

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JUNE 13, 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

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0089

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

ROBERTA M. FLODIN,

Petitioner-Respondent,

v.

RODNEY L. FLODIN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Burnett County:
JAMES H. TAYLOR, Judge. *Reversed and cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Rodney Flodin appeals that part of a divorce judgment dividing the marital property. Because the trial court improperly excluded marital property from the marital estate before dividing the property,

we reverse that part of the judgment and remand the cause for redivision of the marital property.

The court excluded the parties' home from the marital estate. The record establishes that the property was brought to the marriage by Roberta. Property owned by a party prior to the marriage is subject to division. See *Lang v. Lang*, 161 Wis.2d 210, 229, 467 N.W.2d 772, 779-80 (1992). Although § 767.255(3)(b), STATS., allows the court to depart from the presumptive fifty-fifty division of the marital property based on property brought to the marriage, it does not allow the court to exclude the property from the marital estate.

Roberta's brief on appeal suggests that the trial court unequally divided the marital estate after considering the property brought to the marriage. The record does not support that argument for several reasons. First, the trial court unequivocally stated "The Court finds the home as not part of the marital estate." Second, a letter from the court to the parties' attorneys identified the issue presented in the parties' briefs as "whether the home is a marital asset." The court stated in that letter that it found that the home was not a part of the marital estate. Finally, although Roberta's initial brief filed in the trial court requested unequal division of the marital property, Rodney's brief and Roberta's reply brief digressed into issues of whether the property was kept sufficiently separate and whether Roberta exhibited "donative intent." These briefs lost sight of the correct issue of whether the court should depart from the presumptive fifty-five distribution of the marital property and induced the trial court to erroneously believe that the issue was whether the home was a part of the marital estate.

This opinion should not be construed as a requirement that the trial court award Rodney any part of the home or any additional property. After including the home in the marital estate, the trial court is free to exercise its discretion and divide the property unequally to achieve the same result if it is justified after consideration of the factors listed in § 767.255, STATS. We merely hold that the home is a part of the marital estate subject to division.

By the Court.—Judgment reversed and cause remanded.

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