

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 30, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

No. 97-0587

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN RE THE MARRIAGE OF:
REBECCA E. ROETHKE,**

PETITIONER-APPELLANT,

V.

JAMES B. ROETHKE,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County:
RICHARD J. CALLAWAY, Judge. *Reversed and cause remanded with
directions.*

Before Eich, C.J., Vergeront and Deininger, JJ.

VERGERONT, J. Rebecca Roethke appeals from a judgment of divorce, contending that the trial court made legal errors in dividing the real properties and erroneously exercised its discretion in dividing the personal

property. We conclude that the trial court did not apply the correct legal standards with respect to the real properties and therefore reverse and remand. We reject some of the challenges to the personal property but, as we explain in the opinion, we direct that the trial court consider two of the challenges on remand because the record does not show that the trial court properly exercised its discretion with respect to those.

BACKGROUND

Rebecca and James were married on February 8, 1993. In 1981, James purchased a house in Blanchardville, Wisconsin, with \$15,000 he inherited from his aunt. The purchase price of the property was \$15,000. At the time of the divorce, which was granted on September 24, 1996, this property was titled in his name alone. The 1992 and 1993 assessed values were \$18,520. James testified that he made substantial improvements to the property, most of them before the marriage, and spent \$14,833 on expenses associated with those improvements, which he financed through a mortgage on the property. He testified that at the approximate time of his marriage, he obtained an appraisal of the property and the appraised value was \$45,000. He testified that he spent \$1,230 on improvements to the property after the marriage. He acknowledged that Rebecca made improvements to the property after the marriage, but disputed her testimony on the amount and value of her efforts.

Rebecca testified that she moved into the house in Blanchardville with James in 1991 and they both worked on the house, but that after they married, they both began a “push” and did a substantial amount of work on the property, because they wanted to refinance it to obtain funds for a down payment on another house. With a few exceptions, Rebecca did not dispute James’ testimony on the

projects he completed on the property before the marriage. The parties agree that the fair market value of this property at the time of divorce was \$58,000 with a mortgage of \$33,085, which included \$17,085.51 that they obtained through refinancing in June 1993. Thus the equity value of this property at the time of the divorce was \$24,915, or approximately \$25,000.

In June 1993, the parties purchased property in Poynette, Wisconsin, titled in both their names as survivorship marital property. They moved into the house on the property. They used the \$17,085 they obtained from refinancing the Blanchardville property toward the down payment on the Poynette property. The purchase price of the Poynette property was \$150,000; however, they sold a cottage on the property to Rebecca's parents for \$43,892.02 so that they could make a down payment of \$60,000. The parties stipulated that the fair market value of the Poynette property (excluding what they sold to her parents) was \$128,000 at the time of the divorce, with a first and second mortgage of \$112,386.23, and an equity value of \$15,613.67. The Poynette house needed a lot of work, and James did most of that work, although Rebecca did some. During that time period Rebecca was pregnant, then gave birth to their son on September 8, 1993, and then was the primary caretaker of the child. Both Rebecca and James worked full time during the marriage, except that Rebecca was confined to her bed one month before the birth of their child and was on leave after the birth of their child for six weeks.

The parties agreed that James should be awarded both properties. They both agreed James should be responsible for the mortgages on both properties. However, they disputed how the equity value of these properties should be divided. After hearing the evidence, the trial court directed the parties to submit findings of fact and conclusions of law and briefs in support. Rebecca

argued in her brief, and proposed in her submissions, that the stipulated value of the Blanchardville property should be reduced by \$15,000, the amount of James' inheritance, and the resulting equity value of that property, \$10,000, should be included in the marital estate and divided equally. She argued that the equity value of the Poynette property was part of the marital estate and should be divided equally.

James argued that the entire equity value of the Blanchardville property should be awarded to him because it was purchased with inherited funds and because he did practically all the work on that house. He argued that it would be fair to award Rebecca \$1,000 for the work she did on this property, based on his testimony that at \$7 an hour this is the amount she would have earned at the prevailing rate for the time he testified that she spent on this work. He argued that on the Poynette property, he should receive a credit in the amount of \$17,085 because that down payment came from inherited funds—that is, a mortgage on the Blanchardville property which was purchased with inherited funds, and because he paid for and did substantially all the rehabilitation work on that property. The findings of fact and conclusions of law submitted by James reflect these arguments.

The trial court signed and entered the proposed findings of fact and conclusions of law submitted by James. Both properties were awarded to James; he was assigned the mortgages for each; and Rebecca was to receive \$1,000 for her work on the Blanchardville property. With respect to the Blanchardville property, the court concluded that it was not subject to division pursuant to § 767.255(2), STATS.,¹ because it was purchased with inherited property and the

¹ Section 767.255, STATS., provides in pertinent parts:

(continued)

exclusion from the marital estate would not create a hardship for Rebecca or their child. Alternatively, the court concluded that because the property was purchased before the marriage and was substantially renovated by James with his funds before the marriage, and the marriage was short term, he should receive the equity value. With respect to the Poynette property, the court concluded that the down payment obtained from refinancing the Blanchardville property retained its character of inherited property and therefore should be “returned” to James.

DISCUSSION

Generally property division rests within the sound discretion of the trial court. *Brandt v. Brandt*, 145 Wis.2d 394, 406, 427 N.W.2d 126, 130 (Ct. App. 1988). We uphold the division awarded by the court if the court examined the relevant facts, applied the proper legal standard, and using a demonstrably rational process, reached a conclusion that a reasonable judge could reach. *Prosser v. Cook*, 185 Wis.2d 745, 755, 519 N.W.2d 649, 652 (Ct. App. 1994). An exercise of discretion premised upon factual or legal error constitutes an erroneous exercise of discretion. *Brandt*, 145 Wis.2d at 406, 427 N.W.2d at 130. The court is obligated to follow § 767.255, STATS., when determining the property division, and questions concerning the construction of that statute presents questions of law,

(2) (a) Except as provided in par. (b), any property shown to have been acquired by either party prior to or during the course of the marriage in any of the following ways shall remain the property of that party and is not subject to a property division under this section:

1. As a gift from a person other than the other party.
2. By reason of the death of another, including, but not limited to, ... property acquired by right of ... inheritance....
3. With funds acquired in a manner provided in subd. 1. or 2.

which we review de novo. *Schwegler v. Schwegler*, 142 Wis.2d 362, 365, 417 N.W.2d 420, 422 (Ct. App. 1987). However, when the court makes findings of historical fact, we accept these unless they are clearly erroneous. *Brandt*, 145 Wis.2d at 407, 427 N.W.2d at 130.

Real Property

With respect to the Blanchardville property, Rebecca acknowledges that \$15,000 of the equity value in the property is not subject to division because it was inherited property; but she contends the remaining \$10,000 is marital property and should be divided equally.²

James responds that in order for a non-owning spouse to share in the increased value of an inherited asset, the spouse must prove the value of the contribution, and that the record supports the trial court's findings that \$1,000 is a reasonable value for Rebecca's contribution.

Section 767.255(2), STATS., excludes from marital property property that is either acquired by gift or inheritance or paid for with funds so acquired, whether before or during the marriage. *Schorer v. Schorer*, 177 Wis.2d 387, 406, 501 N.W.2d 916, 923 (Ct. App. 1993). When gifted or inherited property appreciates during the marriage due to the efforts of both the owning and non-owning spouse, that appreciation is included in the marital estate. *Id.* On the other hand, if the appreciation in value is due solely to general economic conditions, such as inflation or normal appreciation of real estate values, the

² Rebecca also argues, in the alternative, that the identity of the inherited property has so changed because of the remodeling and improvements that the entire equity value is part of the marital estate. Since Rebecca did not make this argument to the trial court, we will not consider it on appeal. See *Preuss v. Preuss*, 195 Wis.2d 95, 105, 536 N.W.2d 101, 104 (Ct. App. 1995).

property remains separate. *Id.* at 407, 501 N.W.2d at 923. The increase in value of inherited or gifted property due to the owning spouse's efforts prior to the marriage is not exempt as gifted or inherited property but is property that a spouse brings to the marriage. *See Schwegler v. Schwegler*, 142 Wis.2d 362, 365-66, 417 N.W.2d 420, 422-23 (Ct. App. 1987) (trial court erred in failing to distinguish between land gifted to spouse prior to marriage and house built on gifted land by spouse prior to marriage). *See also Arneson v. Arneson*, 120 Wis.2d 236, 244, 355 N.W.2d 16, 20 (Ct. App. 1984) (§ 767.225(2), STATS., extends exemption only to property acquired by the means there recited).

The trial court did not distinguish between that portion of the Blanchardville property purchased with the inherited funds and the increased value due to James' efforts prior to the marriage. While it may consider the non-exempt property James brought to the marriage, *see* § 767.255(3)(b), STATS., and the short term of the marriage, *see* § 767.255(3a), as reasons to deviate from the presumptive equal division of the marital property, a proper exercise of discretion requires a correct factual and legal basis. The court made no findings on the fair market value or the equity value of the property as of the date of the marriage. The tax assessment for 1993 shows an assessed value of \$18,520 and, while James testified that \$45,000 was the appraised value at the approximate time of the marriage, the record does not contain a date for the appraisal.³ Even if we treat the court's finding that James "substantially renovated the Blanchardville house

³ Rebecca asserts in her brief in chief that this appraisal was done on May 20, 1993, citing to Exhibit 7, page 5 of James' financial fact sheet. That shows an appraisal date of May 20, 1996, for the "current market value" of \$58,000. However, in his brief James does not dispute a May 20, 1993 appraisal date for the \$45,000 appraised value, and does not present any argument concerning the value of the property on the date of the marriage, except argument relating to the specific tasks James testified that he accomplished before the marriage.

before he married” as an implicit finding that a substantial portion of the increase in value occurred before the marriage in spite of the tax assessment, it is undisputed that the fair market value of the property increased by at least \$13,000 during the marriage.⁴ There is no evidence that this increase was due to market forces. The findings of fact suggest that this was due primarily to James efforts: “After their marriage, [Rebecca] did some work on the Blanchardville house, which was minor in comparison to the amount of work done by [James]. [Rebecca’s] work on the Blanchardville house can be quantified in value at \$1,000.” An increase in the value of inherited property due to the efforts of the owning spouse during the marriage is marital property. See *Schorer*, 177 Wis.2d at 405, 501 N.W.2d at 922. It does not appear that the trial court considered the increase in value of the Blanchardville property due to James’ efforts after the marriage as marital property.

James, and the trial court, also assume that James’ payments of \$1,230 for renovations during the marriage, and the mortgage are evidence that either the Blanchardville property is not part of the marital estate or there are reasons to divide this marital property unequally. This assumption is based on an incorrect legal standard. There is no evidence that James made these payments from exempt funds. The undisputed testimony is that during the marriage James and Rebecca had two joint accounts. The increase in the value of the property is marital property even if it is exempt due to the expenditure of the owning spouse’s earnings during the marriage. See *Lendman v. Lendman*, 157 Wis.2d 606, 612, 460 N.W.2d 781, 783 (Ct. App. 1990); see also *Torgerson v. Torgerson*, 128

⁴ We recognize that this increase in fair market value does not mean that the equity value of the property increased by this amount during the marriage.

Wis.2d 465, 470 n.3, 383 N.W.2d 506, 508 n.3 (Ct. App. 1986) (value in excess of down payment made with inherited funds is marital property unless owning spouse can show mortgage or other payments were made with exempt funds).

Because of the inadequate factual findings and the application of incorrect law, we cannot sustain the trial court's division of the equity value in the Blanchardville property.

With respect to the Poynette property, Rebecca disagrees with the trial court's determination that the equity in the Poynette property is attributable to the down payment and not to James' efforts at renovating the property, and with its conclusion that the down payment has retained the inherited character of the funds loaned. Rebecca argues that the equity value is entirely marital property and James' greater efforts to improve that property do not provide a basis for awarding the entire amount to him because the court is ignoring the contributions that Rebecca made to the marriage while James was working on their house, such as pregnancy, giving birth, caring for their child and doing housework.

In response, James states that whether the loan proceeds from the Blanchardville property were "transmuted to a marital asset" ... is not the issue. James frames the issue as whether "when the equity on the Poynette real estate is created by and is less than the debt incurred to create it, it is logical to assign the debt creating the asset to the same party, to determine whether equity does, in fact, exist." According to James, since he has been assigned the mortgage on the Blanchardville property, which includes the \$17,085 used for a down payment on the Poynette property, if the equity in the Poynette property is evenly divided, Rebecca nets \$7,806.83 and he nets a negative \$9,193.17. The court can take this

into account, James contends, as a relevant factor justifying a deviation from a presumptive equal property division under § 767.255(3), STATS.

We construe James' position as abandoning the argument that the \$17,085 used for the down payment of the Poynette property is exempt from property division because it has retained its character and identity as inherited property. *See Brandt*, 145 Wis.2d at 408, 427 N.W.2d at 131 (character and identity of gifted or inherited property must be preserved in order to be exempt under § 767.255(2), STATS.). We observe that such an argument has no merit in any event because James is also arguing, and Rebecca agrees, that \$15,000 of the equity value in the Blanchardville property is exempt as inherited property. James' position, adopted by the trial court, in effect exempts more than double the amount of the inherited property.

We understand James now to argue that, although the Poynette property is marital property, the court could properly exercise its discretion by awarding the entire equity value to him because he is responsible for the Blanchardville mortgage. We reject this argument because it relies on subtracting the mortgage of \$17,085 from the equity in both properties, a calculation that makes no sense to us. The mortgage on the Blanchardville property, including the \$17,085, has been deducted from the fair market value of that property to arrive at an equity value of \$25,000, \$15,000 of which Rebecca concedes is not marital property because it was purchased with inherited funds. However the remaining \$10,000 in equity value is divided, James is not in a "negative" position if he is awarded that property and assigned that mortgage. The same is true with the Poynette property. Considering its fair market value and mortgage, however the equity value of \$15,613.67 is divided, James is not in a "negative" position.

We have considered whether the court's decision indicates another basis for awarding the entire equity in the Poynette property to James, recognizing that the court may, in the proper exercise of its discretion, deviate from the presumptive equal division of marital property under § 767.255(3), STATS., for a variety of reasons. The court did make findings that James invested substantial effort in renovating the Poynette property after his normal hours at his employment and that Rebecca's work on the renovations was minimal compared to his. However, while James was working full time and working on the renovations, Rebecca was also working full time (except when due to medical reasons or maternity leave) and either pregnant or caring for an infant, as well as doing housework. In deciding whether to deviate from the presumptive equal division of marital property, the court may consider "the contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and childcare services." Section 767.255(3)(d). The trial court considered James' contribution to the marriage by renovating the parties' home but did not consider the non-economic contributions of Rebecca. We therefore cannot sustain the trial court's exercise of discretion with respect to the division of the equity value of the Poynette property.

Personal Property

The only evidence on the values of personal property items was the parties' testimony, and they disagreed on the values of a number of items. After excluding those items brought to the marriage by each, the trial court found that the values assigned to these items by James—\$3,850 for those items he retained and \$3,275 for those items Rebecca retained—appeared to be reasonable, and it accepted those values. The trial court also accepted the values that James testified to for the vehicles each kept—\$3,000 for Rebecca's vehicle and \$100 for his

vehicle—rather than the values she testified to. Finally, the court assigned each his or her pension accounts, valuing Rebecca’s at \$1,260 and James’ at \$2,219, then discounting each for taxes by thirty percent. The court found the present after-tax value of the portion of James’ IRA accrued during the marriage to be \$83. The court adopted the calculations proposed by James, whereby, after taking into account the assignment of property with these values, the \$1,000 for Rebecca’s work on the Blanchardville property, and the debt division agreed to by the parties, (excluding the mortgages) James was ordered to pay Rebecca \$455. It appears that this division and this payment were intended to be an equal property division of the personal property and debts (excluding the mortgages).

Rebecca argues that the trial court did not engage in a reasoned exercise of discretion in valuing and dividing the personal property because it: (1) accepted James’ values rather than Rebecca’s whenever there was a dispute over the values; (2) excluded all personal property items brought to the marriage by either party, and excluded the present value of James’ IRA accrued period to the marriage, \$612.90; (3) reduced the retirement accounts by thirty percent for taxes even though the parties’ withholding is not more than fifteen percent. She also argues that the manner in which the trial court calculated the equalization payment to her deprives her of the \$1,000 payment for her work on the Blanchardville property and results in awarding her only one-third of the personal property, even if only the property acquired during the marriage is considered with James’ values.

Where the parties’ testimony on values conflicted, it was the trial court’s role to choose between that testimony. *See Posnanski v. City of West Allis*, 61 Wis.2d 461, 465, 213 N.W.2d 51, 52-53 (1973). We conclude the trial court’s findings of values based on James’ testimony rather than Rebecca’s are not

clearly erroneous. We also conclude that, in view of the short marriage, the trial court could properly assign each party the personal property each brought to the marriage, including the present value of James' IRA accrued prior to the marriage, and not subject that property to an equal division. However, we are unable to determine the basis for the thirty percent reduction of the pension and IRA values for taxes. We are also unable to follow the calculations in the trial court's decision which lead to an equalizing payment to Rebecca of \$455. James does not explain these calculations in his brief.

On remand, the trial court should exercise its discretion in dividing all property not exempt under § 767.255(2), STATS., consistent with § 767.255(3), and with this decision, after making the necessary factual findings. The court should also consider the reduction for taxes and Rebecca's objection to the calculation leading to the equalization payout, if the latter objection is still applicable.

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

Not recommended for publication in the official reports.

