

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 27, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-2344-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

NANCY M. BEDORA,

PETITIONER-RESPONDENT,

V.

DAVID L. BEDORA,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Marinette County:
CHARLES D. HEATH, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. David Bedora appeals a judgment of divorce from his former wife, Nancy Bedora.¹ He argues that the trial court erroneously

¹ This is an expedited appeal under RULE 809.17, STATS.

(1) included his shop, land and buildings in the marital estate; (2) included business assets in the sum of \$11,532 in the marital estate; and (3) awarded an unequal property division. Because the record supports the trial court's exercise of discretion, we affirm the judgment.

The parties were married in 1970. At the time of the divorce, David was forty-nine and Nancy was forty-four years of age; their three sons all had reached the age of majority. Throughout the marriage, David operated a business known as "Dave's Electronics," repairing televisions, VCRs and installing satellite TV systems. Nancy worked part-time as an interior painter and paperhanger.

Shortly before the marriage, David had received \$11,053 in settlement of a wrongful death action that arose out of the death of his first wife. He used these proceeds to purchase a shop, land and buildings to operate his business and build the parties' residence.

At the time of the divorce, the principal assets were the parties' home, valued at \$48,000, and David's business. The business consisted of a shop, land and buildings appraised at \$20,000. The court also found that the business had accounts receivable in the sum of \$2,000 and a variety of inventory, equipment and furnishings appraised at \$11,532.

The trial court awarded Nancy the home, her vehicle, household furnishings and interest income in the sum of \$1,628, totaling \$65,244.36. It awarded David his shop, land, buildings, business assets, household furnishings, vehicle and a time share, totaling \$36,859. In lieu of maintenance, the court ordered that Nancy was not required to make a \$14,192.68 equalizing payment to David.

David argues that the trial court should have excluded from the property division his shop, land and buildings, valued at \$20,000, because he used proceeds from the 1970 wrongful death settlement to pay for them. He relies on § 767.255(2)(a)2, STATS., which provides that unless the court finds hardship, it shall exclude from the property division any property shown to have been acquired:

2. By reason of the death of another, including, but not limited to, life insurance proceeds; payments made under a deferred employment benefit plan, as defined in s. 766.01(4)(a), or an individual retirement account; and property acquired by right of survivorship, by a trust distribution, by bequest or inheritance or by a payable on death or a transfer on death arrangement under ch. 705.
3. With funds acquired in a manner provided in subd. 1. or 2.

A determination of whether property should be excluded from the marital estate requires us to construe § 767.255(2), STATS. *Preuss v. Preuss*, 195 Wis.2d 95, 101, 536 N.W.2d 101, 103 (Ct. App. 1995). Statutory construction is a question of law which we review de novo. *Id.* The burden of showing property should be exempt from property division is on the party asserting the claim. *Id.* The division of the marital estate rests in the sound discretion of the trial court. *Id.*

We conclude that the trial court properly included the shop, land, buildings and business assets in the marital estate, but for reasons other than those relied upon by the trial court.² Under § 767.255(2)(a)2, STATS., absent a finding

² Our review is de novo and we may affirm the trial court if we conclude it reached the right result for the wrong reasons. *State v. Alles*, 106 Wis.2d 368, 391, 316 N.W.2d 378, 388 (1982). We disagree with the trial court's reasoning that because § 767.255(2)(a)2, STATS., did not expressly include the category of wrongful death settlements, the legislature did not intend to exempt from property division items purchased with such proceeds.

of hardship, items paid for with the proceeds of a wrongful death settlement would be excluded from the marital estate, at least to the extent that their "character and identity" have been preserved. Property exempt from division "must retain its character and identity if its exempt status is to be preserved." *Brandt v. Brandt*, 145 Wis.2d 394, 410, 427 N.W.2d 126, 131 (Ct. App. 1988). "Character" addresses the manner in which the party has chosen to title or treat the excluded property, while "identity" addresses whether the "asset has been preserved in some present identifiable form so that it can be meaningfully valued and assigned." *Id.* at 410-11, 427 N.W.2d at 132.

The record discloses that the proceeds of the wrongful death settlement amounted to \$11,053. Because the shop, land and buildings are valued at \$20,000, a significant portion of their value must be attributed to sources other than the wrongful death settlement.³ David does not, however, suggest the source of the appreciated value.

The absence of such evidence and argument, of course, deprives the trial court and this court the opportunity to make a determination as to what portion of the exempt asset has been preserved in some present identifiable form that can be valued and assigned. *See id.* at 411, 427 N.W.2d at 132. For instance, if the property has appreciated through normal market conditions, its separate identity is preserved. *See Wierman v. Wierman*, 130 Wis.2d 425, 435, 387 N.W.2d 744, 750-51 (1986). If the property has appreciated through one or more of the parties' efforts, the appreciated value may be marital property subject to

³ The record is not clear with respect to the cost of the land, shop and buildings, or the total amount of the wrongful death settlement that was contributed to their purchase. David testified that \$9,000 of the settlement was used to build the parties' house. David does not, however, claim that any portion of the residence should be exempted from property division.

division. *Id.* If there has been a combination of the two forces, comingling may result. While comingling in and of itself is not necessarily fatal to the exempt status of an asset, a tracing exercise is required. *Brandt*, 145 Wis.2d at 411, 427 N.W.2d at 132.

The burden rests on David to establish the exempt status of an asset. See *id.* at 409, 427 N.W.2d at 131. Whether a party has met this burden is a question of law we address independently of the trial court. *Id.* We conclude that David has not met his burden to show what portion of the assets' value is exempt. In tracing the identity and character of an asset, without adequate proof, a court cannot "unweave the marital fabric and end up with skeins of yarn." *Kunde v. Kunde*, 52 Wis.2d 559, 562, 191 N.W.2d 41, 43 (1971). Because the record is insufficient to suggest the extent to which the value of the assets would be exempt under § 767.255(2)(a)2, STATS., we conclude the trial court was entitled to include the shop, land and buildings in the marital estate.

We further conclude that the trial court was entitled to include the \$11,532 in business assets in the marital estate. David argues that it is undisputed that "this property was brought into the marriage by David in 1970 when the parties were married." Property brought to the marriage is generally included in the marital estate. Section 767.255(3), STATS. David implicitly recognizes this, because he also argues that the court failed to adequately weigh this factor when deviating from an equal property division. The trial court found that Nancy's business as a self-employed painter and paperhanger "generated little income over the expenses and certainly has not generated any assets." On the other hand, David's business "in large part financed the expenses of the parties' cost of and standard of living." The court concluded that "[g]iven the length of the marriage, it would be highly inequitable not to consider the personal property of Mr.

Bedora's business as a marital asset." The record reflects an appropriate exercise of discretion.

Finally, David complains that the trial court erroneously exercised its discretion when it awarded an unequal property division in Nancy's favor in lieu of maintenance. He argues that the trial court failed to make adequate findings that Nancy would have been entitled to maintenance, and there is "no reason for the court to have even considered awarding payment of maintenance from David to Nancy other than an outdated sexist notion that man [sic] should support their female spouses regardless of the relative economic circumstances of each." We conclude that the record supports the trial court's exercise of discretion.

The trial court considered that the parties had been married for twenty-seven years and raised three children. David was forty-nine and Nancy, forty-four years of age, both in good health, and both with high school educations. David was awarded his business, and Nancy worked as a part-time painter and paperhanger. However, it also found that Nancy's expenses exceed her income. This finding is supported by Nancy's testimony that her income is \$1,000 per month and her expenses are over \$1,200 per month.

The court acknowledged that David's financial statement also showed that his monthly expenses far exceed his income. David testified that his annual income for 1995 was a negative \$4,478, and that he expected his 1996 income to be less.⁴

⁴ On his financial statement, however, he indicated net monthly take-home pay of \$700 per month. Also on his financial statement, David indicated \$150 per month rent paid to his mother, and \$80 in monthly telephone and utilities. David's mother testified that he lived with her and that she cooked and cleaned for him. She testified that David did not pay rent, but sometimes paid utilities.

Nancy testified that David came up with \$9,000 to pay court fines, and had a \$2,800 charge on his credit card for a trip with a companion. When asked how he was going to pay the charges, David answered, "I don't know." The court resolved credibility issues against David, finding:

[T]he court on its own motion is going to take judicial notice of the fact that Mr. Bedora on four previous occasions has been convicted of criminal offenses and the court will consider that in determining the weight to be given to his testimony.

....

Mr. Bedora testified that the financial statement [of his business] was prepared by his accountant at his direction but that it was intentionally inflated when he submitted it as a part of his application to become a dealer for a satellite systems company.

....

Frankly, it is difficult for the Court to determine if Mr. Bedora was being deceitful to the satellite company, deceitful to the court, or both.

The court also found:

It seems that Mr. Bedora always dealt in cash. Mrs. Bedora testified he always paid all their bills in cash. Lisa Gable, an employee of Mr. Bedora's off and on for two years, testified she was normally paid in cash but even those times when she was paid by check, there were no typical payroll deductions withheld. On his income tax returns, Mr. Bedora did not take a deduction on his Schedule C for wages paid to others.

The court stated: "Based on all the foregoing, the Court could not conclude, as argued by counsel for Mr. Bedora, that 'David has disclosed all his assets and has admitted the truth even when it made him look bad to do so.'" However, the court concluded that it had inadequate evidence from which to find that David was hiding income and assets.

Issues of weight and credibility are matters addressed to the trial court. *See* § 805.17(2), STATS. The record reflects that the trial court gave greater weight to Nancy's testimony that her expenses exceeded her income. The court also considered other appropriate factors. We conclude that the record discloses an adequate basis for the determination that Nancy demonstrated a need for maintenance while David did not. In light of the record, it was reasonable for the court to award Nancy a disproportionate property division in lieu of maintenance.

By the Court.—Judgment affirmed.

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

