COURT OF APPEALS
DECISION
DATED AND FILED

March 9, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0677 **Cir. Ct. No. 01PR000018**

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

IN RE THE ESTATE OF MARY CAROLYN IVERSON:

ESTATE OF MARY CAROLYN IVERSON, BY ITS PERSONAL REPRESENTATIVE, SUSAN WEARS,

APPELLANT-CROSS-RESPONDENT,

V.

ESTATE OF ROBERT IVERSON,

RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Polk County: MOLLY E. GALEWYRICK, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Susan Wears, the personal representative of the Estate of Mary Carolyn Iverson, appeals an order determining the classification of

certain property under Wisconsin's Marital Property Act, ch. 766[1] (Wears). Wears argues that the trial court erroneously concluded that (1) Carolyn owned only one-half interest in South Dakota real estate; (2) the proceeds of a land contract were the individual property of the Estate of Robert R. Iverson, deceased; (3) Carolyn's individual property in Amery, Wisconsin, was marital property; and (4) Robert's estate is entitled to recover Carolyn's gifts to her children.

¶2 The Estate of Robert Iverson cross-appeals, raising the following issue: "Whether the 1994 deed reclassified the property as individual property of Carolyn Iverson when the deed was made in connection with spouse's will leaving everything to Robert Iverson at her date of death."

¶3 We conclude that the trial court correctly determined that Carolyn owned a one-half interest in the South Dakota property. We further determine, however, that whether the land contract proceeds were individual or marital property was not fully tried. In addition, the record reflects that whether the house in Amery should be reclassified as marital property was not fully tried. We sustain the trial court's ruling negating gifts. Finally, we reject the Estate's cross-appeal. Therefore, we affirm in part and, in the interest of justice, reverse in part. We remand for further proceedings consistent with this opinion.

¶4 Carolyn and Robert were married in 1978. No children were born of their marriage, but each had children from previous marriages. Carolyn died November 8, 2000, and Robert died January 4, 2001. Wears, Carolyn's daughter,

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

commenced probate of Carolyn's estate. Robert's daughter, Barb Harris, objected to the classification of property.

¶5 The parties stipulated that unless otherwise classified by WIS. STAT. ch. 766, all spousal property is presumed to be marital pursuant to § 766.31(1). The parties further agreed that the person challenging the martial property classification must prove by the preponderance of the evidence that the property is not marital.

¶6 Robert inherited a one-half interest in property in South Dakota that he conveyed to Carolyn in 1996. In 1997, Robert conveyed the remaining one-half interest to himself by personal representative's deed. The court found that the time, method and acquisition rebutted the presumption of marital property under WIS. STAT. § 766.31(7).

¶7 The trial court determined that the parties maintained a residence in Amery with marital funds and, therefore, classified the property as marital property. The court classified proceeds received from payment on a land contract to be Robert's individual property because he obtained the property subject of the contract with individual funds before the January 1, 1986, determination date. The court found that Robert did not consent to gifts Carolyn made to her children with the proceeds of the land contract and therefore negated the gifts. Wears appeals the court's order.

A. Appeal

1. South Dakota Property

¶8 Wears argues that the trial court erroneously found that Carolyn only owned a one-half interest in the parties' South Dakota property. In 1996, Robert

owned an undivided one-half interest when he executed a warranty deed conveying his interest in the property to Carolyn. In 1997, upon the death of his mother, Robert received title to the remaining half. The trial court determined that Carolyn's interest in the property was limited to the one-half interest she received by virtue of Robert's warranty deed.

¶9 Under WIS. STAT. § 766.31(7)(a), property acquired by a spouse during a marriage and after the determination date is individual property if acquired by a disposition upon the death of a third person and not conveyed to both spouses.[2] That is exactly what happened here. Robert acquired the remaining one-half of the South Dakota property by disposition upon the death of his mother and it was conveyed to him alone. Consequently, the trial court correctly determined that under § 766.31(7)(a), Carolyn's interest is limited to the one-half she received from Robert.

¶10 Wears contends, nonetheless, that South Dakota has codified the "relation back" doctrine providing that when a grantor subsequently acquires title, the same passes by operation of law to previous grantees. She argues, without citation to authority, that "although Wisconsin marital property law applies to marital property issues, South Dakota law is dispositive" of the question before us. We are unpersuaded. Here, the court's ruling does not address South Dakota law,

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[2] WISCONSIN STAT. § 766.31(7) reads in part:

> Property acquired by a spouse during marriage and after the determination date is individual property if acquired by any of the following means:
>
> (a) By gift during lifetime or by a disposition at death by a 3rd person to that spouse and not to both spouses.

and Carolyn does not refer us to any portion of the record where she may have raised the choice of law issue. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (party who appeals must establish by reference to court record that the issue was raised before the circuit court). Also, without adequate legal citation, the choice of law argument is not developed. Consequently, we decline to address it. ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

¶11 In her reply brief, Wears for the first time relies on Wisconsin law, citing ***Federal Farm Mort. Corp. v. Larson***, 227 Wis. 221, 278 N.W. 421 (1938), and ***Myrick v. Kahle***, 120 Wis. 57, 97 N.W. 506 (1903). She contends that Wisconsin's "after acquired title" law applies. Because Wear's argument regarding Wisconsin law first appears in her reply brief leaving the Estate no opportunity to respond, it is not considered. *See* ***Northwest Whole. Lumber v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995)

2. Proceeds of a Land Contract

¶12 Next, Wears claims the trial court erroneously determined that the proceeds of a land contract were Robert Iverson's individual property. The trial court began its analysis with the presumption that the proceeds of the Betzold land contract were marital. The court found, however, that Robert acquired the land before the January 1, 1986, determination date.

¶13 Although Carolyn's name was inexplicably listed on the land contract as a vendor, the court concluded that evidence did not demonstrate intent

to reclassify the property as marital.[3] The court adhered to the rule set out in the ***Estate of Fischer v. Fischer***, 22 Wis. 2d 637, 642, 126 N.W.2d 596 (1964), that in the absence of a showing to the contrary, it must be presumed that the plaintiff joined in the execution of the land contract "*for the purpose of barring her inchoate dower rights*." (Citation omitted.) The court reasoned that under WIS. STAT. § 766.31(10), the time, method, and source established the land was individual property. It concluded that because the land was Robert's individual property, the land contract proceeds were also Robert's individual property.

¶14 Wears acknowledges that the underlying real estate was Robert's individual property. She claims, however, that as a vendor, Robert's interest in the land contract is distinct and separate from the underlying real estate. She argues that because a vendor's interest in a land contract is personal versus real property, *see* ***City of Milwaukee v. Greenberg***, 163 Wis. 2d 28, 36-39, 471 N.W.2d 33 (1991), the proceeds are marital property under WIS. STAT. § 766.31(4).[4]

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[3] The land contract provided: "If not an owner of the Property the spouse of Vendor for a valuable consideration joins herein to release homestead rights in the subject Property and agrees to join in the execution of the deed to be made in fulfillment hereof."

[4] WISCONSIN STAT. § 766.31, Classification of property of spouses, reads in part:

> (4) Except as provided under subs. (7)(a), (7p) and (10), income earned or accrued by a spouse or attributable to property of a spouse during marriage and after the determination date is marital property.
>
> ….
>
> (7) Property acquired by a spouse during marriage and after the determination date is individual property if acquired by any of the following means:

(continued)

(a) By gift during lifetime or by a disposition at death by a 3rd person to that spouse and not to both spouses. A distribution of principal or income from a trust created by a 3rd person to one spouse is the individual property of that spouse unless the trust provides otherwise.

(b) In exchange for or with the proceeds of other individual property of the spouse.

(c) From appreciation of the spouse's individual property except to the extent that the appreciation is classified as marital property under s. 766.63.

(d) By a decree, marital property agreement or reclassification under sub. (10) designating it as the individual property of the spouse.

(e) As a recovery for damage to property under s. 766.70, except as specifically provided otherwise in a decree or marital property agreement.

(f) As a recovery for personal injury except for the amount of that recovery attributable to expenses paid or otherwise satisfied from marital property and except for the amount attributable to loss of income during marriage.

(7p) Income attributable to all or specified property other than marital property, with respect to which a spouse has executed under s. 766.59 a statement unilaterally designating that income as his or her individual property, is individual property.

….

(10) Spouses may reclassify their property by gift, conveyance, as defined in s. 706.01 (4), signed by both spouses, marital property agreement, written consent under s. 766.61 (3)(e) or unilateral statement under s. 766.59 and, if the property is a security, as defined in s. 705.21 (11), by an instrument, signed by both spouses, which conveys an interest in the security. If a spouse gives property to the other spouse and intends at the time the gift is made that the property be the individual property of the donee spouse, the income from the property is the individual property of the donee spouse unless a contrary intent of the donor spouse regarding the classification of income is established.

¶15 Wears does not refer us to the portion of the record where she articulated this argument in the trial court. We are, therefore, under no obligation to review her claim of error. *See* ***Caban***, 210 Wis. 2d at 604. To further complicate the matter, the trial court's ruling did not address the real versus personal property distinction.

¶16 The Estate does not claim that Wears waived the argument. In addition, it does not respond to the precise argument that land contract proceeds should be classified as personalty and are therefore marital property.

¶17 Nonetheless, our review of the record indicates that Wears' argument was interwoven with another argument but not articulated as a separate issue. We conclude that this issue, whether the proceeds of a land contract are to be distinguished as personal property and therefore are marital property, was not fully tried.

¶18 The court of appeals may use its broad discretionary power of reversal when the real controversy has not been tried or when justice has miscarried. WIS. STAT. § 751.06. In the first situation, an appellate court need not conclude that the outcome would be different on retrial. ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990).

¶19 In ***Vollmer***, our supreme court listed a number of cases in which the real controversy had not been tried. The nonexclusive list included cases involving: "an abundance of misunderstanding, cross-purposes, and frustration …." ***Id.*** at 21. Here, Wears' argument was interwoven with another, showing an abundance of misunderstanding, cross-purposes, and frustration. Her argument was not specifically addressed by the trial court or Robert.

¶20 Consequently, we conclude that the real controversy regarding the land contracts was not fully tried. We therefore reverse the trial court's holding that because the land was individual property, the land contract proceeds were nonmarital. We remand with directions for a new trial on this issue in the interest of justice.[5]

3. Amery Property

¶21 Wears argues that the trial court erroneously concluded that the parties used marital funds to maintain the Amery residence. She argues that pursuant to WIS. STAT. § 766.31(10),[6] the rents received from the property, which was titled individually in Carolyn's name, were not marital. Therefore, she claims that the court erroneously concluded that she mixed marital property with individual property.

¶22 Carolyn purchased the house in Amery in December 1986 and it was titled in her name only. On December 29, 1986, Carolyn and Robert executed a

[5] We emphasize that our reversal in the interest of justice does not suggest a contrary result on retrial, but indicates that the controversy was not fully tried and therefore not susceptible to appellate review.

[6] WISCONSIN STAT. § 766.31(10) reads:

> (10) Spouses may reclassify their property by gift, conveyance, as defined in s. 706.01 (4), signed by both spouses, marital property agreement, written consent under s. 766.61 (3)(e) or unilateral statement under s. 766.59 and, if the property is a security, as defined in s. 705.21 (11), by an instrument, signed by both spouses, which conveys an interest in the security. If a spouse gives property to the other spouse and intends at the time the gift is made that the property be the individual property of the donee spouse, the income from the property is the individual property of the donee spouse unless a contrary intent of the donor spouse regarding the classification of income is established.

quit claim deed to Carolyn and her son as joint tenants. Between 1986 and 1993, several of Carolyn's children, who were apparently adults at the time, resided in the home. After 1993, Carolyn and Robert resided in the Amery home, along with one of Carolyn's sons, Christopher O'Brien, who was disabled. Christopher paid Carolyn $500 per month. Carolyn contends that this payment constituted rent. Carolyn applied Christopher's payments to the mortgage on the house.

¶23 In July 1994, another son, Robert O'Brien, along with Robert and Carolyn, executed a quitclaim deed to Robert Iverson and Carolyn Iverson as survivorship marital property. In November 1994, Robert Iverson executed a quitclaim deed conveying his interest in the house to Carolyn.

¶24 The trial court found that through this conveyance, Robert intended to reclassify the house as Carolyn's individual property. *See* WIS. STAT. § 766.31(10). Nonetheless, the court concluded that Wears failed to trace the funds used to maintain the home from the 1994 quit claim deed until Carolyn's death. The court also concluded that income earned or accrued by a spouse after the determination date is marital property. *See* WIS. STAT. § 766.31(4). The court also determined that mixing the rents, which it considered to be marital income, reclassifies other property to marital if the nonmarital component cannot be traced. *See* WIS. STAT. § 766.63(1). Because the court found that the nonmarital component was not sufficiently traced, it held that the house was reclassified to marital property. The court further found that monies gifted from Carolyn to her children were marital, and the fact that the children applied those funds to satisfy the mortgage demonstrated mixing.

¶25 Wears argues that the rental payments were not marital but were Carolyn's individual property pursuant to WIS. STAT. § 766.31(10). Again, Wears

neglects to demonstrate that she made this argument in the trial court. Robert's Estate responds that Carolyn's son's payments were not rent, but rather payments to Carolyn for the caretaking services she performed. He further contends that Robert made substantial improvements to the home and used his income for mortgage payments. While the Estate points to facts of record to support its legal argument, it fails to identify that its legal argument was made in the trial court. The court's decision does not specifically address all the parties' contentions. However, neither party contends that the other party waived his or her arguments.

¶26 Wears argues that the Estate failed to meet its burden of proof. The court made no specific findings with respect to improvements or payment for services. The record reflects an abundance of misunderstanding surrounding these issues as well. We conclude, therefore, that the issues in controversy regarding the Amery house were not fully tried. *See* ***Vollmer***, 156 Wis. 2d at 19-21. Therefore, in the interest of justice, we reverse and remand for a new trial on the classification of the Amery house.

¶27 Because we reverse and remand for further proceedings, we do not address Wears' further argument that payments to maintain the property, such as utilities and insurance, do not create a marital interest under ***Krueger v. Rodenberg***, 190 Wis. 2d 367, 376, 527 N.W.2d 381 (Ct. App. 1994). We also do not consider that the payments derived from land contract proceeds that were used to satisfy the mortgage can be traced, thereby eliminating any issue regarding mixing. ***Estate of Lloyd v. Lloyd***, 170 Wis. 2d 240, 257-60, 487 N.W.2d 647 (Ct. App. 1992). Instead, the court may consider these issues on remand.

4. Gifts to Carolyn's Children

¶28 Finally, Wears argues that the trial court erroneously concluded that Carolyn made gifts to her children that they were required to return to the Estate. She argues that because Robert is deceased, WIS. STAT. § 766.70(6)(a) limits recovery to 50% of the recovery had recovery been required during the marriage. She argues that the majority of the gifts had been returned to the marital estate when the children used the gifts to pay off a real estate mortgage on marital property.

¶29 The Estate "does not read the Memorandum Decision as requiring all gifts to be recovered, but only the amount of the gifts not applied to the home …." Wears states that she is seeking a ruling that the "only gifts recoverable are those gifts that were not applied to reduce the mortgage against the [Amery] property." Consequently, there appears to be no dispute on this issue and we need not address Wears' claim of error.

B. Cross-Appeal

¶30 The Estate raises the following issue on cross-appeal: "Whether the 1994 deed reclassified the property as individual property of Carolyn Iverson when the deed was made in connection with spouse's will leaving everything to Robert Iverson at her date of death." The Estate argues that the trial court erroneously found that Robert intended to reclassify the Amery property as his wife's individual property. The Estate contends that Robert, "it appears, was willing to take his name off the home because his wife had executed a Will leaving everything to him if she should pass away." It observes, nonetheless, that if we conclude "the property is marital by virtue of the remodeling and other mixing that occurred after 1994, there is no need to reach the issue of the legal

effect of the 1994 deed." It claims that only if that decision is reversed on appeal does the legal effect of the 1994 deed become an issue.

¶31 Because the Amery house classification issue is being remanded for further findings, the cross-appeal involves a hypothetical question. Because this court does not address hypothetical issues, the argument will not be considered.

By the Court—Order affirmed in part; reversed in part and cause remanded with directions. No costs on appeal.

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