COURT OF APPEALS
DECISION
DATED AND FILED

February 28, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP838 **Cir. Ct. No. 2009FA81**

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

IN RE THE MARRIAGE OF:

SHARON TOWNE ZERNIA,

PETITIONER-RESPONDENT-CROSS-APPELLANT,

V.

JOHN ALLEN ZERNIA,

RESPONDENT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for La Crosse County: TODD W. BJERKE, Judge. *Reversed and cause remanded.*

Before Sherman, Blanchard and Kloppenburg, JJ.

¶1 KLOPPENBURG, J. This case concerns the enforceability of a marital property agreement executed by John Zernia and Sharon Zernia prior to

their marriage in 1989. In the parties' subsequent divorce action, the circuit court concluded that the agreement was enforceable, but only with respect to its retirement account provisions, which provided that the parties' respective retirement accounts would remain solely-owned by each party throughout the marriage and upon divorce. The circuit court then considered the value of each party's retirement accounts when awarding spousal maintenance. John appeals the court's judgment, arguing that the agreement is enforceable in its entirety, that the court improperly considered the value of John's retirement account when awarding maintenance, and that the court erred in awarding permanent maintenance. Sharon cross-appeals, arguing that the entire agreement is unenforceable. For the reasons discussed, we conclude that the court erred in its determination that the agreement was enforceable in any respect, including with respect to the retirement account provisions. Therefore, we reverse on the issue of the agreement's enforceability raised in the appeal and cross-appeal,[1] and remand this case to the circuit court to reconsider the property division and, if necessary, the award of spousal maintenance, without regard to the marital property agreement.

BACKGROUND

¶2 John and Sharon[2] met in June 1985 at Gundersen Lutheran Hospital, where John was employed as a new resident and Sharon was employed as an

[1] Our decision addresses that part of John's appeal that concerns the enforceability of the agreement. Because we remand this case to the circuit court for its reconsideration of the property division and maintenance, we do not address John's arguments on appeal concerning maintenance.

[2] Given their common surname, we will refer to the parties by their first names to prevent confusion.

oncology nurse. Sharon was divorced in May 1987, ending a previous four-year marriage. John and Sharon began dating in October of 1987, moved in together during the summer of 1988, and married on May 27, 1989.

¶3 While living together prior to the marriage, John and Sharon shared living expenses. According to John, he first expressed to Sharon his desire to protect his income and retirement with a marital property agreement[3] in July 1988. According to Sharon, John first discussed the idea of obtaining a marital property agreement with her sometime after January 1989, when she had her first marriage annulled.

¶4 In April 1989, John met with an attorney for the purpose of drafting a marital property agreement. The attorney sent John a draft agreement accompanied by a cover letter dated May 10, 1989, which John received on May 11 or 12. In the accompanying cover letter, the attorney advised that Sharon should obtain separate legal advice before signing the agreement. John testified that he gave Sharon the agreement and accompanying cover letter immediately upon receiving them from the attorney. Sharon testified that she did not receive the documents until May 25, 1989, the date on which the parties signed the agreement. It is undisputed that Sharon never met with John's attorney, nor did she ever seek advice from independent counsel regarding the agreement.

¶5 Sharon testified that she read the agreement, but did not understand its terms. She testified that she felt that she had no choice but to sign the

[3] The parties, their lawyers, and various witnesses vary in their description of the agreement, referring to the agreement as either a "prenuptial agreement," a "premarital agreement," or a "marital property agreement." We will refer to the agreement as a "marital property agreement" or "the agreement" throughout this opinion.

agreement, because John would not marry her without an agreement and the wedding was two days away. Based on her experience in meeting with her previous divorce attorney, she did not believe she had enough time to seek legal advice two days before the wedding.

¶6 John and Sharon completed financial statements that were appended to the agreement at home. They signed the financial statements and the agreement before a notary at the La Crosse County courthouse on May 25, 1989. The financial statements included information regarding income, assets, and liabilities of both John and Sharon. At that time, Sharon earned $25,000 per year and John earned $76,000 per year. John and Sharon each had student loans, but listed only the amount of their respective monthly payments, not the terms of the loans or total amounts owed. Rather than list a dollar amount (as suggested by a pre-printed dollar sign symbol on the financial statement form), John wrote "at work" on the form's line for retirement plan information. Similarly, Sharon wrote "work" for her retirement plan information. Both John and Sharon listed "0" for real estate, household goods, and bank deposits.

¶7 Sharon knew the amount of John's monthly student loan payments and their ten-year terms, but did not know the principal balances. The financial statements did not indicate the nature of the retirement accounts, the amount of monthly contributions, or whether the accounts were vested.[4] However, Sharon

[4] Though not listed in their financial statements appended to the agreement, the parties' testimony revealed that John started contributing to a 401(k) in August of 1988 (after starting his new job as an emergency room physician) and had $2,100 in that account at the time he signed the agreement. At that time, he did not earn any retirement pension benefits. Sharon had an independent retirement account to which she had contributed $2,000 per year for eight or nine years (since age twenty-two) before signing the agreement, in addition to her pension plan at Gundersen Lutheran.

knew that as a doctor, John's income and retirement benefits would be significantly greater than hers.

¶8 As for the agreement, the relevant terms are as follows:

> WHEREAS, the parties contemplate marrying each other; and
>
> WHEREAS, the parties desire by this Agreement to determine the system of property ownership applicable during their marriage, and in the event of the termination of their marriage; and
>
> WHEREAS, each party acknowledges receiving a fair and reasonable disclosure under the circumstances of the other's property and financial obligations, as set forth in a separate Memorandum of Assets, Liabilities and Income executed by them on this date; and
>
> WHEREAS, each party understands that the property of the other may be increased in the future through compensation, inheritances, gifts, profits, appreciation or the like; and
>
> WHEREAS, each party understands that in the absence of this Agreement the law would confer upon him or her property rights and interests in certain of the present and future property of the other, and each party understands that those rights and interests will be affected by this Agreement;
>
> NOW, THEREFORE ... it is covenanted and agreed by and between the parties hereto as follows:
>
> 1. All property now owned or herafter [sic] acquired by a party, of whatever nature or description, whether real or personal and wherever situated, shall be classified as the solely-owned property of that party, as though he or she were an unmarried person, in accordance with the classification principles in paragraphs 2 and 3.... [S]olely-owned property shall include:
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> A. All compensation, earnings, and income generated by that party through the provision of services, labor, effort, inventiveness, physical or intellectual skill, creativity or managerial activity.

> B. All deferred benefits of the employment or self-employment of that party, including all retirement benefits, deferred compensation and deferred employment benefits, life and other insurance, individual retirement accounts, and other benefits ....
>
> ....
>
> 2. Property now owned or hereafter acquired by a party shall be classified as follows:
>
> A. Property earned by or titled in the name of a party is the solely-owned property of that party.
>
> ....
>
> 3. The classification of property as the solely-owned property of a party shall extend to income from the property; to additions to property so classified, regardless of the source of the funds or property used to make or acquire the addition; to property of other classifications mixed or commingled with the property ....
>
> 4. Each of the parties is financially able to provide for his or her own support at an appropriate standard of living, and each shall be financially responsible for himself or herself. Neither shall be responsible for providing support for the other in the form of food, clothing, shelter, transportation, insurance, health care, or other necessities consistent with any standard of living that the parties may enjoy.
>
> ....
>
> 11. Prior to signing this Agreement, each party consulted with an attorney of his or her choice. Each party has received from such attorney an explanation of the terms and legal significance of this Agreement and the effect that it has upon any interest that might accrue to each party in property acquired by the other. Each party acknowledges that he or she understand [sic] the Agreement and its legal effect and is signing the Agreement freely and voluntarily.

¶9 The agreement neither addresses nor allocates responsibility in caring for future children. John's attorney testified that he drafted the agreement pursuant to a state bar form from a Wisconsin family law handbook. John's attorney further testified that the agreement does not reference any economic value

given to homemaking or childcare services. Prior to the marriage, John and Sharon discussed having children during their marriage.

¶10 Approximately three months after they married, John and Sharon moved to a farm in Stoddard, Wisconsin. After their first son was born in June 1990, Sharon continued to work outside the home, but on a part-time basis. After their second son was born in August 1993, Sharon maintained her part-time work schedule, earning approximately $4,000 per year. Their third son was born in October 1998. Sharon did not return to work outside the home after her maternity leave with the youngest son. John testified that he was upset when Sharon decided not to return to work, as he wanted her to be responsible for herself financially. John wanted Sharon to work outside the home and to also be responsible for the children. Sharon testified that John did not indicate to her that it was a problem for her not to work outside the home, and, when asked if John frequently asked her to return to work during the marriage, Sharon answered that he did not.

¶11 Sharon intended to return to work after her last maternity leave, but she realized with John's rotating work schedule, their growing deer farm, and three children, she "couldn't do it." Sharon was largely responsible for transporting the children to and from their medical appointments, various athletic practices, swimming lessons, Boy Scouts, and music lessons. The Zernia residence in Stoddard was twenty to twenty-five minutes from La Crosse. The children attended Catholic schools in La Crosse that did not offer bus transportation.

¶12 During their marriage, both John and Sharon's earnings were deposited into a joint checking account. For the years in which Sharon earned minimal amounts, she typically opted to cash rather than deposit her check.

During the marriage, John financially supported Sharon and the children, including paying for the house, food, health insurance, and other necessities.

¶13 John has had the same job as an emergency-room doctor throughout the marriage. John works seven days in a fourteen-day period, including every other weekend and holidays. He works the same eight-hour shift for four weeks, and then rotates forward to the next shift. The shifts include 7:00 a.m. to 3:00 p.m., 9:00 a.m. to 5:00 p.m., 3:00 p.m. to 11:00 p.m., 5:00 p.m. to 1:00 a.m., and 11:00 p.m. to 7:00 a.m. He also serves as the medical director of the BioLife Plasma Services in Onalaska, at which he is contracted to work four hours per week.

¶14 In 2009, Sharon returned to part-time work as a substitute nurse at the Family and Children's Center in La Crosse. Sharon earns approximately $22,000 per year, working twenty hours per week. A vocational expert testified that as a registered nurse, Sharon has an earning potential of at least $47,000 annually. At the time of trial, John's retirement account had a value of $1,622,093.85, and Sharon's retirement account had $63,234.08. Sharon did not contribute to a retirement account while she was not working outside the home.

¶15 Sharon filed for legal separation on February 18, 2009. The circuit court held hearings on January 20 and 21, and February 11, 2011, concerning the enforceability of the agreement. In a decision dated May 26, 2011, the circuit court ruled that the "[a]greement should be enforced with respect to the disposition of the retirement accounts of the parties, but not with respect to the other provisions ...." The court reasoned that John "did not enforce the provisions requiring [Sharon] to provide financial responsibility for her own support; including food, clothing, shelter, transportation, insurance, healthcare, and other

necessities of the parties' standard of living." The court noted John's testimony that he "provided for the family by paying the marital debt, providing [the money for mortgage payments on] the home, and otherwise assuring that the family's needs were met." Because these provisions were not followed throughout the marriage, the court did not enforce them. However, the court further noted that:

> The main provision of the Agreement of concern to the court, therefore, involves the retention of the retirement accounts by the parties. [Sharon] should have been able to determine for herself that [John] would likely accrue a sizeable retirement account if he retired as a physician, and she would have a modest retirement account if she retired as a registered nurse. This provision of the Agreement was followed throughout the marriage, and the court will enforce it at this time.

¶16 On August 29 and 30, 2011, the circuit court held hearings concerning Sharon's request for indefinite spousal maintenance and attorney's fees. The court determined that in light of the statutory factors set forth in WIS. STAT. § 767.56 (2011-12),[5] an indefinite award of maintenance was equitable and supported the "twin objectives of support and fairness" and took "into account the fact that although [John] supported the family financially he did not work harder than [Sharon], who contributed to the family in her own ways." The circuit court ordered that John pay Sharon monthly maintenance in the amount of $6,083.33, commencing on September 1, 2011. As of June 1, 2012, the monthly maintenance amount would be reduced to $5,083.33, or recalculated based upon Sharon's actual wages.

[5] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

DISCUSSION

¶17 On appeal, John argues that the agreement is enforceable in its entirety. Second, John argues that the circuit court improperly considered the value of John's retirement account when determining the spousal maintenance award. Finally, John asserts that the circuit court erred in awarding permanent maintenance, given Sharon's ability to work outside the home. On cross-appeal, Sharon argues that the entire agreement is unenforceable under the test set forth in ***Button v. Button***, 131 Wis. 2d 84, 89, 388 N.W.2d 546 (1986).

¶18 We turn first to the enforceability of the marital property agreement. When dividing property of the parties upon divorce, a circuit court starts with the presumption that it is to award an equal division of the property subject to division. WIS. STAT. § 767.61(3). This presumption may be overcome after consideration of a number of factors, including:

> 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.

WIS. STAT. § 767.61(3)(L).

¶19 Thus, although it is presumed equitable as a starting point, a marital property agreement is not binding if the terms of the agreement are inequitable to either party. Our review of a circuit court's conclusion that an agreement is equitable is limited to whether the court properly exercised its discretion. ***Button***, 131 Wis. 2d at 99. When we review a discretionary decision, we affirm if the court examined the relevant facts, applied the correct standard of law, and arrived

at a conclusion that a reasonable judge could reach using a demonstrated rational process. ***Hatch v. Hatch***, 2007 WI App 136, ¶6, 302 Wis. 2d 215, 733 N.W.2d 648. The court's findings of fact are sustained unless clearly erroneous. WIS. STAT. § 805.17(2).

¶20 A marital property agreement will be considered "equitable" and therefore enforceable as to a property division when all three of the following requirements are met: (1) each spouse has made fair and reasonable financial disclosure of his or her financial status to the other spouse; (2) each spouse has entered into the agreement voluntarily and freely; and (3) the substantive provisions of the agreement that apply to the property division upon divorce are fair to each spouse. ***Button***, 131 Wis. 2d at 89. If any one of the three requirements fails, the agreement is inequitable and therefore unenforceable. ***Id.***

¶21 Because we conclude that the third ***Button*** requirement, substantive fairness, is dispositive as to the unenforceability of the agreement here, we address it first and need not address the remaining ***Button*** requirements. With regard to this third requirement, we conclude that the terms of the agreement dividing the property upon divorce are substantively unfair and the circuit court erred in finding otherwise. We elaborate below.

¶22 Substantive fairness is an "amorphous concept" that must be determined on a case-by-case basis, in light of two competing principles: "the protection of the parties' freedom to contract and the protection of the parties' financial interests at divorce." ***Button***, 131 Wis. 2d at 96. Substantive fairness must exist at the time of execution and, if circumstances significantly change after execution of the agreement, at the time of divorce. ***Gardner v. Gardner***, 190 Wis. 2d 216, 234, 527 N.W.2d 701 (Ct. App. 1994).

¶23 When assessing whether an agreement was fair at the time of its execution, a circuit court must evaluate the agreement's terms from the parties' perspectives at the time of execution. ***Button***, 131 Wis. 2d at 97. The court's evaluation should be informed by how the parties considered the following nine factors, in light of their own knowledge about their property, circumstances, and reasonable predictions about the future at the time of execution:

> the economic circumstances of the parties, the property brought to the marriage by each party, each spouse's family relationships and obligations to persons other than to the spouse, the earning capacity of each person, the anticipated contribution by one party to the education, training or increased earning power of the other, the future needs of the respective spouses, the age and physical and emotional health of the parties, and the expected contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.

Id. at 97-98.

¶24 Three of these factors are particularly relevant to our analysis on the facts of this case: the earning capacity of each person; the anticipated contribution by one party to the education, training, or increased earning power of the other; and the expected contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services. At the time of execution of the agreement, it is undisputed that, with regard to earning capacity, the parties reasonably foresaw that John would earn significantly more income than Sharon, given his career as a physician versus Sharon's career as a nurse. However, while the parties discussed having children during their marriage, their agreement reflects that they did not contemplate Sharon's expected contribution to the marriage through homemaking and child

care, and makes no mention of economic value given to those homemaking or child care contributions.

¶25 As noted above, if circumstances significantly change after the execution of the agreement, and the agreement, as applied at divorce, no longer comports with the reasonable expectations of the parties, then an "agreement which is fair at execution may be unfair to the parties at divorce." ***Button***, 131 Wis. 2d at 98-99. The test is whether the parties, before signing the agreement, were able to reasonably predict a particular event, not whether they agreed that this event would either occur or not occur. ***Warren v. Warren***, 147 Wis. 2d 704, 710, 433 N.W.2d 295 (Ct. App. 1988). In other words, each party has a right to rely upon the marital property agreement when the events as they unfold fall within a range of events that could have been anticipated. ***Id.*** at 710. Consistent with this test, the courts should enforce the specific terms of the agreement if the circumstances at the time the marriage ends were within a range of circumstances anticipated by the parties at the time they entered into the marital property agreement. ***Id.*** at 709.

¶26 Assuming without deciding that the agreement was fair at the time of its execution, we turn to the fairness of the parties' agreement at the time of divorce. We note again that prior to their marriage, John and Sharon discussed having children and living on a farm. It follows that having three children was a circumstance that John and Sharon foresaw at the time of the agreement and does not qualify, in and of itself, as a change in circumstances. However, throughout the course of this twenty-two year marriage, Sharon left a full-time professional career in order to tend to the needs of the shared household and the couple's children. While objectively a couple planning to marry may foresee that having multiple children and living on a rural farm may result in one spouse sacrificing

his or her ability to work outside the home full-time in order to manage those responsibilities, the law requires us to examine what the record reflects that *these* parties subjectively contemplated for their future at the time of execution of the agreement. The record reflects that *these* parties anticipated that each would be able to financially support his or herself throughout the marriage, given their respective professional careers and ability to be financially independent at the time of execution. We conclude that for *these* parties, Sharon's departure from the compensated workforce constituted a change in circumstances not foreseen by this couple, as it diminished her ability to earn income and independently support herself.

¶27 Moreover, the parties significantly deviated from the terms of the agreement, as evidenced not only by Sharon's no longer working outside the home, but also by John's demonstrated willingness to provide financially for all necessities for Sharon and the children. We have previously accepted a circuit court's reasoning that "because the post-nuptial agreement was so long forgotten or ignored by the parties and their finances managed to the satisfaction of all in the interim, the court finds it would be inequitable to enforce same to its literal extent …." ***Brandt v. Brandt***, 145 Wis. 2d 394, 415, 427 N.W.2d 126 (Ct. App. 1988). In ***Brandt***, the parties commingled assets, resulting in an inability to trace those assets and making "meaningful enforcement of the marital agreement impossible." ***Id.*** at 416. This same logic applies here, as the parties ignored the agreement by commingling their income, and by increasingly, and eventually entirely, relying on John's income to care for Sharon and the family.

¶28 In its decision, the circuit court specifically referenced this deviation from the agreement, finding that John did not enforce the provisions requiring Sharon "to provide financial responsibility for her own support; including, food,

clothing, shelter, transportation, insurance, healthcare, and other necessities of the parties' standard of living." The circuit court's recognition of a change in circumstances is implicit in this finding, in that Sharon could no longer independently financially support herself, in addition to caring for a five-member family in their rural household.

¶29 While the circuit court found that the parties failed to adhere to a significant portion of the agreement's terms, it also found the agreement enforceable with respect to the retirement provisions. When addressing the retirement accounts, the circuit court's analysis (recited above in paragraph fifteen) does not provide an explanation as to how the retirement account provisions were "followed" throughout the marriage. To the extent the court relied on the fact that the accounts remained separate, we do not find this persuasive, given the nature of retirement accounts through employers, which typically remain separate for each employee. The court's finding as to the retirement provisions was not supported by a "demonstrated rational process" for enforcing the retirement provisions while simultaneously finding that all the other financial components of the agreement were ignored and therefore unenforceable. *See* ***Hatch***, 302 Wis. 2d 215, ¶6 ("A circuit court properly exercises its discretion when it examines the relevant facts, applies a proper standard of law, and, using a demonstrated rational process, arrives at a conclusion that reasonable judges could reach" (citation omitted)).

¶30 In addition, as a matter of law, the unforeseen change in circumstances that we have identified applies to render the entire agreement, including the retirement provisions, unenforceable. If any one of the three ***Button*** requirements fails, the agreement is inequitable and will not be enforced. ***Button***, 131 Wis. 2d at 89. The unforeseen change in circumstances – Sharon's departure

from the workplace, her contributions to homemaking and child care, her inability to independently support herself financially, and the parties' general lack of adherence to the agreement – results in the agreement's terms being inequitable as to Sharon, and therefore renders the entire agreement, including the retirement provisions, unenforceable. The circuit court erroneously applied the law when it enforced isolated terms of an inequitable agreement. *See* WIS. STAT. § 767.61(3)(L) ("no such agreement shall be binding where the terms of the agreement are inequitable as to either party").

¶31 Accordingly, this case must be remanded to the circuit court to reconsider the property division and, if necessary, the award of spousal maintenance, without regard to the terms of the agreement. Because our decision on the agreement's enforceability is dispositive, we do not reach John and Sharon's remaining arguments. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (when a decision on one issue is dispositive, we need not reach other issues raised).

CONCLUSION

¶32 For the reasons set forth in this opinion, we reverse the circuit court's determination that the marital property agreement was enforceable in any respect, and remand the case to the circuit court for reconsideration of the property division and, if necessary, the spousal maintenance award, without regard to the terms of the marital property agreement.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.