COURT OF APPEALS DECISION DATED AND FILED

February 20, 2002

Cornelia G. Clark
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 00-1642

Cir. Ct. No. 98-FA-225

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

IN RE THE MARRIAGE OF:

ROSA E. FROMM,

PETITIONER-APPELLANT,

V.

WILLIAM P. FROMM,

RESPONDENT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Washington County: LEO F. SCHLAEFER, Judge. *Reversed and cause remanded.*

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Rosa E. Fromm has appealed from a judgment of divorce from the respondent, William P. Fromm, and from an order denying her

motion for relief from the judgment. Because we conclude that the farm on which the parties resided throughout their marriage was marital property and was erroneously excluded from the marital estate, we reverse the judgment and order and remand the matter for further proceedings.

¶2 On appeal, Rosa raises the following issues: (1) whether William met his burden of proving that the farm was inherited by him, and thus was nonmarital property pursuant to WIS. STAT. § 767.255(2)(a) (1999-2000);[1] (2) whether the evidence establishes that, even if inherited, the character of the farm was transmuted into marital property; (3) whether exclusion of the farm from the marital estate would create a hardship for Rosa; (4) whether sufficient evidence was presented as to the value of the farm, farm machinery, and the parties' other personal property so as to permit the trial court to make a fair and equitable distribution of those assets; (5) whether the trial court erroneously exercised its discretion by awarding Rosa limited maintenance of $300 per month; (6) whether the trial court erroneously determined that the parties had entered into stipulations as to their 1998 income tax refunds and other matters; and (7) whether Rosa's initial trial counsel provided her with ineffective assistance of counsel.

¶3 The division of the marital estate lies within the sound discretion of the trial court. ***Cook v. Cook***, 208 Wis. 2d 166, 171, 560 N.W.2d 246 (1997). That discretion, however, must be exercised in accordance with correct legal standards. ***Id***. A trial court erroneously exercises its discretion when its decision is premised upon a factual or legal error. ***Brandt v. Brandt***, 145 Wis. 2d 394, 406, 427 N.W.2d 126 (Ct. App. 1988).

[1] All references to the Wisconsin Statutes are to the 1999-2000 version.

¶4 Property is exempt from the marital estate if it was acquired by gift or inheritance, as a result of the death of another, or with funds acquired as a result of a gift, inheritance, or the death of another. WIS. STAT. § 767.255(2)(a). A trial court is to presume that all other property is to be divided equally between the parties, but may alter this distribution after considering the various factors set forth in the property division statute. Sec. 767.255(3). The marital estate includes property brought to the marriage by either party, provided the property was not acquired by gift or inheritance or in any other manner specified in § 767.255(2)(a). ***Lang v. Lang***, 161 Wis. 2d 210, 229, 467 N.W.2d 772 (1991); § 767.255(3).

¶5 Because the history of this case and the record are convoluted, it is necessary to describe them at some length. An evidentiary hearing initially was held on May 27, 1999. A key issue at that hearing was whether the farm on which the parties had resided for their nearly thirty-year marriage was marital property, or was exempt from the marital estate. William testified that he inherited the entire 160-acre farm, including the parties' residence, when his father, Paul Fromm, died. He denied paying anything for the farm and contended that the only portion of the farm which was marital was an additional 38-acre parcel purchased by the parties after their marriage. Rosa testified that William's father died approximately five months before she and William were married, that William and his sister each inherited one-half of the farm, and that she and William purchased the sister's share of the farm. She testified that they borrowed money to do so from M&I Bank, and that they signed a note and mortgage which was paid off over time. She also testified that she worked outside the home all but two years of the parties' marriage. Both Rosa and William acknowledged that at the time of the divorce, they had a line of credit from the bank which was secured by a mortgage on the farm.

¶6 At the conclusion of the hearing, the parties agreed that an issue remained as to whether the farm was marital or nonmarital. They also discussed whether appraisals were needed. While conceding that the farm machinery which William claimed to have inherited was probably marital property, William's attorney stated that he wanted the value of the machinery to be offset by personal property which William alleged was taken from the home by Rosa. The trial court ultimately determined that the record was incomplete, and that an additional hearing would be scheduled to "get all this material into the record" and "hear anything that needs to be in the record." The trial court scheduled a subsequent hearing for June 22, 1999.

¶7 At that hearing, Rosa's attorney offered into evidence the deed conveying the farm to William and probate documents from the estate of Paul Fromm. The final judgment in the probate proceeding indicated that William's sister, who was the executor of their father's estate, inherited Paul Fromm's residence.[2] The final judgment further stated that the farm owned by Paul Fromm at the time of his death "was sold to William Fromm pursuant to Power of Sale in the Will and option." The deed itself stated that the farm was conveyed to William on November 18, 1969, in consideration for his payment of $20,000 to the estate. The final judgment further indicated that William and his sister were each entitled to one-half of the personal property remaining for distribution by the estate, consisting of approximately $23,000 in cash, or $11,500 each for William and his sister. However, after taking into account amounts owed

[2] Paul Fromm's residence was located on County Highway D and was not part of the farm property resided on by William and Rosa.

by William to the estate, including $3,862 in outstanding notes, the probate documents indicated that the amount owing to William was only $117.

¶8 At the June 22, 1999 hearing, Rosa also submitted evidence that the farm remained subject to a mortgage at the time of the divorce, securing an outstanding loan balance of $46,000. William's attorney objected to the filing of the deed, probate and mortgage documents, contending that they should have been submitted at the May 27, 1999 hearing. The trial court made no express ruling on their admission, but set a schedule for the parties to file briefs addressing the property division and maintenance issues.

¶9 Subsequently, William's attorney filed a brief but Rosa's did not. On November 10, 1999, the trial court issued a written decision dividing the parties' property and awarding Rosa maintenance of $300 per month for a period of five years. The trial court determined that, with the exception of the 38-acre parcel of the farm which was purchased jointly by the parties after their marriage, the remainder of the farm, including the parties' residence, was inherited by William and titled in his name prior to the parties' marriage on July 4, 1969. The trial court further found that Rosa had not met her burden of proving that the character of the farm had changed and had therefore failed to prove that it should be included in the marital property division. It did not address whether failing to include the farm in the marital estate would create a hardship for Rosa, necessitating its inclusion under WIS. STAT. § 767.255(2)(b).

¶10 In its decision, the trial court further found that there was a lack of evidence concerning values to be attributed to the farm equipment and household furnishings, that many household furnishings and fixtures were removed from the home with Rosa's knowledge, and that the record further reflected that "essentially

all of the farm equipment" in William's possession was thirty years old or older. It therefore awarded each party the personal property in his or her possession. The trial court also found that the parties had entered into a stipulation whereby William was to be awarded all of the 1998 federal and state income tax refunds to compensate him for the cost of preparing the 1998 income tax returns.

¶11 A final divorce hearing was held on November 19, 1999, and a written judgment of divorce was entered on December 27, 1999. Shortly before entry of the written judgment, Rosa, by new counsel, filed a motion requesting either reconsideration of the judgment or the reopening of the judgment under WIS. STAT. § 806.07. A hearing was held on the motion on February 9, 2000. At that hearing the trial court stated that it was not vacating or reopening the judgment, but that in the interest of justice, grounds existed to have an evidentiary hearing to clarify the property division issue.

¶12 A hearing was then scheduled for May 1, 2000. Prior to that hearing, Rosa moved the trial court to order an appraisal of the farm machinery. The trial court declined to grant the relief.

¶13 At the May 2000 hearing, the trial court took judicial notice of the probate file for the estate of Paul Fromm, including his will, which bequeathed his home to William's sister and bequeathed the remainder of his estate, including the farm, equally to William and his sister. Other documentary evidence admitted into evidence at the May 2000 hearing included a mortgage signed by William and Rosa on November 18, 1969, the same day the farm was deeded to William, mortgaging the farm in exchange for a loan of $15,000. The evidence also included a satisfaction of that mortgage dated August 1, 1972, and lines of credit

issued by M&I Bank in 1989 and 1992, signed by both William and Rosa and secured by using the farm as collateral.

¶14 At the May 2000 hearing, Rosa reiterated and amplified upon her trial testimony. She repeated that William inherited only half of the farm, and that she and William executed a mortgage on the farm to pay William's sister for the half she inherited. Rosa testified that the payments on that mortgage were made from a joint checking account maintained by the parties, and that the money in that account came from their earnings and from the farm operations. She testified that this same account and the same sources of income were used to pay other mortgages over the years of the parties' marriage.

¶15 William acknowledged that the parties had several mortgages on the farm property over the course of their marriage. He also testified that the payments on the mortgages were made from the parties' joint account. Although he disputed Rosa's testimony that her employment earnings went into this account, he testified that his own earnings and income from the farm operation were deposited into it. He testified that money in this account was also used for all farming operations, for buying machinery, and for maintaining the household.

¶16 William reiterated his earlier testimony that he had inherited the entire farm and paid nothing for it. However, in response to questioning, he admitted that the will gave his father's home on County Highway D to William's sister, and divided the remainder of his father's estate, including the farm, machinery, and other personal property, equally between his sister and him. He also admitted that he and Rosa executed a mortgage on the farm dated November 18, 1969, the same day the farm was deeded to him. However, he denied that the $15,000 loan secured by the mortgage was used to purchase his

sister's share of the farm, and stated that it was used for Rosa's engagement ring and the parties' wedding trip to Germany. In attempting to explain why the deed stated that the farm was conveyed to him in consideration for his payment of $20,000, and why the final accounting in the probate file indicated that he purchased the real estate for $20,000, he alternately claimed that $20,000 was what he owed his father for personal property, and that $20,000 was the value assigned to an option to purchase the farm that his father had given him in 1960. While denying paying anything for the farm, he also testified that $20,000 was what he paid under the 1960 option to purchase the farm, and that he had money in the bank to make this payment and did not need to borrow it.

¶17 At the conclusion of the hearing, Rosa requested reconsideration of the divorce judgment under WIS. STAT. § 805.17(3), or relief from the judgment under WIS. STAT. § 806.07. The trial court denied both requests, concluding that Rosa had failed to establish that the judgment should be reopened pursuant to § 806.07(1)(c) based upon fraud and misrepresentation. Noting the interest of litigants and courts in the finality of judgments, it also concluded that even if mistakes or omissions had occurred at the initial trial, they did not warrant reconsidering and setting aside the judgment.

¶18 We have described the evidence and the trial court proceedings at length because, based upon them, we conclude that the trial court erroneously exercised its discretion when it excluded the farm from the marital estate and refused to reconsider the property division award. We therefore remand the matter for reconsideration of the property division award. We will address the remaining issues raised by Rosa as necessary.

¶19 Initially, we acknowledge that much of the evidence in the record was not presented until the May 2000 hearing on the motion for relief from the divorce judgment. However, a trial court has wide discretion to reconsider a judgment pursuant to WIS. STAT. § 805.17(3), and to accept additional evidence before deciding a motion for reconsideration of judgment. *See* ***Salveson v. Douglas County***, 2000 WI App 80, ¶44, 234 Wis. 2d 413, 610 N.W.2d 184, *aff'd*, 2001 WI 100, 245 Wis. 2d 497, 630 N.W.2d 182. A judge's job is to do justice, and § 805.17(3) gives the judge the right to change his or her mind. ***Id.***

¶20 At the June 22, 1999 hearing, and before issuance of its November 10, 1999 decision dividing the parties' property and awarding maintenance, Rosa had offered into evidence the deed and probate documents which, on their face, revealed that William had inherited only part of the farm and had paid for the remainder of it. This evidence, as well as the additional evidence presented at the May 2000 hearing, established as a matter of law that the entire farm could not be excluded from the marital estate as inherited property.[3] Because the trial court failed to consider the deed and probate documents at the time it issued its November 10, 1999 decision, and because those documents, along with the evidence at the May 2000 hearing, belied William's claim that the entire farm was inherited by him, the trial court erroneously exercised its discretion in refusing to reconsider the divorce judgment.

¶21 The burden of proving that property is inherited and therefore exempt from the property division is on the party claiming the exemption.

[3] This evidence also established that the trial court erred when it found that the farm was inherited by William and titled in his name before the parties' July 4, 1969 marriage.

Brandt, 145 Wis. 2d at 408. The party claiming the exemption must demonstrate that the property was inherited, and that its character and identity have been preserved. ***Id.*** Once the recipient of the inherited property has established these requirements to the requisite degree of proof, a prima facie case for exemption is made, and the opposing party has the opportunity to prove by sufficient countervailing evidence that the property was not inherited, or that it lost its exempt status because its character and identity were not preserved. ***Id.*** at 408-09.

¶22 "Character addresses the manner in which the parties have chosen to title or treat gifted or inherited assets. Changing the property's character can transmute it to divisible property. Such changing of title occurs when, for example, a party … uses the property to purchase property for the mutual enjoyment and use of the marriage." ***Friebel v. Friebel***, 181 Wis. 2d 285, 298, 510 N.W.2d 767 (Ct. App. 1993) (citations omitted).

¶23 As already set forth, Paul Fromm's will bequeathed his home to William's sister and bequeathed William one-half of the remainder of his estate, which included the farm. Moreover, the deed to the farm establishes that, contrary to William's testimony, he paid money for the farm and did not inherit all of it. This conclusion is corroborated by the probate documents, including the memorandum regarding adjustments and credits filed in the probate court on December 1, 1970. The memorandum indicates that William owed the estate $20,000 for the purchase of the farm, that he owed approximately $3000 to the estate based upon promissory notes executed by him to his father in 1960 and

1963, and that after taking into account his inheritance, he owed his sister $11,619 as "1/2 share of estate."[4]

¶24 If only one reasonable inference may be drawn from the established facts, the drawing of the inference is a question of law. ***Haldemann v. Haldemann***, 145 Wis. 2d 296, 307, 426 N.W.2d 107 (Ct. App. 1988). In addition, the construction and application of WIS. STAT. § 767.255 to established facts presents a question of law which this court reviews de novo. ***Friebel***, 181 Wis. 2d at 293. In light of the documentary evidence, neither William's testimony nor the property tax bill indicating that the farm was titled in William's name was sufficient to establish that he inherited the entire farm. The documentary evidence establishes as a matter of law that he inherited at most one-half of the farm.[5] The trial court's exclusion of the entire farm from the marital estate therefore constituted error.

[4] Contrary to William's contention, nothing in the probate documents permits a conclusion that he simply used his share of cash inherited from the estate to pay for the farm. The general inventory for the estate indicated that at the time of Paul Fromm's death, the value of his personal property was only $7522, comprised of $3300 in cash, an automobile and household furnishings valued at $350, and the notes owed to him by William. The only other item in the inventory which was subject to distribution to both William and his sister was the farm, valued in the inventory at $20,000. Based upon these numbers, it is clear that William did not inherit sufficient cash to pay for his sister's share of the farm.

[5] Certain statements made by William in his testimony and in his respondent's brief indicate that if he paid anything for the farm, it was not from the proceeds of the mortgage executed by him and Rosa on November 18, 1969. He contends that payment was instead made from savings he had at the time of his marriage or was from the proceeds of the sale of other property owned by him prior to his marriage. Even if this is true, it does not assist William's case. As previously noted, the marital estate includes property brought to the marriage by either party, provided the property was not acquired by gift, inheritance, or otherwise as a result of the death of another. ***Lang v. Lang***, 161 Wis. 2d 210, 229, 467 N.W.2d 772 (1991). Money or property brought into the marriage by William and used by him to pay for the farm in November 1969 therefore did not render the paid portion of the farm exempt from the marital estate.

¶25 Beyond the error as to William's actual inheritance, the evidence also establishes, as a matter of law, that the character of the portion of the farm that was inherited changed over the course of the parties' marriage, necessitating the inclusion of the entire farm in the marital estate. As previously noted, the character of inherited property can be transmuted so as to render it marital property if the party who inherited the property uses it to purchase property for the mutual enjoyment and use of the marriage. ***Id.*** at 298. In this case, the evidence conclusively establishes that the parties repeatedly mortgaged the farm to benefit the marital estate. In 1969, 1989 and 1992, and continuing at the time of the divorce, William and Rosa borrowed money which was obtained by mortgaging the farm. William himself acknowledged repeatedly mortgaging the farm, testifying that "[b]ecause with a farming operation you buy machinery and/or cattle or whatever. Every once in a while there's a mortgage and it gets paid off again … and it was kind of a routine operation."

¶26 It is undisputed that the parties used the proceeds obtained by mortgaging the farm for the farm operations, to improve the farm, to purchase property of various types, and, in general, for family and living expenses, including raising the parties' two children. Moreover, marital income, whether derived from Rosa's employment earnings, William's earnings or from the farm operations, was used to pay the notes secured by the mortgages.[6] Because the farm was thus used throughout the marriage to procure additional assets and to

[6] William appears to believe that if Rosa's employment income did not go into the joint account from which mortgage payments were made, this renders the mortgages irrelevant in determining whether the farm was marital or nonmarital property. If this is his argument, it is without merit. It is undisputed that income from William's employment and the farm operations were used to pay the various mortgages. Because the parties were married when this income accrued, it constituted marital income.

advance the family's economic situation, a change in the character of the farm occurred, necessitating its inclusion in the marital estate. *See* ***Trattles v. Trattles***, 126 Wis. 2d 219, 225-27, 376 N.W.2d 379 (Ct. App. 1985).

¶27 This conclusion is further supported by the fact that the parties, including Rosa, lived on the farm and contributed to improvements of it throughout their thirty-year marriage. At the May 1999 hearing, William testified that when the parties married, there was no central heating or plumbing in the upstairs of the farm residence. Testimony by both parties indicated that over the course of their marriage, they added central heating and plumbing to the upstairs of the residence, plus a bathroom and a three-stall garage. They also remodeled the house to make the family room larger, and performed maintenance and improvements like adding siding and re-roofing the residence.

¶28 Adding central heating, plumbing, and a three-stall garage are improvements which go beyond the routine maintenance found in ***Spindler v. Spindler***, 207 Wis. 2d 327, 337, 558 N.W.2d 645 (Ct. App. 1996). William's reliance on that case is therefore misplaced.

¶29 The documentary and undisputed evidence thus establishes, as a matter of law, that only one-half of the farm was inherited by William. It further establishes that the parties used the farm throughout their marriage as a marital asset, mortgaging it to further their joint economic situation, and jointly contributing to its improvement as a home and source of income for their family. Because this conclusion follows as a matter of law from the documentary and undisputed evidence, William's arguments challenging Rosa's credibility are irrelevant. The judgment of divorce and the order denying reconsideration must

therefore be reversed, and the matter must be remanded to the trial court for inclusion of the farm in the marital estate.

¶30 In remanding the matter, we note that because the trial court determined that the farm was nonmarital property, the valuation of the farm was not significant at the time of its initial divorce judgment. It also appears that the only valuation of the farm contained in the record is the value set forth in the parties' tax returns. On remand, the trial court may hold an additional evidentiary hearing if necessary to determine the value of the farm.

¶31 In reversing the property division, the portion of the trial court's decision which determined that Rosa and William stipulated that William would receive the 1998 tax refunds must also be reversed. At the May 1999 hearing, Rosa testified that she and William agreed to split the 1998 state and federal tax refunds. William denied agreeing to split the refunds, and testified that Rosa agreed that he could keep the refunds because he paid for the preparation of the returns and was not receiving a deduction for maintenance. Because the parties disputed how the refunds were to be divided rather than reaching a stipulation on the issue in compliance with WIS. STAT. § 807.05, the portion of the divorce judgment determining that William was entitled to the 1998 tax refunds must also be reversed, and the issue must be reconsidered on remand.[7]

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[7] While acknowledging that the parties' attorneys entered into stipulations on the record pertaining to the value of the parties' vehicles and the use of a Qualified Domestic Relations Order to divide their retirement and pension accounts, Rosa also objects that no evidence established the value of the vehicles or retirement accounts, and that there was no confirmation that she or William agreed to the stipulations. However, the record indicates that counsel for the parties stipulated that the trial court could use standard guidebook values for the vehicles, and that William presented evidence regarding the value of the parties' retirement accounts. Because the stipulations were properly placed on the record by counsel, no basis exists to disturb them. *See* WIS. STAT. § 807.05.

¶32 In reversing the property division award, we also note that in its decision dividing the parties' personal property, the trial court awarded William all of the farm machinery in his possession. It did so after finding that there was a lack of evidence concerning the values to be attributed to the farm equipment and household furnishings, that many household furnishings and fixtures were removed from the home with Rosa's knowledge, and that the record further reflected that "essentially all of the farm equipment and machinery have an age approximating or exceeding thirty years." It therefore awarded each party the personal property in his or her possession.

¶33 The trial court's finding that "essentially all of the farm equipment and machinery" was thirty years old or older is not supported by the record. At the May 1999 hearing, Rosa testified that William and his sister each inherited one-half of the farm machinery, that except for a few items the machinery was sold at an auction approximately fifteen years after the parties' marriage, and that all of the other machinery they possessed at the time of their divorce was purchased after the auction. William testified that although he inherited one-half of his father's personal property, he had already purchased the farm machinery from his father in 1960. However, he also acknowledged that most of the machinery he inherited or purchased prior to the parties' marriage was sold at auction, and that he therefore had machinery in his possession at the time of the divorce which was purchased in the years after the auction. Tax schedules presented at the May 1999 hearing indicated that numerous pieces of farm machinery and equipment possessed by William at the time of trial were put into service throughout the 1980's and 1990's, permitting the inference that they were not the same pieces of machinery possessed by him in 1969.

¶34 Because the trial court's division of the farm machinery and household furnishings was premised upon a finding as to the age of the machinery which is not supported by the record, this matter, including the value of the machinery, must be reconsidered on remand. As with the valuation of the farm, the trial court may hold an additional evidentiary hearing as to this matter if it concludes that additional evidence is necessary or desirable.

¶35 As previously noted, Rosa also challenges the trial court's maintenance award. Because the determination as to the amount and duration of the maintenance award is intertwined with and influenced by the property division, and because the property division must be redetermined, the trial court may reconsider the maintenance award on remand, if it concludes that a different award is appropriate. ***Hauge v. Hauge***, 145 Wis. 2d 600, 607, 427 N.W.2d 154 (Ct. App. 1988); ***Arneson v. Arneson***, 120 Wis. 2d 236, 255, 355 N.W.2d 16 (Ct. App. 1984).

¶36 Based upon our disposition of the property division issues, no other issues raised by Rosa need be addressed.

By the Court.—Judgment and order reversed and cause remanded.

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