COURT OF APPEALS
DECISION
DATED AND FILED

October 28, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3708

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

IN RE THE MARRIAGE OF:

COLLEEN SEEFELDT,

PETITIONER-RESPONDENT-CROSS APPELLANT,

V.

DAROLD SEEFELDT,

RESPONDENT-APPELLANT-CROSS RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Marathon County: RAYMOND F. THUMS, Judge. *Affirmed.*

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

PER CURIAM. Darold Seefeldt appeals a divorce judgment, contending that the trial court erroneously (1) set aside a prenuptial agreement;

(2) failed to find extraordinary efforts on the part of his former wife, Colleen Seefeldt, to permit her to share in the appreciation of separate property; and (3) considered his separate property in determining maintenance. Colleen cross-appeals, arguing that the trial court failed to consider, as part of the marital estate, property Darold owned prior to the marriage and erroneously found that certain real estate conveyances were gifts to Darold and his brother. We reject these arguments and affirm the judgment.

The parties were married in 1984 when Colleen was twenty years old and had a high school education. Darold was a thirty-six-year-old dairy farmer. Darold's family operated a large dairy farm. Several days before the wedding, Darold's attorney prepared a prenuptial agreement that the parties signed. The agreement provided that the parties would maintain separate property and income. "Separate property" consisted of property each brought to the marriage and property either party subsequently acquired. The agreement waived maintenance and property division in the event of divorce.

Before the marriage, neither party owned any real estate. During the marriage, they acquired a 160-acre farm stipulated to have a value of $60,600. The farm was titled in both their names. The house on the farm was rental property, not the homestead. In addition, Darold and his brother received several parcels of land from their parents, titled only in the boys' names.

Darold's father, Eldore Seefeldt, testified that he transferred the land as gifts to his sons on advice of his attorney for estate planning purposes. One parcel, in which Darold owned a 12.5% interest, consisted of forty acres with a four-bedroom, two-story home where Darold lived and was appraised at $189,450, resulting in Darold's interest having a value of $23,681. Darold's half interest in

several other parcels was valued at approximately $100,000. The real estate was free of any mortgage debt.

The parties had two children who were ages nine and eleven at the time of the divorce. Both parties worked on the family dairy farm. Eldore would determine the division of the milk check proceeds to be paid to himself, Darold, and Darold's brother. Eldore, age seventy-four, was not yet retired, and testified that he was the boss, and did milking, hay cutting and corn planting.

Eldore testified that Colleen helped with household and farm chores, doing a good job taking care of the health records of the cows. She also helped with feeding calves, milking, butchering chickens, cooking, baking, canning, cleaning the pens, unloading hay bales and helping in the fields. She also occasionally held jobs off the farm. Colleen testified that in 1994, she earned $9,295 and Darold earned $37,249. At the time of the divorce hearing, Colleen worked part-time as a school bus driver. She chose part-time employment so she could be home when her children would be home from school.[1]

The trial court refused to enforce the prenuptial agreement, finding that it was inequitable, and ordered an equal division of the marital estate. It found that Colleen was entitled to one-half of the cattle, valued at $69,255. It also found that Colleen was entitled to $30,300, representing one-half the value of the jointly owned real estate. The trial court found that the balance of the real estate owned by Darold was a gift from his father and mother, and excluded it from the

[1] Because Colleen omitted from her brief any statement of facts, *see* RULE 809.19(1)(d), STATS., we rely on the respondent's brief and the record for our statement of facts.

property division. Darold was also awarded $28,000 in equipment and property owned prior to the marriage. Other personal property was equally divided.

Therefore, in addition to retaining his separate gifted realty, valued at more than $100,000, and approximately $28,000 in property brought to the marriage, the judgment awarded Darold personal property, farm equipment and the realty that had been jointly owned with Colleen. Colleen was awarded certain personal property and a $117,437 equalizing payment. The trial court also awarded Colleen maintenance in the sum of $400 per month for a period of five years.[2]

Appeal

1. Prenuptial Agreement.

Darold argues that the trial court erroneously set aside the parties' prenuptial agreement. We disagree. Property division and maintenance are addressed to trial court discretion. *See* ***Lang v. Lang,*** 161 Wis.2d 210, 217, 467 N.W.2d 772, 774 (1991). Section 767.255, STATS., governs the trial court's exercise of discretion. This statute presumes that certain property shall be divided equally but authorizes the court to alter this distribution after considering certain factors, including any written agreement between the parties. A written agreement "shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable as to either party. The court shall presume any such agreement to be equitable as to both parties." Section 767.255(3)(L), STATS.

[2] Custody and child support were agreed upon and are not issues on appeal.

An agreement is inequitable under § 767.255(3)(L), STATS., if it fails to satisfy any one of the following requirements: "each spouse has made a fair and reasonable disclosure to the other about his or her financial status; each spouse enters into the agreement voluntarily and freely; [and the agreement's substantive terms] dividing the property … are fair to each spouse." ***Button v. Button,*** 131 Wis.2d 84, 99, 388 N.W.2d 546, 552 (1986). It is the third requirement that the trial court found unsatisfied.

The third requirement, an issue of "substantive fairness," is an "amorphous concept" that must be determined on a case-by-case basis. ***Id.*** at 96, 388 N.W.2d at 551. The trial court must be mindful of two principal legislative concerns, "the protection of the parties' freedom to contract and the protection of the parties' financial interests at divorce." ***Id.*** The parties' freedom of contract does not permit them to "ignore the state's interest in protecting the financial interests of the parties at divorce." ***Id.*** An agreement that is fair at its execution may be unfair at the time of divorce if the circumstances have changed significantly. ***Id.*** at 97-99, 388 N.W.2d at 551.

A trial court's determination of inequitableness under § 767.255(3)(L), STATS., requires an exercise of discretion. ***Id.*** at 99, 388 N.W.2d at 552. A discretionary decision will be upheld if it is the product of a rational mental process by which the facts of record and the law are considered together to achieve a reasoned and reasonable determination. ***Id.***

Here the record supports the trial court's reasoning. The court concluded that the agreement was unfair because the parties' circumstances prevented Colleen from ever accumulating any marital estate. Throughout the twelve-year marriage, Colleen worked primarily on the family farm. In her role as

a farm wife, she performed a variety of services without pay. Even her former father-in-law recognized her contributions, stating that she did a "good job" with the animals' health records, in addition to performing other chores. The record demonstrates that Colleen started the marriage with virtually no assets but made contributions during the marriage. Darold's contributions were recognized by the accumulation of farm equipment and cattle titled in his name. Colleen's contributions were not. As the trial court stated, she was not slave labor. The circumstances support the court's conclusion that to prevent Colleen, as a farm wife, from ever sharing in the accumulation of assets acquired by joint efforts during the marriage was inequitable under ***Button***. We affirm the trial court's exercise of discretion.

2. Contribution to Separately Owned Property.

Next, Darold argues that the trial court erred because it failed to identify what extraordinary contribution Colleen made in order to entitle her to share in the appreciation of separately owned property, citing ***Haldemann v. Haldemann,*** 145 Wis.2d 296, 300-01, 426 N.W.2d 107, 109 (Ct. App. 1988). We disagree. Darold's two-paragraph argument has several flaws, not the least of which is the failure to identify the separate property that allegedly appreciated.

The record discloses that the trial court awarded Colleen one-half the value in one parcel of jointly-titled realty. It also awarded her one-half the value of the cattle. Although the cattle were not jointly titled, Darold testified that the cattle he owned at the time of the divorce were not gifts from his father, but were acquired by reproduction. Darold fails to cite legal authority for his implied contention that these assets are separate property. *See* RULE 809.19(1)(e), STATS. Another flaw is that ***Haldemann*** can be distinguished because it involved an

inherited farm. Here, the trial court did not attempt to divide the property gifted to Darold, but clearly excluded it and any appreciation of it. We conclude that Darold fails to demonstrate reversible error.

3. Maintenance.

Darold's final challenge is directed at the maintenance award. He argues that the trial court erred because it considered separate property that was gifted to him by his parents. He cites no legal authority for this argument. *See* RULE 809.19(1)(e), STATS. We conclude that the court was entitled to consider the gifted property.

In awarding maintenance, the trial court considered the tax consequences, the length of the marriage and Colleen's contributions to the marriage. The trial court also stated that in lieu of awarding her any part of the gifted property, "I will order $400 per month in maintenance" for a period of five years. Determinations regarding property and maintenance are closely related to one another and cannot be viewed in a vacuum. ***Dean v. Dean***, 87 Wis.2d 854, 878, 275 N.W.2d 902, 913 (1979).

Section 767.255, STATS., provides that absent a showing of hardship, gifted property is not part of a property division. Although the court's decision was not the most articulate exercise of discretion, we are not persuaded that the court committed reversible error. We interpret the maintenance decision as the court's way of avoiding any hardship that would require a division of the gifted realty. The parties' income disparity, length of the marriage and relative earning capacities support the decision. After twelve years as a farm wife, Colleen left the marriage with a high school education and a part-time job as a school bus driver, earning approximately $400 per month. Darold continued in his family's

dairy farm business, with his substantial assets and over $37,000 per year income. The record discloses that the trial court exercised its discretion and it supports the maintenance decision.

Cross-Appeal

1. Property Acquired Before the Marriage.

Colleen argues that the trial court erroneously excluded from division the property Darold brought to the marriage. Colleen argues that the trial court misinterpreted § 767.255, STATS., by concluding that property brought to the marriage is not subject to division.

We agree that property brought to the marriage is subject to division under § 767.255, STATS. ***Lang,*** 161 Wis.2d at 217, 467 N.W.2d at 773. However, § 767.255(2), STATS., permits the trial court to alter the presumed equal division by considering the assets brought to the marriage by each party. As a result, we conclude that it was within the trial court's discretion to award Darold assets brought to the marriage, consisting of farm equipment valued at $28,310.

2. Gifted Property.

Next, Colleen argues that the trial court erroneously excluded from the property division the parcels of land Darold received as gifts from his parents valued at $114,471.25. She argues that the land was actually payment for services rendered. She points to evidence that she and Darold contributed to the farm operation's milk production and that Darold received only a small percentage of

the milk checks while Eldore received substantial sums.[3] She contends that the real estate conveyances were not intended to be gifts, but rather compensation for their labor. We are unpersuaded.

Section 767.255, STATS., designates certain property as generally not divisible upon divorce. ***Wierman v. Wierman***, 130 Wis.2d 425, 427-28, 387 N.W.2d 744, 745 (1986). Property acquired by gift remains separate property of the donee. ***Id.*** The elements necessary to establish a gift are intent to make a gift, delivery, termination of the donor's dominion over the gift, dominion in the donee and intent. ***Id.*** at 429 n.3, 387 N.W.2d at 746 n.3.

The essence of Colleen's argument is that the evidence is insufficient to support a finding that the conveyances were intended as a gift. "Intent is a fact, and the circuit court's findings of fact concerning the transferor's intent will be sustained unless clearly erroneous." ***Id.*** at 429, 387 N.W.2d at 746. We search the record for evidence to support for the findings the trial court made, not for findings the court could have but did not make. *See* ***Estate of Becker,*** 76 Wis.2d 336, 347, 251 N.W.2d 431, 435 (1977).

The record supports the trial court's implied finding of donative intent.[4] Eldore testified that on advice of his estate planner, he made yearly gifts of land to his boys only. He structured the transactions to avoid gift taxes. He

[3] Colleen does not explain what she means by substantial sums. Eldore testified that he took in over $230,000 in 1995, but he was still operating at a loss. He testified that "In 1993 the loss was $14,838. Gross income was 22,000."

[4] An appellate court may assume that a missing finding on an issue "was determined in favor of or in support of the judgment." ***Sohns v. Jensen,*** 11 Wis.2d 449, 453, 105 N.W.2d 818, 820 (1960). An appellate court affirms if the trial court reached a result that the evidence would sustain had a specific finding supporting that result been made. *See* ***Moonen v. Moonen,*** 39 Wis.2d 640, 646, 159 Wis.2d 720, 723 (1968).

testified that the gifts were "[a]bsolutely not" making up for their lower milk checks. Trial courts, not appellate courts, judge the weight and credibility of testimony. ***Estate of Wolff v. Weston Town Bd.,*** 156 Wis.2d 588, 598, 457 N.W.2d 510, 513-14 (Ct. App. 1990). We conclude that the trial court's finding that the conveyances of land were gifts to Darold and his brother was not clearly erroneous.

By the Court.—Judgment affirmed.

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