COURT OF APPEALS
DECISION
DATED AND FILED

May 14, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2206

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

IN RE THE MARRIAGE OF:

ROBERT MEIXELSPERGER,

PETITIONER-APPELLANT,

V.

DEBBRA L. MEIXELSPERGER,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Sauk County: VIRGINIA A. WOLFE, Judge. *Reversed in part and cause remanded.*

Before Vergeront, Roggensack and Deininger, JJ.

ROGGENSACK, J. Robert Meixelsperger appeals the property division component of his divorce judgment. He claims that the circuit court erroneously exercised its discretion when it refused to consider evidence of an oral agreement between the parties and awarded Debbra Meixelsperger half of the

marital assets, despite uncontroverted evidence that he had brought the bulk of the assets into the marriage seven years earlier. He also ascribes error to the circuit court's failure to consider the tax effects to him of making the equalization payment. Because we agree that the circuit court erroneously exercised its discretion in regard to the tax impact of its property division, we reverse and remand for reconsideration consistent with this opinion.

BACKGROUND

Robert and Debbra were married on October 27, 1989 and divorced on May 21, 1997. Each party had been married before. They had no children together. At the time of the divorce, Robert was fifty-four years old and was earning $2,899 a month gross wages, as a municipal supervisor. Debbra was forty-four years old and was earning $2,212 a month gross wages, as a nurse. Robert suffered from diabetes and Debbra had fibromyalgia.

The marital estate was valued at $301,542. The main assets of the marital estate were parcels of real estate, all of which were brought into the marriage by Robert. The most significant asset which Debbra brought to the marriage was her retirement account.

During the course of the marriage, the parties maintained separate checking accounts and paid their own debts. Robert testified that these and similar financial arrangements were undertaken pursuant to an oral agreement that each party would retain his or her own property in the event of divorce. Debbra testified that the parties had discussed, but never reached, an agreement as to property division in the event of divorce.

The circuit court determined that the property should be divided equally between the parties. In order to do so, the court permitted Robert to retain the property in his name, and it ordered him to either pay Debbra $118,675 within 120 days, or to amortize that amount in monthly installments, over seven years at eight percent interest. The court did not calculate the amount of the monthly payments which would be required, if the installment option were chosen. It also did not consider the tax implications to Robert if he were to sell real estate to meet the $118,675 obligation.

DISCUSSION

Standard of Review.

Both the admission of evidence and the division of the marital estate fall within the sound discretion of the circuit court. ***State v. Keith***, 216 Wis.2d 61, 68, 573 N.W.2d 888, 892 (Ct. App. 1997); ***Long v. Long***, 196 Wis.2d 691, 695, 539 N.W.2d 462, 464 (Ct. App. 1995). Therefore, we will affirm evidentiary decisions and property division awards when they represent a rational decision based on the application of the correct legal standards to the facts of record. ***Id***. However, a circuit court is not free to ignore any statutory factors which are clearly relevant. ***Lundberg v. Lundberg***, 107 Wis.2d 1, 11-12, 318 N.W.2d 918, 923 (1982). In considering whether the proper factors were applied, no deference is due, because our function is to correct legal errors. ***Keith***, 216 Wis.2d at 69, 573 N.W.2d at 892.

Oral Agreement.

Robert contends the parties had a valid property division agreement, which the circuit court refused to consider. Debbra testified that, although the

parties had discussed the matter of property division, they had never reached an agreement. The circuit court heard the entirety of Robert's testimony, but it admitted it only for maintenance considerations.

Section 767.255(3)(L), STATS., directs a court to consider:

> Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements 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.

Paragraph (3)(m) allows the court to consider "[s]uch other factors as the court may in each individual case determine to be relevant." Relevant evidence is that which has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Section 904.01, STATS.

Robert contends that just because an oral agreement would not be presumed to be equitable or binding under para. (3)(L), it does not necessarily follow that it could not be relevant to the property division under para. (3)(m). His argument presents a question of statutory construction about the meaning of para. (3)(m), in light of para. (3)(L). When we are asked to apply a statute whose meaning is in dispute, our efforts are directed at determining legislative intent. ***Truttschel v. Martin***, 208 Wis.2d 361, 365, 560 N.W.2d 315, 317 (Ct. App. 1996). In attempting to determine the intent of the legislature, we begin with the plain meaning of the language used in the statute. ***Id.*** If the language of the statute clearly and unambiguously sets forth legislative intent, our inquiry ends, and we must apply that language to the facts of the case. However, if the language used in the statute is capable of being understood by reasonably well informed persons in either of two or

more ways, it is ambiguous. ***D.S. v. Racine County***, 142 Wis.2d 129, 134, 416 N.W.2d 292, 294 (1987). If the statute is ambiguous, we will determine legislative intent from the words of the statute in relation to its context, subject matter, scope, history, and the object which the legislature intended to accomplish. ***Chicago and N.W. Transp. Co. v. Office of Comm'r of Railroads***, 204 Wis.2d 1, 7, 553 N.W.2d 845, 848 (Ct. App. 1996). Additionally, where a general statutory provision conflicts with a specific provision, the specific statute prevails. ***Fred Rueping Leather Co. v. City of Fond du Lac***, 99 Wis.2d 1, 5, 298 N.W.2d 227, 230 (Ct. App. 1980).

Paragraph (3)(L) requires the court to consider written property division agreements, which are binding on the court when they retain the presumption that they are equitable. Section 767.255(3)(L), STATS. Robert alleges error because the circuit court did not consider testimony of an alleged oral property agreement for purposes of property division under para. (3)(m). Robert makes much of the word "considered," asserting that even if the court did not enforce the entire alleged agreement, it should have "considered" it. But what would the court correctly do with such a "consideration"? If there were an agreement, then it would have controlled the property division, unless it were set aside under ***Button v. Button***, 131 Wis.2d 84, 388 N.W.2d 546 (1986). If there were no agreement, then the testimony was not relevant to property division. What Robert actually wanted the court to do was to give legal effect to the terms of an allegedly oral agreement, *i.e.*, he wanted the court to make an oral agreement binding in terms of the property division, under the nonspecific provisions of § 767.255(3)(m).

While § 767.255(3)(m), STATS., may be ambiguous because it could arguably be used to admit testimony of an oral agreement under its broad terms, it becomes clear that it was not intended to provide a mechanism to admit the

proffered testimony when read in context with § 767.26(8) and (10), STATS., and with § 767.255(3)(L). Section 767.26 sets out the statutory factors for maintenance determinations. Para. (8) permits the court to consider "[a]ny mutual agreement made by the parties before or during the marriage …." There is no requirement that such an agreement be written. Notwithstanding para. (8) of § 767.26, para. (10) permits the court to consider, "[s]uch *other* factors as the court may in each individual case determine to be relevant" (emphasis added). The language of § 767.26(10) is identical to that of § 767.255(3)(m). Those sections provide an opportunity for the court to consider the novel or unanticipated factors that do not fall under one of the named categories. *See* ***State v. Stevens***, 171 Wis.2d 106, 119, 490 N.W.2d 753, 759-60 (Ct. App. 1992).

However, the legislature did anticipate that alleged agreements about property division would arise in divorces and it specifically addressed such agreements in § 767.255(3)(L), STATS. The provisions of para. (3)(L) contrast sharply with those established for agreements relative to maintenance because para. (3)(L) requires property division agreements to be written. If the legislature had intended the court to consider alleged oral agreements for property division, it could have so specified, as it did in § 767.26(8), STATS., for maintenance. Furthermore, it is a basic maxim of statutory construction that detailed provisions which address a specific factor under consideration, such as para. (3)(L), are controlling in regard to that factor over less specific provisions, such as para. (3)(m). ***Fred Rueping***, 99 Wis.2d at 5, 298 N.W.2d at 230. Because we conclude that by specifically addressing property division agreements, the legislature intended that only written agreements be considered for purposes of property division, the circuit court did not erroneously exercise its discretion when it

refused to consider testimony of an alleged oral property agreement for purposes of property division and admitted it solely for maintenance considerations.

Property Division.

The court shall presume that all marital property is to be divided equally between the parties, but it may alter the distribution somewhat after considering statutory factors. Section 767.255(3), STATS. In addition to property division agreements such as those discussed above, the factors relevant to this dispute include the length of the marriage, the property brought to the marriage by each party, the contribution of each party to the marriage, the age and physical and emotional health of the parties, the earning capacity of each party and the tax consequences. ***Id.***

The circuit court began its discussion of these statutory factors by commenting that:

> Given that presumption [of an equal property division], one might argue there's nothing further for the Court to state. However, in fairness to the Petitioner and his strenuous arguments, the Court will respond so that the Petitioner understands why the Court does not believe any deviation from that presumption of an equal division is appropriate.

Robert argues that this statement indicates that the circuit court erroneously believed that the statutory presumption was not rebuttable. While we agree that such a view of the law would be erroneous and would warrant reversal (*see, e.g.,* ***Jasper v. Jasper***, 107 Wis.2d 59, 68, 318 N.W.2d 793, 797 (1982)), Robert's interpretation is not a fair characterization of the court's position, given its subsequent consideration of the factors listed in § 767.255(3), STATS.

Robert next contends that, even if the circuit court understood that it could deviate from an equal property division, its failure to recognize that the facts before it were sufficient to rebut the presumption constituted an abuse of discretion. Again, we agree with Robert that the relatively short term of the marriage and the fact that Robert brought the bulk of the divisible property into the marriage could favor an unequal property division, and could justify a deviation from the presumption in this case. *See* ***Jasper***, 107 Wis.2d at 61, 318 N.W.2d at 793. However, we disagree that the circuit court erroneously exercised its discretion by weighing those factors differently than this court might have. The circuit court considered each factor, but reasoned that "[a] seven-year marriage in and of itself is not so short as to require the Court to divide the property other than equally." Additionally, the court gave weight to Debbra's participation in the management of rental properties. The court also observed that each party had health problems, which could significantly impact future earnings. The court's balancing of these various factors was within its range of discretion.

After determining that an equal property division was in order, the circuit court decided to allow Robert some latitude in choosing the method by which he would meet his equalization obligation. In so doing, it stated that "[s]ince there are several means which do not have [a] capital gains tax impact, the Court has not attempted to factor in this element." This refusal to consider a statutorily relevant factor was legal error because how the property nets out after deducting realistic tax consequences is a test of the fairness of the property division. ***Jost v. Jost***, 89 Wis.2d 533, 542, 279 N.W.2d 202, 207 (1979); *see* § 767.255(3)(k), STATS.

Here, Robert would be unable to make the equalization payment without selling some of his assets, thereby incurring capital gains taxes. For

example, spreading the $118,675 payment he was required to make over seven years would result in a monthly principal payment of $1,412.80, exclusive of eight percent interest which was also ordered by the court. Amortized over seven years, payments of principal and interest would be approximately $1,923 per month. Given that Robert's net income, after the deduction of state and federal taxes and FICA, was $2,119, he would be left with $196 per month to meet all of his basic living expenses after he made his monthly payment to Debbra.[1] Because the circuit court believed that Robert could choose to make installment payments to satisfy the property division when he did not have sufficient income to permit him to do so, it erroneously exercised its discretion. Therefore, we reverse the property division and remand to the circuit court to calculate the tax consequences to Robert of selling sufficient property to achieve a fifty/fifty division based on values for the assets, net of taxes, which will be sold to equalize the marital estate. This direction does not require a revaluation of all the assets in the marital estate, but only those which Robert will sell to meet his obligation to Debbra. However, it will require Robert to pay less than $118,675 to achieve a fifty/fifty division of the marital estate.

CONCLUSION

We reverse the amount of the equalization payment of the divorce judgment, and remand for reconsideration of the property division in light of this opinion.

[1] The circuit court observed that Robert could sell his home without incurring capital gains taxes; however, there is nothing in the record to suggest that Robert would sell his own residence before selling his rental property. Additionally, the record does not provide any indication of why he should be forced to use his exemption, which can be claimed only once in an individual's lifetime.

By the Court.—Judgment reversed in part and cause remanded.

Not recommended for publication in the official reports.

No. 97-2206(C)

DEININGER, J. (*concurring).* I agree with the result reached in the court's opinion. I write separately to note my disagreement with that portion of the analysis which implies that a trial court may never consider oral agreements between the parties when considering whether an unequal property division should be ordered.

The majority states that Robert "wanted the court to make an oral agreement binding," but that is not what he argues on this appeal. Rather, he asserts only that an oral agreement regarding property division may be considered as a factor under § 767.255(3)(m), STATS., if deemed relevant by the trial court. He claims further that the trial court erred by not permitting his testimony regarding an oral agreement between the parties concerning property and financial issues to be admitted for the purpose of determining the property division.

The majority concludes that because of § 767.255(3)(L), STATS., only written agreements may be deemed a relevant consideration in determining property division. I agree with the majority that only written agreements *must* be considered by the trial court, but I do not agree that oral agreements may never be deemed a relevant factor under § 767.255(3)(m). I find nothing in the plain language of 767.255(3) that would compel the latter conclusion. To the contrary, the language of paragraph (3)(m) invites an expansive interpretation of the trial court's authority to consider factors beyond those enumerated in the paragraphs which precede it: "Such other factors as the court may in each individual case determine to be relevant." Section 767.255(3)(m). In my view, whether an oral

agreement regarding property division should be considered in a given case, and if so, what weight it should be given, are matters upon which the trial court may exercise its discretion.

The trial court concluded that it could neither admit nor consider any testimony regarding oral agreements between the parties for property division purposes, and the majority apparently agrees. I would hold that the court should have admitted the testimony and later considered whether any oral agreements were relevant to the property division in this case. Nonetheless, I would not disturb the trial court's property division on this ground. "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected …." Section 901.03(1), STATS.; *see also §* 805.18(2), STATS. This court need only reverse if we conclude that "the result might, within reasonable probabilities, have been more favorable" to Robert had the court admitted his testimony regarding an oral agreement on property issues. ***Nowatske v. Osterloh***, 201 Wis.2d 497, 507, 549 N.W.2d 256, 259 (Ct. App. 1996).

When asked by her counsel whether she had ever entered into "any verbal agreement [regarding property division or maintenance]," Debbra testified that "[w]e did discuss things, but we never came to any concrete conclusion about any of that." Thus, Robert encountered the problem faced by most litigants who wish to enforce oral agreements: the difficulty in establishing that there was an agreement, and if so, what it was. Moreover, the court did receive, and presumably considered, Robert's testimony that the parties kept their property and finances separate during the marriage. I cannot conclude that Robert has established, "within reasonable probabilities," that the property division would have been more favorable to him had the trial court admitted his testimony regarding an oral agreement for property division purposes. The trial court could

have properly concluded on this record that, to the extent there were any agreements (or discussions) between the parties regarding property issues, they were simply not a relevant factor in this case, let alone one that would outweigh those the court enumerated and discussed in its written decision.