COURT OF APPEALS
DECISION
DATED AND FILED

March 2, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP182 **Cir. Ct. No. 2014FA168**

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

IN RE THE MARRIAGE OF:

AUDREY M. HAAS,

PETITIONER-RESPONDENT,

V.

ERIC F. HAAS,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed in part; modified in part; and cause remanded with directions.*

Before Lundsten, Sherman, and Blanchard, JJ.

¶1 PER CURIAM. Eric Haas appeals a judgment of divorce, arguing that the division of marital property that the circuit court ordered was based on

erroneous legal conclusions, unfairly skewing the results in favor of Audrey Haas. Eric argues that the circuit court: (1) erred in classifying as non-divisible property a parcel of farmland that was originally gifted to Audrey, but which Eric argued had become commingled with the divisible assets; (2) erred in awarding solely to Audrey rental income and royalty payments generated by the gifted parcel; (3) erred in concluding that certain personal property was not subject to division; and (4) erroneously exercised its discretion in declining to sufficiently credit Eric for what he paid on a mortgage and toward property taxes and what he should not have to pay toward debt incurred on credit cards in Audrey's possession that increased the marital debt.

¶2 We affirm on the first, third, and fourth issues: the circuit court's decisions regarding the division of the portion of the gifted parcel remaining after part of it was sold, the division of the personal property, and the division of the marital debt. However, we modify the circuit court's decision with respect to the treatment of both rental income and royalty payments generated by the gifted parcel.

BACKGROUND

¶3 The following pertinent facts were testified to or found by the court at the final divorce hearing.

¶4 Eric and Audrey lived together on a 240-acre farm up until the time of their divorce. They jointly purchased 80 acres of the farm from Audrey's parents and the remaining 160 acres were gifted to Audrey by her parents. Eric and Audrey took out a mortgage on the entire 240 acres. Eric and Audrey made the payments on this mortgage loan from their joint checking account.

¶5 **Rental Income.** For each of the three years preceding the divorce, Eric and Audrey rented out farmland to a company that paid rent in exchange for the right to grow crops on the land. The circuit court found that the rented farmland was located entirely on acreage that had originally been gifted to Audrey. At trial, the parties disputed whether rental income that Audrey received after Eric had moved off the farm, but while the divorce was still pending, was divisible. However, as to the time period *after* the divorce, there is no dispute that Audrey is entitled to all rental income attributable to her gifted land.

¶6 **Royalty Income.** A frac sand mining company purchased 73 acres of the farm from Eric and Audrey, consisting of 40 acres from the jointly purchased property and 33 acres from the parcel that had been originally gifted to Audrey. The fracking company made a lump sum payment to Eric and Audrey, and additionally agreed to make royalty payments to Eric and Audrey that would vary depending on quarterly sand yields. Eric and Audrey deposited the initial proceeds from the sale into a joint bank account and used some of the lump sum payment from the fracking company to pay off the original mortgage on the jointly purchased property. Later, Eric and Audrey took out another mortgage on the 167 acres that remained after the sale of the 73 acres, in order to pay off a substantial outstanding tax bill related to capital gains from the property sale to the fracking company.

¶7 At trial's end the circuit court made oral rulings addressing all disputed matters. The court concluded that the 160-acre parcel originally gifted to Audrey was Audrey's non-divisible property. On this basis, the court excluded from the divisible assets the 127 acres of gifted property not sold to the fracking company.

¶8 Separately, based on the premise that income generated from the gifted parcel belongs solely to Audrey, the court exempted from division the rental income that Audrey received after Eric had moved out, but prior to the divorce, based on a determination that all of the rented acreage was gifted acreage. Although the circuit court's order did not address rental income post-divorce, there is no dispute that, post-divorce, Audrey is entitled to rental income attributable to her gifted land.

¶9 Regarding the royalty payments attributable to the 73 acres sold to the fracking company, the court viewed the 33 acres of gifted property differently from the 40 acres that were jointly purchased. With respect to the royalty payments attributable to the 33 acres, the circuit court determined that all payments, both pre-and post-divorce, belonged to Audrey. The court based the pre-divorce part of this ruling on its belief that income from non-divisible property is non-divisible. There is no dispute that the royalty payments received both pre- and post-divorce from the jointly purchased 40 acres belonged to both Audrey and Eric equally. The court's view led to an approximately 73%-27% split of royalty payments in favor of Audrey. Accordingly, pre-divorce royalty payments addressed in the court's property division calculation reflected this unequal split favoring Audrey. Because Audrey and Eric had split three pre-divorce royalty payments equally, the property division calculation effectively required Eric to reimburse Audrey over $40,000 in royalty payments.[1]

[1] The court excluded from the property division balance sheet a royalty payment received shortly before Audrey petitioned for divorce, based on Audrey's testimony that this was used for joint expenses. Eric seems to take issue with the court's decision to exclude this income from the final property division, but he fails to explain why we should not accept the court's determination that the income was used to pay marital expenses and was no longer available for (continued)

¶10 The circuit court addressed post-divorce royalty payments and, consistent with its view above, ordered that future royalty payments be split in the same ratio, split approximately 73% to Audrey and 27% to Eric.

¶11 Separately, the court awarded to Audrey identified personal property, including farm equipment, which the court concluded had been gifted to Audrey. On this basis, the court excluded the amount of this personal property from the property division balance sheet.

¶12 Finally, as pertinent to the issues raised on appeal, the court declined to credit Eric for a substantial increase in the outstanding balances on marital credit cards that had been in Audrey's possession since the petition for divorce had been filed, or for Eric's contribution to the mortgage and property taxes on the marital property, and to the payment of other marital debt that the court assigned to Audrey, after Eric moved out.

¶13 The circuit court addressed child support and ordered Eric to pay child support to Audrey in an amount equaling 25% of Eric's income and the royalty payments that he received.

DISCUSSION

¶14 Repeating, Eric makes the following four arguments on appeal: (1) the circuit court erred in classifying as non-divisible property a parcel of farmland that was originally gifted to Audrey, but which Eric argued had become commingled with divisible assets; (2) the circuit court erred in awarding solely to

---

division at the time of trial. Therefore, we accept the court's determination regarding this payment and confine our discussion to the remaining royalty payments.

Audrey rental income and royalty payments generated by the gifted parcel; (3) the circuit court erred in concluding that certain personal property was not subject to division; and (4) the circuit court erroneously exercised its discretion in declining to sufficiently credit Eric for what he paid on a mortgage and toward property taxes and what he should not have to pay toward debt incurred on credit cards in Audrey's possession that increased the marital debt. We address each argument in turn.

The Gifted Parcel

¶15 Relying on a commingling-of-property theory, Eric argues that the circuit court erred in concluding that the gifted parcel was not subject to division. Eric does not dispute the court's finding that the parcel was originally gifted to Audrey. His argument is that Audrey's conduct created a reasonable inference that she intended to donate the gifted parcel to the marriage because she commingled the gifted parcel with the jointly purchased portion of the farm, thereby converting the parcel from a gift to marital property. Eric contends that the following constituted commingling on Audrey's part: mortgaging the entire 240-acre farm as one parcel on two occasions; using the mortgage proceeds for marital purposes; and entering with Eric into a single contract with the fracking company to sell off property that included portions of both gifted and jointly purchased farmland. The circuit court disagreed with Eric that the gifted parcel was converted into divisible property. For the reasons that follow, we affirm.

¶16 The general property division rule is that assets and debts acquired by either party before or during the marriage are divisible upon divorce. *See* ***Derr v. Derr***, 2005 WI App 63, ¶10, 280 Wis. 2d 681, 696 N.W.2d 170 (citation omitted). Statutory exceptions to the general rule are made for property acquired

(1) by gift, (2) by reason of death, or (3) with funds from either of the first two sources. ***Id.***; WIS. STAT. § 767.61(2)(a) (2015-16).[2] We will refer to these as the statutory exceptions. Although a circuit court's decision on how to divide divisible property is discretionary, the determination as to whether to classify property as divisible or non-divisible does not involve an exercise of discretion on the part of the circuit court and therefore we review it de novo. *See* ***Derr***, 280 Wis. 2d 681, ¶¶9-10.

¶17 A party seeking to rely on a statutory exception bears the burden of showing that the property at issue (1) can be traced to a non-divisible asset and (2) that the party had no intent to donate the non-divisible asset to the marriage. ***Id.***, ¶¶11, 14-19, 22-23 (citation omitted).

¶18 Turning to the circumstances here, this is an easy case on the tracing issue. The land is the same land. That is, there is no problem tracing the disputed acres to the acres Audrey's parents gave her. *See* ***id.***, ¶18 (explaining that tracing was easy in ***Spindler v. Spindler***, 207 Wis. 2d 327, 339, 558 N.W.2d 645 (Ct. App. 1996), where it was "'not seriously disputed that the cottage possesses the same physical form it had when it was gifted ....'").

¶19 We turn to the disputed donative intent inquiry, namely, whether Audrey showed, through her actions, that she subjectively intended to donate the parcel to the marriage. As we now explain, with respect to the 127-acre portion of the gifted 160-acre parcel that remained after the sale to the fracking company, we conclude that Audrey did not intend to donate the 127 acres to the marriage.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶20 "[T]he donative intent inquiry under Wis. Stat. § 767.[61](2)(a) is directed at determining the owning party's subjective donative intent." ***Derr***, 280 Wis. 2d 681, ¶31. ***Derr*** sets forth four situations that can create a rebuttable presumption of donative intent. ***Id.***, ¶¶34-38 (citations omitted). To the extent that Eric is arguing that the situation here fits into one of the four categories set forth in ***Derr***, we conclude that nothing in the record supports this conclusion. Three of the four categories deal with non-divisible *funds* rather than property and therefore could not apply here. *See* ***id.*** And the fourth category, involving a transfer of non-divisible property to joint tenancy, could not apply, because as previously noted it is undisputed that the gifted parcel remained titled in Audrey's name alone at all pertinent times. *See* ***id.***

¶21 Eric argues, without citing legal authority, that "[t]hese categories are not exclusive" and seems to ask us to infer Audrey's donative intent through her actions in using the gifted parcel as collateral for mortgage loans taken out with Eric and using the mortgage proceeds for marital purposes. However, as we now explain, Eric's argument with respect to the 127-acre portion of the gifted parcel that remained after the sale of 33 gifted acres to the fracking company fails under ***Derr***.

¶22 In ***Derr***, as in this case, property was gifted to one spouse (in ***Derr***, the husband) and titled solely in that spouse's name. ***Id.***, ¶1. The property at issue was used to secure a mortgage that the husband and wife took out together, made payments on with marital funds, and had an outstanding balance at the time of the divorce. ***Id.***, ¶¶2, 4. The wife argued that, by virtue of these actions, the husband demonstrated his intent to donate the property to the marriage. ***Id.***, ¶61. This court explicitly rejected this argument, concluding that the husband's "act of putting his building at risk to secure the mortgage loan does not evince an intent to

give all or part of his building to the family. Such 'use' of a non-divisible asset is far different than disposing of an asset in order to make a purchase for the family." ***Id.***, ¶62. In addition, as is the case here, in ***Derr*** there was no testimony suggesting subjective donative intent on behalf of the spouse who owned the gifted property. *See* ***id.*** Neither Audrey nor Eric provided testimony suggesting subjective donative intent on Audrey's behalf. In sum, regarding the gifted portion that remained after the sale to the fracking company, Eric provides us with no reason that we should not reach the same conclusion here that we did in ***Derr***.

¶23 We turn to Eric's argument that Audrey showed donative intent by entering into, with Eric, a single contract with the fracking company to sell off portions of both the gifted and jointly purchased farmland. For reasons we provide below, we agree with Eric, but only as to the proceeds from the 33-acre portion of the gifted parcel involved in the sale to the fracking company.

¶24 As an initial matter, we fail to see how Audrey's participation in the sale of gifted and jointly purchased land to the fracking company could affect land gifted to Audrey that was *not* a part of this sale, which as explained above we conclude remained Audrey's non-divisible property under the ***Derr*** analysis.

¶25 As to the proceeds from the 33 acres of gifted land that were included in the sale to the fracking company, although the parties do not develop arguments on this point, we conclude that it is plain from the record that Audrey gifted the proceeds to the marriage. As discussed above, the land sold to the fracking company consisted of both gifted and jointly purchased land. Eric and Audrey entered into a single contract for the sale and royalty agreement and, key here, the proceeds from the sale were deposited into their joint bank account and later used to pay off marital debt, including a mortgage on the entire parcel, again

including both gifted and jointly purchased portions. As explained in ***Derr***, by using all of the initial proceeds of the sale for marital purposes, Audrey's actions created a rebuttable presumption that she had a donative intent as to all proceeds from the land. *See* ***id.*** ¶36 ("When non-divisible funds are deposited in a joint bank account, even for a short time, donative intent is presumed."). The fact that Audrey equally divided with Eric the royalty payments from the sale that she received while the divorce was pending provides further evidence of Audrey's intent to donate the proceeds from her 33 acres. Audrey points to no evidence in the record that would serve to rebut this presumption, and our independent review of the record similarly reveals no evidence that would be sufficient to rebut this presumption.

¶26 For these reasons, we conclude that the circuit court did not erroneously conclude that Eric failed to present evidence to show that the 127-acre portion of the parcel remaining after the fracking sale lost its non-divisible status through commingling or that through her conduct Audrey indicated the subjective intent to donate the parcel to the marriage. However, we conclude that Audrey's actions with respect to the proceeds of the sale of the 33-acre gifted portion of the parcel indicated her intent to donate the proceeds from that portion of the parcel to the marriage and, for reasons discussed below, that all past and future royalty payments from the 33-acre parcel should be divided equally between Eric and Audrey.

Rental Income and Royalty Payments from the Gifted Parcel

¶27 Eric argues that the circuit court erred in concluding that, because the gifted parcel was non-divisible, the rental income and royalty payments generated by the parcel were also non-divisible. Eric and Audrey received rental

income based on leases on tillable portions of the 127 acres of the gifted portion of the farm that remained Audrey's after the sale of 33 acres of the gifted land to the fracking company. The royalty payments relate to the 33 acres and another 40 acres that had been jointly purchased by Eric and Audrey. To repeat, this total 73 acres was sold to the fracking company, and part of the sale agreement required ongoing royalty payments based on the amount of sand the fracking company removed.

¶28 Eric takes issue with the court's decision to award Audrey all pre-divorce rental income.

¶29 As to the royalty payments, it is undisputed that the circuit court properly split equally royalty payments attributable to the 40 acres. However, Eric contends that the circuit court erred in awarding to Audrey all of the royalty payments generated by the 33-acre portion.

¶30 Audrey argues that the circuit court correctly awarded her all income and payments generated from the gifted parcel.[3]

¶31 As we have indicated, this is a challenge to a legal determination by the court. *See* ***Derr***, 280 Wis. 2d 681, ¶¶9-10 (classifying property as divisible or non-divisible "involves both fact finding and legal questions, but it does not involve the exercise of discretion"). We agree with Eric that the circuit court erred

[3] Beyond Audrey's arguments on the merits regarding the divisibility of the rental and royalty income generated by the gifted parcel, which we address in this section of our discussion, she also contends that Eric conceded arguments on these topics in the circuit court and that he does not sufficiently develop these arguments on appeal. Audrey's arguments are not well supported, and based on our review of the record and the briefs we conclude that it is appropriate for us to reach the merits of the dispute.

as a matter of law in failing to include both pre-divorce rental income and royalty payments from the gifted parcel as divisible property for reasons we now explain.

¶32 **Rental Income.** Our conclusion that the pre-divorce rental income generated from Audrey's gifted property is divisible is dictated by controlling case law interpreting the current WIS. STAT. § 767.61 or its predecessor statutes. In ***Arneson v. Arneson***, we established the following general rule: income generated from non-divisible property is divisible, because it is distinct both from the property itself and from any appreciation in the value of the property. 120 Wis. 2d 236, 244-45, 355 N.W.2d 16 (Ct. App. 1984). ***Arneson***'s general rule of divisibility is based on the fact summarized above regarding the statutory exceptions, namely, that the property division statute, currently § 767.61, excludes from division only property that was acquired by gift or inheritance and not that acquired by any other means. *See* ***Arneson***, 120 Wis. 2d at 244 (interpreting WIS. STAT. § 767.255 (1982-83)). In concluding that income generated by gifted stocks was not exempt from division, ***Arneson*** explains that the income itself "was not acquired by gift, bequest, devise or inheritance. Nor was it paid for with funds so acquired since income is not purchased—it is earned." ***Id.*** at 245.

¶33 We discern no reason to deviate from the general rule of divisibility of ***Arneson*** with respect to pre-divorce rental income generated by Audrey's non-divisible property, and accordingly conclude that the circuit court erred in excluding from division the rental income that Audrey received after Eric had moved out but prior to the divorce. We direct the circuit court on remand to include in its property division calculation an amount equal to the rental income that Audrey received after Eric had moved out, but prior to the divorce, and to treat that amount as divisible property.

¶34 As noted above, regarding post-divorce rental income attributable to property that remained Audrey's non-divisible property, it is undisputed that such income goes to Audrey.

¶35 **Royalty Payments.** Turning to the royalty payments, Audrey may intend to argue that at least a portion of these payments are not divisible because they are generated from the gifted parcel. She fails to persuade us on this point. We concluded above that Audrey donated the proceeds from the 33 acres to the marriage. Such proceeds, including the royalty payments, are not exempt from division.

¶36 Accordingly, we conclude that the circuit court erred in its treatment of the three pre-divorce royalty payments that Eric and Audrey split equally. The circuit court erroneously concluded that these payments should have been split unevenly, and this determination affected the property division calculation. We direct the circuit court to recalculate that part of the property division to reflect an equal division of pre-divorce royalty payments. Regarding all post-divorce royalty payments, we discern no reason why those payments should not be divided equally—Audrey has no greater claim than Eric to these payments. We note that this is in keeping with the circuit court's decision to divide equally the royalty payments attributable to the 40 acres that the court treated as divisible property.

¶37 We observe that our directive to change the treatment of the post-divorce royalty payments may be a reason to revisit the child support order because our directive affects the relative post-divorce income of the parties. For that matter, our directions on remand affect property division, and the handling of property division sometimes is a reason to order more or less child support. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 180, 560 N.W.2d 246 (1997).

Division of Personal Property

¶38 Eric challenges the circuit court's decision to award Audrey personal property, primarily farm equipment, that Audrey's parents gifted to her. Eric may intend to argue that the farm equipment at issue lost its gifted character because it was used during the course of the marriage and was maintained with marital money, relying on some of the same arguments that we have rejected above when discussing the gifted farmland. For reasons discussed briefly below, we affirm the circuit court's decision regarding the division of personal property.

¶39 We observe that, as Audrey correctly points out, Eric's argument regarding the division of personal property is undeveloped and unsupported by citation to legal authority, with the exception of a single case cite that Eric does not back up with analysis as to why that case should affect our decision. We reject Eric's personal property argument on this ground. We further conclude that, even if we were to consider Eric's personal property argument on the merits, we would affirm the circuit court's decision as a proper exercise of the court's discretion.

¶40 Audrey testified at trial that the personal property that Eric seeks to include in the property division was not purchased by Eric, by Audrey, or jointly. Instead, Audrey testified, her parents gave her this property with the intention that it remain on the farm. Based in part on this testimony, the circuit court concluded that the mere fact that the equipment was used by both parties during the marriage did not change the fact that the property was gifted and intended by Audrey to retain its gifted, and therefore non-divisible, character. We have been presented with no reason to upset the court's order regarding the division of personal property.

Allocation of Debts

¶41 Eric argues that the circuit court erroneously exercised its discretion in declining to sufficiently credit Eric in several categories, namely, what he paid on a mortgage and property taxes and what he should not have to pay toward expenditures made solely for Audrey's benefit that increased the marital debt. As with Eric's personal property division argument, Eric fails to adequately develop his credit-and-debt argument with citations to the record and legal authority. We reject Eric's argument on this ground. Further, we observe that, if we were to consider it, we would reject the argument on the merits. This was a proper exercise of the circuit court's discretion, because the court considered the facts, based its decision on proper legal standards, and reached a decision that a reasonable judge could reach. *See* ***Ladwig v. Ladwig***, 2010 WI App 78, ¶15, 325 Wis. 2d 497, 785 N.W.2d 664 (citation omitted); ***Kronforst v. Kronforst***, 21 Wis. 2d 54, 61, 123 N.W.2d 528 (1963) (the circuit court's allocation of debt in determining the marital estate will not be reversed unless the trial court abuses its discretion).

CONCLUSION

¶42 We conclude that the circuit court properly excluded from divisible property the portion of the farmland gifted to Audrey that remained after the sale of land to the fracking company. We further conclude that the court did not erroneously exercise its discretion in awarding the gifted personal property to Audrey and in denying Eric's request to credit him for debts incurred and payments made during the pendency of the divorce. Accordingly, we affirm the court's rulings with respect to those issues.

¶43 We conclude, however, that the court erred in part with respect to rental income and royalty payments.

¶44 The circuit court erred in excluding from division the rental income that Audrey received after Eric had moved out but prior to the divorce. Thus, we direct the circuit court on remand to include in its property division calculation an amount equal to the rental income that Audrey received after Eric had moved out but prior to the divorce, and to treat that amount as divisible property. As noted above, it is undisputed that the post-divorce rental income attributable to property that remained Audrey's non-divisible property goes to Audrey.

¶45 The circuit court erred in its treatment of the three pre-divorce royalty payments that Eric and Audrey split equally. The circuit court erroneously concluded that these payments should have been split unevenly and this determination affected the property division calculation. We direct the circuit court to recalculate that part of the property division to reflect an equal division of pre-divorce royalty payments. Regarding all post-divorce royalty payments, we direct the circuit court to include in the revised judgment a statement making clear that such payments are to be divided equally.

¶46 We repeat our observation that our directive to change the treatment of the post-divorce royalty payments may be a reason to revisit the child support order because our directive affects the relative post-divorce incomes of the parties and also our observation that because our directions on remand also affect property division a change in that regard might have an effect on the proper amount of child support.

By the Court.—Judgment affirmed in part; modified in part; and cause remanded with directions.

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