COURT OF APPEALS
DECISION
DATED AND FILED

August 15, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1911 **Cir. Ct. No. 2008FA510**

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

IN RE THE MARRIAGE OF:

JAMES THOMAS HARTFORD,

PETITIONER-APPELLANT,

V.

KAREN ROSE HARTFORD,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed*.

Before Lundsten, Higginbotham and Kloppenburg, JJ.

¶1 KLOPPENBURG, J. James Hartford appeals a judgment of divorce from Karen Hartford. James argues that the circuit court erroneously exercised its

discretion when it: (1) determined that the parties' prenuptial agreement[1] was unenforceable; (2) divided the parties' property without utilizing the prenuptial agreement; (3) awarded maintenance to Karen in the amount of $4,000 per month for eight years without regard to the prenuptial agreement; and (4) ordered James to pay twenty-five percent of Karen's attorney's fees and costs. We affirm the circuit court's exercise of discretion in all respects.

BACKGROUND

¶2 The following facts are based on the circuit court's findings and on facts in the record viewed in the light most favorable to the circuit court's decision. James and Karen married in June 1997. Both James and Karen were previously married and divorced. No children were born to or adopted by the parties during marriage.

¶3 James and Karen signed a prenuptial agreement approximately six months prior to their marriage. Each party was represented by independent counsel and had adequate time to review the agreement's terms prior to signing. The relevant provisions of the parties' prenuptial agreement stated as follows:

> 6. Any property acquired after the marriage, shall be owned in the name of the parties as joint tenants with rights of survivorship or as tenants by the entireties.
>
> ....
>
> 9. During the continuance of the marriage, each of the parties shall have the full right to own, control or dispose of his or her separate property the same as if the marriage did not exist.

[1] The circuit court and the parties refer to this agreement as an antenuptial agreement; we refer to it as a prenuptial agreement.

....

> 11. Any property now owned by the parties in their own names, acquired by them prior to their contemplated marriage, shall remain their separate property subsequent to the date of said marriage. In the event of the termination of said marriage by dissolution of marriage or divorce, such property and the appreciation thereof, as well as any property acquired in exchange for said property, shall remain the property of the respective party, free from the claim of the other unless otherwise provided herein.
>
> 12. Any property now owned as separate property which is transferred to joint ownership between the parties, or property which is hereafter acquired which is held or owned in the names of the parties as joint tenants with right of survivorship, or as tenants by the entireties, or which is in the name of either of them as trustee for the benefit of the other, shall upon the termination of the marriage by dissolution of marriage or divorce, be divided equally by the parties.
>
> 13. Upon the termination of the marriage by dissolution of marriage or divorce, all appreciation of marital property acquired during the time of the marriage shall be owned by the parties equally unless otherwise agreed to in writing by the parties. The parties further agree that all assets owned in their individual names shall upon dissolution of marriage or divorce, be distributed to that party in whose name said asset is held.
>
> 14. The parties hereto agree that in the event a Judgment of Divorce, Dissolution of Marriage or Legal Separation shall be entered in a proceeding between them, neither the Husband nor the Wife shall have an obligation under such Judgment to pay alimony or support to the other....

¶4 The prenuptial agreement included two schedules outlining the parties' assets at the time of the marriage. James disclosed the following assets and, for some, included the asset's approximated value: a property located at 534 N. 5th Street, Silver Lake, Wisconsin ($68,000 in equity); Advent Tool ($500,000); retirement and benefits ($15,000); bank accounts ($12,000); life insurance, automobile, and personal property. Karen disclosed a "1990 Pontiac

Grand Am" and "Miscellaneous Furniture and Jewelry" as her assets, without any values provided.

¶5 James filed the petition for divorce in May 2008. In August 2008, James moved the court to determine the enforceability of the prenuptial agreement. After an evidentiary hearing, the circuit court determined that the parties voluntarily entered into the agreement, that each party was represented by counsel and negotiated the terms of the agreement, that the parties understood the agreement's terms, and that the agreement's terms were not unconscionable. However, the circuit court reserved for trial the issue concerning the agreement's substantive fairness at the time of divorce.

¶6 The trial was held on twelve days, spanning many months between October 2010 and June 2011. At the time of divorce, James was fifty-nine years old, a fifty-percent owner of Advent Tool and Manufacturing, and employed full-time as Advent Tool's Vice President earning $211,547 (as reported on his 2010 W-2 form). Karen was fifty-nine years old at the time of divorce and employed at Advent Tool as a full-time administrative assistant.

¶7 The evidence at trial focused significantly on James's businesses and Karen's work history. James worked at Advent Tool throughout the marriage, during which time, between 1996 and 2009, the company's income increased substantially. The owners of Advent Tool, including James, elected to convert Advent Tool from a C-corporation to an S-corporation in 1997, resulting in Advent Tool's earnings being taxed on James's personal income tax return, rather than on Advent Tool's corporate tax return. Also in 1997, James purchased additional stock in Advent Tool. During the marriage, James became involved in three additional businesses. In 2003, James and his business partner started J&L

Management, which was acquired by Advent Tool in 2006. Also in 2006, James acquired a fifty-percent ownership interest in TMFM LLC, and a one-fifth interest in Anita Investment Group, LLC. Neither the parties nor the circuit court identify, or reference any part of the record identifying, the source of the funds that James used to invest in Advent Tool and the three new businesses.

¶8 When Karen married James, she was employed full-time as an office worker, earning $18,375 in 1997. In 2001, she changed employment to Advent Tool as a full-time administrative assistant. Since the commencement of the divorce action, Karen's gross income from Advent Tool, according to her W-2 forms, decreased from a high of $56,724 in 2008 when James filed for divorce, to $45,530 in 2009, and to $36,449 in 2010. Karen testified that her duties at Advent Tool had been marginalized since the commencement of the divorce, her work situation was uncomfortable, and she feared being fired.

¶9 In an oral ruling after trial, the circuit court determined that the parties' prenuptial agreement was substantively unfair at the time of divorce:

> Was there any contemplation of the parties when they entered into the Prenuptial Agreement? Was it contemplated that this would -- that if the Respondent devoted ten years or so in her work life to the Advent Tool Company, that [it would] end up in this situation? I think it is a stretch to say that was within the contemplation of certainly Ms. Hartford at the time of entering into the Prenuptial Agreement. So I have that concern.
>
> The other concern I have is that the ... evidence is in some conflict in terms of valuations, in terms of which year to take to determine the incomes from [Advent Tool Company, TMFM LLC, J&L Management, and Anita Investment Group, LLC.]
>
> ....

> ... It is interesting that J&L Management is no longer a separate entity but was incorporated into Advent Tool.
>
> Did Ms. Hartford contemplate that when she entered into the Prenuptial Agreement? I would doubt that. ... Advent Tool changed during the marriage from a C-Corporation apparently to an S-Corporation, so the earnings of Advent Tool went directly to the husband.... It is hard to believe that those acts, distributing in that fashion, were contemplated by Ms. Hartford at the time she executed the Prenuptial Agreement.
>
> I'm satisfied that substantively in this case the provisions of the Prenuptial Agreement dividing the property upon divorce in which the wife gets basically nothing of the fruits of the marriage and that everything and whatever the husband acquired is certainly unfair to the wife.
>
> ....
>
> So what I have determined is as I have indicated the substantive provisions of the Prenuptial Agreement dividing the property upon the divorce, as interpreted by the husband, are unfair; that the Court is satisfied that the actions of the husband in how Advent Tool and how Ms. Hartford and her condition as an employee of the Advent Tool are unfair and not within the contemplation of Ms. Hartford at the time of the execution of the marital Prenuptial Agreement.

¶10 After considering the relevant statutory factors, in light of all the evidence, the circuit court divided the parties' property without regard to the agreement and awarded maintenance to Karen in the amount of $4,000 per month for eight years. The circuit court also ordered that James pay Karen twenty-five percent of Karen's attorneys' fees, expert fees, and costs, totaling $34,814. When awarding fees and costs, the court considered James's ability to pay, Karen's income, the impending property division and award of maintenance, the reasonableness of the attorneys' hourly rates, and the complicated nature of the case.

¶11 The circuit court entered findings of fact, conclusions of law, and judgment of divorce on August 21, 2012. James now appeals.

DISCUSSION

¶12 On appeal, James argues that the circuit court erroneously exercised its discretion when it: (1) determined that the parties' prenuptial agreement was unenforceable; (2) divided the parties' property without utilizing the prenuptial agreement; (3) awarded maintenance to Karen without regard to the agreement in the amount of $4,000 per month for eight years; and (4) ordered James to pay a portion of Karen's attorney fees and costs.

¶13 We begin with James's first argument that the court erroneously exercised its discretion when it concluded that the prenuptial agreement was not substantively fair at the time of divorce. As we explain below, we conclude that the circuit court properly exercised its discretion when it determined that James's keeping property acquired after the marriage as non-divisible property did not comport with Karen's reasonable expectations and that the agreement was therefore inequitable and not binding upon divorce. Specifically, we conclude that the agreement was unfair at the time of divorce because: (1) it was not reasonably anticipated at the time of the agreement's execution that property acquired after the marriage would not be part of the divisible assets, and (2) even if such a result were reasonably expected, James did not meet his burden of showing that he could

trace the source of funds used to acquire the disputed assets, to assets that were non-divisible under the agreement.[2]

¶14 Our review of a circuit court's determination that an agreement is inequitable is limited to whether the court properly exercised its discretion. ***Button v. Button***, 131 Wis. 2d 84, 99, 388 N.W.2d 546 (1986). We will uphold a discretionary determination if the court considered the relevant law and facts and set forth a process of logical reasoning. *Id.*

¶15 When dividing property upon divorce, a circuit court must start with the presumption that it is to award an equal division of the property subject to division. WIS. STAT. § 767.61(3). This presumption may be overcome after consideration of a number of factors, including "[a]ny written agreement made by the parties before or during the marriage concerning any arrangement for property distribution." WIS. STAT. § 767.61(3)(L). "[S]uch agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable to either party. The court shall presume any such agreement to be equitable as to both parties." WIS. STAT. § 767.61(3)(L). The party challenging the agreement bears the burden of persuasion and production of evidence to overcome the statutory presumption that the agreement is equitable. ***Gardner v. Gardner***, 190 Wis. 2d 216, 230, 527 N.W.2d 701 (Ct. App. 1994).

[2] The prenuptial agreement refers to property as "separate" and "marital." In this opinion we will generally use the terms "non-divisible" and "divisible," but because of the language used in the agreement, there will be references to "separate" which we will treat as synonymous with "non-divisible," and references to "marital" which we will treat as synonymous with "divisible," for purposes of this opinion only.

¶16 As the circuit court and both parties recognize, the supreme court in ***Button*** established the standard for circuit courts to employ in deciding whether a written agreement concerning property distribution was equitable and therefore binding on the court:

> [A]n agreement is inequitable under sec. [767.61(3)(L)] if it fails to satisfy any one of the following requirements: each spouse has made fair and reasonable disclosure to the other of his or her financial status; each spouse has entered into the agreement voluntarily and freely; and the substantive provisions of the agreement dividing the property upon divorce are fair to each spouse.

Button, 131 Wis. 2d at 89.

¶17 The parties do not dispute that they voluntarily and freely entered into the agreement and exchanged fair and reasonable financial disclosures. However, James contends that the circuit court erroneously exercised its discretion in its determination regarding the third element: that the agreement's terms were substantively unfair at the time of divorce.

¶18 Substantive fairness is an "amorphous concept" that must be determined on a case-by-case basis, in light of two competing principles: "the protection of the parties' freedom to contract and the protection of the parties' financial interests at divorce." ***Id.*** at 96. If "there are significantly changed circumstances after the execution of an agreement and the agreement as applied at divorce no longer comports with the reasonable expectations of the parties, an agreement which is fair at execution may be unfair to the parties at divorce." ***Id.*** at 98-99. The test is "whether, before the signing of the agreement, the parties were able to reasonably predict a particular event[,] ... not whether they agreed that this event would either occur or not occur." ***Warren v. Warren***, 147 Wis. 2d 704, 710, 433 N.W.2d 295 (Ct. App. 1988). In other words, "[t]he idea behind the

test is that both spouses have a right to rely upon the prenuptial agreement when all subsequent events transpire as logically anticipated." ***Id.***

¶19 The law requires the court to consider whether "the agreement as applied at divorce no longer comports with the reasonable expectations of the parties." ***Button***, 131 Wis. 2d at 98-99. Here, the circuit court concluded that (1) James's claiming as separate property the additional stock in Advent Tool and acquisition of J&L Management along with his acquisition of TMFM and Anita Investment Group and his income from all four businesses, and (2) Karen's salary decrease and changed work environment, were "unfair and not within the contemplation of Ms. Hartford at the time of the execution of the marital Prenuptial Agreement."[3]

¶20 We first address James's investment in Advent Tool and James's acquisition of and income from additional businesses during the marriage. The circuit court noted, and James does not dispute, that the additional stock in Advent Tool, acquired after the marriage, was purchased by James and that the newly created companies were "absorbed into or owned by" James. James argues that these assets were therefore not divisible at the time of divorce, and that such a result constituted reasonably foreseeable conduct by businesses and businessmen in furtherance of their business interests. Karen responds that she reasonably expected that such assets acquired after marriage would be divisible and that "James did *not* act in good faith" when he placed a majority of the newly acquired

[3] Contrary to James's assertion that the circuit court did not support its invalidation of the agreement with a finding that the parties' change in circumstances was not reasonably foreseeable, the record establishes that the circuit court engaged in a detailed and reasoned explanation of the reasonably unforeseeable changes in circumstances that rendered the agreement unfair at the time of divorce.

property "in his name solely or in the name of a business to avoid [her] receiving the property acquired during the marriage." We agree with Karen that it was not reasonably anticipated under the agreement that James would treat property acquired after the marriage so that, in the words of the circuit court, "the wife gets basically nothing of the fruits of the marriage," thereby rendering enforcement of the agreement "certainly unfair."

¶21 The parties' dispute compels us to construe the prenuptial agreement. A prenuptial agreement "is a contract, and its interpretation is consequently a legal question which we review de novo. The primary goal in interpreting a contract is to determine and give effect to the parties' intent. When the language of a contract is unambiguous, we will apply its literal meaning." ***Steinmann v. Steinmann***, 2008 WI 43, ¶21, 309 Wis. 2d 29, 749 N.W.2d 145 (internal citations omitted).

¶22 Five terms of the agreement are relevant to the parties' dispute. Two terms relate to "separate property" that was acquired before marriage and which remained non-divisible during marriage: ¶11, which provides that any premarital property owned in the parties' own names and any appreciation of that property shall remain their separate property after marriage, and ¶9, which provides each party with full authority to manage the separate property "as if the marriage did not exist." One term, ¶12, relates to premarital separate property that the parties during marriage converted to joint ownership and therefore to property to be divided equally upon divorce. The remaining two terms relate to property acquired after marriage: ¶6, which provides that any property acquired after marriage shall be "owned in the names of the parties as joint tenants"; and ¶13, which provides that upon divorce, all appreciation of "marital" property acquired during the marriage shall be "owned by the parties equally," "unless otherwise

agreed to in writing by the parties," and, in its second sentence, that all assets owned in their individual names shall be separate ("be distributed to that party in whose name said asset is held"). These five terms together make it clear that property acquired after marriage is to be divisible upon divorce unless the parties agree otherwise in writing, and that any such agreed upon separate property, plus all separate property acquired before marriage and its appreciation, remain separate and, thus, non-divisible.

¶23 James's position appears to center on the second sentence of ¶13, and so we take a closer look at that provision. Paragraph 13 contains two sentences: the first sentence provides that all appreciation of property acquired during marriage will be jointly owned, except for property that is converted to separate property by written agreement of the parties; and the second sentence addresses how such property so converted to individual ownership will be distributed at divorce. James seizes on the second sentence of ¶13 of the agreement and reads it in isolation to mean that so long as any new property is titled in his name, it is not divisible property even though it was acquired after marriage. James's interpretation is contrary to the plain meaning of the agreement in at least three ways.

¶24 First, and most basically, James broadens the reach of the second sentence beyond its context to cover all property acquired in his name during marriage and to make that property not "marital," without the written agreement required by the first sentence. Critically, James identifies no language in the agreement that provides for the taking of divisible assets and using them to purchase new property in the party's own name, absent a written agreement. Second, James's interpretation incorrectly severs the connection between the two sentences in ¶13, isolating the second sentence from the first sentence. However,

the two work together. The first sentence provides that "marital" (i.e., divisible) property may be converted to individual ownership only by written agreement, and the second sentence states how such converted property shall be distributed at divorce. Lastly, James's interpretation renders the second sentence merely duplicitous of the terms in ¶¶9 and 11, which already fully address the handling and distribution of premarital separate property and any property obtained in exchange for such separate property.

¶25 Nothing in the agreement supports the expectation that one party will take newly acquired assets during marriage out of the marital estate by placing their ownership in that party's name, absent the written agreement required by ¶13 of the agreement. Rather, apart from premarital property separately owned or property rendered separate by written agreement, the prenuptial agreement taken as a whole provides that any property acquired after marriage would be divisible property, regardless of in whose name it is held after acquisition.

¶26 Consequently, that James would treat his purchase of additional Advent Tool stock and his other investments in the new businesses, though acquired after marriage, as non-divisible property because those investments were owned in his name or the name of his businesses only, does not comport with the reasonable expectations of the parties arising out of the negotiated language in the agreement. The circuit court properly exercised its discretion in determining that enforcement of the agreement would be unfair at the time of divorce, because events did not "transpire as logically anticipated" during the course of this marriage, as defined by the provisions in the parties' agreement. *See* ***Warren***, 147 Wis. 2d at 710.

¶27 Even if the agreement did presage the circumstances by which James would place property acquired during marriage in his name or the name of his businesses, so as to make that property separate and non-divisible at divorce, James failed to trace that property so as to preserve its separate identity. "Tracing is the job of determining the value and source of an asset or the value and source of a part of an asset." ***Derr v. Derr***, 2005 WI App 63, ¶22, 280 Wis. 2d 681, 696 N.W.2d 170. A party asking the court to declare an asset separate must be able "to provide evidence that permits the tracing of an identifiable part of the asset to an original non-divisible asset." ***Id.*** "Parties asserting that property, or some part of the value of property, is exempt from division have the burden of establishing that the property is non-divisible at the time of divorce." ***Steinmann***, 309 Wis. 2d 29, ¶26.

¶28 A party seeking to enforce a prenuptial agreement so as to distribute non-divisible property to the individual claiming that property has the "responsibility to trace the property such that a reliable identification and valuation of the assets governed by the agreement can be made." ***Brandt v. Brandt***, 145 Wis. 2d 394, 416, 427 N.W.2d 126 (Ct. App. 1988). James has failed in that responsibility here, for he cites to no evidence in the record establishing that he used his premarital non-divisible property to purchase additional stock in Advent Tool or his interests in the three new businesses during the marriage. He identifies no evidence of the source of these assets. Accordingly, "[e]nforcement of the agreement under these circumstances would [be] inequitable." ***Id.*** (noting that enforcement of the agreement under these circumstances would also be "impossible").

¶29 Because we affirm the circuit court's finding that the agreement was inequitable based on the facts relating to James's investment in Advent Tool and

the three new businesses, we need not address James's challenges to the additional grounds identified by the circuit court concerning changes in Karen's employment at Advent Tool during the marriage. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (when a decision on one issue is dispositive, we need not reach other issues raised).

¶30 We turn next to James's second argument, that the circuit court "abused its discretion in the division of the estate by not utilizing the [Prenuptial] Agreement." The division of property rests within the sound discretion of the trial court. ***Friebel v. Friebel***, 181 Wis. 2d 285, 293, 510 N.W.2d 767 (Ct. App. 1993). James's argument fails in light of our affirmation above of the circuit court's determination not to enforce the agreement, and he identifies no other defect in the circuit court's discretionary division of property. He does fault the court for not considering the tax consequences of that division,[4] but neither develops that argument with any factual analysis nor responds to Karen's statements that the court did consider the tax consequences relating to the parties' retirement accounts and that James presented no evidence about tax considerations as to the businesses. James himself notes that the circuit court noted, "There's nothing," when addressing the tax consequences factor, and provides no references to the record to the contrary. *See* ***Brandt***, 145 Wis. 2d at 419-20 (a court cannot be faulted for failing to address tax consequences in the absence of evidence of such consequences).

[4] The tax consequences to each party is one of the factors that a circuit court shall consider in dividing property. WIS. STAT. § 767.61(3)(k).

¶31 James also argues that the circuit court "abused its discretion in awarding maintenance to Ms. Hartford when maintenance was specifically addressed in the [Prenuptial] Agreement." The determination of the amount and duration of maintenance is within the discretion of the circuit court. ***LaRocque v. LaRocque***, 139 Wis. 2d 23, 27, 406 N.W.2d 736 (1987). As with property division, the court did not err in disregarding the agreement in light of our conclusion above that the court properly decided not to enforce the agreement. Moreover, James concedes that the court made findings as to the ten factors that the court shall consider in determining whether to award maintenance under WIS. STAT. § 767.56(1)-(10). James does not explain how the circuit court's findings were clearly erroneous or offer any evidence from the record to contradict those findings. Accordingly, we reject his unsupported challenge to the court's maintenance award.[5]

¶32 Finally, we address James's argument concerning the circuit court's award of fees and costs. An award of attorney's fees and costs is within the discretion of the trial court. ***Johnson v. Johnson***, 199 Wis. 2d 367, 377, 545 N.W.2d 239 (Ct. App. 1996). WISCONSIN STAT. § 767.241(1)(a) allows the court, after considering both parties' financial resources, to "[o]rder either party to pay a reasonable amount for the cost to the other party of maintaining or responding to an action affecting the family and for attorney fees to either party." When determining whether to award attorney fees and costs, the court must examine the following three factors: "(1) the spouse receiving the award needs the

[5] We note that, with respect to both property division and maintenance, the circuit court painstakingly applied the statutory factors set forth in WIS. STAT. §§ 767.56 and 767.61 based on the evidence presented and arguments made by the parties over the course of numerous and lengthy post-trial hearings.

contribution, (2) the spouse ordered to pay has the ability to do so, and (3) the reasonableness of the fee." ***Johnson***, 199 Wis. 2d at 377.

¶33 Here, the circuit court methodically applied the three-part test to the parties' circumstances. It found that Karen would not be able to pay her fees given her annual income of around $36,000 without "significantly invading the equalization payment" ordered under the property division, and that James earned between $210,000 and $211,000, plus distributions from his business, which may "raise that up to close to $250,000 a year." The court further found that the fees were reasonable, that it was a "fairly complicated and fact-rich case," and that "[t]he submissions on all of the services rendered appear[ed] to be consistent with what was transmitted and presented to the Court." We conclude that the court properly exercised its discretion in awarding attorney fees and costs to Karen.

CONCLUSION

¶34 For the reasons set forth, we affirm the circuit court's determination that the prenuptial agreement was inequitable at the time of divorce and therefore unenforceable, we affirm the circuit court's division of property and award of maintenance, and we affirm the circuit court's award of fees and costs.

By the Court.—Judgment affirmed.

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