COURT OF APPEALS
DECISION
DATED AND RELEASED

JULY 29, 1997

NOTICE

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.

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

No. 96-3587-FT

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

IN RE THE MARRIAGE OF:

KAY ELLEN WEBB-MACCO,

PETITIONER-RESPONDENT,

V.

THOMAS WILLIAM MACCO,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

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

PER CURIAM. Thomas Macco appeals the property division of his divorce judgment with his former wife, Kay Webb. The marriage lasted from September 2, 1995, until October 9, 1996. The dispute centers around the parties'

premarital agreement and $30,023.84 Kay contributed to the marriage coincident with the agreement's execution. Thomas used the money to pay his old bills and to reduce a mortgage he had incurred to remodel his residence to accommodate Kay and her children. Thomas asserted that Kay's $30,000 payment constituted an equity interest with changing fair market value in what amounted to a home remodeling joint venture between the spouses. He also asserted that the premarital agreement, by making no provision for the payment or repayment, disqualified the payment as a loan. Kay asserted that the payment was a loan that she expected Thomas to repay in the event of divorce. The trial court accepted Kay's version of the facts. We must affirm the trial court's findings unless clearly erroneous. *See* ***County of Langlade v. Kaster***, 202 Wis.2d 449, 454, 550 N.W.2d 722, 724 (Ct. App. 1996). The division of the marital estate rests within the sound discretion of the trial court. ***Preuss v. Preuss***, 195 Wis.2d 95, 101, 536 N.W.2d 101, 103 (Ct. App. 1995). The factors the court should consider are set forth in § 767.255 (3), STATS. We affirm the divorce judgment.[1]

The premarital agreement had many wealth shielding clauses, safeguarding each spouse's individual property rights. It did not, however, expressly mention Kay's $30,000 commitment to the home remodeling venture. In Thomas' view, this removes Kay's $30,000 from the contract and ends any further factual inquiry. We reject this analysis; further factual inquiry presents no parol evidence violation. *See* CORBIN ON CONTRACTS §§ 573-76, at 537 (1952) (one volume edition); MCCORMICK ON EVIDENCE § 220, at 446-47 (1954); *see also* ***Estate of Molay***, 46 Wis.2d 450, 456, 175 N.W.2d 254, 258 (1970); ***Downey, Inc. v. Bradley Center Corp.***, 188 Wis.2d 435, 442-43, 524 N.W.2d 915, 920 (Ct.

[1] This is an expedited appeal under RULE 809.17, STATS.

App. 1994). Rather, courts may look for the parties' tacit understanding as implied by their conduct and the nature of the transaction; such implied promises or conditions become part of the parties' agreement, though not expressly mentioned. *See* BLACK'S LAW DICTIONARY 265, 1092 (5th ed. 1979); *see also* CORBIN, §§ 561-72, at 531-33, §§ 631-32, at 590-92, and § 653, at 620-22. Likewise, implied contracts and promises may exist independent of an express contract. *See* CORBIN § 18, at 25-27; *see also* ***Gerovac v. Hribar Trucking, Inc.***, 43 Wis.2d 328, 332, 168 N.W.2d 863, 865 (1969); ***Schaller v. Marine Nat'l Bank***, 131 Wis.2d 389, 398, 388 N.W.2d 645, 649 (Ct. App. 1986).

Here, the trial court could reasonably find that Kay's $30,000 commitment was intended to create a debt commitment. First, Kay testified that she so viewed it, reporting assurances from Thomas and his lawyer that she would get her $30,000 back in the event of divorce. She also told both that she wanted her money back in such event. This testimony, by itself, furnished strong support for the trial court's findings. The trial court is the sole arbiter of the credibility of witnesses and the weight of their testimony. *See* ***State v. Wyss***, 124 Wis.2d 681, 694, 370 N.W.2d 745, 751 (1985). Thomas admitted telling Kay later in the marriage that he wanted to pay her back. This ambiguous testimony could support Kay's version of the parties' intent, despite Thomas' in-court portrayal of his out-of-court statements as nothing more than failed efforts at marriage reconciliation.

Further, the circumstances surrounding the premarital agreement comported with Kay's expressed understanding. Kay committed her money contemporaneously with her execution of the agreement, and listed the $30,000 as her individual property in one of the agreement's schedules. The parties' agreement reflected a mutual desire to protect private property in uncertain circumstances, *see* ***Davis v. Mills***, 194 U.S. 451, 457 (1904) (Holmes, J.). The

parties' documented unwillingness to share wealth stood in contrast to Kay's simultaneous, unexplained willingness to commit $30,000. Courts seeking to ascertain how contracting parties viewed a particular transaction may look to the parties' other agreements for evidence of what they implicitly intended. *See* ***Karp v. Coolview of Wisconsin, Inc.***, 25 Wis.2d 299, 303, 130 N.W.2d 790, 792 (1964); *see also* ***Hartford Steamboiler Insp. & Ins. Co. v. Schartzman Packing Co.***, 423 F.2d 1170, 1173-74 (10th Cir. 1970); MCCORMICK ON EVIDENCE § 198, at 469-70 (2d ed. 1972).

From the totality of the circumstances, a fact finder could reasonably infer that Kay and Thomas expected Kay's transfer to be protected. A finding that the parties tacitly expected the premarital agreement to protect Kay's interest in her $30,000 commitment is consistent with the definition of a debt commitment. *See* ***Dieck v. Antigo Unified School Dist.***, 165 Wis.2d 458, 469-70, 477 N.W.2d 613, 618 (1991); BLACK'S LAW DICTIONARY 363 (5th ed. 1979). Finally, the agreement contained nothing to refute this tacit understanding.

By the Court—Judgment affirmed.

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