

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 23, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP2608

Cir. Ct. No. 2002FA151

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

RICHARD G. GABODA,

PETITIONER-APPELLANT,

V.

CORRENE A. GABODA,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Portage County:
FREDERIC FLEISHAUER, Judge. *Affirmed.*

Before Dykman, Deininger and Higginbotham, JJ.

¶1 DEININGER, J. Richard Gaboda appeals an order that lowered the property division equalization payment he had been ordered to pay to his former wife, Correne Gaboda. The parties' divorce judgment provided for the possibility

of an adjustment to the payment, to be based on the outcome of an intended sale by Richard of a portion of the farm personal property he was awarded in the divorce. Richard contends the trial court should have ordered a larger reduction in his equalization payment because the auction value of the property sold was only seventy-three percent of its appraised value, which, according to Richard, means that all of the personal property he was awarded was similarly overvalued in the property division.

¶2 Richard therefore argues that the trial court should have proportionately reduced the value of all the farm personal property and ordered his equalization payment reduced accordingly. He also asserts that the trial court erred by failing to take into account the capital gains tax consequences to him from the personal property sale, which he claims would further reduce the amount he should be required to pay to Correne. We are not persuaded the trial court erroneously exercised its discretion in ordering the adjustment that it did. Accordingly, we affirm the appealed order.

BACKGROUND

¶3 This appeal involves an adjustment to the equalization payment Richard was originally ordered to pay to Correne in the judgment that divorced them after twenty-four years of marriage. During their marriage, the parties engaged in farming, trucking and snowplowing businesses. At the time of the divorce, the marital estate consisted largely of farm real estate and related machinery and equipment, the bulk of which was awarded to Richard.

¶4 Prior to the commencement of the divorce action, Correne arranged and paid for appraisals of the couple's real estate and personal property by a local appraiser. The appraiser set the total value of the real estate at \$360,000 and the

total value of the business personal property at \$326,925. Richard did not obtain a separate appraisal and did not object at trial to the values placed on the property by Correne's appraiser, although he testified he believed that some of the appraised values were high. After deducting the couple's debts, the court valued the net marital estate at \$598,741.

¶5 The trial court awarded Correne \$240,000, approximately forty percent of the marital estate. Richard was ordered to pay her \$30,000 within a month of the divorce, which he did, and the balance of \$210,000 within six months of the divorce. During the trial, Richard maintained that, in order to pay Correne the balance of her share of the marital estate, he would have to sell some of the farm personal property awarded to him. Addressing that possibility, the court ordered the following in the divorce judgment:

- a. [Correne] shall be given notice consisting of a list of the property to be auctioned thirty (30) days prior to the time of auction.
- b. A professional auctioneer shall be utilized and the auction sale shall be conducted in a commercially reasonable manner, with both parties agreeing upon the auctioneer to be used.
- c. Both parties shall share equally in the costs of sale, including any commissions due and owing or other commercially reasonable fees due and owing to the auctioneer.
- d. *Both parties shall share equally in the event of any gain or loss resulting from the auction sale as compared with the aggregate appraised value of the items to be auctioned as established by the above-described personal property appraisals.*

(Emphasis added.)

¶6 Following the entry of the divorce judgment, Richard auctioned personal property that had been valued at \$210,010 in the property division. The auction was well advertised and 185 potential bidders attended, but the sale netted only \$154,128. The parties do not dispute that the sale was conducted in a commercially reasonable manner and complied with the quoted conditions in the divorce judgment. Shortly after the sale, Correne moved to “clarif[y]” the divorce judgment with regard to “the marital property settlement payment due” her.

¶7 The trial court, at the conclusion of the hearing on Correne’s motion, reduced the amount Richard owed to Correne based on the reduced sale value of the items sold as compared to their appraised value in the divorce. The court calculated the remaining amount due to Correne as follows. First, it calculated the difference between the appraised value (\$210,010) and the sale proceeds for the items sold (\$154,128), a reduction in value of \$55,882. The court then reduced the value of the parties’ marital estate by this difference: \$598,542¹ minus \$55,882, yielding an adjusted marital estate value of \$542,660.

¹ The total value of the marital estate as set forth in the parties’ divorce judgment was \$598,741, while the figure used at the postjudgment adjustment hearing was \$598,542. Neither the record nor the parties explain why a slightly different figure was used at the postjudgment hearing.

¶8 Using the same 60/40 ratio it had in the original property division, the trial court apportioned the adjusted marital estate as follows: \$325,596 to Richard and \$217,064 to Correne. Next, the court subtracted from \$217,064 the payments Richard had made to Correne up to the date of the hearing: \$30,000 paid within the first month, and another \$147,750 thereafter. From the resulting figure, which the court stated was “\$39,315” ($\$217,064 - \$30,000 - \$147,750 = \$39,314$), the court subtracted 50% of the costs of the auction sale (total costs $\$10,159.31 \times .5 = 5,080$; $\$39,315 - \$5,080 = \$34,235$). The court then made two final adjustments: (1) it apparently added \$79 to the total to account for Correne’s share of a “wagon and flat rack” whose sale price had not been included in the sale proceeds amount supplied by Correne’s counsel, and (2) it apparently *subtracted* \$900 to account for Richard’s one-half share of the appraisal fee that Correne had paid during the divorce ($\$34,235 + \$79 - \$900 = \$33,414$, which is the figure the court ordered Richard to pay to Correne to complete the property division).²

² Correne paid \$1800 for the appraisal upon which the divorce property division was based. The court ordered at the conclusion of the divorce trial that the parties were to split the cost of the appraisal. Thus, it appears that the trial court should have added \$900 to the amount Richard owed Correne, not subtracted that amount. Correne has not cross-appealed regarding the apparent error in the treatment of the appraisal fees.

¶9 Richard appeals the order directing him to pay Correne “an additional \$33,414 to equalize the marital estate, pursuant to the parties’ Judgment of Divorce.”³

DISCUSSION

¶10 Had no adjustment to the equalization payment been ordered, the balance due at the time of the hearing from Richard to Correne pursuant to the divorce judgment would have been \$62,250: \$240,000 (Correne’s original share) - \$177,750 (previously paid by Richard) = \$62,250 (original balance remaining due). The adjusted payment of \$33,414 essentially reduced the balance due to Correne by forty percent of the “loss” on the items sold and fifty percent of the sale costs, as adjusted for the wagon value and appraisal fee. Richard claims the trial court erroneously exercised its discretion by calculating the amount owed to Correne using the method described above.

¶11 Richard argues that, because the portion of the couple’s personal property that was awarded to him and sold at the auction yielded approximately seventy-three percent of its appraised value, all of the personal property he was awarded in property division was similarly overvalued. Thus, according to

³ Richard also attempted to appeal the property division and maintenance provisions in the divorce judgment, but we concluded in an earlier order that his appeal was untimely with respect to the divorce judgment. Our jurisdiction is thus limited to review of the post-judgment order that modified the property division equalization payment.

Richard, the total value of the personal property he received in the divorce should have been reduced by twenty-seven percent and the equalization payment adjusted accordingly. Richard also argues that the trial court erred by failing to consider the capital gains tax consequences of the auction sale which would have further reduced the amount he owed to Correne.

¶12 The division of the property of divorcing parties rests within the sound discretion of the trial court. *See Brandt v. Brandt*, 145 Wis. 2d 394, 406, 427 N.W.2d 126 (Ct. App. 1988). The court's valuation of the parties' property is a finding of fact, which we will not disturb unless it is clearly erroneous. *Rodak v. Rodak*, 150 Wis. 2d 624, 633, 442 N.W.2d 489 (Ct. App. 1989). We will uphold a trial court's division of property if we determine that the trial court considered the relevant facts, applied the proper standard of law, and used a rational process to reach a conclusion that a reasonable judge could reach. *See Rumpff v. Rumpff*, 2004 WI App 197, ¶27, 276 Wis. 2d 606, 622, 688 N.W.2d 699.

¶13 The trial court based its property division in the original divorce judgment on the appraised values of the parties' real and personal property. It appeared likely, however, at the time of the entry of the judgment, that Richard would need to sell some farm machinery and equipment in order to pay Correne her share of the marital estate. To account for this possibility, the court included a provision requiring the parties to share equally the costs of such a sale and,

further, the court directed that they would “share equally in the event of any gain or loss resulting from the auction sale *as compared with the aggregate appraised value of the items to be auctioned*” (emphasis added).

¶14 Generally, the assets of the marital estate are valued as of the date the divorce is granted, *see Holbrook v. Holbrook*, 103 Wis. 2d 327, 346-47, 309 N.W.2d 343 (Ct. App. 1981), and achieving finality is an important goal of property division in a divorce, *see Washington v. Washington*, 234 Wis. 2d 689, 696, 611 N.W.2d 261 (2000). Occasionally, however, a final division of property in a divorce judgment may require subsequent remedial action in order “to effectuate the objectives of the final division without disrupting the finality of the judgment.” *Id.* at 696-97. Furthermore, if a trial court concludes that a judgment provision relating to property division is ambiguous, it may subsequently clarify the provision. *See Schultz v. Schultz*, 194 Wis. 2d 799, 802, 535 N.W.2d 116 (Ct. App. 1995). Provided we agree with the trial court that its prior judgment is ambiguous, we will accord great deference to the trial court’s resolution of the ambiguity and we will affirm “unless the trial court’s subsequent interpretation is devoid of reason.” *Id.*

¶15 We agree with the trial court’s implicit conclusion that the provision in the parties’ divorce judgment allowing for them to “share equally in the event of any gain or loss resulting from the auction sale” was ambiguous. The court clearly intended that there be an adjustment to the property division in the event

the sale values differed from the appraised values of the items sold, but the judgment did not specify how the parties' adjusted shares would be determined once the sale had occurred.

¶16 In our view, the trial court's interpretation and effectuation of the judgment's post-sale adjustment provision was reasonable. The court made the adjustment based on the reduced value of the items actually sold at the auction, which is consistent with the language of the provision specifying that the gain or loss to be shared by the parties was that "resulting from the auction sale as compared with the aggregate appraised value *of the items to be auctioned*" (emphasis added). The court's conclusion that the loss should be apportioned between the parties according to their respective shares of the estate, i.e., 60/40, was also not unreasonable.⁴ While it is true that this resulted in Richard bearing a larger share of the loss than Correne, had it not been for the court's allowance of a post-sale adjustment, Richard would have borne the entire loss in value of the

⁴ The judgment of divorce specified that Richard and Correne were to "share equally in the event of any gain or loss resulting from the auction sale." In both the divorce judgment and the postjudgment adjustment, however, the court employed a 60/40 division of the marital estate. Richard does not argue that the trial court erred in this particular regard, although the effect of employing the 60/40 allocation after deducting for the sale loss was to increase Correne's adjusted share over what it would have been had the loss been "share[d] equally." (50% of the \$55,882 loss equals \$27,941. If Correne's original \$240,000 share were reduced by that sum, she would have an adjusted share of \$212,059 instead of \$217,064.) Richard does not specifically challenge on appeal that what the trial court apparently meant by "equal sharing" of any gain or loss resulting from the auction sale is that the parties would share in proportion to their respective shares of the marital estate as awarded in the divorce judgment.

items sold. The court also acted reasonably in dividing the sale costs equally between the parties, which is what the adjustment provision called for. Finally, if the court erred in its treatment of the appraisal fee, the error benefited Richard, and Correne has not cross-appealed (see footnote 2).

¶17 Because the trial court reasonably interpreted and clarified the divorce judgment, we reject Richard’s contention that the trial court should have gone further and revalued *all* of the personal property he received on the basis of the sale-to-appraised-value ratio for the items sold. First, as we have noted, Richard did not object at trial to the use of the appraisal Correne had procured for property division evaluation purposes. Moreover, Richard’s proposed adjustment would have been inconsistent with the language in the judgment calling for loss-sharing only on “the items to be auctioned.” Thus, what Richard proposes goes beyond a “clarification” of the property division in the judgment and is arguably a “modification” to it, which is prohibited by WIS. STAT. § 767.32(1)(a) (2003-04).⁵

¶18 We similarly reject Richard’s argument that the trial court erred in failing to take into account the capital gains tax consequences of the sale. We recognize that WIS. STAT. § 767.255(3)(k) provides that, when dividing the

⁵ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted. WISCONSIN STAT. § 767.32(1)(a) provides in relevant part, “... nor shall the provisions of a judgment or order with respect to final division of property be subject to revision or modification.”

property in a divorce, a court should consider “[t]he tax consequences to each party,” but it can do so only if the party who allegedly suffers such consequences provides evidence as to the tax impact on him or her. A party seeking an allowance for tax consequences bears the responsibility of demonstrating to the trial court what those consequences are. *See Fowler v. Fowler*, 158 Wis. 2d 508, 518-19, 463 N.W.2d 370 (Ct. App. 1990). As we explained in *Fowler*:

[I]t is not up to the court to provide the evidence. Rather, it is the court's responsibility to decide on the basis of the evidence. If the parties do not present the trial court with any evidence or other reliable data as to the tax consequences of the court's decision, the court does not abuse its discretion in failing to take those consequences into consideration.

Id. at 519 (citation omitted).

¶19 Richard provided no evidence or data at the postjudgment hearing that would have permitted the trial court to make a further adjustment to the property division for the tax consequences to Richard flowing from his personal property sale. Richard first brought up the subject of capital gains tax consequences from the sale at the conclusion of the hearing. He told the court, “I had no choice, but to sell it. I couldn’t get a loan with that kind of maintenance. I feel that capital gains should be shared.” The court responded as follows:

... I tend to agree [with Correne’s counsel] that’s *not* at issue today. My reaction is that if there are capital gains, my initial reaction to that process is if there are capital gains as part of the sale, that those are reduced proceeds as well and ought to be divided. That’s how I would react. I’m not saying that’s my decision. *I don’t know how much money that is.*

If you want to argue about it, you can argue about it, but it seems to me we divided all the other costs of the

sale. Capital gain is legitimate cost of that sale. It's money out of somebody's pocket. I think that it ought to be shared.

(Emphasis added.)

¶20 Thus, the trial court essentially agreed with Richard that the tax consequences of the personal property sale were a legitimate consideration and might well have been taken into account had evidence of the tax impact on Richard been presented. That not having occurred, however, we conclude the court did not erroneously exercise its discretion by not granting a further reduction in the equalization payment for capital gains taxes on the sale. *See Fowler*, 158 Wis. 2d at 519.

CONCLUSION

¶21 For the reasons discussed above, we affirm the appealed order.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

