COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2202 **Cir. Ct. No. 2014FA651**

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

IN RE THE MARRIAGE OF:

PATRICK J. FLANAGAN,

PETITIONER-RESPONDENT,

V.

JULIE F. SAMAIN F/K/A JULIE F. FLANAGAN,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: MITCHELL J. METROPULOS, Judge. *Reversed and cause remanded with directions*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Julie Samain appeals a divorce judgment, challenging the circuit court's division of property. The circuit court determined three real estate properties owned by Samain's former husband, Patrick Flanagan, were Flanagan's individual property under the terms of the parties' marital property agreement (MPA) and awarded Samain no interest in the properties or their value. Samain contends the undisputed evidence shows that the properties in question were "irretrievably mixed" with marital property and, as a result, under the plain language of the MPA the properties lost their character as Flanagan's individual property. We agree with Samain that, by virtue of the payment of expenses related to the properties from the parties' joint checking account, a portion of the properties' value became marital, even though the real estate is titled solely in Flanagan's name and was properly awarded to him under the MPA. We therefore reverse the circuit court's judgment and remand for the court to determine anew the property division, considering the value of the marital portion of the commingled real estate assets.

BACKGROUND

¶2 At all times relevant to this appeal, Flanagan was the sole shareholder in two businesses: Flanagan's Stop and Shop, Inc., and Flanagan's Wine Review, Inc. Both of those businesses were located in commercial real estate Flanagan owned on College Avenue in Appleton.

¶3 In June 2005, Flanagan and Samain began cohabitating. At the end of that month, Samain began working at Flanagan's Stop and Shop. Around the same time, the parties opened joint personal savings and checking accounts at First State Bank in New London. Samain deposited her paychecks from Flanagan's Stop and Shop into the parties' joint checking account. On November 24, 2006,

Samain also deposited into the parties' joint account $174,002.20 she had received from a property division in a prior divorce. It is undisputed that at least $100,000 of that money was subsequently used to purchase inventory for Flanagan's businesses and pay suppliers.

¶4 The parties were married on June 18, 2011. Three days before the marriage, they executed the MPA, which classified certain property as the individual property of each party. As relevant to this appeal, the MPA stated each party's income from any source based on that party's "labor, work, inventiveness or other activities" would be classified as individual property. The MPA also specified that all "interest, dividends, rents, profits, or other income of any sort" derived from each party's individual property would be individual property.

¶5 In addition, the MPA classified as Flanagan's individual property: (1) the parties' residence on North Road in Greenville, which Flanagan represented was valued at $400,000; (2) a rental property located on Wisconsin Avenue in Kaukauna, which Flanagan valued at $82,000; and (3) the College Avenue commercial property in Appleton where Flanagan's businesses were located, which Flanagan valued at $1,200,000. Each of those properties was titled in Flanagan's name alone. At the time the MPA was signed, the North Road residence was subject to a mortgage with a balance of $223,131, the Wisconsin Avenue property was subject to a mortgage with a balance of $75,973, and the College Avenue property was subject to a mortgage with a balance of $577,739. The MPA provided that these mortgages were Flanagan's individual debts and were to be paid from his individual property.

¶6 The MPA also included three other provisions that are relevant to the issues raised in this appeal. First, Section VI, entitled "Classification of All Other

Property," provided that, except for those items specifically classified by the MPA as individual property, "all other property of either or both parties, whether now owned or hereafter acquired, … shall be classified as provided in the [Marital Property] Act."

¶7 Second, Section VII, entitled "Mixing Marital Property and Individual Property," stated:

> A. Except as herein provided for, neither party shall mix marital property with his or her individual property.
>
> B. Except as herein set forth, the parties recognize that individual property acquired before or during their marriage must be segregated and not irretrievably mixed with marital property if the individual property is to remain individual property.

¶8 Third, Section XIV of the MPA, entitled "Dissolution of Marriage: Property Division," addressed how the parties' property would be divided in the event of a divorce, annulment, or legal separation. Section XIV provided that each party's individual property "shall remain that party's individual property and shall not be further divided by the court having jurisdiction of the parties' divorce," but all other property of the parties "shall be divided by the court … pursuant to Section 767.61, Wisconsin Statutes." Section XIV further provided that, in recognition for Samain's contributions during the years she cohabitated with Flanagan, Flanagan would make a one-time payment to Samain in the event of a divorce, the amount of which would be based on the length of the parties' marriage.

¶9 After they were married, the parties deposited virtually all of their income into their joint checking account at First State Bank, including their paychecks from Flanagan's Stop and Shop, their income tax refunds, and rent

payments Flanagan received from Flanagan's Stop and Shop and Flanagan's Wine Review. The parties used the funds in the joint checking account to pay for various expenses, such as health insurance, car insurance, credit card bills, and real estate taxes on the College Avenue property. In addition, mortgage payments on the College Avenue property, the Wisconsin Avenue rental property, and the parties' North Road residence were automatically withdrawn from the joint checking account.

¶10 Flanagan petitioned for divorce in September 2014, just over three years after the parties were married. The circuit court issued an oral decision concerning property division on August 1, 2016. The court began by concluding the MPA "exclude[d] the Court from having really any jurisdiction with regards to dividing up Mr. Flanagan's business and his property." The court then determined that, under Section XIV of the MPA, Samain was entitled to a payment of $100,000, based on the length of the parties' marriage. The court also concluded it was appropriate to award Samain an additional $74,000, based on the court's finding that Samain invested $174,000 in Flanagan's businesses before the parties were married. However, the court subtracted $55,000 from that sum, to account for payments Flanagan made to Samain during the pendency of the divorce proceedings. After equally dividing all property that was "accumulated during the term of the marriage," the court "[came] up with a total award to [Samain] of $170,375."

¶11 The circuit court next addressed and rejected Samain's argument that she was entitled to "half of the joint checking and joint savings accounts." The court explained:

> I considered that [argument], [but] it was difficult to try to analyze that because I believe by the time of the divorce

> [they] had been converted into the business accounts, but by giving her that $74,000 extra of what she brought into the business, I'm not going to make any awards or try to divide that up.

¶12 After the circuit court announced its ruling, Samain's attorney requested clarification, stating:

> I think your decision means that you did not find any commingling of personal funds with—or marital funds with individual funds? You know, I had argued under the [MPA] that all the payments that had gone into the joint personal account and then went out to pay on real estate were marital payments.

The court responded:

> The [MPA] in my opinion gives Mr. Flanagan his businesses and his property, and it would, even if they had made what I characterize as equity during the course of the marriage. Now, I did not award any commingling or analyze the case that way at all, but I felt it fair to your client that she, at a minimum, get back the full $174,000 she invested.

The court subsequently confirmed it "did not" find that the parties had commingled individual and marital property.

¶13 A written judgment of divorce was entered on September 28, 2016. Samain now appeals, arguing the circuit court erred by treating the North Road, Wisconsin Avenue, and College Avenue properties as Flanagan's individual property. She asks this court to "either divide this marital property equally or to remand the case to the trial court with instructions to treat these properties as marital property subject to division with the presumption of equal division."

STANDARD OF REVIEW

¶14 The division of property at divorce is entrusted to the circuit court's discretion and will not be disturbed on appeal absent 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 when it examines the relevant facts, applies a proper standard of law, and uses a demonstrated rational process to reach a reasonable conclusion. ***Id.***

¶15 Our review of a circuit court's discretionary decision may involve underlying questions of law and fact. *See* ***Covelli v. Covelli***, 2006 WI App 121, ¶13, 293 Wis. 2d 707, 718 N.W.2d 260. We independently review any questions of law, *see* ***id.***, including the interpretation of the parties' MPA, *see* ***Steinmann v. Steinmann***, 2008 WI 43, ¶21, 309 Wis. 2d 29, 749 N.W.2d 145, and the application of the Marital Property Act, *see* ***Gardner v. Gardner***, 175 Wis. 2d 420, 425, 499 N.W.2d 266 (Ct. App. 1993). However, we will not disturb the circuit court's factual findings unless they are clearly erroneous. ***Covelli***, 293 Wis. 2d 707, ¶13. A finding of fact is clearly erroneous when it is against the great weight and clear preponderance of the evidence. ***Phelps v. Physicians Ins. Co.***, 2009 WI 74, ¶39, 319 Wis. 2d 1, 768 N.W.2d 615.

DISCUSSION

¶16 Samain argues on appeal that, under the terms of the MPA, funds deposited in the parties' joint checking account became marital property. Samain further contends the undisputed evidence shows that the parties used funds from their joint checking account to make mortgage payments on the North Road, Wisconsin Avenue, and College Avenue properties, all of which were titled in Flanagan's name and were classified by the MPA as Flanagan's individual

property. Samain asserts that, by using marital property to make the mortgage payments on those three properties, Flanagan "irretrievably mixed" marital and individual property. Consequently, Samain argues that, under the plain language of the MPA, the North Road, Wisconsin Avenue, and College Avenue properties lost their character as individual property, and the circuit court therefore erred by treating them as such.

¶17 We agree with Samain that even though the properties are titled solely in Flanagan's name and they were properly awarded to him pursuant to the MPA, a portion of the properties' value became marital under the MPA's terms as a result of the parties' conduct during the marriage. The parties' joint checking account is not expressly classified as individual property under the MPA. Accordingly, under Section VI of the MPA, the joint account "shall be classified as provided in the [Marital Property] Act." It is undisputed that the joint account was opened sometime around June 2005—long before the date of the parties' marriage, which is also their "determination date" under the Marital Property Act. *See* WIS. STAT. § 766.01(5) (2015-16).[1] Because the parties' determination date is the same as the date of their marriage, the Marital Property Act specifies that "the property owned at the determination date is individual property of the owning spouse." WIS. STAT. § 766.31(6).

¶18 In this case, however, the property at issue is a joint checking account in both parties' names. An inherent tension arises when applying WIS. STAT. § 766.31(6) to a joint account because, while that section specifies that

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

property owned on the determination date is the "individual property of the owning spouse," under WIS. STAT. § 705.03(1) a joint account "belongs, during the lifetime of all parties, to the parties without regard to the proportion of their respective contributions to the sums on deposit and without regard to the number of signatures required for payment." Under these circumstances, it makes no sense to say that the joint checking account was the individual property of the "owning spouse" following the parties' determination date, given that under § 705.03(1) the account was wholly owned by both parties both before and during the marriage. On these facts, and given the presumption set forth in the Marital Property Act that all property of spouses is marital property, *see* § 766.31(2), we conclude the parties' joint checking account became marital property as of their determination date—i.e., the date of their marriage.

¶19 It is undisputed that, following their marriage, both parties deposited individual property into their joint checking account, including Samain's paychecks, Flanagan's paychecks, and rent from the College Avenue property. The parties then used funds from the joint checking account to pay a wide variety of marital and individual expenses. The record does not contain any sort of accounting that would permit tracing of the individual property deposited in the joint account. The MPA expressly states that, if individual property is to retain its character as individual property, it cannot be "irretrievably mixed" with marital property. We conclude that, by placing individual property into the joint checking account, which became marital property on the date of the parties' marriage, the parties' "irretrievably mixed" that individual property with marital property. Consequently, under the terms of the MPA, the parties changed the character of

their individual property to marital property by depositing that individual property into their joint checking account.[2]

¶20 It is further undisputed that, throughout the course of the parties' marriage, mortgage payments on the North Road, Wisconsin Avenue, and College Avenue properties were automatically withdrawn from the parties' joint checking account. In other words, the mortgage payments on those properties were made using marital property. Again, the MPA specifies that, if individual property is to retain its character as individual property, it cannot be "irretrievably mixed" with marital property. By using marital property to pay the mortgage debt on the three properties listed above, thereby increasing Flanagan's equity in those properties, the parties "irretrievably mixed" those properties with marital property. *See* ***In re Landsinger***, 490 B.R. 827, 830-31 (Bankr. W.D. Wis. 2012) ("Under Wisconsin law, when marital funds are used to reduce a debt on non-marital property, the marriage acquires an ownership interest in the property."); *see also* KEITH A. CHRISTIANSEN ET AL., MARITAL PROPERTY LAW IN WISCONSIN, § 3.12 (4th ed. 2010) (observing the comment to section 14 of the Uniform Marital Property Act,

[2] Notably, Section XIII of the MPA, entitled "Household Expenses," provided:

> The parties may establish a joint checking account to pay all household expenses, such as food, clothing, utilities, housing, medical, automobile, joint travel, and entertainment expenses. The parties shall contribute to this account in such amounts as they may from time to time agree.

The parties' actual use of the First State Bank joint checking account went far beyond the use contemplated by Section XIII of the MPA. As discussed above, the parties deposited virtually all of their income into the joint checking account, rather than simply making periodic contributions. In addition, the parties used funds from the joint checking account to make mortgage payments on the Wisconsin Avenue and College Avenue properties and to pay real estate taxes on the College Avenue property. Those payments cannot be reasonably described as "household expenses."

on which the Wisconsin Marital Property Act is based, considers an "increased value resulting from payments on liens on property" as an example of a type of mixed property). On this record, the circuit court's finding that the parties did not "commingle" individual and marital property is against the great weight and clear preponderance of the evidence and is therefore clearly erroneous. *See* ***Phelps***, 319 Wis. 2d 1, ¶39. Because the North Road, Wisconsin Avenue, and College Avenue properties were "irretrievably mixed" with marital property in the manner explained above, the court erred by treating them entirely as Flanagan's individual property.

¶21 Flanagan argues the circuit court made a factual finding that the funds in the parties' joint checking account were not marital property. However, we agree with Samain that the court made no such finding. Instead, when addressing Samain's claim that she was entitled to half of the funds in the joint checking and savings accounts, the court stated it was "difficult to try to analyze that" argument because the funds in those accounts had been transferred into business accounts. Ultimately, the court indicated that, in light of the fact it had awarded Samain an additional $74,000 to account for her pre-marital investment in Flanagan's businesses, it was not necessary to attempt to divide the funds that had been transferred from the joint accounts into business accounts. Contrary to Flanagan's assertion, the court never made an express or implied finding that the funds in the joint accounts were not marital property.

¶22 Flanagan also argues the circuit court properly treated the North Road, Wisconsin Avenue, and College Avenue properties as his individual property because the evidence showed he had "no donative intent … to give [Samain] any ownership interest" in them. Flanagan cites his own testimony that he did not intend to gift any portion of the rent from the College Avenue property

to Samain by placing that money in the parties' joint checking account. Flanagan also asserts he only opened the joint account "at the instruction of his banker to be a pass though account for rents for his real estate."

¶23 Flanagan cites several cases for the general proposition that donative intent is relevant when determining whether the parties' conduct has caused individual property to be transmuted to marital property. However, Flanagan does not explain why his donative intent—or lack thereof—is relevant under the circumstances of this case. As discussed above, it is undisputed that Flanagan placed individual property, including rent from the College Avenue property, into the parties' joint checking account. By doing so, Flanagan converted that property to marital property under the plain language of the MPA. It is further undisputed that funds from the joint checking account—i.e., marital property—were used to pay down mortgage debt on the North Road, Wisconsin Avenue, and College Avenue properties, thus irretrievably mixing those individual properties with marital funds. Under these circumstances, that Flanagan may not have intended to gift any of his individual property to Samain is not dispositive of whether the property at issue actually remained his individual property under the terms of the MPA. None of the cases Flanagan cites regarding donative intent involved an MPA similar to the one in this case, which expressly prohibited the parties from irretrievably mixing marital and individual property.

¶24 Finally, Flanagan argues the North Road, Wisconsin Avenue, and College Avenue properties were not irretrievably mixed with marital property because the funds used to make the mortgage payments on those properties are traceable to his individual property. Flanagan contends that his rental income was deposited into the parties' joint checking account, and that money was then

immediately used to pay the mortgages on the North Road, Wisconsin Avenue, and College Avenue properties.

¶25 The record does not support Flanagan's argument that the funds used to pay the mortgages on the relevant properties are traceable solely to his individual property. First, it is undisputed that neither the North Road residence nor the Wisconsin Avenue rental property generated any rental income during the parties' marriage. The mortgages on those properties must therefore have been paid using funds from other sources. Second, Flanagan conceded at trial that there were times when his businesses did not have sufficient funds to make their rental payments for the College Avenue property. During those months, the mortgage on the College Avenue property was necessarily paid using other funds. Ultimately, Flanagan has failed to provide any sort of accounting showing that his individual property from the joint account was used to make the monthly mortgage payments on the North Road, Wisconsin Avenue, and College Avenue properties. We therefore reject Flanagan's argument that the circuit court properly treated those properties as his individual property because the mortgage payments are traceable to his individual income.

¶26 For the foregoing reasons, we conclude the circuit court erred by treating the North Road, Wisconsin Avenue, and College Avenue properties entirely as Flanagan's individual property. Rather, given the parties' "irretrievable mixing" of marital property to reduce the mortgage debt on the three properties at issue, some portion of the value of those properties became marital property that must be divided between the parties. We therefore reverse and remand for the court to determine anew the property division, considering the value of the marital portion of these commingled real estate assets.

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

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