

**COURT OF APPEALS
DECISION
DATED AND FILED**

SEPTEMBER 29, 1999

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. 98-2871

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

SHARON ARNSMEIER,

PETITIONER-APPELLANT,

v.

IVAN ARNSMEIER,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

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

PER CURIAM. Sharon Arnsmeier appeals from certain portions of a judgment of divorce which addressed the division of property. She argues that the circuit court erred by not including certain securities in the marital estate, the

court misused its discretion when it refused to award her maintenance, and the court erred when it allowed her husband, Ivan Arnsmeier, to keep a diamond she had inherited. Because we conclude that the circuit court properly exercised its discretion, we affirm.

At the time of the divorce trial, Sharon and Ivan had been married for almost twenty-nine years. Sharon was fifty-two years old and Ivan was fifty-nine years old. Both were unemployed. Ivan had been laid off from his job in the telephone industry because his experience and training had become outdated with the advance of technology. Sharon had trouble staying employed because of her health and had difficulty finding a job, in part, because she did not drive. Both were looking for employment.

There are three aspects of the property division in the judgment of divorce at issue. First, the circuit court found that Ivan had purchased certain securities with money he had inherited from his mother. The court, therefore, excluded these securities from the marital estate. Second, the court determined that neither Ivan nor Sharon was entitled to maintenance. The third aspect of the judgment at issue is the court's decision to allow Ivan to keep a diamond which Sharon received from her mother and which she argued was intended for their son.

Generally, the property division in a divorce judgment lies within the sound discretion of the circuit court. *See Brandt v. Brandt*, 145 Wis.2d 394, 406, 427 N.W.2d 126, 130 (Ct. App. 1988). We will sustain a discretionary act of the circuit court if that court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. *See Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982). Whether a party has met the burden of proof of

establishing that property is gifted or inherited and therefore not subject to division under § 767.255(2), STATS., is a question of law which we examine without deference to the circuit court. *See Brandt*, 145 Wis.2d at 409, 427 N.W.2d at 131. A circuit court's finding as to the tracing or commingling of an asset is a question of fact which will not be set aside unless it is clearly erroneous. *See id.* at 407, 427 N.W.2d at 130.

The first issue presented is whether the circuit court erred when it determined that certain securities purchased by Ivan were purchased with money he inherited and therefore were exempt from the marital estate. Sharon argues that the court erred because Ivan did not establish that the excluded securities were purchased with inherited funds, Ivan did not prove that the property retained its character, and Ivan did not establish that the property preserved its identity. Specifically, she argues that the property was commingled with marital property.

In order to establish that the property is exempt, the recipient of the property must first establish that the property was gifted or inherited. *See id.* at 408, 427 N.W.2d at 131. The recipient of the property must also prove that the character and identity of the property have been preserved. *See id.* Character addresses the manner in which the parties have chosen to title or treat the inherited property. *See id.* at 410, 427 N.W.2d at 132. Identity addresses whether the asset has been preserved "in some present identifiable form so that it can be meaningfully valued and assigned." *Id.* at 411, 427 N.W.2d at 132. Tracing is the method used to determine whether the identity of the property has been preserved. *See id.* at 412, 427 N.W.2d at 132. "Commingling, in and of itself, is not necessarily fatal to the exempt status of a gifted or inherited asset. The critical inquiry is whether, despite the commingling, the inherited or gifted component of the asset can nonetheless be identified and valued." *Id.*

In this case, it is undisputed that Ivan inherited \$52,000 from his mother. Because Sharon does not dispute that Ivan inherited \$52,000, Ivan established that the property was inherited. The next question then becomes whether Ivan preserved the character and identity of the property.¹

Sharon argues that Ivan did not establish that the securities he purchased were purchased with the money he inherited. Ivan presented a tracing showing that the money he inherited was used to purchase the excluded securities. Ivan offered as evidence copies of pages of his bank account book which show deposits and withdrawals. Ivan asserted that he deposited the money he received as distribution from his mother's estate and then withdrew money to purchase the contested securities. The bank book shows deposits which correspond with the amount of money Ivan received as a distribution from his mother's estate and withdrawals which correspond with the purchases he made.

Sharon argues that these deposits are suspect because the bank book shows the deposits being made on dates which are earlier than the dates on which Ivan received the distributions from his mother's estate. Ivan testified that he believes the dates in the book must be typographical errors.² The record supports

¹ Sharon argues that Ivan did not establish that the property was inherited. However, she refers to the securities. She confuses establishing that the property was inherited with preserving its character and identity. The first question is whether Ivan inherited money from his mother. Sharon does not appear to contest that fact. The next question, then, is whether he preserved the character and identity of that money. Ivan states that he used the money to purchase securities and offers a tracing to prove it. Sharon disputes Ivan's ability to show that the securities were actually purchased with the money he inherited. In other words, she disputes that Ivan preserved the character and identity of the money he inherited.

² At least one of the dates is obviously a typographical error. Ivan claims that he deposited the amounts in 1985, when he received them from his mother's estate. The bank book shows some of the transaction dates, including some of the deposits, as 1983. One of the transaction dates among the 1983 dates is a 1985 date. In the absence of any evidence to the contrary, this supports Ivan's assumption that the transaction dates were incorrectly recorded.

that assertion. While the dates do not coincide with the dates Ivan received these distributions, the amounts do correspond to the penny. While Sharon argues that this is not sufficient evidence, she did not offer any evidence to contradict this testimony. Standing alone, the incorrect dates on the bank book might be suspect. However, because the deposited amounts correspond exactly to the amount of money Ivan received as a distribution, and in the absence of any other evidence, it was not erroneous for the court to find that Ivan preserved the identity of these funds.

Sharon also asserts that the circuit court should not have excluded the assets from the marital estate because doing so created a hardship for her. Under § 767.255(2)(b), STATS., inherited or gifted property shall not be excluded from the marital estate if the refusal to divide the property “will create a hardship on the other party” The record does not support Sharon’s argument that she will suffer a hardship from the property being excluded. She received a greater portion of the marital estate which, at least in part, was based on the fact that Ivan’s inherited stock was not subject to the property division. Therefore, the court considered the effect the exclusion of this property would have on Sharon when it determined how the property would be divided.

Sharon also contests the award to Ivan of a diamond which she inherited. Sharon argued that the ring was to be given to their son. The court determined that Ivan should keep the ring. This is a determination within the trial court’s discretion and we see no reason for disturbing it on appeal.

Sharon asserts that the circuit court did not set forth any reasoning for why it determined that Ivan should keep the ring and that therefore the court misused its discretion and we must remand. If the circuit court does not set forth

its reasoning for exercising its discretion, we will independently review the record to see if it provides a basis for the circuit court's exercise of discretion. *See State v. Pharr*, 115 Wis.2d 334, 343, 340 N.W.2d 498, 502 (1983).

Our review of the record establishes that there was a basis for the circuit court's exercise of discretion. The testimony indicated that Sharon gave the diamond to Ivan and that Sharon's mother, from whom Sharon received the ring, understood and agreed that he would receive the diamond. Based on this testimony, it was not unreasonable for the court to find that Ivan should retain the diamond.

The final issue is whether the circuit court properly determined that Sharon was not entitled to maintenance. Sharon argues that the court did not consider all of the relevant statutory factors when it decided that she was not entitled to an award of maintenance and did not adequately set forth its reasons for ruling as it did. We disagree. Our review of the record indicates that the court addressed the factors it considered relevant, including the earning capacity of both parties, the length of the marriage, the health of the parties and the division of property. *See* § 767.26, STATS. Therefore, we conclude that the court properly exercised its discretion when it denied maintenance to Sharon.

By the Court.—Judgment affirmed.

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

