

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**DECEMBER 2, 1997**

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. 97-1349-FT**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**IN RE THE MARRIAGE OF:**

**VALERIE B. ADLER,**

**PETITIONER-RESPONDENT,**

**V.**

**STEPHEN I. ADLER,**

**RESPONDENT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Oconto County: LARRY JESKE, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Stephen Adler appeals that part of a divorce judgment dividing the marital property and an order denying his motion for

reconsideration.<sup>1</sup> The trial court included the parties' home in the marital estate even though it was partially purchased with money Stephen inherited and with the proceeds from his personal injury settlement. The court found that these funds had been commingled with marital property. Stephen argues that these funds retained their separate identity and character despite the commingling, and that the trial court should have excluded them from the marital estate or unequally divided the marital property. We reject these arguments and affirm the judgment and order.

Separate property can become marital property if it is commingled with marital property such that it loses its separate identity and cannot be meaningfully valued and assigned. *See Estate of Lloyd*, 170 Wis.2d 240, 259, 487 N.W.2d 647, 654 (Ct. App. 1992). It loses its separate identity if it is so commingled with marital property as to make valuation completely speculative. *See Friebel v. Friebel*, 181 Wis.2d 285, 291, 510 N.W.2d 767, 770 (Ct. App. 1993). Separate property may also become marital property if its character is changed by creating joint ownership rights with "donative intent." *Id.* at 298, 510 N.W.2d at 773.

While the trial court's decision appears to focus on the identity of Stephen's separate property and it made no findings on Stephen's donative intent, we review both the identity and character issues. Whether Stephen has met his burden of proving that the property has retained its identity and character are questions of law that we review de novo. *Estate of Lloyd*, 170 Wis.2d at 255, 487 N.W.2d at 653.

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<sup>1</sup> This is an expedited appeal under RULE 809.17, STATS.

Most of the inherited property and all of the personal injury settlement was so commingled with marital property that the court properly ruled that it lost its separate identity. The \$21,520 Stephen inherited from his father in August 1988 was spent on a new kitchen, carpeting, wallpapering, replacement drywall, ceramic tile flooring and a new deck on a house that they later sold. The proceeds from that sale were used to buy a new house. Later that same year, Stephen inherited \$63,835 from his mother's estate. Forty thousand dollars went into a certificate of deposit in a joint account. That money was later used to buy a lot and commence construction of a new home. The parties could not account for the remainder of the inheritance from Stephen's mother. The personal injury settlement occurred in the early 1980s and was used to pay medical bills, replace a car, a dining room set and to pay part of the mortgage on the parties' former house.

With the exception of the \$40,000 certificate of deposit, Stephen's separate funds were so commingled with marital property that they lost their separate identity. In order to properly trace the separate property, Stephen had to establish what portion of the value of the new house was attributable to the increased sale value of their previous home that resulted from his financial contributions from the inheritance or personal injury settlement. Stephen presented no evidence establishing that his financial contributions to home improvements directly resulted in increased property value years later when the house was sold.

The \$40,000 certificate of deposit arguably retained its separate identity but was transmuted into marital property by Stephen's creation of joint property with donative intent. The certificate of deposit was placed in a joint account and later used to buy property that was held in joint tenancy. Using

separate property to purchase items for the benefit and enjoyment of the family unit creates a presumption of donative intent. See *Trattles v. Trattles*, 126 Wis.2d 219, 226, 376 N.W.2d 379, 383 (Ct. App. 1985). Stephen's argument itself suggests that he had the donative intent to create joint property based on his assumptions and expectations regarding Valerie's future plans. In the absence of evidence that Stephen did not intend to create a joint marital asset when he used his separate funds to buy the joint property, he has not overcome the presumption of donative intent.

Citing *Zirngibl v. Zirngibl*, 165 Wis.2d 130, 137, 477 N.W.2d 637, 640 (Ct. App. 1991), Stephen argues that his gift of the separate property to the estate must fail because the gift was expressly conditioned upon Valerie becoming the primary breadwinner and supporting Stephen when he retired. Stephen did retire and Valerie continued to work and supported him until the divorce. Valerie testified that they never discussed Stephen's separate money or the conditional nature of any gift to the marital estate. The record does not establish any expressed agreement between the parties, or that the terms of the alleged agreement included a provision for Valerie to support Stephen for the rest of his life, or that divorce breaches the alleged agreement. Stephen's testimony notes the parties' joint "goal" and "plans," but does not establish a conditional gift to the marital estate.

The court properly exercised its discretion when it equally divided the marital property despite the inclusion of Stephen's previously separate property. Citing *Schwartz v. Linders*, 145 Wis.2d 258, 263, 426 N.W.2d 97, 99 (Ct. App. 1988), Stephen argues that the court should have unequally divided the marital property in recognition of his gift to the marital estate. In *Schwartz*, the parties had been married only five years and Mrs. Linders was fully capable of

supporting herself. In contrast, the Adler marriage lasted over twenty years. The personal injury settlement occurred approximately fifteen years before the divorce. The inheritances were received nearly seven years before the divorce. Valerie's ability to support herself is questionable. The longer term marriage and the length of time the separate property had been commingled, along with Valerie's questionable ability to support herself constitute grounds for refusing to give Stephen a greater share of the marital estate.

*By the Court.*—Judgment and order affirmed.

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

