

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 13, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2068-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

In re the Marriage of:

ZETTIE NICKS,

Petitioner-Respondent,

v.

GEORGE A. NICKS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Racine County:
ALLEN B. TORHORST, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. George A. Nicks has appealed from a judgment of divorce from Zettie Nicks. Pursuant to this court's order of August 21, 1995, and a presubmission conference, the parties have submitted memorandum briefs. Upon review of those memoranda and the record, we affirm the judgment of the trial court.

The sole issue on appeal is whether the trial court erroneously exercised its discretion when it determined that the marital property agreement (MPA) entered into by the parties in August 1990, after approximately six years of marriage, was inequitable and would not be enforced at the time of their 1995 divorce. An MPA entered into by parties during the course of their marriage is binding at the time of divorce unless the trial court determines that its terms are inequitable as to either party. Section 767.255(L), STATS. The trial court must presume that the MPA is equitable as to both parties. *Id.*

The burden of proving that an MPA is inequitable is on the party challenging it. *Gardner v. Gardner*, 190 Wis.2d 216, 230, 527 N.W.2d 701, 705 (Ct. App. 1994). An MPA is inequitable if it fails to satisfy any of the following requirements: each spouse has made a fair and reasonable disclosure of his or her financial status; each spouse has entered into the agreement voluntarily and freely; and the substantive provisions of the agreement dividing the property upon divorce are fair to each party. *Greenwald v. Greenwald*, 154 Wis.2d 767, 779-80, 454 N.W.2d 34, 38 (Ct. App. 1990). The substantive fairness of an MPA must be assessed both at the time it is executed and, if circumstances significantly change after execution, at the time of the divorce. *Button v. Button*, 131 Wis.2d 84, 89, 388 N.W.2d 546, 548 (1986).

The trial court's determination as to equitableness involves the exercise of discretion and will not be disturbed on appeal unless discretion was erroneously exercised. *Greenwald*, 154 Wis.2d at 780, 454 N.W.2d at 38.¹ We will uphold the trial court's determination if it considered the relevant law and facts and set forth a process of logical reasoning. *Id.*

A trial court's findings of fact will not be disturbed unless they are clearly erroneous. *Noll v. Dimiceli's, Inc.*, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983). In concluding that the MPA was inequitable, the trial court found that:

¹ The Wisconsin Supreme Court has changed the terminology used in reviewing a trial court's discretionary act from "abuse of discretion" to "erroneous exercise of discretion." *State v. Plymesser*, 172 Wis.2d 583, 585 n.1, 493 N.W.2d 367, 369 (1992). The substance of the standard of review has not changed.

the rush in preparing and signing the document prevented [Zettie] from having the benefit of discussing the matter with an attorney so she would be advised and understand the rights she may be forfeiting or giving up, even though she may understand the document on its face.

The trial court thus found that while Zettie may have understood the words of the MPA, she did not understand the rights she was giving up. This finding is not clearly erroneous, particularly since the MPA was contradictory and misleading on its face. It expressly provided that it did not "affect rights at divorce." However, it simultaneously provided that the parties' homestead and certain other assets were to be considered the separate property of George, even though they had been acquired by the parties during the course of their marriage and would normally have been considered part of the marital estate at the time of divorce. Because the MPA provided for the surrender by Zettie of existing property rights without clearly and understandably conveying this fact to her, it was substantively unfair at the time of its execution and was properly deemed inequitable by the trial court.

In assessing substantive fairness, courts must be mindful of both the parties' freedom to contract and the protection of the parties' financial interests at divorce. *Greenwald*, 154 Wis.2d at 784, 454 N.W.2d at 40. Here, Zettie's financial interests were not protected by the MPA, which provided for her surrender of important existing property rights. Moreover, in giving effect to the parties' freedom to contract, courts generally consider that at the time of execution of an MPA, the parties are able to draft a fair agreement because they know their property and other relevant circumstances and are able to make reasonable predictions about the future. *Button*, 131 Wis.2d at 97-98, 388 N.W.2d at 551. Since the document signed by Zettie did not clearly and understandably explain that she had existing property interests which she was foregoing, and since it therefore did not put her in a position of understanding all of the relevant circumstances surrounding its execution, it cannot be said that enforcement of the MPA is warranted to effectuate the parties' freedom to contract.

In addition to making findings which, in essence, indicate that the MPA was substantively unfair at the time it was executed, the trial court found

that it was substantively unfair at the time of the parties' divorce. If there are significantly changed circumstances after the execution of an MPA and the agreement as applied at divorce no longer comports with the reasonable expectations of the parties, the MPA may be unfair at the time of the divorce, even if fair at the time of execution. *Greenwald*, 154 Wis.2d at 787, 454 N.W.2d at 42.

The trial court found that George and Zettie acquired substantial assets after signing the MPA, and that it was "impressed with" the value of the assets disclosed by them at the time of the divorce as opposed to the values set forth at the time the MPA was executed. Implicit in this finding, and in the trial court's determination that the MPA was not fair at the time of the divorce, was a finding that the impact of the MPA was not foreseen. Because Zettie did not understand the existing property rights she was foregoing when she signed the MPA and because by surrendering those rights she also gave up her right to much of the growth that occurred in the value of the parties' assets between the time of the execution of the MPA and the divorce, we conclude that the trial court properly exercised its discretion in determining that the MPA was unfair and unenforceable.

By the Court. – Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.