COURT OF APPEALS
DECISION
DATED AND FILED

November 25, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2575

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

IN RE THE ESTATE OF JOHN W. ERNST, DECEASED:

THE ESTATE OF ANN M. ERNST, DECEASED, AND
THE ESTATE OF JOHN W. ERNST, DECEASED,

PETITIONERS-APPELLANTS,

V.

DENNIS JOHN ERNST,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County: PATRICK L. SNYDER, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. The Estates of John and Ann Ernst appeal from a judgment determining that Garnet Abrasive and Water Filtration Company is solely owned by John and Ann's son, Dennis John Ernst, and therefore is not an

asset of the Estate of John Ernst. The Estates argue that the doctrine of issue preclusion prevents Dennis from asserting sole ownership when he asserted otherwise in an Arizona divorce action and that the evidence does not support the probate court's conclusion. We affirm the judgment.

Garnet Abrasive commenced doing business in 1974. Although John and Dennis worked together to obtain an exclusive distributorship from a subsidiary of Sunshine Mining Company, John was a member of the board of directors of Sunshine Mining and precluded from having an ownership interest which might be deemed by the Securities and Exchange Commission to be a conflict of interest. John performed sales and consulting services for Garnet Abrasive. Dennis handled the financial affairs and business decisions. After Dennis moved to Arizona in 1978, he continued to run the business by telephone contact with John and another employee.

When John died in 1994, Ann was appointed personal representative. In her representative capacity and as the surviving spouse, Ann sought a probate court order directing Dennis to turn over control and possession of Garnet Abrasive to the estate. Dennis claimed that the business was his sole proprietorship. The matter was tried to the probate court. Ann sought to prove that Garnet Abrasive was a partnership in which Dennis owned no more than an eighteen percent interest. She relied in large part on documents filed in an Arizona divorce action involving Dennis.[1]

[1] Ann died unexpectedly on December 4, 1997. Her estate was substituted as a party to this action.

In the 1987 divorce action, Dennis stated in written interrogatory responses that he performed "solely bookkeeping" for Garnet Abrasive, that his income from Garnet Abrasive was based upon ten percent of gross sales, that John was the "managing partner" of Garnet Abrasive, that his percentage interest in the business was unknown and had never been calculated, and that he held "a sales representative business" in trust for John. Dennis indicated that of the $100,000 capitalization of Garnet Abrasive, John contributed $82,000 and Dennis $18,000. Discovery during the action turned up balance sheets and ledger records reflecting capital accounts for both John and Dennis, insurance documents which showed that on occasion John referred to himself as the owner of Garnet Abrasive, and an exclusive distributorship agreement for the products sold by Garnet Abrasive signed and held by John. The judgment of divorce incorporated a marital property settlement agreement which gave Dennis's wife $19,000 as "her total interest" in Garnet Abrasive.

The Estates argue that issue preclusion prevents Dennis from now claiming that Garnet Abrasive is his solely-owned business. Issue preclusion refers to the effect of a judgment in foreclosing relitigation in a subsequent action of an issue of law or fact that has actually been litigated and decided in a prior action. *See* ***Northern States Power Co. v. Bugher***, 189 Wis.2d 541, 550, 525 N.W.2d 723, 727 (1995). Issue preclusion requires the court to conduct a fundamental fairness analysis before applying the doctrine. *See* ***id.*** at 551, 525 N.W.2d at 727. We review the trial court's exercise of discretion in considering the various factors to determine fairness. *See* ***Ambrose v. Continental Ins. Co.***, 208 Wis.2d 346, 355, 560 N.W.2d 309, 313 (Ct. App. 1997). We will affirm if the

trial court applied the proper law to the relevant facts of record[2] and used a rational process to arrive at a reasonable result. *See* ***id.*** at 350, 560 N.W.2d at 311.

The factors to be considered in determining whether to apply issue preclusion in a particular case are:

> (1) could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment; (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law; (3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue; (4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or (5) are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

Id. at 351, 560 N.W.2d at 312 (quoting ***Michelle T. v. Crozier***, 173 Wis.2d 681, 689, 495 N.W.2d 327, 330-31 (1993)).

The probate court declined to apply issue preclusion because in the divorce action the only issue was division of an asset and not ownership. Thus, the probate court was looking at factors two and three. Examining the issues in litigation during the divorce action reveals the faulty basis for the Estates' argument that issue preclusion applies. The Estates believe that the divorce action

[2] The Estates suggest that this court conduct a de novo review of the documentary evidence from the divorce proceedings to determine whether issue preclusion should apply. *See* ***WTMJ, Inc. v. Sullivan***, 204 Wis.2d 452, 457, 555 N.W.2d 140, 142 (Ct. App. 1996) ("When evidence to be considered is documentary, we review the document de novo."). The evidence before the probate court was not strictly documentary but included the testimony of witnesses. Thus, the probate court's findings of fact will not be set aside unless clearly erroneous. *See* § 805.17(2), STATS. We are required to give due regard to the opportunity of the trial court to resolve conflicts in the testimony which requires assessing the credibility of the witnesses. *See* ***Hughes v. Hughes***, 148 Wis.2d 167, 171, 434 N.W.2d 813, 815 (Ct. App. 1988).

involved a judicial determination of ownership. Ownership was never at issue because Dennis acknowledged some ownership interest in Garnet Abrasive. Moreover, the issue was not fully litigated but resolved by the parties' stipulation. The parties only stipulated to a sum designed to compensate Dennis's wife for whatever interest Dennis held in Garnet Abrasive.

Issue preclusion requires an identity of issues and it also requires actual litigation of an issue necessary to the outcome of the first action. *See* ***Michelle T.***, 173 Wis.2d at 687, 694 n.13, 495 N.W.2d at 330, 333. Where the result is obtained by stipulation, there is less cause to apply issue preclusion. *See* ***Heggy v. Grutzner***, 156 Wis.2d 186, 193-94, 456 N.W.2d 845, 849 (Ct. App. 1990). While the materials produced during discovery and Dennis's admissions in the divorce action have in fact served to impugn his claim that Garnet Abrasive is a sole proprietorship,[3] they do not conclusively determine the issue.[4]

The Estates contend that the manner in which Dennis and John operated the business falls squarely within the definition of a partnership under § 178.03(1), STATS. This issue is subsumed in the Estates' claim that the probate court's finding that Garnet Abrasive is solely owned by Dennis is contrary to the great weight and clear preponderance of the evidence. We simply address the sufficiency of the evidence.

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[3] The probate court commented that but for Dennis's dishonesty in the divorce action, it would have granted summary judgment in his favor. It found Dennis's testimony in this action to be incredible because of the representations made in the divorce action.

[4] On the date the divorce was granted, a qualified domestic relations order regarding a division of Garnet Abrasive's Keough plan between Dennis and his wife was entered. The order was to effectuate the stipulation made by the parties and states that Garnet Abrasive is a sole proprietorship. Thus, even if the divorce litigated and determined the ownership of Garnet Abrasive, it was consistent with Dennis's position in this action.

For purposes of appellate review, the evidence supporting the probate court's findings need not constitute the great weight and clear preponderance of the evidence; reversal is not required if there is evidence to support a contrary finding. *See* ***Bank of Sun Prairie v. Opstein***, 86 Wis.2d 669, 676, 273 N.W.2d 279, 282 (1979). Rather, the evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence. *See* ***id.*** While a great deal of documentary evidence was offered, the testimony of witnesses was also considered. Thus, the probate court is the ultimate arbiter of the witnesses' credibility. *See* ***id.*** We accept the inference drawn by the trier of fact when more than one reasonable inference can be drawn from the evidence. *See* ***id.***

Garnet Abrasive's tax returns and tax reporting forms reflected that Dennis was the sole owner. The absence of partnership tax returns is strong evidence that there was no intent to form a partnership. *See* ***Tralmer Sales & Service, Inc. v. Erickson***, 186 Wis.2d 549, 564, 521 N.W.2d 182, 187 (Ct. App. 1994). The signature card for the business's checking account also states that Garnet Abrasive is a sole proprietorship owned by Dennis. Dennis was the only person authorized to write checks on the account. Credit applications, financial information provided to outside persons, collection complaints and lien waivers likewise reflected Dennis's sole ownership. An agreement establishing an employee benefit and profit sharing plan stated that Garnet Abrasive was Dennis's sole proprietorship. John's reporting of income from Garnet Abrasive was consistent with that of an independent consultant and not an owner.

In addition to the business records, there was testimony from disinterested witnesses, including accountants, a competitor and an estate planner, that they were told that Dennis solely owned Garnet Abrasive. A letter sent by

Dennis's sister, Barbara Engstrom, to John demanded a share of Garnet Abrasive. It gives rise to an inference that Barbara understood that Dennis solely owned Garnet Abrasive. There is also the fact that John never sought to change the structure of the business after his membership on Sunshine Mining's board of directors—a motivating factor for not being a named owner—ceased.

The evidence is sufficient to support the findings made by the probate court. Moreover, the documents on which the Estates rely do not by themselves constitute the great weight and clear preponderance of the evidence such that the probate court was required to find that Garnet Abrasive was a partnership.

By the Court.—Judgment affirmed.

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