COURT OF APPEALS
DECISION
DATED AND RELEASED

May 29, 1997

NOTICE

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.

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No. 96-2821

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

IN THE MATTER OF THE ESTATE OF EDWARD L. JONES, DECEASED;
NANCY L. DEWITT,

PETITIONER-APPELLANT,

V.

ESTATE OF EDWARD L. JONES, DECEASED; DOLORES M. JONES, PERSONAL REPRESENTATIVE, AND EDWARD R. JONES, PERSONAL REPRESENTATIVE,

RESPONDENTS.

APPEAL from a judgment of the circuit court for Jefferson County: JOHN ULLSVIK, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

VERGERONT, J. Nancy L. DeWitt, a daughter of Edward L. Jones, appeals the trial court's judgment that the farm owned by Edward at his

death was marital property under the Wisconsin Uniform Marital Property Act (UMPA). She contends that the farm was Edward's nonmarital property because he owned it at the time of his marriage to Delores Jones, prior to the enactment of the UMPA, and that the trial court made errors of fact and law in concluding that it was reclassified to marital property through the mixing of nonmarital and marital property. We conclude the trial court correctly determined that the farm was reclassified to marital property and we therefore affirm.

Edward was not married when he purchased a 236 acre farm and residence on August 1, 1958. The purchase price was $56,000. Edward paid $26,000 and assumed a mortgage on the property of $30,000. Edward married Dolores Jones on March 18, 1972. At the time, the mortgage had an outstanding balance of $10,748 and the farm had an equalized assessed value of $77,435. At the time of Edward's death on November 3, 1994, he and Dolores were still married. The appraised value of the farm at that time was $385,000. Edward retained title to the farm in his name alone throughout the marriage.

Edward and Dolores did not have children. Edward had three children from prior marriages. One of the children, Edward R. Jones (Ed Jones) is the a co-representative of the estate. Ed Jones signed the inventory classifying the farm as marital property. Edward's two daughters, Barbara Vernon and Nancy DeWitt, filed a petition to determine the classification of the farm, claiming that it was nonmarital property.[1] The trial court heard the testimony of DeWitt, Dolores, and Ed Jones, and made findings of fact based on the testimony and exhibits. The court concluded that since Edward acquired the farm before he was married and

[1] Barbara Vernon is not appealing the trial court's decision.

before January 1, 1986, the effective date of the UMPA, the presumption that the farm was marital property and the secondary presumption that it was deferred marital property were overcome.[2] However, the court also concluded that Dolores had proved by a preponderance of the evidence that the farm was converted to marital property through mixing deferred marital income and marital income with the nonmarital property. Since the burden to trace the nonmarital component within the mixed property then shifted to DeWitt, and since she did not meet the burden, the court decided that the farm was marital property.[3]

The trial court rejected Dolores's argument that the farm had become marital property because of the application of her labor and effort, as provided in § 766.63(2), STATS.[4] The court found Dolores had established the first

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[2] The "determination date" is the later of the date of a couple's marriage, the date they take up residence in Wisconsin or January 1, 1986, the effective date of the Marital Property Act. Section 766.01(5), STATS. The determination date for Dolores and Edward is January 1, 1986. Property owned by a spouse before the determination date is predetermination date property, and is generally treated during the marriage as if it were individual property. ***Estate of Lloyd***, 170 Wis.2d 240, 253, 487 N.W.2d 647, 652 (Ct. App. 1992). At death, predetermination date property is subject to deferred marital analysis. ***Id.*** at 253-54, 487 N.W.2d at 652.

Deferred marital property is property acquired while spouses are married and while ch. 766, Marital Property Act, does not apply, if the property would have been marital property under ch. 766 had it been acquired when the chapter applied. Section 851.055, STATS. Whether deferred marital property exists is considered only at death and then only in the context of the two elective rights granted a surviving spouse. ***Id.*** at 255, 487 N.W.2d at 653. When property is acquired both before the determination date and before the marriage, the initial presumption that the property is marital property and the secondary presumption that it is deferred marital property are overcome. ***Id.*** at 260, 487 N.W.2d at 655.

[3] The significance of the classification of the farm as marital property is that Dolores retains an undivided one-half interest in the farm if it is marital property, *see* § 861.01, STATS., and may have election rights to Edward's individual one-half interest. *See* § 861.02, STATS. If the farm is nonmarital property, then it apparently is included in the bequest of remaining property under Edward's will, which passes one-third to Dolores and two-thirds to Edward's children.

[4] Section 766.63(2), STATS., provides:

(continued)

requirement--that reasonable compensation was not received for her labor--but not the second--substantial appreciation of the property results from the application--because she had not shown the amount of appreciation due to her efforts. Because we affirm the trial court's ruling with regard to mixing, we need not address this issue.

DeWitt contends that the trial court made erroneous factual findings and also erroneously concluded that Dolores and the estate met their burden of proving that mixing had occurred. We are uncertain whether DeWitt is also contending that she met her burden to establish tracing, but we will assume she is. The estate and Dolores agree with the trial court and DeWitt that the farm is nonmarital property unless it has been reclassified by mixing of marital and nonmarital property, and that they have the burden to establish mixing. They contend, however, that they have adequately established mixing and that DeWitt has failed to meet her burden of tracing the nonmarital component of the mixing.

We set aside a trial court's findings of fact only if they are clearly erroneous, and we must give due regard to the opportunity of the trial court to judge the credibility of the witnesses. Section 805.17(2), STATS. The legal significance of the facts as found by the trial court--that is, whether property is

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> (2) Application by one spouse of substantial labor, effort, inventiveness, physical or intellectual skill, creativity or managerial activity to either spouse's property other than marital property creates marital property attributable to that application if both of the following apply:
>
> (a) Reasonable compensation is not received for the application.
>
> (b) Substantial appreciation of the property results from the application.

marital or nonmarital--is a question of law, which we review de novo. *See* ***Estate of Lloyd***, 170 Wis.2d 240, 252, 487 N.W.2d 647, 651 (Ct. App 1992).

Mixing marital property with property other than martial property reclassifies the other property to marital property unless the component of the mixed property which is not marital property can be traced. Section 766.63(1), STATS. The burden of proving mixing is on the person requesting reclassification; the burden of establishing tracing is on the person seeking to avoid reclassification. ***Estate of Bille,*** 198 Wis.2d 867, 876, 543 N.W.2d 568, 571 (Ct. App. 1995).

Income earned or accrued by a spouse or attributable to property of a spouse during marriage and after the determination date is marital property. Section 766.31(4), STATS. Mixing of marital and nonmarital property can occur when the martial income of either spouse is used to enhance the value of property that is not martial property. ***Estate of Kobylski***, 178 Wis.2d 158, 176, 503 N.W.2d 369, 375 (Ct. App. 1993). However, payment with marital income of the expenses of simply maintaining nonmarital property does not convert the nonmarital property to marital property. ***Krueger v. Rodenberg***, 190 Wis.2d 367, 375, 527 N.W.2d 381, 385 (Ct. App. 1994).

The trial court made the following findings of fact. When Edward and Dolores married, she was employed full-time at a factory. Edward asked that she end her employment and work on the farm with him and she agreed. She brought savings in an unproved amount, furniture and furnishings to the marriage. Edward and Dolores operated the farm together throughout their marriage. In addition to performing homemaking duties, Delores helped milk cows twice a day until they were sold in 1983; fed cows and cattle; cleaned the barn twice a day;

harvested hay; dehorned cattle; and cut wood and brush. Edward was ill the last year and a half of his life and Dolores continued to perform farm work until August 1994.

Dolores and Edward always filed joint income tax returns and the Agriculture Stabilization and Conservation Service (ASCS) payments were made to them jointly until 1992. The parties made mutual powers of attorney so that each could act for the other in ASCS matters. The mortgage was satisfied with farm income in 1976, and farm income was used by Dolores and Edward to pay for machinery, maintain farm buildings, and these improvements: new well, new calf shed, new heifer shed, new siding for the house, new windows, kitchen floor, sink, furnaces and wood burners, and remodeling the bathroom.

At Edward's request, he and Dolores kept separate and solely-owned checking accounts. Edward used his checking account to pay for farm bills including the mortgage, and Delores used hers to pay for groceries. It is not clear what income went into each checking account. They had social security income and interest income as well as farm income. In August 1994, when the cattle and machinery were sold because of Edward's illness, the net sale proceeds were divided equally between Edward and Dolores.

On March 3, 1992, Dolores and Edward signed an agreement whereby Dolores acknowledged that they each had individual funds and property and that the farm was his individual property. The court stated in its findings that according to Dolores, she signed this at Edward's insistence. In the agreement, Dolores waived marital property rights to income from Edward's individual property, and authorized Edward to "individually sign all contracts, agreements and to receive all ASCS payments as his individual property." The agreement also

stated: "This agreement is for use solely for payments from the United States Department of Agricultural Government purposes." On March 30, 1992, Dolores acknowledged receipt of a unilateral statement of Edward, which classified farm income as his individual property. The court stated that this evidence indicated an intent that Edward retain separate title to the farm. However, the court also stated that evidence of his intent was not uniform, referring to the course of the parties' conduct over the preceding years.

The court found that the value of the farm appreciated over the years due to general economic conditions but also due to the improvements to the farm.

With respect to tracing the nonmarital component, the court found that the amount of the mortgage satisfaction was proved, but not all of the improvements, including the bathroom remodeling, the new heifer shed, one of the new gas furnaces, and the two wood burners.

DeWitt claims that the following findings of fact with respect to mixing are erroneous: (1) Dolores Jones was employed fulltime at a factory at marriage and that the deceased requested Dolores quit; (2) Dolores brought money into the marriage in an unproved amount; (3) ASCS payments were made jointly; (4) the farm mortgage was satisfied by farm income in 1976; (5) farm income was used by the deceased and Dolores to pay for machinery, maintenance of farm buildings and farm improvements; and (6) the improvements were substantial improvements to this farm.[5] As to 2 through 6, we have reviewed the record and

[5] One of the alleged factual errors--that the farm mortgage was satisfied in 1976 with deferred marital farm income--contains a conclusion of law and we address it later in this opinion. However, to the extent DeWitt contends that the court's finding that the mortgage was satisfied in 1976 with farm income is erroneous, that finding is supported by Dolores's testimony and is not clearly erroneous.

are satisfied that these findings are supported by the record and are not clearly erroneous. The fact that the record might support other findings, or more elaborate findings, does not render the trial court's findings clearly erroneous, as long as there is sufficient evidence to support them. As to the first alleged erroneous finding, we assume DeWitt's point here is that Edward did not ask Dolores to quit her employment at the factory. Dolores testified that it was a mutual agreement when they married that she would work on the farm; "[Edward] figured there really was plenty to do on the farm and keeping up the house." Even if the finding should have been that there was a mutual agreement that she work on the farm, rather than that Edward requested her to do so, such an error is harmless. The significant part of the finding is that, with Edward's agreement, Dolores quit her employment at the factory and began to work with him on the farm once they married. It is irrelevant whether or not Edward initially made the request.

Apart from DeWitt's challenges to the court's factual findings, we have a difficult time following her argument that mixing did not occur. It appears she is arguing that we should adopt the approach of two California cases—***In re Marriage of Moore*** 618 P.2d 208 (Cal. App. 1980), and ***In re Marriage of Marsden***, 130 Cal. App. 3d 426 (1982)—in apportioning the appreciation of the farm during marriage between the nonmarital and marital components. However, we see no need to follow these cases. UMPA and the Wisconsin cases we have cited above provide an adequate framework for resolving the issue presented on this appeal.

The trial court correctly concluded that the income of Edward and Dolores while married and prior to January 1, 1986, was deferred marital property, and after that date their income was marital property. Since the mortgage was

paid with income from the farm in 1976, the court correctly concluded it was paid with deferred marital income. The improvements to the farm were also made with either deferred marital income or marital income, depending on when they were made. The trial court's conclusion that there was mixing of marital and nonmarital is correct. We also agree with the trial court's conclusion that even if Edward's action in 1992 was evidence of an intent to keep the farm as his individual property, that intent did not overcome the mixing that had occurred prior to that date.

With respect to the court's decision that Dewitt did not meet her burden to trace the nonmarital component, DeWitt asserts that the evidence of mixing of marital property is evidence of tracing of the nonmarital property. That may be true in a case such as ***Kobylski***, where the party seeking reclassification to marital property presents an itemized list of the cost of all improvements made with marital property. *See* ***Kobylski***, 178 Wis.2d at 175, 503 N.W.2d at 375. In such a situation, that amount can easily be segregated from the nonmarital component, thereby tracing the nonmarital component. However, neither the estate nor Dolores nor DeWitt presented a complete itemization here of the costs of all improvements. Although DeWitt challenges this finding as erroneous, she does not refer us to the record to show evidence of the cost of the improvements specified by the trial court, and her own list of improvements in her brief leaves a blank in the column for the cost of these improvements. We hold that the trial court correctly concluded that DeWitt did not meet her burden to establish tracing of the nonmarital component. The farm was properly reclassified to marital property.

By the Court.—Judgment affirmed.

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