subsequent calculations were not improper. The trial court's grant of the tax credit is upheld.

Rosemary next disputes the trial court's finding that the $25,000 Carson borrowed and used to pay the debt on Bell's Store was in furtherance of the marital estate. The court has authority to consider the contributions of each party to the marriage; this also allows the court to consider destruction or waste of the marital assets by either party. ***Anstutz v. Anstutz,*** 112 Wis.2d 10, 12-13, 331 N.W.2d 844, 846 (Ct. App. 1983). Furthermore:

> Spouses are not trustees or guarantors toward each other. ... A spouse is not bound always to succeed in matters involving marital property ventures, but while endeavoring to succeed in a venture, must proceed with an appropriate regard for the property interests of the other spouse and without taking unfair advantage of the other spouse.

Gardner v. Gardner, 175 Wis.2d 420, 426, 499 N.W.2d 266, 268 (Ct. App. 1993) (quoting the UNIF. MARITAL PROPERTY ACT § 2 cmt.).

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[2] Rosemary also claims error because the court used the higher Wisconsin income tax rates rather than the applicable Illinois rates in calculating the tax credit. She concedes, however, that the social security tax burden was not divided. Neither of these issues were raised below, and we decline to address them here.

It was apparent to the trial court that both Carson and Rosemary shared the blame for the unprofitability of Bell's Store and its subsequent sale. Rosemary's refusal to manage the store during the divorce proceedings, coupled with Carson's inability to effectively oversee its operations, resulted in a net loss. After a determination that the infusion of the $25,000 was an attempt to keep the store operating and thus more saleable, the trial court characterized the loan as being in furtherance of the marital estate. On the issue of marital waste, we affirm the trial court.

Finally, Rosemary appeals the trial court's fifty/fifty division of the marital estate as an erroneous exercise of discretion. It is not an erroneous exercise of discretion if the trial court's determination reflects a reasoned approach and is based upon a proper consideration of the law. ***Enders,*** 147 Wis.2d at 142, 432 N.W.2d at 640. We will uphold the trial court's discretionary decision if there are facts of record to support that decision. ***Id***. at 149, 432 N.W.2d at 642. Under § 767.255(3), STATS., property is to be divided equally between the parties, but such division may be altered upon a consideration of relevant factors.

At the end of the trial, the court was presented with two proposals for property division, one calling for a fifty/fifty split of assets and the other for a sixty/forty division. Based on the evidence presented, the court adopted a fifty/fifty settlement which was a modification of the two proposals submitted. The court enumerated its reasons for the parties, including the high standard of living enjoyed during the marriage and the court's belief that Rosemary would

unlikely be able to equal the parties' predivorce income level. While Rosemary's position was that a departure from the fifty/fifty norm was necessary to compensate her for marital waste committed by Carson, the court had already determined that the $25,000 borrowed was "in the final analysis spent in furtherance of the marriage and I will make no adjustment therefore." The court equally apportioned any loss from the sale of Bell's Store. Because the court properly applied the relevant factors in § 767.255(3), STATS., we affirm the division of the marital estate.

Carson cross-appeals from a requirement that he maintain two life insurance policies naming Rosemary as beneficiary and reinstate a third policy which he had surrendered. Carson was awarded the cash value of the two whole-life policies and was directed to continue premium payments in order to ensure Rosemary's maintenance. It is not uncommon for the party paying maintenance to be required to maintain life insurance naming the former spouse as beneficiary. *See, e.g.*, ***Wilharms v. Wilharms,*** 93 Wis.2d 671, 679-81, 287 N.W.2d 779, 784 (1980) (noting that not until the divorce is finalized is it known whether the wife will be retained as beneficiary under a policy); ***Washington v. Hicks,*** 109 Wis.2d 10, 325 N.W.2d 68 (Ct. App. 1982).

There are two distinct property interests in a life insurance policy: (1) ownership of the policy, which includes the power to name and change beneficiaries and to surrender the policy for its cash value; and (2) the interest of the named beneficiary. ***Bersch v. VanKleeck,*** 112 Wis.2d 594, 596-97, 334 N.W.2d 114, 116 (1983). It is well settled in Wisconsin that division of property

is within the sound discretion of the trial court. *See* ***Trieschmann v. Trieschmann,*** 178 Wis.2d 538, 541, 504 N.W.2d 433, 434 (Ct. App. 1993). A life insurance policy is property within the jurisdiction of the court. ***Prince v. Bryant,*** 87 Wis.2d 662, 671, 275 N.W.2d 676, 680 (1979).

We affirm the award of the beneficent interest in the policies to Rosemary. As noted by the court, this was a long marriage, and Rosemary is at risk of losing all maintenance should Carson die unexpectedly. Carson is fifty-five years old, and there is a family history of heart disease. Retaining Rosemary as beneficiary protects her interest during the term that maintenance is required.[3]

The cross-appeal also raises the issue of a third policy issued by Aetna. This policy insured Carson's life and was required by the lender for Bell's Store. The policy was surrendered when the business was sold in 1993, but that fact was not brought to the court's attention by either Carson or his attorney. We find this to be manifest error, pursuant to § 805.17(3), STATS. Failure to bring a motion for reconsideration to correct such error constitutes a

[3] We note that the trial court did not classify the $205 per month cost of the insurance to Carson. While the policies were purchased during the marriage with marital funds, the continuing monthly cost cannot be considered marital property. *See* ***Bloomer v. Bloomer,*** 84 Wis.2d 124, 127 n.1, 267 N.W.2d 235, 237 (1978) (contributions to a retirement fund after a divorce are not assets of the marital estate). This would appear to be analogous to the more common stipulation whereby a supporting parent is required to maintain life insurance in order to ensure the availability of funds for minor children. Such a requirement is considered a part of child support. *See* ***Vaccaro v. Vaccaro,*** 67 Wis.2d 477, 483, 227 N.W.2d 62, 65 (1975); ***Duhame v. Duhame,*** 154 Wis.2d 258, 263-64, 453 N.W.2d 149, 151 (Ct. App. 1989). Logic would dictate that Carson's $2460 yearly expenditure to continue these policies be treated as maintenance, although we leave this to the determination of the trial court.

waiver of the right to have the issue considered on appeal. ***Schinner v. Schinner,*** 143 Wis.2d 81, 93, 420 N.W.2d 381, 386 (Ct. App. 1988). Therefore, we decline to address this issue on appeal.

By the Court.—Judgment affirmed.

Recommended for publication in the official reports.