

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 25, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 99-3223

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

ERIC W. KRUGER,

PETITIONER-RESPONDENT,

v.

CHRISTINA L. KRUGER,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: ANNETTE K. ZIEGLER, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Christina L. Kruger appeals the property division and maintenance provisions of the judgment divorcing her from Eric W. Kruger.¹ On appeal, Christina contends that the circuit court failed to apply proper legal standards when it divided the parties' marital estate and that it erred by awarding an unequal portion of the marital estate to Eric. She further argues that the circuit court erred in denying her request for maintenance or to reserve the question of maintenance for five years in light of her uncertain medical condition. We conclude that the methodology employed by the circuit court in dividing the marital estate was sufficiently ambiguous that we must reverse the property division and remand to the circuit court for further proceedings. We affirm the denial of maintenance to Christina.

¶2 Christina and Eric were divorced on June 11, 1999, after ten and one-half years of marriage. It was Christina's third marriage and Eric's first. The parties were forty and forty-one years of age, respectively, at the time of their divorce. There are no children from the marriage.² Eric and Christina both worked throughout the marriage, Eric as an electrician and Christina as a nurse. The circuit court found that the parties pooled all their income from various sources during the marriage to manage their household and raise Christina's children.

¹ Judge Annette K. Ziegler entered the amended findings of fact, conclusions of law and judgment of divorce on December 20, 1999. This judgment, which was amended to correct certain numerical calculations, incorporated as its terms the findings of fact, conclusions of law and judgment of divorce rendered orally by Judge John W. Mickiewicz at the close of trial on June 11, 1999.

² Christina has three children from a prior marriage who lived with the parties for much of the marriage, and for whom she received child support until the older children left home. The children are now adults.

¶3 At the time of trial, the parties had stipulated to the value of their assets, allocated most of their personal property and agreed to sell their homestead and adjacent lot. The only issues before the court were the division of marital property and the question of maintenance for Christina. Accordingly, the parties' testimony focused on the assets each party brought to the marriage and on Christina's health.

¶4 Christina testified that she brought property worth approximately \$55,000 to the marriage. The record indicates that she produced a highly detailed list of household goods and furniture that she valued at \$31,194, a sum that she admits was derived from the purchase price of the various items before the marriage. Many of these items were replaced or discarded during the marriage. In addition, she owned a 1988 Ford valued at \$12,000, which was replaced during the marriage, and had \$12,000 in cash proceeds from the sale of a prior residence which she contributed toward the home the parties built together upon their marriage. Although Christina did not consider this fact worthy of note in her appellant's brief, it is also undisputed that she is a residual beneficiary of a testamentary trust in which she has a future interest in one-half the residue of the trust if she survives her parents. The record indicates that on the date of the divorce the trust was valued at approximately \$806,000. Eric agrees that this future interest is an inherited asset and thus not part of the marital estate.

¶5 Eric did not testify as to furniture and household items he brought to the marriage, although the record indicates that he owned a car, a boat, a pool table and other household items at the time of the marriage. He testified that he had used his salary to acquire a number of mutual funds and certificates of deposit prior to the marriage. Before the parties were married, he liquidated some of these investments to purchase an unimproved lot for \$14,400, where the parties built

their home. When the parties decided to marry, he liquidated additional assets to make a \$50,252 down payment on a construction loan to build the home. Eric also testified that he liquidated an additional \$20,000 in assets to pay for the wedding, make improvements on the home, and purchase furniture for the family, including Christina's children. Eric owned interests in two limited partnerships valued at \$10,000 at the time of the marriage, but he concedes that these investments were primarily tax write-offs that retained no significant value upon maturity. Eric also brought an Individual Retirement Account (IRA) to the marriage. At the time of the marriage, this "Heartland IRA" contained a total of \$6,278. With the exception of \$3,012 that Eric rolled into the Heartland IRA from a 401K established with a previous employer, neither party made any contribution to the Heartland IRA during the course of the marriage. When the parties divorced, the Heartland IRA had a stipulated after-tax value of \$31,384.

¶6 We first review the circuit court's order dividing the marital estate. The court explicitly stated that an unequal division was warranted in this case and awarded the bulk of the marital estate to Eric. Christina challenges the circuit court's decision to divide the marital estate unequally. In particular, she challenges the circuit court's decision to award the entire Heartland IRA to Eric.

¶7 Matters concerning property division are entrusted to the sound discretion of the circuit court. *See Cook v. Cook*, 208 Wis. 2d 166, 171, 560 N.W.2d 246 (1997). That discretion, however, must be exercised by applying correct legal standards. *See id.* This court will sustain the circuit court's decision if it examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *See Sharon v. Sharon*, 178 Wis. 2d 481, 488, 455 N.W.2d 415 (Ct. App. 1993).

¶8 WISCONSIN STAT. § 767.255(3) (1997-98)³ creates a presumption that marital property is to be divided equally between the parties. *See id.* The court may alter this distribution, but only after considering the relevant factors listed in § 767.255(3)(a)-(m). *See Mack v. Mack*, 108 Wis. 2d 604, 607-08, 323 N.W.2d 153 (Ct. App. 1982). After weighing the relevant factors, the court must explain the effect of these factors upon the decision to divide property unequally. *See Arneson v. Arneson*, 120 Wis. 2d 236, 254, 355 N.W.2d 16 (Ct. App. 1984). The circuit court may not ignore those factors that are clearly relevant. *See id.*

¶9 Here, our difficulty lies not with the result of the circuit court's order dividing the marital estate unequally in favor of Eric, but in ascertaining whether the court applied a proper standard of law to reach this result. It is unclear whether the circuit court based its decision on proper consideration of the factors set forth in WIS. STAT. § 767.255(3), or whether the court's decision may have been based on the application of an erroneous legal standard introducing concepts from the marital property law that have no place in a divorce proceeding.

¶10 The court ruled orally from the bench at the close of trial, stating that an unequal division of property was warranted. The court made findings regarding some of the factors set forth in the property division statute, WIS. STAT. § 767.255, including the length of the marriage and the property each party brought to the marriage. In particular, the court discounted the value of Christina's claimed contribution, noting that many of the household items had been discarded or replaced. The court similarly noted that some of Eric's contributions, particularly money spent for the wedding and furniture, had also

³ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

“dissipated” during the marriage. Thus, at first blush it appears that the court properly based its decision after considering the factors set forth in the marital property statute. However, the court did not make findings with respect to each of the remaining factors set forth in § 767.255(3). Our concern that the circuit court did not apply the correct legal standard is increased by its frequent use of the term “tracing” in its discussion of the property each party brought to the marriage. The “tracing” language, which pervades the decision, suggests that rather than basing its determination on the application of the factors set forth in § 767.255, the circuit court may have improperly introduced marital property principles to divide the property.

¶11 The circuit court’s final statements regarding division of the property are also ambiguous in this regard. The court states that “out of the sale of the homestead, the husband will receive by way of disproportionate property division the first \$60,000. The balance on the homestead and lot after payment of the mortgage and the credit card payments will then be divided 50/50.”⁴ This is inconsistent with the court’s previously stated intent to divide the estate unequally. Moreover, this wording suggests that the circuit court may have employed tracing to award most of the value of the house to Eric before dividing the remaining estate equally. If this was the court’s methodology, it was in error. The Marital Property Act was designed to govern property ownership during the course of an on-going marriage and applies to property division only upon the death of a spouse. It was not intended to alter divorce law. *See Abitz v. Abitz*, 155 Wis. 2d 161, 176, 455 N.W.2d 609 (1990). It is also unclear from the record whether the

⁴ The court later corrected the property division to reflect the court’s order granting credit for the disparity in value of the parties’ vehicles. Accordingly, Eric received the first \$70,000 from the sale of the home.

court intended to exclude the Heartland IRA from the marital estate, which again would be an improper exercise of discretion, or whether the court simply considered it appropriate to award the entire Heartland IRA to Eric after proper consideration of the factors set forth in WIS. STAT. § 767.255(3), which would be entirely within its discretion.

¶12 We conclude that the circuit court’s ruling is too ambiguous for us to determine whether it was operating under a mistake of law when it divided the marital property in this case. We reiterate that our concern is not with the outcome reached by the circuit court on the facts of this case, but rather with our uncertainty regarding the legal standard applied by the circuit court. Accordingly, we reverse the property division and remand this issue to the circuit court with directions to consider all the factors set forth in WIS. STAT. § 767.255(3)(a)-(m) that the court finds are relevant. Because we remand for further findings on this point, we need not address Christina’s contention that the circuit court misused its discretion in calculating the respective values of the parties’ premarital assets.

¶13 We turn to the question of maintenance. The circuit court denied Christina’s request for maintenance and denied her request that the question of maintenance be reserved for a period of five years in light of her allegedly uncertain medical condition. The record supports the circuit court’s decision, and we affirm the denial of maintenance to Christina.

¶14 The amount and duration of maintenance awards rests within the sound discretion of the circuit court and will not be disturbed absent an erroneous exercise of that discretion. *See LaRocque v. LaRocque*, 139 Wis. 2d 23, 27, 406 N.W.2d 736 (1987). An erroneous exercise of discretion occurs when “the trial court has failed to consider the proper factors, has based the award upon a factual

error, or when the award itself was, under the circumstances, either excessive or inadequate.” *DeLaMatter v. DeLaMatter*, 151 Wis. 2d 576, 582-83, 445 N.W.2d 676 (Ct. App. 1989). Therefore, the court’s decision must be “the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.” *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

¶15 Christina contends that she is entitled to receive maintenance or, in the alternative, that the question of maintenance should be reserved for a period of five years in light of her uncertain medical condition. She testified that she had recently suffered medical problems that might result in a disability impairing her ability to support herself in the future. She underwent surgery for a bladder problem in 1998, missing nearly four months of work due to an infection that developed as a result of the surgery. At the time of trial, she testified that she had recently developed swallowing problems and was being evaluated in an effort to determine the source of the problem. The circuit court found that Christina, a registered nurse, was capable of supporting herself and that her earning capacity was close to that of Eric. The court further found that although Christina’s current employment did not afford her health insurance or other benefits, there was no evidence suggesting she would not be able to obtain a position with benefits. There were no children from the marriage and Christina’s three children from a prior marriage are now adults. With respect to her medical condition, the court found that Christina’s own testimony supported the court’s finding that she had fully recovered from the surgery and subsequent illness, and that her present medical condition had thus far not impaired her ability to work. The court also found that Christina had adduced no evidence regarding her medical condition—

no diagnosis, prognosis or other medical record—that indicated she was then unable to work or that she would likely be disabled in the future. Accordingly, the circuit court denied an award of maintenance and denied Christina’s request to reserve the question for five years. The circuit court’s determination is supported by the record and involved a logical application of the appropriate law to the facts.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded for further proceedings.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

