COURT OF APPEALS
DECISION
DATED AND FILED

October 23, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 96-1546

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

IN RE THE MARRIAGE OF:

MICHAEL MARTIN BURDS,

PETITIONER-RESPONDENT,

v.

KATHY ANN WALSH-BURDS,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Grant County: JOHN R. WAGNER, Judge. *Reversed and remanded with instructions.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

DEININGER, J. Kathy Walsh-Burds appeals a judgment of divorce which requires her to pay almost $26,000 to her former husband, Michael, in order to balance the division of marital property ordered by the trial court. She also appeals an order denying her motion to reconsider the property division. She

claims that the trial court erred by not excluding from the property division, under § 767.255(2)(a), STATS.,[1] certain items which she claims were acquired by her with inherited funds. We agree and reverse the divorce judgment with respect to the property division. We remand for a reconsideration of the property division in light of the excluded property.

BACKGROUND

Michael, a self-employed certified public accountant, and Kathy, a teacher, were married in 1976, separated in March 1993 and divorced on June 15, 1995. They agreed to joint custody of their nine-year-old son, with primary placement to Kathy. Michael was ordered to pay 17% of his gross earnings, but not less than $400 per month, in child support. Property division was contested,

[1] Section 767.255(2), STATS., provides as follows:

> (2)(a) Except as provided in par. (b), any property shown to have been acquired by either party prior to or during the course of the marriage in any of the following ways shall remain the property of that party and is not subject to a property division under this section:
>
> 1. As a gift from a person other than the other party.
>
> 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.
>
> (b) Paragraph (a) does not apply if the court finds that refusal to divide the property will create a hardship on the other party or on the children of the marriage. If the court makes such a finding, the court may divest the party of the property in a fair and equitable manner.

with the principal issue being Kathy's claim that certain property in her possession at the time of the divorce was acquired by her with funds inherited from her mother and stepfather, both of whom had died during her marriage to Michael. Neither party sought an award of maintenance from the other.

Kathy's testimony that she inherited approximately $30,000 from her mother following her death in 1988 and approximately $51,000 from her stepfather following his death in 1992 was uncontroverted.[2] Some $9,000 to $12,000 of the inherited funds were used during the marriage to pay for family needs and business debts relating to Michael's accounting practice. In her proposed property division, Kathy claimed the following assets in her possession at the time of the divorce were acquired with inherited funds: two hundred shares of Younkers stock worth $3,887; an account with Harvest Savings having a balance of $7,616; a van valued at $8,500; a $25,000 certificate of deposit at Dubuque Bank & Trust; furniture worth $6,867, which she purchased after her separation from Michael; and a $20,000 down payment for a residence in Dubuque, which she had purchased with her fiancee; for a total of $71,870 in excludable assets. Her proposal called for no cash payment in either direction to balance the property division.

Michael's proposed property division included all of the disputed assets as marital property and requested a $35,000 cash payment from Kathy to balance the division, although he did not seek an equal division of the marital

[2] The testimony and exhibits in the record show that the funds Kathy received came via various death transfers, including life insurance, joint accounts, and by will. Since there is no issue regarding the origin or acquisition of the funds, we employ the term "inherited" to refer to all amounts Kathy received as a result of the death of her mother and stepfather.

estate so as to "reflect that inherited property to some degree." On cross-examination, however, he testified as follows:

> Q Do you believe that in general Kathy should share her inherited property fully with you?
>
> A I am not asking for that.
>
> Q You believe that her inherited property should be set off as her sole property?
>
> A I believe so.

Michael also acknowledged that: (1) Kathy had maintained an Edward Jones investment account in her own name that represented monies she had inherited; (2) the Harvest Savings account contained monies Kathy had inherited and that he had not made any deposits to that account; and (3) the $25,000 Dubuque Bank & Trust certificate was acquired by Kathy from funds inherited from her stepfather.

Michael established at trial that some, but not all, of the assets Kathy claimed to have acquired with inherited funds had been purchased with funds that had been deposited for at least a brief period of time in the Harvest Savings account. Kathy testified as follows regarding that account:

> Q How is that account held?
>
> A Well, I did not realize it was a joint account until it came up to deposition. That account was opened when I first moved back to Platteville and got a job in Dubuque. So at that time I must have made it a joint account.
>
> I guess I didn't realize that as time went on because all the statements always came only in my name. The interest was always given to me at the end of the year. Only my name, my Social Security number. At the time I guess I wasn't aware it was a joint account. I probably made it a joint account when I first opened it. I didn't have children. I usually put somebody else on.
>
> Q I take it, you didn't remember?

> A I didn't remember that as a joint account, no.
>
> Q Did you ever intend to gift to Michael any of the monies that you had inherited that was placed in that account?
>
> A No.
>
> ….
>
> A No, I didn't. Michael did not have access to that account. We didn't share monies whatsoever. Probably didn't even know his name was on it until he found out a couple months ago.

Later, during cross-examination, Kathy testified that she "closed that out the moment I found out it was a joint account" at the time of her deposition. Kathy also testified that "[f]rom day one of our marriage, we always lived with separate monies. We never commingled monies. He always had his things to pay. I had my things to pay." Michael did not refute Kathy's testimony regarding the Harvest Savings account or the handling of finances during their marriage.

The trial court made certain oral findings at the conclusion of the hearing, granted the divorce, and took the property division under advisement. The court's oral findings include the following:

> [K]athy indicated she received some $81,000 inheritance. She can account for almost [$]71,000 of it. Inherited or gifted property is not to be divided unless the Court finds it would be unfair to do so. I will get back to that.

Thereafter, the court issued a written decision on property division which basically awarded to each party the personal property in their respective possession, divided equally the sale proceeds from the marital residence, ordered Kathy's pension/retirement account to be divided equally, and assigned responsibility for marital debts. With respect to the items Kathy claimed excludable as inherited, the court apparently treated all as subject to division between the parties. (Due to the manner in which the court treated Kathy's contribution to the Dubuque

residence and debts she had incurred post-separation with her fiancee, the net effect was to include the entire $20,000 down payment on the residence and approximately $9,000 of the Dubuque Bank & Trust certificate in the marital division.)

The court's only mention of the inherited property issue in its decision is the following:

> During the course of the trial, the respondent attempted to show that inherited [sic] from her mother and step-father during the marriage had been kept separate and distinct and should not be consider [sic] part of the marital estate. She did not list the home at 2380 Knob Hill, Dubuque, Iowa as an asset because she claimed that the monies used for the purchase of the home were part of inherited funds. She included in her proposed property division the remaining balance due on said home. Since she claims to be purchasing the home with [her fiancee], this liability would have been only one-half hers.

The court ordered Kathy to pay Michael $25,654 "[i]n order to achieve an equal division."

The trial court's property division order was subsequently incorporated into the judgment of divorce, although the transfer payment ordered in the judgment is $25,879. Kathy then moved the court to reconsider on the grounds that the court had failed to make specific findings regarding the inherited property and had failed to exclude it as required under § 767.255(2)(a), STATS. The court denied reconsideration, stating:

> I was particularly interested in how she used her money while living with Mr. Burds and I became convinced that it had lost identity by the use it made during the time that she was married to Mr. Burds.
>
> I found it rather strange that she wished to tell the court that she had -- $72,000 or $74,000 -- marital debt that she wanted the court to offset as to her assets, but she didn't have any interest in the property for which the debt was outstanding.

> Now you can't have your cake and eat it; so I found that she had mixed it up so that it lost its identity and that's how the ruling came to be.

(As we discuss below, the court's characterization of Kathy's property division proposal as it related to her post-separation debts is incorrect.) Kathy appeals the property division ordered in the judgment of divorce and the order denying her motion to reconsider.

ANALYSIS

a. Standard of Review

Generally, the property division in a divorce judgment lies within the sound discretion of the trial court. ***Brandt v. Brandt***, 145 Wis.2d 394, 406, 427 N.W.2d 126, 130 (Ct. App. 1988). The application of a statute, here § 767.255(2)(a), STATS., to a set of facts is a question of law regarding which we need not defer to the conclusions of the trial court. ***Trattles v. Trattles***, 126 Wis.2d 219, 223, 376 N.W.2d 379, 381 (Ct. App. 1985). The tracing or commingling of assets may present a question of fact, a finding regarding which will not be set aside unless it is "clearly erroneous." Section 805.17(2), STATS.; ***Brandt***, 145 Wis.2d at 407, 427 N.W.2d at 130. Here, however, the trial court made no specific findings regarding tracing or commingling, and Kathy's testimony regarding the purchase of certain assets with inherited funds was largely undisputed. Therefore, the question of "whether the property at issue in this case is marital property subject to division under sec. 767.255, Stats., presents a question of law." ***Weiss v. Weiss***, 122 Wis.2d 688, 692, 365 N.W.2d 608, 610 (Ct. App. 1985).

b. Character and Identity of Inherited Property

One who claims certain items of property should be exempt from division under § 767.255(2)(a), STATS., must establish by the greater weight of the credible evidence that the items are exempt as inherited or gifted property, or, as in this case, were acquired with inherited or gifted funds. ***Brandt***, 145 Wis.2d at 407, 427 N.W.2d at 131. That party must also establish that the "character and identity" of the property has been preserved, and once he or she does so, "a prima facie case has been made that the subject property is exempt." ***Id.*** at 408-09, 427 N.W.2d at 131. Thereafter, it lies with the opposing party to establish "by sufficient countervailing evidence" that either the property in question was not gifted or inherited, or that it "has lost its exempt status because its character or identity has not been preserved." ***Id.*** In ***Brandt***, we discussed the concepts of "character" and "identity" as they apply to disputes regarding the exemption of property from division in a divorce:

> Character addresses the manner in which the parties have chosen to title or treat gifted or inherited assets. Changing the character of non-marital property can serve to transmute it to marital property. In such cases, the donative intent of the owner of the exempt property is an issue. Identity, on the other hand, addresses whether the gifted or inherited asset has been preserved in some present identifiable form so that it can be meaningfully valued and assigned.

Brandt, 145 Wis.2d at 410-11, 427 N.W.2d at 132 (citations omitted).

Michael presented no evidence to refute Kathy's claim that she had received some $81,000 during the marriage as a result of death transfers from her mother and stepfather, and this fact was acknowledged by the trial court in its oral findings at the conclusion of the trial. Michael asserts, however, that because some of the inherited funds passed through the nominally joint Harvest Savings

account, the funds lost their character as an inheritance. Further, he asserts that Kathy failed to meet her burden in establishing the identity of the assets she claimed were exempt from division as being acquired from inherited funds.

We note that the trial court's only comments approaching findings on the issues of the character and identity of the disputed assets came at the hearing on Kathy's reconsideration motion. The court apparently concluded that "how [Kathy] used her money while living with [Michael]" converted all of her inherited funds to marital property because of "the use it made during the time that she was married [sic]." However, Kathy is not seeking to reclaim any inherited funds that she contributed to the marriage or "loaned" to Michael after he suffered business reversals. We agree that any inherited funds so applied during the marriage must be deemed gifts to Michael or contributions to the marriage and may not be offset or excluded from the property division. *See* ***Preuss v. Preuss,*** 195 Wis.2d 95, 104, 536 N.W.2d 101, 104 (Ct. App. 1995). The fact that Kathy consumed part of her inheritance during the marriage for marital purposes, however, does not necessarily affect the character or identity of assets she held at the time of the divorce that were acquired with inherited funds. The determination must be made on an asset-by-asset basis.

We also note that the trial court seemed particularly bothered by what it believed was an effort by Kathy to conceal assets and overstate her debts. The trial court misconstrued Kathy's property division proposal, however. She testified that the Dubuque residence was titled in her fiancee's name and that she had not included it as a divisible asset of hers for that reason and because her contribution of the $20,000 down payment was made from inherited funds. Kathy listed the post-separation debts she had acquired with her fiancee (the mortgage loan and a loan secured by the Dubuque Bank & Trust certificate), but she then

specifically excluded those debts from consideration as being non-marital in her written property division proposal. Her testimony regarding the proposal's treatment of these debts was as follows:

> Q Turn to the last page now. First line item shows balance; it shows a negative number. Is that because we are subtracting the DB & T notes?
>
> A Yes, it is.
>
> Q Then the next item, we take those off again, don't we, so that Michael is not being in any way held responsible for those?
>
> A Correct.

Kathy's financial circumstances may have been somewhat complicated at the time of the divorce, and her method of presenting those circumstances was a bit confusing. But, we cannot conclude, as did the trial court, that she was attempting to conceal the truth. The court stated "I remember her telling me that she has all of this money invested in that house that's not in her name and she wanted to use the outstanding debt on it as a marital debt that's not being shared by [her fiancee], and the smoke got thicker and thicker." The court was simply incorrect regarding the substance of Kathy's testimony and exhibits.

As we discuss below, we conclude that none of the assets Kathy sought to exclude from the property division lost their character as having been acquired with inherited funds simply because those funds passed through the Harvest Savings account. We also conclude that with respect to most of the disputed items, Kathy has met her burden of showing their identity as having been acquired with inherited funds, particularly in the absence of any countervailing evidence from Michael.

c. The Dubuque Bank & Trust Certificate of Deposit

Michael does not specifically address this asset in his brief, perhaps because there is no testimony tracing its acquisition through the Harvest Savings account, which is the basis of his "transmutation" argument. The certificate was held in the names of Kathy, her son, and her fiancee. Kathy testified that it was acquired with funds "directly after my stepfather passed away" and that the funds were never "held with" Michael. Michael's testimony was in accord:

> Q Do you know where the money came that was in the certificate of deposit at Dubuque Bank & Trust, where that money came from?
>
> A $25,000?
>
> Q Yes.
>
> A I believe she inherited it from her stepdad.

Thus, there is no question as to the source, character or identity of this asset, and the trial court erred by not excluding it from the divisible property. On remand, neither this asset nor the loan for which it was pledged as collateral should be considered in the property division. Kathy acknowledged that the loan against the certificate was a non-marital debt, and contrary to the court's comments, she did not seek to offset this debt against her marital assets.

d. The Harvest Savings Account

Michael claims that, since this account was at one time held jointly with him, not only the balance remaining in the account at the time of trial, but also the assets Kathy purchased with funds that had passed through the account (the Younkers stock, the van, post-separation furniture, and part of the down payment on the house in Dubuque), had all lost their character as inherited

property and had become transmuted into marital property subject to division. We disagree.

Michael relies on the holding in ***Bonnell v. Bonnell***, 117 Wis.2d 241, 344 N.W.2d 123 (1984) that:

> [T]he transfer of separate, inherited property into joint tenancy changes the nature of the property interest…. Once the properties came under the unified ownership of both [parties] as joint tenants, they no longer retained their character as [the wife's] separate, inherited property. The properties thus became part of the marital estate subject to division under sec. 767.255.

Id. at 246-47, 344 N.W.2d at 126-27. His reliance is misplaced, however. The supreme court makes clear in ***Bonnell*** that an "accidental" joint tenancy does not trigger transmutation. An intent to make a gift is required. ***Id.*** at 245-46, 344 N.W.2d at 126, ("It is clear that Mrs. Bonnell intended to create a joint tenancy in the subject properties," and that she "intended to make a gift of the inherited property to Mr. Bonnell.").

The requirement of donative intent before the creation of a joint tenancy will be deemed to have transmuted inherited property into marital property is further clarified in ***Trattles v Trattles***, 126 Wis.2d 219, 376 N.W.2d 379 (Ct. App. 1985). We concluded in ***Trattles*** that actions such as converting inherited funds into jointly held assets, "create[s] a presumption of donative intent, subject to rebuttal by sufficient countervailing evidence." ***Id.*** at 224, 376 N.W.2d at 382 (citations omitted). There, just as in ***Weiss v. Weiss***, 122 Wis.2d 688, 693, 365 N.W.2d 608, 611 (Ct. App. 1985) (husband "manifested his intent to make a gift by the conversion of his separate property into a joint tenancy,") we concluded that no countervailing evidence had been presented to rebut the presumption of donative intent. ***Trattles***, 126 Wis.2d at 225, 376 N.W.2d at 382.

The presumption of donative intent when a joint tenancy is created can be overcome, however. *See* ***Zirngibl v. Zirngibl,*** 165 Wis.2d 130, 136, 477 N.W.2d 637, 639 (Ct. App. 1991). Here, the only evidence in the record regarding Kathy's intent with respect to the inherited funds that she deposited in the Harvest Savings account precludes a finding that she intended thereby to make a gift to Michael. Kathy testified that she was unaware at the time of the deposits that the account was joint, that the statements came in her name alone, and that interest on the account was reported in her name and social security number. Michael testified that he never made deposits to or withdrawals from the account.

Michael offered no countervailing evidence to refute any of Kathy's testimony regarding her intent or activities with respect to the Harvest Savings account. Moreover, the deposits at issue were largely made to the account after Kathy's separation from Michael. In December 1993, she cashed a $22,000 Edward Jones certificate held in her sole name which she had acquired with inherited funds, and deposited the proceeds in the Harvest Savings account. Some of these funds were shortly thereafter applied to the down payment on the house she was purchasing with her fiancee and to the purchase of the Younkers stock. Michael does not explain, nor presumably can he do so, why we should conclude that the brief deposit of inherited funds in an account Kathy did not know was jointly held with him, at a time when she was separated from him and planning to marry another man, evidences intent on Kathy's part to make a gift to Michael of the funds so deposited.

As we discuss further below, Kathy traced the $7,616 balance in the Harvest Savings account at the time of the divorce to inheritances she received during the marriage which had previously been deposited in a certificate of deposit with Edward Jones, held in her sole name. We conclude that she established the

origin, character and identity of the account balance as having been acquired with inherited funds. The trial court erred by not excluding it from the marital property division.

e. The Younkers Stock

Kathy's testimony that the Younkers stock was purchased in January 1994 with money she received after the death of her stepfather was uncontroverted. Michael claims the stock should be deemed marital property because the money used to purchase the stock moved from Kathy's solely held Edward Jones certificate through the Harvest Savings account while that account was still nominally held in joint names. As we have discussed above, we conclude that the record does not support a claim that Kathy had the necessary donative intent to transmute funds deposited in the Harvest Savings account into a marital asset. This is especially so of the funds used to purchase the Younkers stock, inasmuch as those funds resided in the Harvest account for only one month, at a time when Kathy had been separated from Michael for almost a year.

Michael also claims that there is an identity problem with the Younkers stock because Kathy's "testimony continued to change." The record does not support this argument. Kathy's account of the source of the funds used to acquire the Younkers stock, unlike her testimony regarding certain other assets, was consistent and unrefuted. The Younkers stock should have been excluded from division because it was acquired by Kathy with inherited funds.

f. The Van

Kathy testified that she purchased the van in June 1994 for $8,500 with funds she acquired "directly out of -- my stepfather's estate." On cross-

examination she clarified that $2,500 for the van purchase was withdrawn from the Harvest Savings account and the remaining $6,000 came "directly from the check [she] received from" her stepfather's estate. She stated that she "didn't think" the $6,000 went into any account but acknowledged that she might have "put it probably directly into my checking account." Michael's claim to the van rests upon the fact that $2,500 of the purchase price came out of the Harvest Savings account and his assertion that Kathy's testimony showed she "is not even sure where the rest of the money" for the van came from. We reject the characterization of Kathy's testimony as being inconsistent or incredible on this point. Her testimony, again unrefuted, was that the van was acquired with funds traceable to inheritances from her stepfather, and the timing of the purchase coincident with the closing of her stepfather's estate lends support to her testimony.

In order to defeat Kathy's claim that she acquired the van with inherited funds, more is required than simply quibbling over the details of her testimony. There is no dispute that Kathy received funds following her stepfather's death in the amounts and at the times she described. Her account of the handling and application of those funds toward the van purchase was not controverted by any evidence in the record. The van must also be excluded from the marital property division.

g. Post-Separation Furniture Purchases

Unlike our determinations regarding the assets discussed thus far, we conclude the trial court did not err by including the value of Kathy's post-separation furniture purchases, totaling $6,867, in the marital estate subject to division. Although Kathy testified on direct examination that she used inherited

funds from her Edward Jones account to purchase furniture and household items following her separation from Michael in March 1993, the decrease in the balance of that account during that time accounts for only some $2,400 of expenditures. On cross-examination, Kathy acknowledged that only "some" of her post-separation furniture purchases were made from funds in the Edward Jones account. She said that other items were purchased with monies from her checking account and savings account, but she could not give "an accurate number" and the source of those funds was not identified.

With respect to the furniture purchases, therefore, we agree with Michael that Kathy's testimony lacked the clarity and specificity required to establish their identity as having been acquired with inherited funds. The post-separation furniture purchases thus represent an asset subject to division in the divorce.

h. The Down Payment on Dubuque Residence

Kathy testified that she provided $20,000 from her inherited funds for the down payment on a residence in Dubuque that she acquired with her fiancee, and which was titled in his name. The record shows, however, that she could only definitely trace $10,000 to inherited funds. She testified that $10,000 of the down payment came from inherited funds that had been part of a $22,000 certificate of deposit with Edward Jones. The certificate proceeds were released to her in two installments, one of $10,000 and one of $12,000, in December 1993. $5,000 of the balance of the down payment on the residence came from a loan, and the source of the final $5,000 was not clear. Kathy testified that the final $5,000 came from her stepfather, but did not trace it to a specific account. (During her adverse examination at the beginning of the trial, she mentioned a "Clare Bank

C.D." as a possible source for some of the down payment, but the source and disposition of that asset is not further explained in the record.)

Kathy first testified that she applied $5,000 of the remaining $12,000 from the Edward Jones certificate to pay off the down payment loan when she received those funds. She later clarified, however, that the final $12,000 of the Edward Jones certificate went to purchase the Younkers stock ($4,000) and that the remaining $8,000 was left on deposit in the Harvest Savings account. We have relied upon that testimony in determining above that the Younkers stock and Harvest Savings account balance were acquired with inherited funds.

We therefore agree with Michael, that except for the "first $10,000" from the Edward Jones certificate, Kathy did not meet her burden to identify the source of the funds used for the down payment as being inherited monies. She acknowledged that she contributed $20,000 to the purchase of the house, that it was titled in her fiancee's name at the time of trial, and that she expected to acquire an ownership interest in it following her remarriage. Under the circumstances, since Kathy was able to definitely trace only $10,000 of her contribution to the house purchase to inherited funds, we conclude that the remaining $10,000 of her contribution must be treated as marital property, subject to division. On remand, the Dubuque house and its mortgage loan should be left out of the property division computation, but the untraced $10,000 Kathy contributed to the down payment should be treated as a marital asset subject to division.

CONCLUSION

Because Kathy established that most of the assets she claimed as exempt from division under § 767.255, STATS., were acquired by her with

inherited funds, and that those assets had not lost their character or identity as inherited property, we reverse the divorce judgment insofar as it relates to the division of the property of the parties at the time of the divorce. On remand, the trial court should exclude from the property division the following assets: the Dubuque Bank & Trust certificate of deposit ($25,000); the Harvest Savings account ($7,616); the van ($8,500); the Younkers stock ($3,887); and $10,000 of the $20,000 applied by Kathy to the purchase of a home with her fiancee. In light of our decision that some $55,000 must be excluded from the property division as Kathy's separate, inherited property, the court may consider on remand whether the "hardship" provision of § 767.255(2)(b), STATS., is implicated, and whether its prior presumption of an equal division of marital property should be adjusted "based on the equitable considerations embodied" in § 767.255, STATS.[3] *See* ***Spindler v Spindler***, 207 Wis.2d 329, 343, 558 N.W.2d 645, 652 (Ct. App. 1996).

By the Court.—Judgment and order reversed and remanded with instructions.

Not recommended for publication in the official reports.

[3] See n.1, *supra*, for text of § 767.255(2)(b), STATS. At the divorce trial, Michael made neither a claim nor any showing of hardship. His trial strategy was to attempt to undermine Kathy's claims of exempt assets, not to establish an equitable basis for the court to award him additional property in view of Kathy's inheritances. We express no opinion as to whether § 767.255(2)(b), STATS., might be shown to apply nor whether anything other than an equal division of marital assets would be appropriate in this case.