COURT OF APPEALS
DECISION
DATED AND FILED

March 19, 2002

Cornelia G. Clark
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. 01-1041 **Cir. Ct. No. 00 CV 3267**

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

CONDOR ENERGY, INC.,

PLAINTIFF-APPELLANT,

V.

ESTATE OF RICHARD A. MALONE, BY ITS PERSONAL REPRESENTATIVE, JANET MALONE, AND JANET MALONE, INDIVIDUALLY,

DEFENDANTS-RESPONDENTS,

TITLE 100, INC.,

GARNISHEE-DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL G. MALMSTADT, Judge.[1] *Reversed and cause remanded with instructions*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 SCHUDSON, J. Condor Energy, Inc., (Condor) appeals from the circuit court judgment granting it $2,892.25, plus interest, from Janet Malone, but denying Condor the additional recovery it had sought, following the court's consideration of cross-motions for summary judgment and declaratory relief in a garnishment action to collect on a judgment against Janet's husband, Richard A. Malone, rendered in Kansas and docketed in Milwaukee County. The circuit court concluded that only ten percent of the underlying Kansas debt was a marital property debt or a family purpose obligation, and that Condor was not entitled to garnish the escrow account established to contain the "net distributable proceeds from the sale of [Richard's] Estate's undivided one-half interest in the [Malone homestead]" because "the entirety of the funds remaining in the … account … is fully exempt" under the homestead exemption statute, WIS. STAT. § 815.20.

¶2 Condor contends that the entire amount of the Kansas judgment is a debt that was incurred in the interest of the marriage between Richard and Janet. It argues, therefore, that it has the right to proceed against all of the Malones' marital property to satisfy the Kansas judgment. Condor also argues that a judgment debtor who escrows funds to cover a debt is not able to claim a homestead exemption regarding the escrowed funds. Finally, Condor argues that

[1] Although Judge Malmstadt rendered the judgment being appealed, Judge Stanley A. Miller rendered earlier decisions regarding the foreign judgment at issue in this case.

even if the homestead exemption is available, the statutory two-year period allowed for procurement of another homestead with the proceeds from the sale of the homestead for which the exemption is being claimed should not be extended due to pending litigation.

¶3 We conclude that the entire amount of the foreign judgment is a debt that was incurred in the interest of marriage, and that it may be satisfied from the proceeds from the sale of the Malone homestead. Because the proceeds from the sale of the homestead are sufficient to satisfy the foreign judgment even without application of the homestead exemption, we decline to address whether the homestead exemption is available and, if so, whether litigation tolls the statutory two-year reinvestment period.[2] Accordingly, we reverse and remand with instructions.

I. BACKGROUND

¶4 The factual background is very complicated, but essential to an understanding of this appeal. In June 1993, Richard became a record title owner in the working interest of an oil and gas leasehold in Kansas (the McWhirter leasehold). Shortly thereafter, he assigned his interest in the leasehold to Steiner Law Offices (Steiner).

¶5 In March 1995, Condor, having undertaken operations pursuant to the leasehold but without a written contract with Richard, filed a mechanic's lien claim in Kansas for $32,594.32 plus interest, listing Richard and Steiner as owners

[2] *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issue need be addressed); ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground ….").

of the working interest in the leasehold. About a year later, Condor filed a petition to foreclose. Richard and Steiner answered the petition, stating that only Steiner had a working interest in the leasehold and that although Condor had provided labor, service, and materials, Condor did not perform its work pursuant to any contract.

¶6 In May 1996, Condor moved for summary judgment in the Kansas case. Richard and Steiner failed to respond to the motion, and Condor was granted summary judgment against Richard for the amount of the mechanic's lien claim.

¶7 In July 1996, the interest in the leasehold was sold at a sheriff's sale. An order was entered confirming the sheriff's sale and establishing $28,922.58 as the deficiency amount due Condor.[3]

¶8 In October 1996, the Kansas judgment for $32,594.32 was filed in Milwaukee County; the $22,720.02 Condor had received from the sheriff's sale was not taken into account.

¶9 Richard died in September 1997. In June 1998, Condor filed a claim in probate against his estate for $28,922.58 plus interest, classifying the claim as an obligation incurred in the interest of marriage. Condor's foreign judgment action and its claim in the probate action were consolidated by stipulation and order.

¶10 In March 1999, Janet sold the home that she had shared with Richard.[4] As personal representative of Richard's estate, she entered into an

[3] The sum of the amount listed in Condor's petition to foreclose, subsequent services, interest, and legal expenses was $51,642.60. Condor received $22,720.02 in proceeds from the sheriff's sale. $51,642.60 minus $22,720.02 equals $28,922.58.

[4] The Malone homestead, purchased in 1964, had originally been titled in joint tenancy. On March 22, 1995, Janet and Richard signed a marital property agreement which stated, in pertinent part:

> **V. CLASSIFICATION AND OWNERSHIP OF PROPERTY**
>
> In general, all property or interests in property now titled to or hereafter acquired by each party, of whatever nature or description, whether real or personal and wherever situated, shall be owned and classified as that party's individual property, subject to the additional provisions of Article VI and VII of this agreement. This individual property shall include, without limitation, all:
>
> ….
>
> **H.** Beneficial interests of either party in an estate or in a trust created by either party or by a third person, including distributions of principal or income from an estate or a trust
>
> ….
>
> **J.** Undivided interests in property owned by either party as tenant in common with the other party or with third persons
>
> **VI. EFFECT OF TITLE**
>
> Notwithstanding the general arrangement of classification and ownership of property or interests in property as each party's individual property pursuant to Article V of this agreement, the manner in which property or interests in property are titled shall determine classification and ownership rights to the property. More particularly:
>
> ….
>
> **B.** Property titled in both parties' names without designation of the right of survivorship shall be classified and owned as marital property. Property titled in both parties' names with designation of the right of survivorship shall be classified and owned as survivorship marital property.

Also on March 22, 1995, the Janet H. Malone Living Trust was created.

On May 18, 1995, Richard and Janet executed a document terminating their joint tenancy in the homestead and creating a tenancy in common; by the same document, Janet quitclaimed her interest in the homestead to the Janet H. Malone Living Trust.

escrow agreement with an individual described as "the 'putative' assignee of two mortgages," the Internal Revenue Service (IRS),[5] and Title 100, Inc., the escrow agent, regarding $116,065.35 the agreement described as the "net distributable proceeds from the sale of the Estate's undivided one-half interest in the [homestead]." As personal representative of Richard's estate and trustee of the Janet H. Malone Living Trust, Janet also entered into an escrow agreement with Title 100 regarding $48,891.00 the agreement described as coming out of "the independent and separate funds of The Janet H. Malone Living Trust realized in connection with the sale of its interest in the [homestead]."[6]

¶11 Sometime prior to December 14, 1999, Janet moved to vacate the foreign judgment. In its written decision denying Janet's motion, the circuit court, noting that Richard and his attorney had had notice of Condor's motion for summary judgment in the Kansas case and had failed to respond to it, declared that "[s]ince no procedural due process rights were violated," it was exercising its discretion in deciding "not [to] allow the estate of Malone to relitigate this case in Wisconsin in violation of the 'full faith and credit' clause."[7] It did, however,

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[5] On January 8, 1981, a federal court had entered judgment in favor of the United States against Richard for $88,881.36 plus interest and costs, for his failure to pay taxes. The tax lien, originally filed in 1982, had been refiled on August 21, 1995.

[6] Additionally, from the sale proceeds, $66,766.34 was paid directly to the Janet H. Malone Living Trust.

[7] The United States Constitution provides, in relevant part: "Full Faith and Credit shall be given in each State to the … judicial Proceedings of every other State." U.S. CONST. art. IV, § 1. The purpose of this full-faith-and-credit clause is "to establish throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered." ***Magnolia Petroleum Co. v. Hunt***, 320 U.S. 430, 439 (1943), *overruled on other grounds by* ***Thomas v. Wash. Gas Light Co.***, 448 U.S. 261 (1980).

Under Wisconsin's Uniform Enforcement of Foreign Judgments Act, a "foreign judgment" is defined, in relevant part, as "any judgment … of a court of the United States … (continued)

reduce the amount of the foreign judgment to correspond with the established deficiency amount as stated in the order confirming the sheriff's sale of Richard's interest in the McWhirter leasehold. Because Janet failed, in her motion for reconsideration, to make any new argument regarding the validity of the Kansas judgment, the circuit court also denied that motion.

¶12 On April 24, 2000, Condor filed a garnishment action against Janet—both as an individual and as personal representative of Richard's estate—and Title 100. In her amended answer to the complaint, Janet, contending that she, as an individual, was not liable to Condor, pointed out that she had not been named as a defendant in either the Kansas action or the resulting Kansas judgment. She also characterized the judgment as "a debt classified as 'other debts' pursuant to [WIS. STAT.] § 766.55(2)(d)." Accordingly, she asserted that "[p]ursuant to the exception in [WIS. STAT.] § 806.15(4), … the lien of judgement may not attach to [her] marital property interest in proceeds from the sale of the homestead." Additionally, she contended that "[d]efendants are entitled to a homestead exception [sic] pursuant to [WIS. STAT.] § 815.20."

¶13 In October 2000, Janet moved for declaratory relief to determine Title 100's liability, as garnishee, for Richard's judgment debt. In her brief in support of the motion, she concluded that neither escrow account was subject to garnishment by Condor. Also in October 2000, Condor moved for summary

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which is entitled to full faith and credit in this state," and such a judgment is to be treated "in the same manner as a judgment of the circuit court of this state." WIS. STAT. § 806.24(1)-(2) (1999-2000). Thus, Condor's Kansas judgment against Malone is entitled to full faith and credit in Wisconsin, unless it was obtained without due process. *See* ***Griffin v. Griffin***, 327 U.S. 220, 228-29 (1946).

judgment, claiming that, as matters of law, Janet was liable for Richard's debt and the homestead exemption was not available.

¶14 In November 2000, the IRS notified Title 100 of a tax levy regarding the 1981 federal court judgment against Richard, stating that the levy was "intended to attach" to only $101,000 of the escrowed funds.[8] Title 100 then moved to join the IRS as a party to the garnishment action and requested that the court allow the escrowed funds to be deposited with the Milwaukee County Clerk of Courts. Title 100 amended its motion to add an alternative request—that it be allowed to pay the IRS levy in the amount of $101,000 (and be released from any liability resulting from that action) and deposit the remainder of the escrowed funds with the Milwaukee County Clerk of Courts (and be dismissed from the garnishment action). On January 12, 2001, the circuit court ordered Title 100 to pay the IRS $101,000 out of escrow and released Title 100 from any further liability for that amount.

¶15 The circuit court heard Janet's motion for declaratory relief and Condor's motion for summary judgment on January 16, 2001, and issued its written decision the following month. The court concluded: (1) the amount remaining in the estate's escrow account was fully exempt under the homestead exemption pursuant to WIS. STAT. § 815.20; (2) the § 815.20(1) two-year time limit for reinvestment of exempt proceeds from the sale of the homestead would not begin until the case was concluded; and (3) under WIS. STAT. §§ 766.55(2)(b) and 806.15(4), Janet was liable for only ten percent of Richard's judgment debt, plus postjudgment interest, payable from her trust's escrow account.

[8] The IRS had calculated that with statutory interest and late payment penalties added to the original assessment, the actual amount due as of November 30, 2000, would be $809,828.96.

Consequently, the court ordered judgment for Condor in the amount of $2,892.25 plus *postjudgment* interest, ordered Title 100 to release to Janet all escrowed funds upon payment of that amount, and dismissed the remainder of Condor's claims with prejudice. The judgment clerk entered the judgment as $2,892.25 plus *prejudgment* interest of $18.05. Condor appeals from this judgment.

II. DISCUSSION

A. Standard of Review

¶16 Summary judgment methodology is used to determine whether a legal dispute requires a trial. ***U.S. Oil Co. v. Midwest Auto Care Servs., Inc.***, 150 Wis. 2d 80, 86, 440 N.W.2d 825 (Ct. App. 1989). A circuit court must enter summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2) (1999-2000).[9]

¶17 When we review an order granting summary judgment, we apply the same methodology employed by the circuit court. ***Doe v. Archdiocese of Milwaukee***, 211 Wis. 2d 312, 332, 565 N.W.2d 94 (1997). Accordingly, we will reverse a summary judgment decision only when "the record reveals that one or more genuine issues of material fact are in dispute or the moving party is not entitled to judgment as a matter of law." ***Strasser v. Transtech Mobile Fleet Serv., Inc.***, 2000 WI 87, ¶30, 236 Wis. 2d 435, 613 N.W.2d 142.

[9] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated.

B. Debt Incurred in Interest of Marriage

¶18 Relying on WIS. STAT. § 766.55(1), Condor contends that the entire $28,922.58 deficiency judgment is a debt that was incurred in the interest of the marriage between Richard and Janet.[10] Condor is correct.

¶19 Janet contends that "[t]he undisputed evidence is that Richard … was one of a pool of investors and never personally assumed the risk for the other investors." She maintains that "[j]ust because Richard … was burdened with the deficiency judgment for 100% of the investors …, Condor is not justified in insisting [that she] is responsible for the entire debt under any conceivable analysis." Janet's factual allegations are flawed and her legal argument is incorrect.

1. Flawed Factual Allegations

¶20 Janet claims that the following are among a number of "facts" that "were (and are) undisputed": (1) the August 5, 1993 letter from Richard's attorney, Gaar Steiner, to Condor's president, John Remmert, "clearly informed [Remmert], prior to any services performed, that there were multiple investors and disclaimed personal liability for them"; (2) Remmert's October 21, 1998 affidavit stated that he "first learned that Richard … was part of a group of investors pursuant to a letter to him from … Steiner dated November 13, 1993"; (3) the December 31, 1993 letter from Condor's attorney, Charles Pike, to Steiner "acknowledges the 'joint venture interest owners'"; (4) Jeribeth Jones, a paralegal in Steiner's office, "had numerous telephone conversations with Remmert in

[10] WISCONSIN STAT. § 766.55(1) provides, in relevant part, that "[a]n obligation incurred by a spouse during marriage … is presumed to be incurred in the interest of the marriage."

which he referred to the multiple investors"; (5) Richard "owned less than 10% of the total investment"; and (6) Janet's attorney provided Condor's attorney with a list of the investors. The record belies her claims.

¶21 Steiner's August 5, 1993 letter to Remmert, obviously addressing Steiner's concerns regarding a proposed operating agreement for the McWhirter leasehold, states, in relevant part:

> With regard to the operating agreement, I have various questions.…
>
> With regard to paragraph 3, relating to operating expenses, it is unclear whether there is direct personal liability for each of the working interest holders or whether the operator looks solely to revenues produced by the well itself.… [T]he Steiner Law Offices acts solely in the capacity of an agent for the actual working interest owners, has no ownership or working interest and assumes no liability whatsoever for expenses. At some point in the future, it is likely that further assignments will be made which identify the actual working interest owners. However, for present purposes, it must clearly be understood that the undersigned assumes no liability or responsibility with regard to assumption or payment of any costs associated with the well in excess of amounts received from production and then only to the extent of amounts on hand in my trust account ….
>
> Finally, with regard to paragraph 15, I have no problem with the language and Internal Revenue Code references[;] however, that agreement is on behalf of the working interest owners in the well bearing in mind that the undersigned acts as an agent only as noted above. Prior to year end, the working interest holders will be identified, appropriate social security numbers provided and all resulting tax statements are to be issued to the working interest owners, not to the undersigned law firm.
>
> After you have reviewed the foregoing, don't hesitate to give me a call so that we may discuss any required modifications to the agreement.

¶22 Remmert's affidavit states that "nothing was said" to him about Richard "being a record holder for a group of investors" when Richard "took title

to the McWhirter lease." Remmert, apparently misstating the date of the letter he received from Steiner, went on to say that "the first [he] heard of this *claim* was in the letter of November 13, 1993, from … Steiner." (Emphasis added.) Remmert's affidavit also indicates that he "personally handled all of the documen[ta]tion concerning Condor's operation of the McWhirter lease." Additionally, it states: "The parties who purchased oil from the McWhirter well [were] issued 1099's accordingly. All of the 1099's for the McWhirter lease were issued in the sole name of Richard A. Malone. This included 1099's after the well interest was assigned to the Steiner Law Offices."

¶23 While the December 31, 1993 letter from Condor's attorney to Steiner does, indeed, "acknowledge[] the 'joint venture interest owners,'" the record reveals that the letter is in regard to "ERIC WADDELL vs S & J OIL COMPANY, ET AL." Although the letter mentions an attorney named Terry Malone, it does not mention either Richard Malone or the McWhirter lease.

¶24 Jones' affidavit indicates that from 1994 to 1996, she had many telephone conversations with Remmert pertaining to "oil well investment losses sustained by numerous investors," many of whom had lost their interests in "the McWhirter" through foreclosure but subsequently had "repurchased an interest in the McWhirter through the assistance of [Richard] Malone." Jones states that Remmert was, "at all times during [her] conversations with him[,] … expressly aware that Mr. Malone was one, among many, investors who repurchased the McWhirter well."

¶25 Thus, Janet's record references in support of her assertion that it was and is an "undisputed" fact that Richard "owned less than 10% of the total investment" reduce to: (1) a statement to that effect contained in the "factual

background" section of the brief in support of her motion for declaratory relief; (2) a "finding of fact" to that effect contained in the circuit court's written decision declaring that Janet's liability for Richard's debt is only ten percent of the amount of the deficiency judgment; and (3) a statement to that effect contained in Janet's own affidavit.[11] Therefore, the record establishes an issue of fact regarding whether Richard "was a partner in a joint venture with respect to an oil and gas well" in which "[h]is interest was approximately ten percent"—one of the "findings of fact" recorded by the circuit court in its written summary judgment decision.[12]

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[11] Janet supplied no record reference regarding her assertion that her attorney provided Condor's attorney with a list of the investors. Our independent review of the record failed to reveal such a list, or any evidence verifying that it was, in fact, provided to Condor's attorney.

[12] The dissent asserts:

> A review of the January 16, 2001 transcript reveals that *there was no dispute* that Richard's interest in the McWhirter lease was ten percent or less and that there was a pool of investors responsible for the remaining ninety percent. The circuit court confirmed this undisputed fact with both sides. Counsel for Condor did not dispute this fact.

Dissent at ¶3. This assertion is misleading. The following dialogue occurred at the January 16 hearing:

> THE COURT: Okay. Let me see if I can make some assumptions. I want to make sure that I'm right. This was a lawsuit brought in Kansas. It involved an oil well that Mr. Malone … was a partner in. It turns out Mr. Malone's partnership interest was somewhat less than 10 percent, as I understand it. I guess there's no dispute about that. And ultimately the judgment taken in Kansas was somewhere in the nature of $30,000 but has since been reduced to something like $28,000. And as I understand the pleadings, Condor now concedes that Mr. Malone's liability is joint but not several, correct?[*]
>
> [*This reference to the pleadings requires explanation. Condor's brief in support of its summary judgment motion noted that "[t]he record is void of any listing of investors or of a pooling agreement" and

(continued)

concluded that "[e]ven if the pool did exist, absent an agreement to the contrary, the arrangement would be a partnership under which each partner is jointly and severally liable for the debts of the partnership." Condor's subsequent reply brief to Janet's brief in opposition to the motion for summary judgment acknowledged that it had misread WIS. STAT. § 178.12 regarding liability for partnership debts and conceded that Malone's liability for partnership debt would be joint, not joint and several.]

CONDOR'S ATTORNEY: Yes.

THE COURT: So that we're talking about a liability for Mr. Malone of potentially $2,800.

JANET'S ATTORNEY: Right. No, Your Honor, no. That was my interpretation.

THE COURT: That's mine. Tell me why I'm wrong.

CONDOR'S ATTORNEY: The judgment in Kansas is now a judgment in this state, and it's a judgment for the full amount against him alone. Counsel had an opportunity to bring other parties into it through interpleader contribution and so on all down in Kansas[;] none of that was done. We now have a definitive judgment in this state which I'm seeking to enforce.

Condor's attorney then explained Condor's position that the entire amount of the Kansas debt was a family purpose debt, thus entitling Condor, as a creditor under WIS. STAT. § 766.55(2)(b), to reach all marital property for satisfaction of the debt. The court then asked Condor's attorney to explain Condor's position and the following dialogue occurred:

CONDOR'S ATTORNEY: My position is that the entire debt is a family purpose debt.

THE COURT: Why?

CONDOR'S ATTORNEY: Because it's a judgment entered against him and it was incurred during the marriage, in the interest of the marriage.

THE COURT: No. Only 10 percent of it was in the interest of the marriage because only 10 percent of his interest in that oil well, only 10 percent of the oil well went towards the family, his family.…

JANET'S ATTORNEY: Your Honor, I agree that it is a debt against him completely, against his interest. I mean, the whole debt, if there was enough in that estate's escrow to pay your judgment, let's say the IRS didn't have liens, yes, she would be entitled to be paid that whole entire judgment from his portion. The judgment was only against Richard Malone. Janet Malone was not named in the judgment or named in the lawsuit.

(continued)

You can't have a judgment against her unless you can attack her marital property because the debt was for her family purpose.…

….

CONDOR'S ATTORNEY: … It's my position that that entire debt was incurred in the interest of the family, not 10 percent of it.

….

THE COURT: You're wrong. The statute doesn't say your position is right. I agree the statute said any debt which is incurred for the purpose of the marriage becomes subject to the marital property. No question about it. The question is, is the $30,000 debt in Kansas against him as one of ten partners in an oil well. Is that entire $30,000 a debt of the marriage and—

CONDOR'S ATTORNEY: Aren't we making a distinction, Your Honor?

THE COURT: I'm making a distinction that only 10 percent of the money that came from that investment was ever going towards that marriage.… So then if 10 percent of the proceeds of that investment were going to go towards the marriage, if 10 percent of that investment was marital—was property of the marriage, then only 10 percent of that debt can be assessed against her as marital property because the other 90 percent of that investment in Kansas was never going to do anything for her family. It was going to go toward the other investors, not here, not to the Malones.

… [M]y view is that statute says, yes, she has marital property liability as a result of that debt but only up to the extent that the debt reflects a marital property interest. And her marital property in that oil well in Kansas is only 10 percent of it.… His liability, because the judgment was against him, may well have been for 30 grand, but hers is limited by the amount of the marital property. That's reflected by his interest in that oil well, which is 10 percent.

….

… [M]y view is she has no liability above and beyond that 10 percent or whatever that figure is.… I'm also satisfied that he's entitled to that homestead exemption. And that that's—that the portion of that of the escrow accounts—of the escrow account in his estate's name, which is below—now below $20,000, is entitled to the protection of the homestead exemption. So that of the two accounts, the one that's in his name has homestead account protection. The one that's in her name has a liability for this judgment of approximately $2,800. I'm sure the two of you can agree on what the number is.

(continued)

2. Incorrect Legal Argument

¶26 Janet, contending that "Condor is not justified in insisting [that she] is responsible for the entire debt under any conceivable analysis," claims that "the critical factor in determining whether the obligation is incurred in the interest of the marriage or family is whether the benefits derived from the obligation inure to the enhancement of the interest of the marriage or family." Janet bases this claim on our observation, in ***Schmidt v. Waukesha State Bank***, 204 Wis. 2d 426, 555 N.W.2d 655 (Ct. App. 1996), that if benefits flowing from a loan obligation incurred by one spouse were found to have inured to the enhancement of the other spouse's interest, then that obligation would qualify as an obligation "incurred in the interest of the marriage." *See* ***id.*** at 442. Relying on ***Schmidt*** and cases from foreign jurisdictions, Janet argues that the statutory presumption under WIS. STAT. § 766.55(1) is successfully rebutted by evidence that the debt was not intended for the benefit of the community.[13] She asserts that "in light of the case law, the presumption that [Richard's] debt was entirely or even substantially incurred in

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Thus, the record refutes the dissent's characterization. Indeed, it indicates that Condor's attorney never conceded that Malone was one of a pool of investors in the McWhirter leasehold. Rather, Condor has maintained that even if such a pool did exist, the Kansas debt was incurred in the interest of the Malones' marriage, the Kansas judgment was entered against only Malone, and Condor had the right, under WIS. STAT. § 766.55, to proceed against all marital property of the Malones for satisfaction of the judgment.

[13] *See* ¶18 n.10, above; *see also* WIS. STAT. § 903.01, which states:

> **Presumptions in general.** Except as provided by statute, a presumption recognized at common law or created by statute, including statutory provisions that certain basic facts are prima facie evidence of other facts, imposes on the party relying on the presumption the burden of proving the basic facts, but once the basic facts are found to exist the presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

the interest of the marriage or family is rebutted by the facts showing multiple third party investors which Condor has admitted as detailed [in her appellate brief]." Thus, she concludes that "[g]iven the facts of this case, the non-existence of a family purpose for 90% of the debt is more probable than its existence[,] thus rebutting the presumption of family purpose."

¶27 As noted, the circuit court found that Richard "was a partner in a joint venture with respect to an oil and gas well" in which "[h]is interest was approximately ten percent." The court also found: "Since Malone only owned ten percent of the investment, only ten percent of the debt was incurred in the interest of the marriage. The other ninety percent of the debt … in no way could have benefited Janet Malone or the Malone family." Accordingly, the court concluded that the presumption that Richard incurred the entire $28,922.58 debt in the interest of the marriage had been "sufficiently rebutted by the facts in this case." Our review of the record, however, compels us to disagree.

¶28 The record contains no listing of investors, no pooling agreement, and no admission by Condor that "multiple third party investors" actually existed. Nor has Janet presented any other evidence to successfully rebut the presumption that the entire debt was incurred in the interest of the marriage.

C. Property Available to Satisfy Foreign Judgment

¶29 As important as the factual issues of this case may be in other contexts, they do not affect the validity of the Kansas judgment. Even assuming, for the sake of argument, that Richard incurred the debt as a member of a pool of investors, the judgment against him was not obtained in violation of his due process rights and, therefore, it is entitled to full faith and credit in Wisconsin. Thus, Condor had the right to proceed against all marital property of Richard and

Janet to satisfy the Kansas judgment, *see* ***Courtyard Condo. Ass'n v. Draper***, 2001 WI App 115, ¶11, 244 Wis. 2d 153, 629 N.W.2d 38, as well as the right to proceed against all other property belonging to Richard, *see* WIS. STAT. § 766.55(2)(b).[14]

¶30 Moreover, because there is no evidence that Condor, at the time when Richard incurred the debt, had actual knowledge of the marital property agreement, Condor may not be adversely affected by any provision of that agreement. *See* WIS. STAT. § 766.55(4m). As noted, the Malones terminated their joint tenancy in the homestead and created a tenancy in common on May 18, 1995. Thus, under the terms of both section VI. B. of the marital property agreement and WIS. STAT. § 766.60(4)(b)1.b,[15] the homestead was marital property. Richard, therefore, had an undivided one-half interest in the entire homestead for the duration of the tenancy in common, *see* WIS. STAT. §§ 766.31(3) & 700.17(3), and proceeds of the sale of the homestead thus were available for satisfaction of his debt to Condor to the same extent that the homestead itself was available for satisfaction of that debt prior to his death, *see* WIS. STAT. § 859.18(2).[16]

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[14] Under WIS. STAT. § 766.55(2)(b), Richard's debt to Condor "may be satisfied only from all marital property and all other property of the incurring spouse."

[15] WISCONSIN STAT. § 766.60(4)(b)1.b provides: "If a document of title, instrument of transfer or bill of sale expresses an intent to establish a tenancy in common exclusively between spouses after the determination date, the property is marital property."

[16] Under WIS. STAT. § 766.31(3), "[e]ach spouse has a present undivided one-half interest in each item of marital property." Additionally, we note that § 766.31(5) clarifies that "transfer of property to a trust does not by itself change the classification of the property." WISCONSIN STAT. § 700.17(3) provides that each tenant in common "has an undivided interest in the whole property for the duration of the tenancy." WISCONSIN STAT. § 859.18(2) provides, in relevant part, that "[a]t the death of a spouse, property, including the proceeds of … that property, that but for the death of the spouse would have been available under s. 766.55(2) for satisfaction of an obligation continues to be available for satisfaction."

¶31 After Richard's death, the IRS agreed to levy against only $101,000 of the proceeds from the sale of the homestead. The tax levy is another of Richard's obligations "presumed to be incurred in the interest of the marriage or the family." *See* WIS. STAT. § 766.55(1). Janet presented no evidence to rebut this presumption. Consequently, the IRS had the right to proceed against all marital property of the Malones to satisfy the tax levy. *See* ***Draper***, 2001 WI App 115 at ¶11.

¶32 The sum of the amounts distributed to the escrow accounts and the trust was $231,722.69. Subtraction of the $101,000 IRS levy from this amount leaves $130,722.69 available for satisfaction of the Kansas judgment debt and division between Richard's estate and the trust.

D. Conclusion

¶33 We reverse the judgment and remand the cause with instructions to the circuit court to direct that the $231,722.69 in proceeds from the sale of the Malone homestead, originally distributed to the escrow accounts and the trust, be redistributed as follows: $101,000 to the IRS; $28,922.58 plus interest (in accordance with the established deficiency amount as stated in the July 23, 1996 Order Confirming Sheriff's Sale) to Condor; and the remainder to be divided equally between the estate and the trust.

By the Court.—Judgment reversed and cause remanded with instructions.

Not recommended for publication in the official reports.

No. 01-1041(D)

¶34 WEDEMEYER, P.J. (*dissenting*). I dissent from the majority opinion in this case because I disagree with its determinations that: (1) whether Richard was a multiple party investor in the McWhirter lease is a disputed issue of fact; (2) Janet failed to present any evidence to overcome the presumption that Richard's entire liability was incurred in the interest of the marriage; and (3) regardless of these two factual issues, "Condor had the right to proceed against all marital property of Richard and Janet to satisfy the Kansas judgment." Majority at ¶29. I would affirm the judgment of the circuit court.

¶35 Janet sought a declaratory judgment from the circuit court. Condor filed a motion for summary judgment. The trial court conducted a hearing on the motions on January 16, 2001. A declaratory judgment action is equitable in nature. ***F. Rosenberg Elevator Co. v. Goll***, 18 Wis. 2d 355, 365, 118 N.W.2d 858 (1963). The standard of review for a declaratory judgment is the same as that for other judgments rendered by trial courts when deciding issues of fact. ***In re Estate of Molay v. Molay***, 46 Wis. 2d 450, 175 N.W.2d 254 (1970). The trial court's decision whether to grant declaratory relief is discretionary. ***State ex rel. Lynch v. Conta***, 71 Wis. 2d 662, 668, 239 N.W.2d 313 (1976).

¶36 A review of the January 16, 2001 transcript reveals that *there was no dispute* that Richard's interest in the McWhirter lease was ten percent or less and that there was a pool of investors responsible for the remaining ninety percent. The circuit court confirmed this undisputed fact with both sides. Counsel for Condor did not dispute this fact. The majority examines the documents in the record and concludes that there is "an issue of fact regarding whether Richard

'was a partner in a joint venture …' in which '[h]is interest was approximately ten percent.'" Majority at ¶25. Later in the opinion, the majority states that "the record contains no listing of investors, no pooling agreement, and *no admission by Condor* that 'multiple third party investors' actually existed." Majority at ¶28.

¶37 But that is not true. There was an admission by Condor that Richard's interest was limited to ten percent—the admission was made to the trial court during the January 16, 2001 hearing. Our role as an appellate court is not to assess the amount or clarity of the evidence to support a trial court's finding of fact. Clearly, this case would have been a lot less complicated if Janet could have produced a document listing names, identifying information, and percentage of investment of the other pool participants. Regardless, our role in reviewing a trial court's finding of fact is not to determine whether there is also evidence to support a contrary finding than that made by the trial court. Our role is to determine whether the trial court's findings are clearly erroneous. ***Molay***, 46 Wis. 2d at 457.

¶38 After conducting a hearing on the cross-motions, the trial court rendered findings of fact, conclusions of law, and a decision. The trial court found that Richard was a partner in a joint venture in the McWhirter lease and that his interest was approximately ten percent. The trial court also found that Janet presented sufficient evidence to overcome the presumption that Richard's entire debt was incurred in the interest of the marriage. The trial court ruled that only the ten percent investment was incurred in the interest of the marriage. It is these two findings that are critical to the outcome in this case. Based on these findings, the trial court concluded that Janet's liability to Condor was limited to ten percent of the original debt because only that percentage could be classified as a marital property debt or as a family purpose obligation under WIS. STAT. § 766.55(2)(b).

¶39 Here is where the analysis gets somewhat sticky. In this state, a judgment creditor may proceed against "all marital property" to satisfy that judgment even if only one spouse incurred the debt. ***Courtyard Condo. Ass'n v. Draper***, 2001 WI App 115, ¶11, 244 Wis. 2d 153, 629 N.W.2d 38.[17] This right, however, is not unrestricted. To be accessible, the debt must have been incurred during the marriage for a family purpose. ***Id.*** at ¶4; WIS. STAT. § 766.55(2)(b).

¶40 Condor argued, and the majority agreed, that because the debt was a joint debt, it did not matter whether Richard was only a ten percent partner—that he was one hundred percent liable for the debt. I don't disagree. However, even if Richard is one hundred percent liable, Janet is not if she can show that the debt Richard incurred did not have one hundred percent marital or family purpose. The trial court found that she did so.

¶41 In my opinion, the trial court's findings are not clearly erroneous, and the trial court exercised proper discretion to reach a reasonable conclusion in fashioning an equitable remedy in this case. I would affirm, and therefore must respectfully dissent.

[17] The majority cites this case for the proposition that "Condor had the right to proceed against all marital property of Richard and Janet to satisfy the Kansas Judgment." Majority at ¶29. That case, however, did not alter the statutory requirement that in order for a creditor to proceed to collect a judgment from the non-incurring spouse, the debt must have been incurred for a family purpose. ***Courtyard Condo. Ass'n v. Draper***, 2001 WI App 115, ¶4, ¶11, 244 Wis. 2d 153, 629 N.W.2d 38; WIS. STAT. § 766.55(2)(b) ("An obligation incurred by a spouse *in the interest of the marriage or the family* may be satisfied only from all marital property and all other property of the incurring spouse.") (Emphasis added.).