**COURT OF APPEALS DECISION DATED AND FILED**

**March 25, 2008**

**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. 2007AP1667**

**Cir. Ct. No. 2005FA670**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**
**DISTRICT III**

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**IN RE THE MARRIAGE OF:**

**JANET M. ANDERSON, P/K/A JANET M. ROACH,**

**PETITIONER-APPELLANT,**

**V.**

**JOHN M. ROACH,**

**RESPONDENT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Reversed and cause remanded.*

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

¶1 PER CURIAM. Janet Anderson, p/k/a Janet Roach, appeals a divorce judgment. She claims the circuit court improperly failed to award her a marital property interest in retained earnings in a partnership in which John Roach

had a 25% interest, and also improperly failed to award her a marital property interest in accounts payable to John. We conclude the assets were marital and therefore reverse and remand.

¶2 During the marriage, John acquired a 25% interest in a limited liability partnership called Roach Family Partnership, LLP. The partnership consisted of John, his two brothers and his mother as equal members. The partnership was formed for the purpose of owning and maintaining the Roach family farm, which was in the Roach family for over 100 years. The partnership carried on income-producing activities, including timber harvesting, a sand and gravel pit operation and land rent. John and his brother Timothy assisted in managing the property.

¶3 It is undisputed that John's interest in the partnership was acquired by gift, and therefore John's 25% partnership interest in the partnership itself was properly excluded from the property division. The parties dispute whether the income generated by the partnership was a marital asset. The parties also dispute whether accounts payable to John associated with his management of the partnership were properly excluded from the property division.

¶4 The circuit court held the income from the partnership was not marital property based primarily on John's testimony that the income was intended to be used only for maintaining the farm and not for individual purposes. The court found this testimony "highly credible." The court also found spouses were not intended to have any interest in the partnership, and therefore concluded the accounts payable were not a marital asset. Janet now appeals.

¶5 The division of property rests within the sound discretion of the circuit court. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d

789. We will sustain a discretionary decision if the circuit court examined the relevant facts, applied a proper standard of law, and using a rational process reached a decision that a reasonable judge could reach. ***Liddle v. Liddle***, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). An equal division of a marital estate is presumed under WIS. STAT. § 767.61(3).[1] The court may alter this distribution after considering statutory factors. However, whether an asset is marital property subject to division under § 767.61 is a question of law we review de novo. ***Lang v. Lang***, 161 Wis. 2d 210, 217, 467 N.W.2d 772 (1991).

¶6 As to property division, Wisconsin views income generated by an exempt asset as distinct from the asset itself.[2] ***Metz v. Keener***, 215 Wis. 2d 626, 632, 573 N.W.2d 865 (Ct. App. 1997). In ***Arneson v. Arneson***, 120 Wis. 2d 236, 244-45, 355 N.W.2d 16 (Ct. App. 1984), we stated:

> For purposes of determining the components of a marital estate, we view income generated by an asset as separate and distinct from the asset itself. We also view such income separate and distinct from the appreciation of the asset itself. We see nothing in the developing Wisconsin law excluding appreciation of gifted or inherited property from a marital estate as mandating that property purchased with the income from such property also be excluded.

¶7 John argues that ***Arneson*** is "not universally applicable in every case." John attempts to distinguish the present case on the basis that the earnings were retained by the partnership for maintaining the farm for future generations.

[1] Citations to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] Wisconsin case law appears to treat property division and maintenance issues differently for purposes of determining whether income generated by the asset is marital. *See* ***Metz v. Keener***, 215 Wis. 2d 626, 636, 573 N.W.2d 865 (Ct. App. 1997). Because the present appeal concerns property division, not maintenance, we will not address this distinction further.

John argues that when income is not passed through the hands of the owner it should not be included in the marital estate.

¶8 Although the decision in ***Arneson*** did not extend to whether income not passing through the hands of the owner should be included in the marital estate, our subsequent decision in ***Ayres v. Ayres***, 230 Wis. 2d 431, 602 N.W.2d 132 (Ct. App. 1999), was unequivocal. We stated "that while the appreciated value of nonmarital property may retain its nonmarital status, income generated by exempt stock must be included in the marital estate." ***Id.*** at 447. John does not attempt to address ***Ayres*** in his brief to this court, although it stands in direct contravention to his position.

¶9 Moreover, in ***Metz*** we held that income was attributable to an individual even though it had not yet been distributed by a Subchapter S corporation. ***Metz***, 215 Wis. 2d at 633-34. We noted that, as a pass-through entity, the character of the income in a Subchapter S corporation functioned in the same general manner as the character of the income that passes through to partners. *See* ***id.*** at 633. Accordingly, the income is taxed on the individual returns of the individual owners.

¶10 Here, John's expert witness testified that even though the income may not have been distributed by the partnership, it was reported on each of the individual partners' income tax returns.[3] Therefore, the income generated by the

[3] Janet contends in her brief that she and John recognized the retained cash as ordinary income on their State and Federal income tax returns. John does not refute this statement and it is therefore it is deemed admitted. ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

partnership was separate and distinct from the asset itself, regardless of the intended use of the retained earnings.

¶11 John also contends the "act of selling some trees already owned by the Partnership is nothing more than a partial liquidation of assets." John insists that "[t]urning an excluded, individual asset into cash does not change the fact that the money generated from that sale is still an excluded, individual asset." John's contention that a timber sale is nothing more than a "partial liquidation of assets" is unsupported by citation to legal authority and we therefore will not consider it. *See* ***Kruczek v. DWD***, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286.[4]

¶12 Similarly, the accounts payable to John were marital assets. Both John and his brother claimed mileage expenses for driving to the farm and for other expenses associated with partnership management. John contends the accounts payable were properly excluded from marital funds because "this was for tax purposes only and none of the partners actually collected their 'reimbursement.'" However, as managing partner, John had authority under the partnership agreement to pay from partnership accounts all expenses determined by him to be advisable to pay. Whether or not John intended to reimburse himself was irrelevant because the liability was carried on the partnership records as an indebtedness to John. Absent a gift to the partnership by cancelling the debt, John was entitled to receive payment or some other consideration equivalent to the amount of the debt. As such, it should have been included as a marital asset.

[4] It also appears John did not raise this argument below. Generally, we do not raise issues raised for the first time of appeal. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980).

¶13 John insists that WIS. STAT. § 767.61(3)(m) "clearly allows the Trial Court to consider any relevant factor when deciding how to divide property in a divorce action." John's argument is based upon the improper premise that altering the distribution after consideration of all the factors under § 767.61(3) is equivalent to the determination of whether an asset is marital property subject to division in the first instance. We note that the circuit court concluded the property division was fair and reasonable and, further, the division of the marital assets approximated an equal division of the property of the parties. However, the court erroneously exercised it discretion in the first instance by applying improper standards of law to exclude from marital assets the income generated by the partnership and the accounts payable to John. The judgment must therefore be reversed. Upon remand, the circuit court may revisit the statutory factors under § 767.61(3), if the court deems it appropriate.

*By the Court.*—Judgment reversed and cause remanded.

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