

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 4, 2009

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. 2008AP2590

Cir. Ct. No. 2005FA74

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

NANCY JANE SMITH,

PETITIONER-APPELLANT,

v.

MARK CHARLES SMITH,

RESPONDENT-RESPONDENT.

APPEAL from orders of the circuit court for Taylor County: ANN KNOX-BAUER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Nancy Smith appeals an order after remand and the denial of a motion for reconsideration. On a previous appeal, we determined a farm Nancy acquired from her grandmother during the course of her marriage was

not entirely gifted or inherited, and remanded for a determination of what portion of the farm was gifted. Nancy now claims the increased value of the gifted portion remained individual property. She also challenges the method of valuation. We affirm.

¶2 The facts were discussed previously in *Smith v. Smith*, No. 2006AP2403, unpublished slip op. (WI App July 17, 2007). Approximately six years prior to her divorce, Nancy entered into a land contract for the purchase of the 278-acre farm that belonged to her grandmother. The land contract provided for a purchase price of \$80,000. Nancy's grandmother reserved a life estate for herself and Nancy's mother. The land contract also provided that if Nancy's grandmother died before the contract was fully paid, payments should continue to Nancy's mother and children. The land contract did not include an interest rate.

¶3 Payments were made to Nancy's grandmother in the amount of \$500 monthly from April 1999 until she died on May 1, 2003.¹ Prior to her death, Nancy's grandmother executed a will reiterating that payments after her death shall be made to "my estate or to the heirs." The will also indicated Nancy would no longer be required to pay interest on the unpaid balance after the date of her death. At the time of her grandmother's death, Nancy signed promissory notes in which she promised to pay her mother and siblings until the notes were paid in full.

¹ Divorce proceedings were filed on July 27, 2005.

¶4 The circuit court found the farm was worth \$295,000 in 2005 at the time of the divorce. No evidence was introduced at the final divorce hearing as to the fair market value at the time Nancy entered into the land contract in 1999. The court found the farm was intended to be a gift or inheritance and therefore excluded it from the marital estate. We reversed, concluding the farm was not entirely gifted or inherited. We reasoned Nancy received the farm as a result of a transfer of the property by land contract during her grandmother's life and Nancy was to continue payments to other heirs of the estate if the land contract was not fully paid by the time of her grandmother's death. Her grandmother's will also specifically mentioned the land contract and referred to it as a sale.

¶5 We therefore remanded for a determination of what portion of the farm may have been a gift to Nancy from her grandmother. We also instructed the circuit court to value the farm at the time of the acquisition and revisit the statutory property division factors as regards the farm property.

¶6 After conducting an evidentiary hearing upon remand, the circuit court concluded the land contract was a partial gift and partial sale. It valued the gifted portion of the farm at \$85,100, which consisted of a fair market value of \$165,100 minus the \$80,000 purchase price. The court also analyzed the statutory property division factors and concluded it should not deviate from an equal division of the marital property.² The court subsequently denied Nancy's motion for reconsideration.

² The value of the farm included as marital property was \$209,900, determined by taking the fair market value of the farm at the time of divorce and subtracting the value gifted to Nancy. The court also assigned Nancy the debt still owing on the farm as a marital debt. The court then divided the property equally between the parties, resulting in Nancy receiving the entire farm with an equalization payment.

¶7 Nancy now argues on appeal the increased value of the gifted portion of the farm during the marriage was individual property and not subject to property division. Nancy also contends the circuit court erred by using an appraised value in determining the farm's fair market value in 2005 at the time of the divorce but using the real estate tax assessment for the value at the time of acquisition in 1999. Nancy notes the property was not appraised in 1999 and contends a more accurate reflection of the farm's value would be found using the fair market value from the tax assessments for both years.

¶8 A circuit court's decision on property division is discretionary and will be sustained if the court examined the relevant facts, applied a proper standard of law and reached a rational conclusion that a reasonable judge could reach. *See Liddle v. Liddle*, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). The valuation of assets is a factual finding that will not be disturbed unless clearly erroneous. *See id.*

¶9 Here, the circuit court did not erroneously exercise its discretion by concluding the increase in the farm's value during the marriage was marital property. The court found the farm was purchased, maintained and improved with marital funds. The court noted its original findings at the divorce hearing were that "all of the debts and activities arising from this farm were paid for through Ms. Smith's own account." The court also determined rental proceeds generated from the gifted portion of the farm were marital funds. *See Metz v. Keener*, 215 Wis. 2d 626, 633-34, 573 N.W.2d 865 (Ct. App. 1997). The rental proceeds and Nancy's marital payroll check were co-mingled into her individual checking account. The court concluded the increase in value could not be apportioned in any logical manner between the gifted, purchased or improved portions of the farm.

¶10 Nancy insists any appreciation in value was due solely to general economic conditions and appreciation of the real estate and therefore should be considered individual property pursuant to *Plachta v. Plachta*, 118 Wis. 2d 329, 348 N.W.2d 193 (Ct. App. 1984), and its progeny. Nancy’s citations are inapposite, however, as the character and identity of the gifted portion of the farm was not preserved in the present case. The farm increased in value, but contributions were made by the marital estate in the form of substantial improvements and maintenance. The court found there was no legitimate manner by which to apportion the appreciation of the gifted portion of the farm from the marital portion under the facts of this case. As the court correctly observed, there was “no evidence in the record from which the court could conclude that the increase in the farm’s value was due to economic conditions or due to the improvements on the farm.” The court indicated it “would have to guess or speculate as to how those improvements increased the value of the property, and what percentage could or should be assigned to those improvements.”³ We reject Nancy’s argument that any increase in value was due solely to general economic conditions.

¶11 We also conclude the circuit court’s finding of fair market value based upon the 2005 appraisal was not clearly erroneous. *See* WIS. STAT. § 805.17(2).⁴ At the final divorce hearing, the court determined the farm’s value

³ Nancy does not directly challenge the statutory property division factors. However, the court specifically addressed the statutory factors and we are satisfied the circuit court’s lengthy explanation of the factors incorporated appropriate considerations. The court did not erroneously exercise its discretion in rejecting Nancy’s request to deviate from the presumption of equal property division.

⁴ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

based on Nancy's appraisal, an amount much lower than the appraisal submitted by her ex-husband. At the remand hearing, the 1999 tax bills for the farm were introduced. The court found this to be the best available evidence presented at the hearing of the property's value when it was conveyed to Nancy, and it was entitled to do so. Nancy argues the farm was not appraised in 1999 but, "[i]f there was one would assume it would be higher than the fair market value shown on the 1999 tax statement." We are unpersuaded. As the court observed in its order denying reconsideration, "the court cannot assume that the FMV on the tax bill is not a fair comparison to the FMV on an appraisal." The court's finding based upon the 2005 appraisal was not clearly erroneous.

By the Court.—Orders affirmed.

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

