

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 17, 2007

David R. Schanker
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP2403

Cir. Ct. No. 2005FA74

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

NANCY JANE SMITH,

PETITIONER-RESPONDENT,

v.

MARK CHARLES SMITH,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Taylor County:
GARY L. CARLSON, Judge. *Reversed and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Mark Smith appeals his divorce judgment. The principal issue concerns the division of the marital estate and more specifically

whether a farm acquired by Nancy Smith from her grandmother during the course of their marriage was gifted or inherited and therefore excluded from the marital estate. We conclude the farm was not acquired by gift or inheritance in its entirety and therefore reverse the judgment and remand for a determination of what portion, if any, of the farm was gifted. Upon remand, the circuit court shall also revisit the property division pursuant to WIS. STAT. § 767.225(3).¹

¶2 The parties were married on January 24, 1982, and divorce proceedings were filed on July 27, 2005. On February 28, 1999, Nancy entered into a land contract for the purchase of the farm consisting of approximately 278 acres that belonged to her grandmother. The land contract provided for a purchase price of \$80,000. Nancy's grandmother reserved a life estate for herself and Nancy's mother. The land contract also provided that if Nancy's grandmother died before the contract was fully paid, payments should continue to Nancy's mother and her children. The land contract did not indicate an interest rate.

¶3 Payments were made to Nancy's grandmother in the amount of \$500 monthly from April 1999 until she died on May 1, 2003. Prior to her death, Nancy's grandmother executed a will reiterating that payments after her death shall be made to "my estate or to the heirs." The will also indicated Nancy would no longer be required to pay interest on the unpaid balance after the date of her death. At the time of her grandmother's death, Nancy signed promissory notes in which she promised to pay her mother and siblings until the notes were paid in

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

full. Subsequently, in September 2003 and again in March 2005, Nancy received personal representative's deeds for the farm.

¶4 The circuit court found the farm was worth \$295,000 at the time of the divorce. No evidence was introduced as to the fair market value at the time Nancy entered into the land contract. The trial court found the farm was intended to be received by Nancy as a gift or inheritance and therefore excluded it from the marital estate. The court based its decision largely on "clear donative intent by the grandmother to transfer the property to the petitioner and keep the farm in the family." The court concluded the farm was undervalued at \$80,000 in 1999 and also that any appreciation in value during the marriage was not due to Mark's efforts. Finally, the court concluded that even if it were to consider all or part of the farm to be part of the marital estate, it would deviate from an equal division under the catch-all provision of WIS. STAT. § 767.255(3)(m), based upon Nancy's grandmother's "subjective donative intent to have the property go solely to the petitioner." This appeal follows.

¶5 The general rule is that assets and debts acquired by either party before or during the marriage are divisible upon divorce. *Derr v. Derr*, 2005 WI App 63, ¶10, 280 Wis. 2d 681, 696 N.W.2d 170. There is a statutory exception for property acquired by gift or "[b]y reason of the death of another." WIS. STAT. § 767.255(2)(a). The application of this subsection involves both fact finding and legal questions, but the decision whether property is divisible does not involve the exercise of discretion. *Derr*, 280 Wis. 2d 681, ¶10. A circuit court's decision on how to divide divisible property, however, is discretionary. *Id.*, ¶9.

¶6 We conclude Nancy did not acquire the entirety of the farm by gift or by reason of her grandmother's death. Rather, Nancy received the farm as a

result of a transfer of the property by land contract entered during the life of her grandmother. The uncontradicted testimony indicates that Nancy had been paying for the farm under the land contract. At the time of her grandmother's death, Nancy signed promissory notes in which she promised to pay her mother and siblings until the notes were paid in full. Nancy subsequently received a personal representative's deed upon fulfillment of the land contract. The finding that the farm was gifted in its entirety is clearly erroneous.

¶7 We also conclude the circuit court erred by concluding the entirety of the farm was acquired by reason of the death of another. Nancy acquired an equitable interest in the farm pursuant to the land contract. Her grandmother's will provided that if the land contract was not fully paid by the time of her grandmother's death, the specified payments would continue to other heirs of the estate. Her grandmother's will specifically mentions the land contract and refers to the transaction as a sale. At the time of her grandmother's death, Nancy did not receive anything more than she already had, with the possible exception of the forgiveness of the interest under the will.² The only evidence in the record demonstrates Nancy was to continue to abide by the terms of the land contract, even in the event of her grandmother's death. Nancy was to receive legal title to the farm upon fulfillment of the land contract. At the time of her grandmother's death, Nancy continued to be an equitable owner, and nothing changed except to whom the payments were given. Accordingly, it was error for the circuit court to

² Nancy testified that she never paid interest under the land contract. However, Nancy also testified under cross-examination that the amortization schedule indicates an interest rate. Nancy testified the understanding was that the interest payments would be "willed back" and Nancy would not have to pay interest.

treat the entire farm property as a gift or inheritance. We therefore reverse the judgment.

¶8 Nevertheless, some portion of the farm may have been a gift. The circuit court concluded the 278-acre farm was undervalued at \$80,000, but no evidence was presented as to the value of the farm at the time of the land contract. The circuit court found the reduction in the purchase price constituted a gift. The difference between the fair market value of the farm at the time of the land contract and the \$80,000 purchase price may be considered a gift, taking into account the value of the life estates.³ However, without evidence as to value of the farm at the time of the land contract, we cannot determine the amount of the reduction in the purchase price and thus what amount, if any, was a gift.⁴ We therefore remand for a determination upon proper evidence of what portion of the farm may have been a gift to Nancy from her grandmother.⁵

¶9 Finally, the parties dispute whether the circuit court applied an incorrect standard of law in deviating from an equal property division. The court concluded that even if it were to consider all or part of the farm property to be part of the marital estate, it would deviate from an equal division under the catch-all provision of WIS. STAT. § 767.255(3)(m).

³ In this regard, we note the court found no appreciation in the value of the farm due to the efforts of Mark. That finding is not challenged on appeal, but regardless we do not consider the finding clearly erroneous.

⁴ In addition, the forgiveness of the interest may be considered a gift or inheritance.

⁵ It is irrelevant how title to marital assets is held. *LeMere v. LeMere*, 2003 WI 67, ¶16 n.3, 262 Wis. 2d 426, 663 N.W.2d 789. It is also irrelevant that Nancy had a separate checking account as it is undisputed that she used marital earnings to purchase the farm.

¶10 Property division in divorce is governed by WIS. STAT. § 767.255, which establishes a presumption in favor of equal division of marital property. A circuit court may deviate from the presumptive equal division of property, but only after considering a lengthy and detailed list of statutory factors. *LeMere v. LeMere*, 2003 WI 67, ¶16, 262 Wis. 2d 426, 663 N.W.2d 789. The statutory list contains twelve enumerated factors, plus the catch-all, and the current version of the statute is preceded by an explicit requirement that the circuit court consider all of the enumerated factors before altering the presumption of equal property division. *Id.*, ¶17.

¶11 The statute therefore does not permit a circuit court to deviate from the presumption of equal property division after considering one factor alone. The record must at least reflect the court's consideration of all applicable statutory factors before a reviewing court can conclude that the proper legal standard has been applied to overcome the presumption of equal division under WIS. STAT. § 767.255(3). The failure to address factually inapplicable factors is not an erroneous exercise of discretion, and the court may summarily conclude that certain of the statutory factors are irrelevant. *See LeMere*, 262 Wis. 2d 426, ¶26. Here, although the court mentions four factors, we cannot determine to what extent the court considered any factors other than the catch-all provision. Nor can we consider whether the court's failure to address any applicable factors is harmless. *See id.*, ¶27.

¶12 Therefore, the circuit court shall upon remand also revisit the issue of property division as regards the farm property. The court in its discretion may determine that it is appropriate in this case to deviate from the presumption of equal division but it must do so by application of the proper legal standards.

By the Court.—Judgment reversed and cause remanded with directions.

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

