COURT OF APPEALS
DECISION
DATED AND RELEASED

April 3, 1996

NOTICE

No. 95-1263

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

In re the Marriage of:

VIRGINIA KASIAN,

Petitioner-Respondent,

v.

GERALD KASIAN,

Respondent-Appellant.

APPEAL from a judgment of the circuit court for Waukesha County: CLAIR VOSS, Judge. *Affirmed*.

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

PER CURIAM. Gerald Kasian appeals from a judgment of divorce from Virginia Kasian. He argues that awarding Virginia one-half the value of a residence violates the parties' antenuptial agreement, improperly includes the property in the marital estate, and fails to give regard to a mortgage lien against the property. He also challenges the award of maintenance to Virginia. We affirm the judgment.

The parties were married in 1980. Gerald operated a sole proprietorship, Green Acres Nursery, and owned and operated with his four sons a business corporation, Kasian & Sons, Inc. After the marriage the parties lived at a home on West Honey Lane, New Berlin. The Honey Lane home was sold and the proceeds used to purchase a residence on Woodland Drive. The Woodland Drive home was sold in 1987 and the proceeds divided equally between the parties and used for vacation purposes. Upon sale of the Woodland Drive home, the parties moved into a residence on Wexford Court, Brookfield. The home was purchased by Gerald's businesses and titled solely in Gerald's name.

This action for divorce was commenced on September 7, 1990. On that date, title to the Wexford Court home was transferred to Kasian & Sons, Inc. On October 27, 1992, Kasian & Sons took out a mortgage against the Wexford Court home.

The trial court found that the Wexford Court home was a marital asset and ordered it to be sold and the proceeds split equally, or that one party buy the other's interest for one-half the value of the home. Gerald was also ordered to pay maintenance in the amount of $1000 per month for five years.

Gerald argues that the equal division of the Wexford Court home is contrary to the parties' antenuptial agreement.[1] That agreement embodied the parties' desire that their marriage not change the existing rights of their children in their individual property. Article V provides:

In the event of a divorce between the parties, it is agreed that

> Gerald shall receive no property of [sic] money from Virginia, but that Virginia shall receive from Gerald the same amounts of property as a settlement as set forh [sic] [in] ARTICLE III B. namely one half.

[1] The antenuptial agreement was found to be enforceable early in the action. On appeal, neither party challenges the enforceability of the agreement.

Article III B provides:

> It is with the understanding of Virginia and Gerald at the time of this marriage, Gerald will relinquish, one-half (1/2) ownership to Virginia, the present home at 1300 West Honuey [sic] Lane, New Berlin, Wisconsin or any new home built or purchased in the future.

Gerald contends that because the proceeds of the parties' Woodland Drive residence were divided equally during the marriage, the agreement has been fulfilled and Virginia cannot claim any interest in the Wexford Court home.

The construction of a contract is a legal question that we decide independently of the trial court's determination. ***Antuk v. Antuk***, 130 Wis.2d 340, 343-44, 387 N.W.2d 80, 81 (Ct. App. 1986). The purpose of construction is to ascertain the true intention of the parties as expressed by the contractual language. ***Id.*** at 343, 387 N.W.2d at 81. The best indication of the intent of the parties is the language of the contract itself. ***Levy v. Levy***, 130 Wis.2d 523, 535, 388 N.W.2d 170, 175 (1986). The recital clauses may also be examined to determine the parties' intent. ***Id.*** at 534, 388 N.W.2d at 175.

The marital agreement evinces an intent of the parties to protect Gerald's business interests from claims by Virginia and to provide Virginia with an interest in a home in the event of divorce or Gerald's death. The recitals indicate that each party had previous marriages, and each had adult children from previous marriages. In the event of Virginia's death, Gerald waived all interest in Virginia's property. If Gerald died, "title to any home which the parties or either of them own are [sic] living in" was to be transferred to Virginia. Article III B requiring Gerald to "relinquish" to Virginia one-half "ownership" in the Honey Lane home or any home purchased in the future is consistent with the intent that Virginia be assured a residence upon dissolution of the marriage, whether by death or divorce. The provision is reasonably construed to provide Virginia a one-half ownership interest in the primary residence of the parties at a given moment, particularly on the date of the divorce.

The near equal division of the proceeds of sale from the Woodland Drive home is irrelevant. That the parties agreed to use those proceeds as they did does not change the language in the marital agreement. It is not the duty of this court to use the rules of construction to revise an unambiguous agreement in order to relieve a party to the agreement from terms which become disadvantageous. *See* ***Old Tuckaway Assocs. Ltd. v. City of Greenfield***, 180 Wis.2d 254, 280-81, 509 N.W.2d 323, 333 (Ct. App. 1993). The agreement intended to give a present ownership interest in whatever home the parties lived in. It governs disposition of the Wexford Court home.

Gerald next argues that the Wexford Court home cannot be considered marital property because it was purchased with business assets. The mere fact that an asset is purchased with business income does not exempt it from the property division. Only property acquired by inheritance or gift is excluded.[2] Section 767.255(2)(a), STATS. There is no claim here that the business gifted the home to Gerald.

The trial court found that the Wexford Court home was a personal asset. That finding is not clearly erroneous. Section 805.17(2), STATS. The evidence was that the businesses were solely owned or controlled by Gerald and that the line between personal and business transactions had often been obscured. Further, the trial court found that Gerald's transfer of the property to the business when the divorce action was commenced was an attempt to secrete assets from the marital estate. The home was properly subjected to division under the provision in the antenuptial agreement.

We summarily reject Gerald's next two claims with respect to the Wexford Court home. He claims that appreciation in the home was exempt

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[2] Gerald misreads the following statement in ***Popp v. Popp***, 146 Wis.2d 778, 795, 432 N.W.2d 600, 606 (Ct. App. 1988): "We first note that if Richard's testimony that certain of this artwork was purchased with PMP Trenching funds is correct, there can be no transmutation because the shares of PMP were not gifted or inherited." Gerald contends that the statement holds that property purchased with funds from a nongifted, noninherited business enterprise is an exempt asset. He fails to recognize that Richard Popp's interest in PMP Trenching was included in the marital estate. The quoted statement only indicates that the transmutation analysis did not have to be applied to a portion of the artwork purchased with marital assets.

from division. This was not separate property and the appreciation is therefore not separate either. That the business entities made remodeling and landscaping improvements to the home in the amount of $75,000 to $80,000 does not exempt the increased value either.[3] The improvements were not due to the sole efforts of one spouse to increase the value of a marital asset. The businesses were attempting to increase the value of a supposed business asset.

Gerald argues that it was error to require the division of the home's value without regard to the existing mortgage on the property. The trial court found that Gerald's transfer of the property to the business was fraudulent. The mortgage debt was a continuation of Gerald's attempt to deprive Virginia of an equitable share of the marital estate. It was not a marital debt. It was not a misuse of discretion to divide the asset in a manner that charged Gerald's interest with satisfaction of the mortgage debt.[4]

We turn to the award of maintenance. The determination of the amount and duration of maintenance rests within the sound discretion of the trial court and will not be upset absent a misuse of discretion. ***Wikel v. Wikel***, 168 Wis.2d 278, 282, 483 N.W.2d 292, 293 (Ct. App. 1992). Discretion is properly exercised when the court arrives at a reasoned and reasonable decision through a rational mental process by which the facts of record and the law relied upon are stated and considered together. ***Id.***

Gerald first challenges the trial court's finding that he purposely retired from the business operations in order to avoid his support obligation to Virginia.[5] Gerald equates the finding to one that he was "shirking" his duty of support. He suggests that because he was at an appropriate retirement age, the trial court could not require him to work "*ad infinitum*."

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[3] Gerald's businesses made improvements to the property to use it as a model to show prospective landscape customers.

[4] We reject Gerald's suggestion that the trial court's order impaired the interest of the mortgagee, who was not a party to the action.

[5] Three months before trial, Gerald stopped taking salary and draw checks from the businesses and declared his retirement. He claimed that his sole source of funds was social security in the amount of $1077 per month.

We need not concern ourselves with whether the trial court made proper findings to support the award of maintenance based on the concept that Gerald was shirking. *See* ***Wallen v. Wallen***, 139 Wis.2d 217, 224, 407 N.W.2d 293, 295-96 (Ct. App. 1987). The trial court found that Gerald had control over many assets. It imputed income to Gerald from business operations. Thus, the trial court was determining income by a method which disregarded corporate or business structures which tended to shield Gerald's financial ability to pay. *See* ***Schinner v. Schinner***, 143 Wis.2d 81, 105, 420 N.W.2d 381, 390 (Ct. App. 1988) (urging the family court to "utilize its creative talents to monitor and control such deceptive tactics"). The circuit court's determination of income is a finding of fact which we will not set aside unless clearly erroneous.[6] ***DeLaMatter v. DeLaMatter***, 151 Wis.2d 576, 588, 445 N.W.2d 676, 681 (Ct. App. 1989).

The trial court's findings are supported by the record and must be sustained. Gerald claims that the businesses are now under the control of his sons, highly encumbered and losing money. However, Gerald is a fifty-one percent owner of the family-controlled corporation which has gross receipts over one million dollars. He solely owns the nursery business and owns numerous properties connected with that business. Moreover, the evidence established that Gerald utilized company houses, including a corporate villa in Mexico, and drove company cars.

Gerald also argues that Virginia is employable and that the finding that she is unable to work is clearly erroneous. Virginia testified about her many health problems and the restrictions she would suffer in attempting to work. Gerald produced the testimony and report of a vocational expert. The expert's conclusion that Virginia could obtain a medical clerical position was based solely on his review of Virginia's deposition. The weight of the evidence is peculiarly within the province of the trial court acting as the trier of fact.

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[6] Even if we were to consider the trial court's finding to be that Gerald was shirking, our standard of review is the same. *See* ***Wallen v. Wallen***, 139 Wis.2d 217, 224, 407 N.W.2d 293, 296 (Ct. App. 1987). Gerald's claim is that because of business stress he chose to retire. Where a nonvolitional reason for a reduction in income is advanced, there should be "positive evidence of [the payor's] bad faith in failing to recover financially unless the trial court can find that the [payor's] explanation or circumstances are inherently improbable or the [payor's] veracity is discredited." ***Id.*** at 226, 407 N.W.2d at 296. The record here establishes Gerald's bad faith in attempting to secrete assets from Virginia. It is also apparent that the trial court questioned Gerald's veracity.

Wiederholt v. Fischer, 169 Wis.2d 524, 533, 485 N.W.2d 442, 445 (Ct. App. 1992). Due regard must be given to the opportunity of the trial court to assess the credibility of the witnesses. ***DeLaMatter***, 151 Wis.2d at 590, 445 N.W.2d at 682. The trial court's finding that Virginia was unable to work is not clearly erroneous.

We conclude that the trial court's maintenance award was the proper exercise of discretion. It meets both the fairness and support objectives of maintenance. *See* ***Wikel***, 168 Wis.2d at 282, 483 N.W.2d at 293.

By the Court.—Judgment affirmed.

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