COURT OF APPEALS
DECISION
DATED AND FILED

February 28, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP815 **Cir. Ct. No. 2005FA1071**

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

IN RE THE MARRIAGE OF:

THOMAS C. METCALF, JR.,

PETITIONER-RESPONDENT-CROSS-APPELLANT,

V.

GINA L. METCALF,

RESPONDENT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Rock County: JAMES WELKER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Higginbotham, P.J., Dykman and Vergeront, JJ.

¶1 DYKMAN, J. Gina Metcalf appeals from a divorce judgment that divided property between Gina and Thomas Metcalf, Jr., and set maintenance and child support. Gina contends that the trial court erred in finding that Thomas's interest in Metcalf Farms Partnership II (MFP II) was non-divisible gifted or inherited property, that, even if Thomas's interest in MFP II was gifted, the appreciation in its value was divisible property, and that the trial court erred in valuing MFP II. Gina also contends that the trial court erroneously exercised its discretion in setting maintenance and child support by failing to consider the required statutory factors and not including MFP II's income in its calculations. Thomas cross-appeals from the portions of the trial court's judgment invalidating Gina and Thomas's marital property agreement, characterizing Thomas's interest in MFP II as the value of MFP II's stored grain, and determining that the value of the grain was divisible property.[1]

¶2 We conclude that the trial court's finding that Thomas's interest in MFP II was gifted was not clearly erroneous, but its determination of the amount that was divisible was clearly erroneous. We also conclude that the record does not reflect the trial court's determination as to the value of MFP II and whether the appreciation in its value, if any, is divisible. Finally, we conclude that the court properly exercised its discretion in determining that the marital property agreement was invalid.[2] Thus, on remand, the trial court must reconsider the

[1] Some of the issues in Gina's appeal and Thomas's cross-appeal overlap. We address the arguments pertaining to the trial court's decisions that are adverse to Gina within our discussion of her appeal and the arguments pertaining to the trial court's decisions that are adverse to Thomas within our discussion of his cross-appeal.

[2] Thomas also appeals from the trial court's denial of his motion for reconsideration of the marital property agreement, arguing that the trial court erred as a matter of law. Our decision as to his first argument negates this assertion, and thus we need not address it separately.

interrelated issues of property division, maintenance and child support. Accordingly, we affirm in part, reverse in part, and remand with instructions.

Background

¶3 The following facts are taken from trial testimony and exhibits. Additional facts will be stated as needed in the discussion section. Thomas and Gina Metcalf were married in 1988. They had three children during their marriage. Thomas has spent his entire career working in his family's farming business. In 1993, Thomas became a 20 percent partner in one of the entities of his family's business, MFP I. After Thomas's father died in 2004, MFP I was dissolved. Thomas used his interest in MFP I to start MFP II, a partnership with his mother. Thomas and his mother each own a 50 percent interest in the partnership. Gina worked at various part-time jobs and did a majority of the homemaking duties.

¶4 In 2002, Thomas and Gina filed a joint petition for divorce. The parties reconciled the next year and dismissed their petition. As part of that reconciliation, the parties began discussing a marital property agreement. Later that year, the parties entered into a marital property agreement, which assigned to each his or her individual property and waived maintenance in the event of divorce. In this endeavor, Thomas was represented by counsel and Gina was not.

¶5 Thomas filed this divorce action on November 15, 2005. Following a trial that concluded on December 20, 2006, the court divided property between the parties and set maintenance and child support. Gina appeals and Thomas cross-appeals.

Standard of Review

¶6 We review a trial court's division of divisible property upon divorce for an erroneous exercise of discretion. *See* ***Derr v. Derr***, 2005 WI App 63, ¶9, 280 Wis. 2d 681, 696 N.W.2d 170. We will uphold the trial court's factual findings unless they are clearly erroneous. ***Green v. Hahn***, 2004 WI App 214, ¶9, 277 Wis.2d 473, 689 N.W.2d 657. Thus, we review a court's determination of the value of a marital asset for whether it is supported by the record. ***Ondrasek v. Ondrasek***, 126 Wis. 2d 469, 479, 377 N.W.2d 190 (Ct. App. 1985). We review a circuit court's determination as to the validity of a marital property agreement for an erroneous exercise of discretion.[3] ***Button v. Button***, 131 Wis. 2d 84, 99, 388 N.W.2d 546 (1986).

¶7 The amount and duration of maintenance are committed to the sound discretion of the trial court. ***Larocque v. Larocque***, 139 Wis. 2d 23, 27, 406 N.W.2d 736 (1987). Child support is also committed to the trial court's discretion. ***Modrow v. Modrow***, 2001 WI App 200, ¶9, 247 Wis. 2d 889, 634 N.W.2d 852.

Discussion

(1) Gina's Appeal

¶8 Gina argues that the trial court erred in categorizing Thomas's interest in MFP I as non-divisible gifted property, finding that any appreciation in

[3] In ***Button v. Button***, 131 Wis. 2d 84, 99, 388 N.W.2d 546 (1986), the supreme court explained that a trial court's determination of whether a marital property agreement is inequitable under WIS. STAT. § 767.255(11) (1983-84) requires an exercise of discretion. That section was renumbered to WIS. STAT. § 767.255(3)(L). ***Van Boxtel v. Van Boxtel***, 2001 WI 40, 242 Wis. 2d 474, 625 N.W.2d 284.

the gifted property was also non-divisible, valuing MFP II, and failing to award interest on Thomas's deferred equalization to Gina. Gina also argues that the trial court erred in setting maintenance and child support. The record does not reflect the trial court's finding as to whether MFP II's current value contains an appreciation from the amount Thomas received from MFP I's dissolution, which he re-invested in MFP II, and whether MFP II's appreciation in value, if any, is attributable to Thomas's efforts after the transfer from MFP I to MFP II. The record also does not reflect the trial court's finding as to the value of MFP II. We conclude that the trial court's finding that the value of MFP II's grain is divisible is clearly erroneous. Remand on these issues requires the trial court to revisit the issues of property division, maintenance, and child support.

¶9 "The general rule is that assets and debts acquired by either party before or during the marriage are divisible upon divorce." ***Derr***, 280 Wis. 2d 681, ¶10. However, under WIS. STAT. § 767.255(2)(a) (2003-04),[4] property acquired by gift or inheritance, or with funds so acquired, is non-divisible. ***Id.*** A party in a divorce action asserting that property is non-divisible bears the burden of showing that the property is non-divisible at the time of divorce. ***Id.***, ¶11. Gina's argument is limited to whether, factually, Thomas received the interest in MFP I as a gift. Gina argues only that the record establishes that Thomas paid $1000 for his interest in MFP I and it was therefore not gifted to him. Thus, we review the trial court's determination that Thomas received his interest in MFP I as a gift to see whether that determination is clearly erroneous. *See* ***id.***, ¶¶10, 45.

[4] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶10 When Thomas began working on the farm, his father and two uncles owned MFP I. In the early 1990s, the Metcalf farming business consisted of three entities: Metcalf Brothers, Inc., Triple M Farms, and MFP I. MFP I was the operating entity that grew grain. In January 1993, Thomas became a 20 percent partner in MFP I. Thomas testified that he did not pay anything to become a partner in MFP I, and that he and his mother were brought into the business as equal partners in order to increase the business's government subsidies. Gina argues that Thomas purchased his interest in MFP I. She points to the 1993 property agreement making Thomas a 20 percent partner that states that the new partners each contributed or would contribute $1000 to their capital accounts. Thomas claimed that he never contributed the money himself, even though the balance was shown on his capital account.

¶11 Gina claims that the court's finding that Thomas did not purchase his interest in MFP I is clearly erroneous, because the only physical documentation shows that Thomas was required to pay $1000 for his interest, and Thomas's self-serving testimony to the contrary should be disregarded. We disagree. When, as here, there is conflicting evidence in the record, it is the role of the trial court to weigh that evidence. *See* ***Schorer v. Schorer***, 177 Wis. 2d 387, 396-97, 501 N.W.2d 387 (Ct. App. 1993). The trial court deemed Thomas's testimony credible. We will not disturb a trial court's credibility determinations on appeal. *See* ***id.*** Further, Gina has not cited any law requiring Thomas to provide written documentation proving he received his interest in MFP I as a gift. Because the trial court's finding that Thomas received his interest in MFP I as a gift is supported by Thomas's testimony that he paid nothing to receive that interest, it is not clearly erroneous.

¶12 Having determined that the trial court did not err in finding that Thomas's interest in MFP I was a gift and therefore non-divisible, we turn to the issue of whether any appreciation in the value of MFP II over the amount Thomas received following MFP I's dissolution that he invested in MFP II is divisible.[5] While gifted property is exempt from division, "[w]here … gifted or inherited property has appreciated in value during the marriage due to the efforts of both the owning and nonowning spouses, that appreciation will be included in the marital estate." ***Id.*** at 406. We look, then, to whether any increase in value of a non-divisible asset was active or passive: if the appreciation is due to general economic conditions rather than due to the efforts of the marital partnership, it is passive and remains non-divisible; if it is due to the efforts of the married parties, it is active and thus part of the marital estate. ***Id.*** at 407. "Thus, if during the marriage, both spouses contribute to the acquisition of property through their abilities and efforts, that property is part of the marital estate. The property acquired may be the appreciation in value of an asset separately owned by one of the spouses." ***Id.*** at 406-07 (citation omitted).

¶13 Here, the trial court found that any appreciation in Thomas's gifted interest in MFP I was not divisible because any appreciation was not due to Thomas's efforts. The court found that Thomas provided only farming services for the business in the same manner as other non-owning farm workers. This finding is supported by the record as to the time that Thomas worked for MFP I, but not as to the time he worked for MFP II. Thomas testified that as a 20 percent

[5] While MFP II was not in existence when Thomas received his interest in MFP I, the parties do not dispute that Thomas obtained his interest in MFP II with funds acquired from his interest in MFP I. *See* WIS. STAT. § 767.255(2)(a).

partner in MFP I, he did not control the finances of the business, and was paid a salary and received housing for his farming work. The farming entities were dissolved in 2004, and Thomas's interest in MFP I was valued. Thomas put all of his interest from MFP I into MFP II, which is a partnership between Thomas and his mother. Thomas testified that his role in MFP II is day-to-day operations and general labor and that he and his mother make the decisions that were previously made by his father. The record therefore does not support the trial court's reasoning that Thomas did nothing more than any other farm laborer to contribute to the success of MFP II. We therefore remand the issue of appreciation for the trial court's reconsideration.[6]

¶14 Gina next argues that the trial court erroneously valued MFP II. Thomas responds that the trial court did not place a value on MFP II and therefore there can be no erroneous valuation; however, he argues that the trial court erred in finding that the value of the grain held by MFP II was $459,515 and in finding

[6] We realize, as Thomas points out, that whether to divide the appreciation of Thomas's gifted property is only relevant if the property did, in fact, appreciate. *See* ***Schorer v. Schorer***, 177 Wis. 2d 387, 406-07, 501 N.W.2d 916 (Ct. App. 1993). Thomas argues that MFP II has lost a significant amount of money since its inception and was worth less as of the date of the parties' divorce than the amount he received from MFP I's dissolution and invested in MFP II. Thomas's accountant, Douglas Swenson, testified that MFP II lost money in 2005 and in 2006. The trial court must first determine whether there has been any appreciation in the value of Thomas's gifted interest before determining whether it must reach the question of whether that appreciation is divisible. If there is any appreciation, the question of whether to divide that appreciation turns not only on whether Thomas's efforts contributed to its increase in value, but also on whether Gina's efforts, including her homemaking efforts, also contributed to the increase in value. *See* ***id.*** at 405. The relevant dates are the date of the formation of MFP II (December 15, 2004) and the date of the parties' divorce (December 31, 2006), unless the trial court determines that cause exists to value the parties' property as of a date other than the date of divorce.

that that amount was divisible.[7] Thomas argues that no reasonable construction of the evidence supports that interpretation. We agree.[8]

¶15 Douglas Swenson, who did the accounting for MFP I and MFP II, testified as to his calculation of the fair market value of Thomas's interest in MFP II. Swenson prepared his calculation of Thomas's interest in MFP II as of October 31, 2006. Swenson first totaled MFP II's assets, including its checking account balance, a note receivable including interest, a revolving credit agreement including interest, the value of MFP II's stored grain, checks received for sold grain, and a newly constructed grain facility less depreciation. Swenson then totaled MFP II's liabilities, including advances to MFP II for grain, unpaid bills, rents owed, revolving lines of credit plus interest, grain storage costs, costs for use of machinery and equipment, and a bank loan with interest. Swenson testified that he subtracted MFP II's liabilities from its assets and assigned 50 percent to each partner to calculate Thomas's interest. After explaining that a large component of the valuing of MFP II was pricing its stored grain and that grain values fluctuate dramatically, Swenson gave his calculation of Thomas's interest in MFP II using

[7] In her reply brief, Gina changes her argument to assert that the trial court failed to value MFP II and erred in valuing the stored grain. Gina thus argues that the issue of the value of MFP II must be remanded for the court to determine.

[8] Gina also argues that the trial court erred in including only a portion of the stored grain in the marital estate, failing to use the stipulated value of grain closest to the date of trial, failing to consider her argument that Thomas inflated liabilities in representing the value of MFP II, and failing to order interest on Thomas's delayed equalization payments to Gina. Because we have concluded that the trial court's finding as to the value of MFP II's stored grain and its determination that that amount is divisible are clearly erroneous, we need not reach these issues. However, they may be considered on remand. We note that although property is normally valued as of the date of divorce, special circumstances beyond the control of the parties may warrant deviation from that rule. *See* ***Sommerfield v. Sommerfield***, 154 Wis. 2d 840, 851, 454 N.W.2d 55 (Ct. App. 1990). Here, the trial court explained that the dramatic fluctuation in grain prices, over which the parties have no control, was the reason it valued the grain using the average of October and December prices rather than the date closest to trial.

December 13, 2006 grain prices. Swenson also calculated Thomas's interest in MFP II using the average price of grain for 2006. Following Swenson's testimony, the parties stipulated the value of MFP's stored grain as of the average of the October 31, 2006 value, the December 13, 2006 value, and the 2006 average value. Using the stipulated values, Thomas submitted updated balance sheets reflecting MFP II's assets and liabilities as Swenson explained in his testimony. The balance sheets show Thomas's interest in MFP II as $362,941, using October 31, 2006 grain prices; $556,089, using December 13, 2006 grain prices; and $156,241 using 2006 average grain prices.

¶16 The trial court found that Thomas "has an interest in a quantity of grain as a result of his farming operation acquired over the last year or two."[9] The court went on to find that "[t]hat grain had a value of $362,941 on October 31, 2006. It had a value at the time of trial of approximately $556,089. That grain would represent an income during the marriage from an inherited asset. As such, it is subject to division." The court averaged the two values and concluded that "the sum of $459,515 is a fair method of valuation of that grain." The court then concluded that "the only portion of the farming operation which is divisible in this divorce is the sum represented by the value of the grain."

¶17 We agree with the parties that the trial court's valuation is not supported by the record. The numbers the trial court used as the value of Thomas's interest in the quantity of grain resulting from MFP II's operation were the values Swenson assigned to Thomas's interest in MFP II, after adding the

[9] The trial court's finding that Thomas has an interest in grain is clearly erroneous. MFP II owns the grain, and Thomas has a 50 percent interest in MFP II's net worth.

value of grain as stipulated by the parties and all other assets of the partnership and then subtracting its liabilities. The numbers do not reflect the value of grain owned by the partnership. Because the numbers used by the court to determine the value of grain acquired by MFP II are not supported by the record, this finding is clearly erroneous.

¶18 Further, the court's determination that the value of an amount of grain owned by MFP II was divisible does not follow from its factual findings.[10] The record establishes that the grain is owned by MFP II and that Thomas owns a 50 percent interest in MFP II. The evidence presented to establish the value of Thomas's interest in MFP II shows that the grain is the major asset of the partnership. However, the court found that Thomas's interest in MFP II was gifted and therefore non-divisible; we have determined that this finding is not clearly erroneous and therefore will be upheld. Thus, the value of the partnership itself, which includes the value of the grain it owns, is initially non-divisible.

¶19 As explained above, however, the court may determine that an appreciation in the value of MFP II is divisible if that appreciation is due to efforts of the marital partnership. We also reiterate that "the categorization of property as

[10] The court stated that the value of the grain it classified as divisible represented Thomas's income, without explaining why this was so. Thomas testified as to his income, and the trial court determined that his testimony was credible, finding that Thomas has an income of approximately $30,000 per year. We note that Gina's accountant testified that Thomas had a potential for $250,000 to $350,000 worth of income based on what he could realize from the sale of grain based on his 50 percent interest in MFP II. However, the trial court expressly found that testimony to be incredible. Additionally, although the court stated that the value of a portion of the grain represented Thomas's income, it then divided the grain as if it were an asset of the partnership. Swenson testified that the grain was an asset of the partnership, and both parties refer to the grain as an asset in their briefs. We therefore address the division of the value of MFP II's grain as division of an asset, though we note that the grain was not MFP II's only asset and that MFP II had liabilities.

non-divisible under WIS. STAT. § 767.255(2)(a) does not necessarily dictate how such property will be treated when the court divides divisible property. Under some circumstances courts may avoid 'hardship' or inequities that might result from according property non-divisible property." ***Derr***, 280 Wis. 2d 681, ¶12. This may occur if failing to divide non-divisible property would create a hardship for the other party or the parties' children. ***Id.***; *see also* § 767.255(2)(b). In the event that the parties' divisible estate is close to nothing, the trial court will necessarily have to consider § 767.255(2)(b).

¶20 Because we remand the trial court's property division, we also remand the issues of maintenance and child support. *See* ***Ondrasek***, 126 Wis. 2d at 479. Although our remand as to the court's property division renders a detailed discussion of the parties' arguments over maintenance and child support unnecessary, we offer some general points related to the parties' arguments to aid the trial court's reconsideration. On remand, the trial court should consider the two objectives of maintenance, support and fairness. ***Larocque***, 139 Wis. 2d at 32-33. While the trial court "should consider the property division in awarding maintenance," a spouse should not be required to use the proceeds of a sale of his or her share of the property division to support himself or herself. ***Id.*** at 34. The circuit court must also consider the related issue of whether to award limited or indefinite maintenance, considering the statutory factors under WIS. STAT. § 767.26. ***Larocque***, 139 Wis. 2d at 40. When determining whether to limit the duration of maintenance, the trial court must consider various factors, including

> the ability of the recipient spouse to become self-supporting by the end of the maintenance period at a standard of living reasonably similar to that enjoyed before divorce; the ability of the payor spouse to continue the obligation of support for an indefinite time; and the need for the court to continue jurisdiction regarding maintenance.

> Because limited-term maintenance is relatively inflexible and final, the circuit court must take particular care to be realistic about the recipient spouse's future earning capacity.

Id. at 41.

(2) Thomas's Cross-Appeal

¶21 Thomas argues that the trial court erred in voiding the parties' marital property agreement. He contends that the trial court's reliance on the fact that Gina was not represented by counsel and that she waived maintenance were insufficient to justify striking the agreement. We disagree, and conclude the trial court properly exercised its discretion in striking the marital property agreement.

¶22 While parties are free to contract under a marital property agreement, a trial court may "override the parties' agreement if the agreement is inequitable." ***Button***, 131 Wis. 2d at 94. A marital property agreement may be inequitable for various reasons, one of which is

> if it is not entered into voluntarily and freely. In determining whether the agreement was entered into voluntarily and freely, the relevant inquiry is whether each spouse had a meaningful choice. Some factors a circuit court should consider are whether each party was represented by independent counsel, whether each party had adequate time to review the agreement, whether the parties understood the terms of the agreement and their effect, and whether the parties understood their financial rights in the absence of an agreement.

Id. at 95-96.

¶23 Here, it is undisputed that Thomas was represented when the parties executed the marital property agreement and Gina was not. Additionally, Gina testified as follows:

> THE COURT: I gather you know a lot more about what's in that prenuptial or that marital property agreement now than you did then, right?
>
> THE WITNESS: That's correct.
>
> THE COURT: You talked to [your attorney], and you have learned a lot, right?
>
> THE WITNESS: Yes.
>
> THE COURT: Just one question. Putting yourself back to where you were then, if you knew all that back then would you have signed it?
>
> THE WITNESS: No, I would not have.
>
> THE COURT: Why?
>
> THE WITNESS: Because I feel I was taken for a ride. I feel that I was set up. They all knew what a postnup meant and I had no idea. I had no idea what the farm was worth. I had no idea what the agreement meant.
>
> I never knew the farm's value. I was just the mom of three kids, and my job was to stay at home and take care of them.
>
> THE COURT: If you had known its value would you have signed it?
>
> THE WITNESS: No. I don't think I would have.

¶24 The trial court found that it was "not certain that [Gina] fully understood the extent of the value of what it was that was at issue." The court also found that Gina understood she had the right to consult an attorney and decided not to, and that she would have signed the agreement even if she had an attorney and had been advised against it. However, we do not agree with Thomas that these findings, together with the fact that Gina signed the agreement stating that she had read and understood all the parts of the agreement and Thomas's financial disclosure, render the agreement enforceable as a matter of law. Gina testified that she did not understand the agreement or Thomas's financial statement, and the

trial court was entitled to accept that testimony, even if it was contrary to the signed agreement. The trial court thus properly exercised its discretion in striking the agreement.

¶25 In sum, we conclude that the trial court's finding that Thomas's interest in MFP I was gifted was not clearly erroneous and that the court properly exercised its discretion in determining that the marital property agreement was inequitable. We also conclude that the trial court's finding as to the amount of Thomas's interest in MFP II that was divisible is clearly erroneous. To resolve the other disputes between the parties, the court must first make findings of fact and reconsider its property division. Accordingly, we affirm in part, reverse in part, and remand with directions.

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

Not recommended for publication in the official reports.