COURT OF APPEALS
DECISION
DATED AND FILED

March 9, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0678 **Cir. Ct. No. 01PR000019**

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

IN RE THE ESTATE OF ROBERT R. IVERSON:

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

APPELLANT,

V.

ESTATE OF ROBERT IVERSON,

RESPONDENT.

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. This appeal arises out of the probate of the estate of Robert Iverson. Susan Wears, the personal representative of the estate of

Robert's late wife, Carolyn Iverson, appeals an order determining the classification of certain property under Wisconsin's Marital Property Act, WIS. STAT. ch. 766.[1] Wears argues that the trial court erroneously concluded (1) Carolyn owned only one-half interest in South Dakota real estate; (2) the proceeds of a land contract were Robert's individual property; (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 trial court correctly determined that Carolyn owned just a one-half interest in the South Dakota property and that Robert's estate is entitled to recover Carolyn's gifts to her children, as more fully described below. We conclude, however, that whether the land contract proceeds were individual or marital property was not fully tried. We further conclude that whether the house in Amery should be reclassified as marital property was also not fully tried. Therefore, we affirm in part and, in the interest of justice, reverse in part. We remand for further proceedings consistent with this opinion.

¶3 Carolyn and Robert were married in 1978. No children were born of their marriage, but Carolyn had five children from her previous marriage and Robert had two children from his previous marriage. Carolyn died November 8, 2000, and Robert died January 4, 2001. In 2001, Wears, Carolyn's daughter, commenced probate of Carolyn's estate. Robert's daughter, Barbara Harris, objected to the classification of property.

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

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

¶5 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 determination date of January 1, 1986. 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.

¶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). Wears appeals the court's order.

1. South Dakota Property

¶7 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 the warranty deed from Robert.

¶8 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 was limited to the one-half she received from Robert.

¶9 Wears contends, nonetheless, that South Dakota has codified the "relation back" doctrine, providing that when a grantor subsequently acquires title, the title 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 and Carolyn does not refer us to any portion of the record where she may have raised this issue. *See* ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, 406, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463. 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).

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

> (7) 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.

2. Proceeds of a Land Contract

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

¶11 Although Carolyn's name was inexplicably listed on the land contract as a vendor, the trial court concluded that evidence did not demonstrate intent to reclassify the property as marital.[3] The trial court adhered to the rule set out in ***Estate of Fischer v. Fischer***, 22 Wis. 2d 637, 644, 126 N.W.2d 596 (1964), that in the absence of a showing to the contrary, it must be presumed that the vendor's spouse joined in the execution of the land contract "*for the purpose of barring her inchoate dower rights*." (Citation omitted.) The trial court reasoned that under WIS. STAT. § 766.31(10), the time, method and source established the land was individual property. It found that Carolyn being named as a vendor on the land contract did not alter its conclusion. It determined that because the land was Robert's individual property, the land contract proceeds were also Robert's individual property.

¶12 Wears acknowedges that the underlying real estate was Robert's individual property. She argues that the ***Fischer*** case does not apply. She claims, however, that as a vendor, Robert's interest in the land contract is distinct and

[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."

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

> ….
>
> (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:
>
> (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.

(continued)

¶13 Wears does not refer us to the portion of the record where she articulated this claim before the trial court. We are, therefore, under no obligation to review her claim of error. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (A party who appeals has the burden to establish by reference to the court record, that the issue was raised before the circuit court.). To further complicate the matter, the trial court's ruling did not address the real versus personal property distinction.

¶14 Robert's estate, however, 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.

¶15 Our review of the record indicates, nonetheless, that Wears' argument was interwoven with another argument but not articulated as a separate issue. We

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> (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.

conclude, therefore, that the issue whether the proceeds of a land contract are to be distinguished as personal property and therefore are marital property, was not fully tried.

¶16 The court of appeals may use its broad discretionary power of reversal in two circumstances: when the real controversy has not been tried, or when justice has miscarried. *See* 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).

¶17 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's estate.

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

[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.

3. Amery Property

¶19 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 martial property with individual property.

¶20 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 quitclaim 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 these payments from Christopher were rent. Carolyn applied the payments from Christopher to the mortgage on the house.

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

> (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.

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

¶22 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 to 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 determined that mixing rent, which is 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.

¶23 Wears argues that the rental payments were not marital but were Carolyn's individual property, pursuant to WIS. STAT. § 766.31(10). Wears does not indicate that she made this argument to the trial court. *See* ***Grothe***, 239 Wis. 2d 406, ¶6. Robert's estate responds that the payments from Carolyn's son were not rental payments, but rather were payments to Carolyn for the caretaking services she performed. It 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 argument, it also fails to identify that his legal argument was made to the trial court. *See* ***id.*** The court's decision

does not specifically address the parties' contentions. However, neither party contends that the other party waived his or her argument.

¶24 Because the parties fail to indicate that their specific arguments were made to the trial court, do not suggest that the opposing party waived his or her argument, and because the trial court did not specifically address their contentions, we conclude an abundance of misunderstanding surrounds 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.

¶25 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

¶26 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 fifty percent 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.

¶27 Robert's 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.

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