COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1310

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

IN RE THE MARRIAGE OF:

MICHAEL J. GLUNZ,

PETITIONER-RESPONDENT,

V.

LAURA A. SOKOL (F/K/A GLUNZ),

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Reversed in part and cause remanded with directions; affirmed in part.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Laura A. Sokol appeals from the judgment of divorce entered following divorce proceedings between her and Michael J. Glunz.

Sokol challenges two property division rulings of the trial court. First, she claims that the trial court erroneously exercised its discretion when it found that the Dean Witter account constituted gifted property to Glunz and should be excluded from the marital estate. Because the Dean Witter account was not gifted property, we reverse that portion of the judgment and remand to the trial court to re-calculate the division of the estate with the Dean Witter account included.[1] Second, Sokol claims that the trial court erroneously exercised its discretion when it ordered the Kemper account to be discounted 20% for equalization purposes. Because the trial court's discounting on the Kemper account did not constitute an erroneous exercise of discretion, we affirm that portion of the order.

I. BACKGROUND

¶2 Glunz and Sokol were married on May 14, 1988. During the marriage they had two children: a daughter born July 21, 1990, and a son born April 25, 1992. On July 29, 1999, Glunz filed for divorce. The case went to trial in February 1999. As pertinent to this appeal, the trial court found that a Dean Witter IRA was property gifted to Glunz and not marital property. The Dean Witter account was in Glunz's name only, and had been started by him and his parents prior to the marriage. No money was added to the account after the marriage. At the time of marriage, the approximate value of this account was $12,720 and, at the time of divorce, the account was valued at $34,215. Glunz testified that his parents put money into the Dean Witter IRA, and that he made contributions as well. Glunz could not testify as to what part of the Dean Witter

[1] Because we have concluded that the Dean Witter account did not constitute gifted property, Sokol's related issue regarding the interest on the Dean Witter account need not be addressed. ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need to be addressed).

fund was a gift from his parents and what part was money he himself contributed into the IRA.

¶3 The trial court also ruled that the Kemper brokerage account would be discounted 20% for equalization purposes. The Kemper account was gifted to both Sokol and Glunz by Glunz's brother. A final judgment of divorce was entered on April 5, 2000. Sokol now appeals.

II. DISCUSSION

A. Dean Witter Account.

¶4 Sokol argues that the trial court erroneously exercised its discretion when it found that the Dean Witter IRA was gifted property and not subject to the marital estate. The trial court ruled that the IRA was a gift to Glunz from his parents, that no contributions were made to the account after the date of the marriage, and that the character of the account never changed. We conclude that the trial court erred when it found, based on the record before us, that the Dean Witter IRA account was a gift.

¶5 The division of property in a divorce case rests within the discretion of the trial court. ***Brandt v. Brandt***, 145 Wis. 2d 394, 406, 427 N.W.2d 126 (Ct. App. 1988). Accordingly, our review on this issue is limited to determining whether or not the trial court erroneously exercised its discretion. ***Id.*** at 407. We will not conclude that the trial court erroneously exercised its discretion if it considered the facts of record, applied the pertinent law, and reached a reasonable conclusion. ***Burkes v. Hales***, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991).

¶6 WISCONSIN STAT. § 767.255(2)(a) (1999-2000)[2] provides that gifted and inherited property do not constitute a part of the marital estate, except in cases of hardship. The person claiming that the property is gifted or inherited bears the burden of proving that it should be excluded from the marital estate. ***Brandt***, 145 Wis. 2d at 408. Here, the burden falls upon Glunz to prove that the entire property was a gift to him. He failed to meet that burden.

¶7 Glunz testified that both he and his parents made contributions to the Dean Witter IRA. Glunz failed to present any evidence showing what amount of the IRA was a gift from his parents and what amount constituted his own contribution. Because the account consisted of contributions from his parents and from him, the account is not entirely gifted property and cannot fall outside the marital estate. Glunz has also failed to prove what amount constituted a gift from his parents. Accordingly, the entire account must become a part of the marital estate.

¶8 Therefore, we reverse that portion of the trial court's order and remand the matter with directions to the trial court to consider the Dean Witter IRA as a part of the marital estate.

B. Kemper Account.

¶9 Sokol also contends that the trial court erroneously exercised its discretion when it discounted the jointly held Kemper account by 20% for equalization and tax purposes. Again, the distribution of the property is reviewed subject to the deferential standard of review and will not be reversed unless we can

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

find that the trial court failed to consider the relevant facts, apply the pertinent law, and reach a reasonable conclusion. We cannot conclude that the trial court erroneously exercised its discretion.

¶10 There is very little discussion on this issue in the trial court record. The judgment of divorce reflects that the Kemper account was awarded to Glunz, with a 20% discounted value of $21,670. The actual value was about $27,000. Sokol argues that the 20% discount was erroneous because it was not an IRA or pension account, but a simple brokerage account. Glunz responds that WIS. STAT. § 767.255(3)(k) requires the trial court to consider tax consequences of the property division to each party. Glunz contends that the reason for the discount has to do with equalization. He argues that this account was added to the marital estate, and then awarded to him, rather than split fifty-fifty. Glunz retained the account, and Sokol received an equalization cash payment or some other asset.

¶11 Frankly, the record is somewhat sparse regarding this issue. There was little testimony or discussion regarding this particular account. In essence, the record contains the written judgment which awards the discounted Kemper account to Glunz and a cash payout to Sokol, and a statement by counsel that the Kemper account should be discounted 20% for tax purposes pursuant to ***Selchert v. Selchert***, 90 Wis. 2d 1, 9, 280 N.W.2d 293 (Ct. App. 1979). Under such circumstances, we are guided by two principles. First, a trial court's acquiescence in a statement by counsel may provide the rationale for upholding a determination. ***Hagenkord v. State***, 100 Wis. 2d 452, 464, 302 N.W.2d 421 (1981). Second, we look for reasons to sustain the trial court's discretionary decision, ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968), even if our ruling provides a different basis other than that of the trial court, ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985).

¶12 Although we fail to see the connection between ***Selchert*** and the discounting in this case, the law remains that the trial court is required to consider tax implications when ruling in divorce proceedings. Here, in an attempt to equalize the property division, Glunz was awarded 100% of Kemper account. The trial court allowed a 20% discount for tax purposes. Glunz suggests that this was reasonable because Glunz would be responsible for paying the taxes on that account. If the pre-tax value was added into the marital estate, Sokol would have received compensation for half of the full value of the Kemper account in the equalization payment without having to pay taxes on her portion. The only fair way of sharing the tax liability was to add the post-tax value into the marital estate and, when taxes were due, Glunz would pay the entire tax liability. This rationale supports the trial court's discounting.

¶13 Although this court does not necessarily agree that the 20% discount was the proper amount, this is often the standard percentage used for tax purposes, unless the parties present evidence to the contrary. None was presented here.

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

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