

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 30, 2012

Diane M. Fremgen
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. 2011AP1744

Cir. Ct. No. 2009FA61

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

DIANE M. RASMUSSEN,

PETITIONER-RESPONDENT,

V.

DAVID P. RASMUSSEN,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Douglas County:
KELLY J. THIMM, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. David Rasmussen appeals a judgment of divorce in which the circuit court determined that real estate owned by Fagerlin Fuel, Inc.

was marital property subject to division under WIS. STAT. § 767.61.¹ David contends that even though Fagerlin Fuel was purchased from his father with marital funds, he nonetheless inherited the business when the remaining debt associated with the purchase was forgiven by bequest. We conclude that David failed to meet his burden of showing that the Fagerlin Fuel properties are nondivisible. Accordingly, we affirm.

BACKGROUND

¶2 David and Diane Rasmussen were married on June 5, 1982. Afterwards, David worked for his father's fuel business, Fagerlin Fuel. Eventually David purchased the business from his father. A portion of the Stock Purchase Agreement introduced at the final hearing shows that David agreed to buy one share of Fagerlin Fuel stock for \$20,000. The rest of the agreement, not introduced but testified to, provided that David would pay a total of \$120,000 for the shares, with the remaining \$100,000 due in monthly \$1,000 increments.

¶3 David made four monthly payments before his father passed away. It is undisputed that David used marital funds to pay the \$20,000 down payment and each of the four subsequent monthly payments. In his will, David's father forgave the remaining \$96,000 debt.

¶4 The oil business proved difficult, and David eventually purchased rental properties on behalf of Fagerlin Fuel. In 2005, the oil business was sold to a third party. David used the sale proceeds to buy additional rental properties.

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

David handled the majority of these purchases, but Diane explained at the final hearing that David would often consult her beforehand. Diane was listed as Fagerlin Fuel's vice-president in a filing with the Wisconsin Department of Financial Institutions. She also acted as the company secretary, a role that consisted of informally documenting meetings and company events.

¶5 During the divorce proceedings, David argued that property held by Fagerlin Fuel was not subject to division under WIS. STAT. § 767.61(2)(a)2. because it was acquired by reason of his father's death. Diane, conversely, argued that the business was a marital purchase and that David had failed to rebut the presumption that Fagerlin Fuel's assets were divisible.

¶6 The circuit court ultimately refused to depart from the presumption that the Fagerlin Fuel properties were subject to equal division. It concluded David had failed to show that the business properties were traceable to his inheritance because the business was purchased in part using marital funds, there was "significant spousal involvement in the company[,]" and the nature of the business had changed during the marriage. David appeals.

DISCUSSION

¶7 Review of a property division determination involves several standards of review. Property division proceeds in two steps: determining what property is subject to division, and then dividing that property. Whether an asset or debt is divisible in the first instance is a mixed question of fact and law. Findings of historical fact will not be set aside unless they are clearly erroneous. WIS. STAT. § 805.17(2). However, the application of a statute to a particular set of facts—and, therefore, whether property is subject to division under WIS. STAT. § 767.61—is a question of law. *Weiss v. Weiss*, 122 Wis.2d 688, 692, 365

N.W.2d 608 (Ct. App. 1985). Once the circuit court has concluded that property is divisible, the decision on how to divide that property rests in the circuit court's discretion. *Derr v. Derr*, 2005 WI App 63, ¶9, 280 Wis. 2d 681, 696 N.W.2d 170.

¶8 Here, David asserts that, pursuant to WIS. STAT. § 767.71(2)(a)2., most of the Fagerlin Fuel property is not subject to property division. That paragraph excludes from division any property acquired “[b]y reason of the death of another, including ... property acquired ... by bequest or inheritance” David contends that Fagerlin Fuel’s assets, minus the marital investment of \$24,000, can be traced back to his \$96,000 “inheritance,” and are therefore separate. He further asserts that any appreciation is entirely attributable to the debt forgiven by his father’s will.

¶9 In a divorce, assets and debts acquired by either party before or during the marriage are generally divisible upon divorce. *Derr*, 280 Wis. 2d 681, ¶10. This general rule is subject to statutory exceptions for property acquired by gift, by reason of death, or with funds from either of those two sources. WIS. STAT. § 767.61(2)(a). However, all property is presumed to be divisible. *Derr*, 280 Wis. 2d 681, ¶11. The party seeking exclusion bears the burden of showing that the property is nondivisible at the time of divorce. *Id.*

¶10 The treatment of debt forgiveness for the purpose of property division has not been the subject of extensive Wisconsin case law. The most significant case is *Wierman v. Wierman*, 130 Wis. 2d 425, 428-29, 387 N.W.2d 744 (1986), in which a real estate developer, Eugene Koning, transferred several properties to his two daughters. Although the transfers were structured as part gifts and part purchases, Koning testified he never expected to receive any money from his daughters. *Id.* All debt incurred by the daughters was forgiven by

Koning. *Id.* Our supreme court determined that the property was gifted, and was therefore the separate property of the daughter. *Id.* at 430. Koning never intended to sell the property, nor was there any evidence that a sale had ever taken place. *Id.*

¶11 Unlike the transactions in *Wierman*, the transaction here was an actual purchase during marriage. Under the partial Stock Purchase Agreement introduced into evidence, David agreed to purchase one share of Fagerlin Fuel stock for \$20,000. There is no dispute that the agreement further contemplated the sale of the remaining shares for \$100,000, with \$1,000 due each month. David apparently acted in accordance with this agreement until his father's death, making four payments totaling \$4,000. There is no dispute that each of these payments, and the initial \$20,000 payment, were made using marital funds. The sole inference that can be drawn from these undisputed facts is that Fagerlin Fuel was a marital asset purchased by David on behalf of the marriage, not inherited.²

¶12 It follows that the debt incurred in the transaction was marital debt. Indeed, this is the presumption accorded to obligations of spouses under WIS. STAT. § 766.55(1), which states that an “obligation incurred by a spouse during marriage, including one attributable to an act or omission during marriage, is

² Diane contends the circuit court erroneously found that Fagerlin Fuel was inherited by David. The court made no such finding. The court found that “the husband inherited \$96,000 worth of the \$120,000 that FF was worth.” We understand the court to have found that David's inheritance consisted of debt relief, not property that David and Diane had already purchased.

presumed to be incurred in the interest of the marriage or the family.”³ This presumption may be rebutted by clear, satisfactory and convincing evidence that establishes to a reasonable certainty that the debt is nonmarital. *See Brandt v. Brandt*, 145 Wis. 2d 394, 407, 427 N.W.2d 126 (Ct. App. 1988) (middle burden of proof applies to rebut presumption that an asset is exempt from property division as gifted or inherited property). The record is devoid of evidence that David intended to purchase Fagerlin Fuel for his sole benefit. Indeed, the use of marital funds suggests the purchase was meant to benefit the economic partnership.

¶13 David insists that Fagerlin Fuel’s property and any appreciation is nonetheless separate because he inherited \$96,000 directly from his father. This is incorrect. David did not inherit \$96,000; he inherited marital debt forgiveness. The nature of the debt relief must necessarily be determined by reference to the forgiven debt. The debt was a marital obligation before David’s father died, and it remained a marital obligation afterward. Accordingly, there is no basis to conclude that David alone is entitled to the benefits of a marital enterprise simply because the purchase was financed by his father. The parties equally benefitted from the inheritance, regardless of the testator’s intent. Thus, the circuit court correctly determined that Fagerlin Fuel’s assets were subject to division.

¶14 Our conclusion that Fagerlin Fuel’s assets are subject to division obviates the need for further review. Thus, we need not apply tracing or

³ We recognize that the Wisconsin Marital Property Act does not supersede or supplant the property division provisions of WIS. STAT. § 767.61. *Kuhlman v. Kuhlman*, 146 Wis. 2d 588, 589, 432 N.W.2d 295 (Ct. App. 1988). WISCONSIN STAT. ch. 766 governs ownership, management, and control of property owned by spouses during their marriage; in contrast, § 767.61 governs the division of property upon divorce. However, because the debt in this case was incurred during the marriage and did not exist at the time of divorce, its classification during the marriage—the only time it existed—is relevant.

transmutation principles to determine the divisibility of separate property. *See State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989). Accordingly, we affirm, but on a different ground. *Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (court of appeals may affirm on grounds different from those relied on by the trial court).

By the Court.—Judgment affirmed.

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

