COURT OF APPEALS
DECISION
DATED AND FILED

August 12, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1786 **Cir. Ct. No. 2007FA573**

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

IN RE THE MARRIAGE OF:

DONNA L. TOWNSEND,

PETITIONER-RESPONDENT,

V.

GARY L. TOWNSEND,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: ANTHONY G. MILISAUSKAS, Judge. *Affirmed*.

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

¶1 PER CURIAM. Gary L. Townsend appeals from the property division and maintenance portions of a judgment of divorce. Specifically, he

contends that only the portion of his pension that accrued during the ten-year marriage should have been subject to equal division and that the trial court erred in awarding limited maintenance to his former wife, Donna L. Townsend. We conclude that neither determination constitutes an erroneous exercise of the court's discretion. We affirm.

¶2 Gary and Donna married in 1997 and divorced in 2008. It was a second marriage for both. No children were born to the marriage. A court trial was held to determine property division and maintenance. The parties agreed on an equal property division save for Gary's pension through Chrysler/AMC, where he had been employed since 1970. Gary sought equal division of only the amount accrued during the marriage, or $88,545. Donna sought equal division of the entire thirty-eight-year accumulation, or $298,835. The trial court ordered an equal division of all property, including Gary's full pension. It also ordered Gary to pay Donna maintenance of $1200 per month for three years. Gary appeals.

1. Property division

¶3 Gary argues that the fifty-fifty division of his entire pension was an erroneous exercise of discretion. He contends that the trial court did not consider that he contributed a substantial amount to it before the marriage, which he characterizes as short-term. Gary also asserts that the trial court incorrectly reasoned that an equal division of the marital estate was warranted because he benefited from money Donna's parents contributed throughout the marriage.

¶4 At divorce, all property except that acquired by gift or inheritance is part of the marital state and is presumed subject to equal division. ***Hokin v. Hokin***, 231 Wis. 2d 184, 191-92, 605 N.W.2d 219 (Ct. App. 1999). The court may alter the equal distribution after considering various factors. ***Id.*** at 193; *see*

also WIS. STAT. § 767.61(3)(a)-(m) (2007-08).[1] Property division is a matter within the sound discretion of the trial court and we will uphold its decision if the court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion a reasonable judge could reach. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We accept the trial court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). Whether the trial court applied the correct legal standard is a question of law we consider de novo. ***Landwehr v. Landwehr***, 2006 WI 64, ¶8, 291 Wis. 2d 49, 715 N.W.2d 180.

¶5 A spouse's entire interest in a pension, whether existing before the marriage or acquired during it, is part of the marital estate. ***Hokin***, 231 Wis. 2d at 193. The premarital component of the plan is in the nature of property brought to the marriage, a factor possibly relevant as to how the asset should be divided, but not as to whether it should be. ***Rodak v. Rodak***, 150 Wis. 2d 624, 630, 442 N.W.2d 489 (Ct. App. 1989). A coverture fraction—the length of the marriage divided by the "owning" spouse's total years in the plan—may be an appropriate way to divide a pension as part of the overall property division. *See* ***Hokin***, 231 Wis. 2d at 189, 194. Gary contends that because the marriage was only ten of the thirty-eight years he held the pension, a coverture fraction should have been used and subjecting the entire pension to a fifty-fifty division was error.

[1] Gary cites to WIS. STAT. § 767.255 rather than to WIS. STAT. § 767.61. Section 767.255 was renumbered to § 767.61, effective January 1, 2007, however. 2005 Wis. Act 443, §§ 109, 267.

All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

¶6 The court found that Donna brought approximately $28,000 to the marriage from the sale of her premarital home while Gary contributed about $5400 from the sale of his; that Donna's and Gary's gross incomes were approximately $43,000 and $88,000, respectively; that both parties generated the fairly significant credit card debt; and that they equally benefited from the considerable monetary gifts from Donna's parents throughout the marriage.[2] Based on the shared lifestyle the money gifts afforded, their similar approach to spending, the parties' undisputed economic partnership and the total financial picture, the court reasoned that Gary's entire pension should remain part of the divisible property.

¶7 Gary argues, however, that "property given to one party as a gift remains that party's property and cannot be divided by the court." *See* ***Grumbeck v. Grumbeck***, 2006 WI App 215, ¶6, 296 Wis. 2d 611, 723 N.W.2d 778; *see also* WIS. STAT. § 767.61(2)(a). Gary misapplies the teaching of ***Grumbeck***. There, the husband was gifted shares of his family's corporation which he kept separate from the marital estate. *See* ***Grumbeck***, 296 Wis. 2d 611, ¶¶2, 9-10. At the dissolution of the forty-one-year marriage, the trial court deviated from the presumptive equal division of the marital estate and awarded the parties equal shares of the value of the gross combined marital estate, including gifted property. ***Id.***, ¶4. In other words, the trial court recognized that the gifted assets were not divisible but then, despite no finding of hardship, fashioned an unequal split of the marital estate, effectively nullifying the legislative intent to shield gifted assets. *See* ***id.***, ¶¶3, 11. We held that the trial court could consider substantial gifted assets when dividing the marital estate but, absent hardship, it could not skew the

[2] Donna's parents gave the couple $1500 per month for ten years, plus $10,000 in loan forgiveness, five $1,000 anniversary gifts and two $20,000 checks.

property division to work a de facto splitting of those gifted assets. ***Id.***, ¶1; *see also* § 767.61(2)(b).

¶8 This case is not the same as ***Grumbeck***, as Gary contends. Indeed, it is ***Grumbeck*** in reverse. Unlike in ***Grumbeck***, the money gifts from Donna's parents never had any individual property aspect; even if they did, they lost it when the parties poured the gifts into the marital estate for their joint benefit. Contrary to Gary's assertion, ***Grumbeck*** did not "specifically reject[] dividing a pension in order to equalize gifts made to the parties during their marriage."

¶9 The court here considered each WIS. STAT. § 767.61(3) factor, one by one, thoroughly examining the parties' marital partnership and nearly equal division of duties, their financial and non-financial contributions to the marriage, and the mutually enjoyed lifestyle enabled by what the court termed "free money" from Donna's parents. The court concluded that the presumptive fifty-fifty split was not overcome. We agree. "[I]nherent in the concept of a presumption [is] that it must have weight." *See* ***Grumbeck***, 296 Wis. 2d 611, ¶12. Therefore, absent special circumstances demonstrating that some unfairness would result from equal division—and Gary offers none—the presumption should stand. *See* ***id.*** In some cases an emphasis on which party generated the assets making up the marital estate may be appropriate. *See* ***Hokin***, 231 Wis. 2d at 200. Here, however, equally dividing Gary's pension was not an erroneous exercise of discretion.

2. Maintenance

¶10 The trial court also ordered Gary to pay Donna $1200 maintenance per month for three years. Gary contends this was an erroneous exercise of discretion because the court considered a single factor—Donna's desire to keep

the marital home—and then "double counted" his 401(k) plan to accomplish it. We disagree that the court's focus was so narrow or that it double counted.

¶11 The amount and duration of a maintenance award are matters within the sound discretion of the circuit court. ***Meyer v. Meyer***, 2000 WI 132, ¶15, 239 Wis. 2d 731, 620 N.W.2d 382. We will uphold the trial court's determination unless the court erroneously exercises its discretion, which may occur if it makes an error in law or fails to base its decision on the facts in the record. ***Id.***

¶12 Before awarding maintenance, a court must consider the factors set forth in WIS. STAT. § 767.56.[3] The court here did. It awarded Donna the 401(k) after finding that Donna's desire to remain in the house the couple had built was "part of the reason" she sought maintenance; that Gary testified that he wanted Donna to stay there; and that refinancing was the only way she could do so. It also found that the parties have different earning capacities and that using the 401(k) to pay off the debts Gary currently was paying would enable him to pay the ordered maintenance so that Donna could refinance the home and become self-supporting. These findings are not clearly erroneous.

¶13 Further, we fail to see how this is "double counting." "Double counting" is counting as income for maintenance or child support purposes the payout from or distribution of an asset the value of which has been included in the property division. ***Hokin***, 231 Wis. 2d at 203. Donna was awarded the 401(k) in the property division with the directive that she pay the credit card and WIS. STAT. ch. 128 debts in full by August 31, 2008. Freed of those obligations, Gary then

[3] Gary cites to WIS. STAT. § 767.26. That statute was amended and renumbered to WIS. STAT. § 767.56, effective January 1, 2007. 2005 Wis. Act 443, §§ 110, 267.

could pay maintenance. The court did not consider the 401(k) as income for maintenance. Like the trial court's property division determination, its maintenance determination represents a proper exercise of discretion. Both are supported by the facts of record and apply the proper law. We affirm.

By the Court.—Judgment affirmed.

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