COURT OF APPEALS
DECISION
DATED AND RELEASED

February 27, 1997

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

NOTICE

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No. 96-2442

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

In re the Marriage of:

DORIS H. KROHN,

Petitioner-Appellant,

v.

JEROME KROHN,

Respondent-Respondent.

APPEAL from a judgment of the circuit court for Waushara County: LEWIS MURACH, Judge. *Reversed and cause remanded with directions.*

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

VERGERONT, J. Doris Krohn appeals from portions of her divorce judgment relating to property division and maintenance. She contends that: (1) the trial court erred in finding that the conveyance of land to Jerome Krohn and his first wife was a gift and therefore not subject to division as part of the marital estate; (2) even if that land were a gift, the trial court erred in

treating the residence Jerome built on the land as exempt from division; (3) Jerome had assets that he did not account for; (4) the trial court erred in failing to divide exempt assets because of hardship; and (5) the trial court erroneously exercised its discretion in failing to award her maintenance. We conclude that the trial court correctly determined that the land was a gift and therefore not marital property. However, we also conclude that the court erred in treating the residence as a gift. For this reason and others explained below, we reverse and remand.

Doris and Jerome Krohn were married on June 23, 1984. Both had been previously married and widowed. At the time their divorce was granted in May 23, 1996, Doris was seventy-six years old and Jerome was eighty-one years old. Neither were employed during the marriage. During the marriage Doris was receiving social security and supplemental security income benefits and at the time of the divorce these benefits were $565 per month. For the first couple years of the marriage, she received $125 per month rental income from the residence she owned during her first marriage. Doris transferred ownership of that residence to her daughter during the marriage in exchange for $1,000 and a car that her daughter had purchased for $16,955.

During the marriage and at the time of the divorce, Jerome was receiving social security benefits and a pension from International Harvester; at the time of the marriage these monthly payments were $597 and $426 respectively. During the marriage Jerome also received $350 monthly from the sale of a former residence to his son on a land contract, but those payments had terminated by the time of the divorce because the contract was paid in full.

Jerome received a conveyance of land in 1963 valued at $200 from an aunt and uncle. He later built a residence on the land and lived there with his first wife until her death in 1982. Just prior to the marriage of Jerome and Doris, they decided to improve the house by building an addition. A $30,000 loan was obtained, placed in a joint account, and used to pay for the improvements.

The trial court determined that the land conveyed to Jerome was a gift and therefore exempt from property division. The court treated the value of the land and residence at the time of Jerome's marriage to Doris as an

appreciation in the value of the gift and therefore also exempt from property division. The court treated the appreciation in value from the time of the marriage to the time of the divorce as part of the divisible marital estate. The court awarded each party fifty percent of the marital estate, ordering Jerome to pay Doris an equalization payment of $10,831 payable in monthly installments of $200. Although Doris argued in her post-trial brief that the pre-marriage value of the residence should be subject to division to avoid hardship to her, the trial court did not address that issue in its memorandum decision and findings of fact, conclusions of law and judgment. The court denied Doris' request for maintenance.

LAND AND RESIDENCE

A gift to one spouse from a third person, either before or during the marriage, is not subject to property division upon divorce, unless that creates a hardship for the other spouse or children. Section 767.255(2), STATS. The burden of proof on the question of whether an asset is exempt as gifted property rests upon the party asserting the claim. ***Spindler v. Spindler***, No. 96-0591, slip op. at 5 (Wis. Ct. App. Dec. 4, 1996, ordered published Jan. 28, 1997). Doris contends that the court erred in finding the parcel of land was a gift to Jerome from his uncle and aunt because they gave it to him in exchange for services he performed for them. Whether his aunt and uncle intended the parcel of land as a gift or whether it was in exchange for consideration is a question of fact, which we sustain unless it is clearly erroneous. *See* ***Wierman v. Wierman***, 130 Wis.2d 425, 429, 387 N.W.2d 744, 746 (1986).

There is ample evidence to support the court's finding that the conveyance of the parcel of land was a gift. Jerome testified that he did favors for his aunt and uncle over the years, from his childhood until approximately 1951, consisting of cutting their grass, driving them places and painting their house. However, he testified that he never expected he would be paid for those favors and they never indicated he would be. The warranty deed transfers the land to Jerome and his former wife, "for the sum of one dollar and other good and valuable consideration." However, Jerome testified he did not pay for the land.

Jerome's son testified that he was present when his aunt and uncle offered to give the lot to his father. At the same time, they gave two lots to Jerome's brother and cash instead of a lot to Jerome's sister because she needed money at the time. The aunt and uncle had no children. Jerome's son testified that no money changed hands for the lots. He described his family as one that helped each other out on a regular basis, not expecting anything in return "except a good sandwich and a cup of coffee."

Doris points to Jerome's interrogatory in which he answered "no" to the question whether he claimed that any property was gifted to him or inherited by him prior to or during the marriage. However, immediately after his "no" answer in the interrogatory, when asked to describe the gifted or inherited property if he answered "yes," he wrote: "This house I owned myself." It is not clear what Jerome is saying here about gifted or inherited property. Doris also points to the portions of his deposition where he answered affirmatively questions as to whether the parcel of land was given to him in exchange for his services. However, in other portions of his deposition and trial testimony, Jerome described the parcel as a gift, or as "donated" by his aunt and uncle.

It was for the trial court to resolve the inconsistencies and ambiguities in Jerome's testimony, make an assessment of his credibility and weigh his testimony along with the other evidence. The trial court found that, although Jerome had performed favors for his aunt and uncle before the land was conveyed to him and his first wife, there was no specific exchange for money owed or for past favors rendered. These findings are not clearly erroneous.

Doris next argues that the trial court erred in treating the house built on the gifted land as an increase in the value of the real estate and therefore also exempt, rather than as a separate asset that was not gifted. Doris relies on ***Schwegler v. Schwegler***, 142 Wis.2d 362, 364-66, 417 N.W.2d 420, 422-23 (Ct. App. 1987), in which we reviewed a trial court decision that treated a parcel of land gifted to the husband and a residence later built on the land by the husband (before the marriage) as one asset, and included in the marital estate the increase in equity during the marriage. The husband appealed, claiming that the land was entirely exempt as a gift and the residence was acquired before marriage, and therefore no portion of the value of either should be

included in the marital estate. After noting that ownership of an asset prior to marriage is only one factor to take into account in the divisions of marital property, *see* § 767.255(3)(b), STATS., we stated:

> Although we recognize that the addition of a residence is generally considered an improvement on the land, we conclude that, for purposes of property division, the residence might not be an improvement or enhancement of the gifted land, but may be a separate asset, the character of which may differ from that of the land.
>
> The trial court's decision does not make any distinction between the residence and the gifted land. Although the trial court frequently refers to the value of the house or residence, those figures correspond to the combined values of land and improvements as stated in the tax assessments.
>
> The failure of the trial court to explain its determination warrants reversal. (Citation omitted.) On remand, the trial court shall determine whether the residence constitutes gifted property. If the trial court concludes that it is not gifted, its value is to be included in the marital estate. (Citation omitted.)
>
> After the gifted property (here, presumably the land) is separated from the nongifted (presumably the residence), a further determination should be made regarding the gifted property. As contemplated by ***Plachta v. Plachta***, 118 Wis.2d 329, 334, 348 N.W.2d 193, 195-96 (Ct. App. 1984), the source of any appreciation of the gift's value must be determined. The amount of appreciation due to general economic conditions accrues to the gift and hence is separate property; however, any amount due to contributions by the non-owning spouse is to be included in the marital estate. (Footnote omitted.)

Id. at 365-66, 417 N.W.2d at 422-23.

The trial court does not explain why it treated the house built by Jerome and his first wife as an addition to the value of the gifted land rather than a separate asset.[1] The court did find that some portion of the construction of the house resulted from gifts of labor and materials from family members. That finding is supported by the record. However, as the trial court implicitly found, and as is evident from the record, Jerome also contributed his labor and paid for materials for the construction of the house during his first marriage. It is Jerome's burden to prove the house was a gift. Whether he has met that burden is a question of law. *See* ***Spindler***, No. 96-0591, slip op. at 5. We conclude that he has not met that burden. It is undisputed that he participated in the construction of, and payment for, materials for the house. The record does not provide a basis for separately valuing the portion contributed in materials and labor by family members.

Jerome argues that the trial court followed ***Schwegler*** because it did explain that "the construction of the house by Jerome and his former wife added to the value of the premises." However, this explanation is inconsistent with our holding in ***Schwegler***. In ***Schwegler***, we expressly rejected the husband's argument that because he constructed the residence prior to his marriage and without his wife's assistance, the residence "merged" with the gifted parcel of land resulting in one exempt asset. ***Schwegler***, 142 Wis.2d at 365, 417 N.W.2d at 422. We conclude that ***Schwegler*** is controlling and requires that the house be treated as a separate asset from the land because the former was not gifted as was the latter. The result is that the value of the land, including appreciation due to general economic conditions but excluding improvements due to the contributions of the non-owning spouse, remains Jerome's separate property. *See* ***Id.*** at 366, 417 N.W.2d at 423; ***Spindler***, No. 96-0591, slip op. at 6. However, the value of the residence is marital property.

We are aware that the trial court indicated in its decision that even if the residence were not gifted property, it would have reached the same result:

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[1] We note that Doris did not cite ***Schwegler v. Schwegler***, 142 Wis.2d 362, 417 N.W.2d 420 (Ct. App. 1987), in her brief to the trial court, but she did make the argument in that brief that because the house was built later by Jerome after he received the land, only the value of the land was exempt as gifted property. Therefore, although the trial court did not have the benefit of our analysis in ***Schwegler***, Doris did properly raise the issue.

treated the appreciation in value of the land and residence after the marriage as marital property and returned Jerome's "original contribution" to him. The trial court can properly take into account the non-gifted and non-inherited property a party brings to the marriage in dividing the marital property. *See* § 767.255(3)(b), STATS. Were the exempt status of the lot and residence the only issue in this case, we might well conclude that the trial court could properly exercise its discretion in this manner and affirm on that alternative ground. However, because the trial court must determine the separate values of the land and the residence, and because of other issues that need to be addressed on remand, we conclude the better course is for the trial court on remand to consider the appropriate division of marital property after it has separated the value of the exempt property from the marital property and resolved the other issues affecting the value of the marital property.

Because of our determination that the residence is not exempt as gifted property, we do not address Doris' contention that the lot lost its identity of separate gifted property through the construction of the non-gifted residence on the lot. However, we do address her contention that the lot lost its exempt status because it changed its character to marital property through Jerome's donative intent. *See* ***Brandt v. Brandt*** , 145 Wis.2d 394, 408, 427 N.W.2d 126, 131 (Ct. App. 1988). It is Doris' burden to demonstrate that the character of the lot as separate property was not preserved. ***Spindler***, No. 96-0591, slip op. at 5. Since the trial court treated the lot and residence as one asset, it analyzed the issue of donative intent with regard to both the lot and the residence and concluded that she had not shown donative intent. We conclude that the trial court's analysis would not be different if it considered Jerome's donative intent solely with respect to the lot. We further conclude that its determination that there was no donative intent which changed the lot to marital property is supported by the record.

UNACCOUNTED ASSETS

Doris argues that at the beginning of the divorce proceeding, Jerome had $4775.74 in an account at Farmer's Exchange Bank, $4,920.36 in an account at Marine Bank in Milwaukee, and an $8,000 balance due on the land contract with his son, all of which he disposed of before the divorce trial and which should have been considered by the trial court. At the time of the divorce trial on May 23, 1996, Jerome testified that there was $200 in the first account, $429 in the second account, and the land contract had been paid in full

earlier that May. When asked on cross-examination whether he had $10,000 in his bank accounts at the beginning of the divorce action, he answered that he did not recall. There is no other testimony from Jerome on this issue. Doris argued in her post-trial brief that this unaccounted for sum--approximately $17,000--should be taken into account by the trial court in setting maintenance. The trial court in its decision stated that, "it did not attempt to compute credits or offsets for various items disposed of along the way and not available for distribution at final hearing," but did not otherwise address this issue.[2] Jerome does not respond in his brief on appeal to this issue.

Although assets are generally valued on the date of divorce, ***Holbrook v. Holbrook***, 103 Wis.2d 327, 334, 309 N.W.2d 343, 346 (Ct. App. 1981), the trial court may include in the marital estate assets that would have been in the marital estate but for the gift, inadequate exchange, or lack of accounting by one spouse, and may take this into account in dividing marital assets. *See* ***Gardner v. Gardner***, 175 Wis.2d 420, 427, 499 N.W.2d 266, 268-69 (Ct. App. 1993). Whether Jerome actually had the amounts in his bank accounts and was entitled to the amount under the land contract as indicated by Doris' exhibit 10 and her testimony, and if he did, what happened to those funds, are questions of fact. Although a trial court does not make specific findings of fact, we can affirm decisions that imply factual findings if such findings, had they been made, are supported by the record. *See* ***Moonen v. Moonen***, 39 Wis.2d 640, 646, 159 N.W.2d 720, 723 (1968).

The division of marital property, once it has been valued, is within the discretion of the trial court, subject to the court's obligation to comply with § 767.255, STATS., in making its determination. ***Schwegler***, 142 Wis.2d at 364, 417 N.W.2d at 422. We affirm a discretionary determination if the trial court considered the facts of record, applied the applicable law, and, through a logical process, reached a conclusion a reasonable judge could reach. ***Rodak v. Rodak***, 150 Wis.2d 624, 631, 442 N.W.2d 489, 492 (Ct. App. 1989). And we may search the record to determine if the record supports the trial court's decisions, even if the reasoning is not expressly stated. *See* ***Schauer v. De Neveu Homeowners Ass'n Inc.***, 194 Wis.2d 62, 71, 533 N.W.2d 470, 473 (1995).

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[2] Pursuant to a temporary order entered on November 15, 1994, both parties were restrained from disposing of assets except in the usual and ordinary course of business.

Our review of this record does not permit us to say with confidence how the court arrived at its decision not to consider items or amounts disposed of before the final hearing. Were the amounts in question relatively small considering the parties' assets and income, or were the amounts disposed of by each party approximately equal, or had Jerome provided an explanation that we could assume the court had implicitly accepted, we would have a basis for affirming the court's decision on this issue. However the sum of $17,000 is significant compared to the parties' income and assets; it is a great deal larger than the value of the items which Jerome testified Doris sold; and there is nothing in the record that provides an explanation for the disposition of the $17,000 or a basis for finding that it never existed.

We have considered that the source of the evidence of the larger amounts in the two bank accounts and the amount due on the land contract is an exhibit--exhibit 10--introduced by Doris, without supporting documentation. She testified, based on this exhibit, to these amounts. Jerome's counsel objected to admission into evidence of this exhibit before he had a chance to cross-examine Doris because there were "a lot of figures that are not substantiated by the exhibit," and the court did not admit the exhibit at that time. Jerome's counsel cross-examined Doris on other items on the exhibit but not on these items. When the court later asked whether that exhibit could be admitted into evidence, Jerome's counsel stated he had no objection.

Since exhibit 10 was admitted into evidence, in the absence of any argument from Jerome why this is not evidence of assets that he disposed of before the final hearing, or any explanation of what happened to these assets, and without the benefit of findings or reasoning from the trial court on this issue, we conclude that we must remand to the trial court. This will permit the trial court to make a determination of the sums in Jerome's two accounts and the amount due under the land contract when the divorce action was commenced, and the disposition of those funds until the final hearing. These determinations and the determination whether the funds--if they did or do exist--are marital property may require a reconsideration of the court's valuation and division of marital property.

MAINTENANCE AND HARDSHIP

Because the issues which the court must determine on remand may change some of the factors pertinent to an analysis of maintenance, we do not address Doris' claim that the court erroneously exercised its discretion in not awarding maintenance. The court may revisit that issue on remand in light of its other determinations. Similarly, we do not address Doris' claim that because of hardship, Jerome's separate property should be divided, since the amount of separate property and marital property have been affected by our decision and may be further affected by the court's determinations on remand. Doris may present her claim of hardship to the court on remand.

We are concerned that as a result of our decision, the parties' limited resources will be expended in further litigation. However, we are persuaded that the merits and interrelationship of the issues raised on appeal require a reversal and remand.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.