

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 8, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2007AP581

Cir. Ct. No. 2002FA1490

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

LYNN ANN SETH,

PETITIONER-RESPONDENT,

V.

AJAY SETH,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
C. WILLIAM FOUST, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

Before Higginbotham, P.J., Dykman and Vergeront, JJ.

¶1 DYKMAN, J. Ajay Seth appeals from a divorce judgment dividing the marital estate of Ajay and Lynn Seth.¹ Ajay argues that the trial court erred in unequally dividing the marital estate, in exempting from the marital estate \$36,760 that Lynn inherited and used to satisfy the Seths' mortgage on their home, and in deferring payment of Ajay's award without interest. We conclude that the court erroneously exercised its discretion in unequally dividing the marital estate. We therefore reverse in part and remand with directions. In all other respects, we affirm.

Background

¶2 The following facts are taken from trial testimony. Ajay and Lynn married in 1973 and separated in 1999. They purchased their marital home together in 1979, and in 1996 Lynn used money from an inheritance to pay the \$36,760 outstanding on their mortgage. In 1996, the estimated fair market value of the home was \$148,500. When the parties separated in 1999, Ajay moved out of the marital home while Lynn retained the residence and took a roommate.

¶3 Lynn filed for divorce in 2002. The trial court held a final hearing on the petition for divorce in December 2006, and the parties appeared pro se. Lynn requested she be granted the marital residence, and stated she did not think Ajay was entitled to any amount of the value of the home. She said that he had not contributed to the home in ten years, through paying taxes or insurance or helping with upkeep. Additionally, she stated that when he did live at home, he did not contribute to upkeep. She stated that he had provided money for the house

¹ For clarity, we refer to the parties by their first names.

and to cover bills. She stated that she and Ajay both contributed to the house payments and home expenses between 1979 and 1996, except that there were times that Ajay was unable to contribute and she had to use her own savings and help from her cousin. Lynn agreed with the trial court that the only issue in the divorce was how much each party should get from the value of the house. The 2005 estimated fair market value of the home was \$292,700.

¶4 Ajay claimed that he was entitled to half the value of the house, and half the value of merchandise that was stored in the basement. He claimed that he and Lynn made all the house payments together from 1979 to 1996, and that he could not contribute to the house after the parties separated because Lynn had a restraining order against him. Ajay stated that he believed only the division of the value of the house was in dispute, because the parties had agreed to divide the value of the merchandise in the basement equally. Ajay stated that he did not agree that Lynn should be awarded the house just because she had paid off the balance of their mortgage with her inheritance. He stated that they had worked together fifty/fifty, so the house should be split fifty/fifty. He also stated that he had told Lynn many times that he wanted her to have the \$36,000 that she put into the house out of her inheritance. He stated that Lynn paid the mortgage “on her own accord,” and that he wanted her to have that amount back out of the proceeds of the house.

¶5 When the court questioned Lynn as to whether she had agreed to split the basement merchandise evenly, Lynn stated that she would give all the merchandise in the basement to Ajay. The court asked Ajay if he would take the merchandise, and Ajay stated he would not, because he thought it would only be fair to split it evenly.

¶6 The court held that the marriage was a long marriage, that the parties were in equally dire financial situations, have comparable educational levels, and neither contributed substantially to the education of the other. The court divided the value of the marital home by beginning with the fair market value in 1996, subtracting the amount Lynn contributed from her inheritance, and then dividing the remaining equity between the parties. It then awarded Ajay a share of the appreciation in the real estate from 1996 to 1999. It ordered the merchandise sold and the proceeds split equally between the parties. The court also held that Lynn could use the proceeds from the sale of the merchandise to pay Ajay the equalization amount he was due for their marital home, and that if that did not occur within five years, the home must be sold or refinanced to award Ajay the amount he was due.

¶7 After the court's ruling, Ajay stated that he did not think it was fair that the value of the house had not been evenly split, although he thought that Lynn was entitled to interest on her \$36,000 payment. The court stated that it had made its ruling and that Ajay was entitled to an appeal. Ajay appealed.

Standard of Review

¶8 We review a trial court's decision on property division for an erroneous exercise of discretion. *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. A court properly exercises its discretion if it considers the facts in the record, applies the correct legal standard and uses a rational process to reach a decision that a reasonable court could reach. *Id.*

Discussion

¶9 Ajay raises three arguments on appeal: that the circuit court erroneously exercised its discretion in unequally dividing the marital estate because it did not consider or explain how an unequal division was justified under WIS. STAT. § 767.255(3) (2003-04),² that the court erred as a matter of law in exempting Lynn's \$36,760 from the marital estate, and that the court erroneously exercised its discretion in deferring payment of Ajay's share of the marital estate without interest. Lynn responds that the circuit court properly exercised its discretion in unequally dividing the marital estate.³ She argues that all of Ajay's remaining arguments are raised for the first time on appeal, and that Ajay has therefore waived them. We agree with Ajay that the record does not support the unequal property division awarded by the trial court. We agree with Lynn that Ajay failed to preserve his remaining arguments for appellate review.

¶10 In Wisconsin, courts adhere to a presumption of an equal division of marital property upon divorce. *LeMere*, 262 Wis. 2d 426, ¶16. However, courts may deviate from an equal division after examining and applying the relevant factors under WIS. STAT. § 767.255(3).⁴ *Id.*, ¶16 & n.3.

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

³ Although Lynn states that the only issue in this appeal is waiver, she does not apply a waiver argument to the trial court's unequal division of the house. Our own review of the record reveals that the issue of the division of the house was raised in the trial court. We therefore conclude that this issue has been preserved for review.

⁴ WISCONSIN STAT. § 767.255(3) lists the following factors for courts to consider before unequally dividing a marital estate:

- (a) The length of the marriage.

(continued)

(b) The property brought to the marriage by each party.

(c) Whether one of the parties has substantial assets not subject to division by the court.

(d) The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.

(e) The age and physical and emotional health of the parties.

(f) The contribution by one party to the education, training or increased earning power of the other.

(g) The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibility for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.

(h) The desirability of awarding the family home or the right to live therein for a reasonable period to the party having physical placement for the greater period of time.

(i) The amount and duration of an order under s. 767.26 granting maintenance payments to either party, any order for periodic family support payments under s.767.261 and whether the property division is in lieu of such payments.

(j) Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.

(k) The tax consequences to each party.

(L) 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.

(m) Such other factors as the court may in each individual case determine to be relevant.

¶11 Here, the trial court heard testimony from both Ajay and Lynn as to their marriage, their economic situations and their marital property. The court then found that the marriage had been a long one. It also found that prior to the mid-1990s, Ajay and Lynn had been substantially equal financial partners, had comparable pre-marital education levels, and that neither contributed substantially to the education or work skill development of the other. The court found that Ajay and Lynn were currently in “substantially equal dismal economic circumstances.”

¶12 The court then determined that the marital home had been purchased jointly, and that Lynn had satisfied the amount remaining on the couple’s mortgage in 1996 with inherited funds of \$36,760. It reiterated that until 1996, Ajay and Lynn had been “a joint enterprise in life and in business.”

¶13 The court then divided the marital estate as follows: first, it found that the fair market value of the house in 1996 was \$148,500. It then subtracted the amount Lynn had used from her inheritance to satisfy the mortgage, for a remainder of \$111,740. The court divided that in half so that each party was entitled to \$55,870. It then noted that from 1996 to 2006, the marital home increased in value by \$144,200, or roughly ten percent per year. It determined that in addition to half the equity to 1996 (minus the amount Lynn paid through her inheritance), Ajay was entitled to a share of the equity in the home until the parties separated in 1999. Thus, the court calculated that Ajay’s share in the home’s increase in value between 1996 and 1999 amounted to an additional \$17,000. The

court awarded Ajay \$82,870 from the division of the marital home,⁵ and awarded the real estate to Lynn.

¶14 We agree with Ajay that the court's reasoning and the record do not support the court's deviation from the presumption of an equal division of marital property under WIS. STAT. § 767.255(3). The home had a 2006 fair market value of \$292,700. The parties agreed that the amount Lynn had contributed to the mortgage from her inheritance, \$36,760, was non-divisible. That left \$255,940 as divisible equity.⁶ The court awarded Ajay \$82,870, and Lynn the remaining \$173,070. This division awarded nearly seventy percent of the home's value to Lynn and just over thirty percent to Ajay. Yet the only factor in the record and discussed by the court to support a deviation from the presumption of fifty-fifty property division was the fact that Ajay moved out of the home in 1999 and that Lynn had since individually contributed to its maintenance and payment of insurance and property taxes. Even accepting Lynn's argument that the circuit court was entitled to rely on this fact as an additional relevant factor under

⁵ Lynn points out in her response brief that this number is a mathematic error, and in fact the court's calculations total \$72,870. While we agree, Lynn has not cross-appealed from this portion of the court's judgment. We therefore will not address it further.

⁶ It is unclear from the record whether the court divided the divisible equity in the marital home equally based on its 1999 value or unequally based on its 2006 value. When Ajay protested that he had not received half the home's value, the court said: "You have done nothing to contribute to the house or any of its increase in value since certainly 1999, perhaps earlier. What you've got is half of what was the value of the house that you contributed to. Lynn is entitled to what's left. That's my ruling." However, the parties have not argued that the court valued the property as of 1999. See *Rumpff v. Rumpff*, 2004 WI App 197, ¶28, 276 Wis. 2d 606, 688 N.W.2d 699 (marital estate is valued on date of divorce absent special circumstances). Instead, the parties argue the issue as one of unequal property division under WIS. STAT. § 767.255(3). Thus, we follow the parties' line of reasoning that the court valued the house as of 2006 and unequally divided its current equity.

§ 767.255(3)(m), we do not agree that this factor alone justifies a nearly seventy-thirty split in the marital home's value.⁷

¶15 While the court noted that Ajay did nothing to increase the home's value, nothing in the record indicates that Lynn contributed to the home's increase in value, either. As the court noted, property values increased at roughly ten percent per year during that timeframe. Thus, the increase in the home's value was due to market changes and had nothing to do with the actions of either party. Further, the court's reasoning does not explain how all of the relevant factors lead to its decision. *See LeMere*, 262 Wis. 2d 426, ¶22 (“The statute ... does not permit a circuit court to deviate from the presumption of equal property division after considering one factor alone.”). Thus, we conclude that the court erroneously exercised its discretion in ordering an approximately seventy-thirty split of the marital estate without explaining why the unequal division was justified under § 767.255(3). On remand, the court should consider all relevant statutory factors including the presumption of an equal property division and reconsider its division of the marital estate.

¶16 Ajay next argues that the trial court erred in exempting \$36,760 from the marital estate, the amount that Lynn had inherited and used to pay the Seths' mortgage. Ajay argues that he should not be bound by his statement as to the divisibility of Lynn's inheritance money because it was a concession of law that was not binding on the court. *See Fletcher v. Eagle River Mem'l Hosp., Inc.*, 156 Wis. 2d 165, 168, 456 N.W.2d 788 (1990). He also argues that as a pro se litigant,

⁷ We need not decide whether this reason is based upon marital misconduct, an impermissible factor in property division. WIS. STAT. § 767.255(3).

he is entitled to some leniency. *See Waushara County v. Graf*, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992). Lynn responds that Ajay's concession was factual rather than legal: that Lynn inherited the funds used to pay the mortgage and she made the payment without intending to donate the funds to the marriage; and that even though pro se, Ajay has waived the issue of the divisibility of Lynn's inheritance. We conclude that this issue is properly resolved based on Ajay's trial stipulation to the non-divisibility of Lynn's inherited funds.⁸

¶17 During trial, Ajay told the court:

I also have told Lynn many times in the past that it's only fair that the amount of inheritance money that she had put into the house, I am willing to give her that \$36,000 that she put there. She did it on her own accord. But, I would like her to have that extra \$36,000 from whatever the proceeds of the house are.

Thus, the parties agreed that upon division of the marital estate the court should credit Lynn with the \$36,760 that she had inherited and used to pay the parties' mortgage. After the court granted the parties' divorce, incorporating their agreement to credit Lynn \$36,760, Ajay said:

Yeah. I had a question for you. First of all, I find it very unfair that half the real estate is not mine, the proceeds—half the real estate are not mine. She did that on her own accord to pay off the house. She can be entitled to interest on the \$36,000. But, she should in no way—because she—First of all, I pay from—may folks had to pay for my—

⁸ Because we conclude that Ajay may not assert an argument contrary to his trial stipulation, we need not reach the parties' arguments over whether Lynn's inheritance is legally divisible or non-divisible property.

The court then stated that Ajay had not asked a question, and that it had made its ruling.

¶18 The parties disagree over the meaning of Ajay’s postjudgment statement. Ajay asserts that he gave the court two inconsistent statements: one that he agreed that Lynn get credit for the inheritance money she used to pay their mortgage, and one only that he agreed that she should receive interest on that payment. Lynn responds that Ajay’s postjudgment statement was not inconsistent with his earlier statement that he had agreed to credit her \$36,000, and only added that she was also entitled to interest on her mortgage payment.

¶19 We have said that “[p]arties are free to withdraw from a stipulation until it is incorporated into the divorce judgment.” *Hottenroth v. Hetsko*, 2006 WI App 249, ¶13, 298 Wis. 2d 200, 727 N.W.2d 38 (citation omitted). “It is consistent with the circuit court’s authority to decide whether to adopt a stipulation that, once the court decides to do so, the right of a party to withdraw from the stipulation comes to an end.” *Id.*, ¶26. Additionally, “[w]hen a judgment of divorce is granted, it is effective immediately; a judgment is ‘granted’ when it is given orally in open court on the record.” *Id.*, ¶28 (citation omitted). Thus, we need not resolve the parties’ dispute over the meaning of Ajay’s postjudgment statement. Because Ajay stipulated to allowing Lynn a \$36,760 credit for her investment of inherited funds, and the court incorporated that stipulation in its judgment, Ajay may not now withdraw that stipulation.

¶20 Finally, Ajay argues that the trial court erroneously exercised its discretion in deferring payment of Ajay’s share of the marital estate for up to five years, and in failing to order interest on those payments. Lynn responds that Ajay

has waived this argument because he did not raise it in the trial court. We agree with Lynn.

¶21 In the absence of waiver, a court must award interest on installment payments or state why it has not. *See Corliss v. Corliss*, 107 Wis. 2d 338, 347, 320 N.W.2d 219 (Ct. App. 1982). Here, the court determined that it could not value the merchandise in the marital home's basement based on the absence of evidence on that issue presented by the parties. Thus, it ordered the parties to sell the merchandise and divide the proceeds equally. The court stated that Lynn could pay Ajay the \$82,870 equalization payment out of the proceeds from the merchandise, if her share amounted to that much. Otherwise, the court ordered that the home must be sold or refinanced within five years to allow Ajay to receive his share of the marital estate. The parties did not raise, and the court did not address, the issue of interest.

¶22 “The general rule is that a party waives a claim that is neither pleaded nor argued to the trial court, and such a claim will not be considered on appeal.” *Preston v. Meriter Hosp., Inc.*, 2005 WI 122, ¶16, 284 Wis. 2d 264, 700 N.W.2d 158 (citation omitted). Ajay concedes that he is raising the issues of interest and deferred payment for the first time on appeal. He correctly argues, however, that while we may decline to consider his arguments, we are not barred from considering them. *See Estate of Hegarty v. Beauchaine*, 2001 WI App 300, ¶10, 249 Wis. 2d 142, 638 N.W.2d 355. He contends that there are good reasons for us to consider his arguments: that the deferred payments severely impact Ajay's ability to support himself, and that he did not understand the issues of interest and deferred payments as a pro se litigant. We are not persuaded that these concerns overcome the general rule that we will not consider issues for the first time on appeal. *See Preston*, 284 Wis. 2d 264, ¶¶16-17 (when issue presents

question of law, has been fully briefed, and is of sufficient public interest, we may decline to apply waiver). Thus, we will not review the merits of Ajay's claim to interest on deferred payments on his share of the marital estate. However, nothing in our opinion prevents Ajay from raising this issue on remand. See *Ondrasek v. Ondrasek*, 126 Wis. 2d 469, 479, 377 N.W.2d 190 (Ct. App. 1985) (remanding issues on appeal from divorce where issues are interdependent, where error is shown as to one). Accordingly, we affirm in part, reverse in part, and remand with directions.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

