STATE OF WISCONSIN
IN COURT OF APPEALS
DISTRICT III
2024 AP 001143

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In Re the Marriage of:

Kelly Ann Lewis,

Petitioner-Respondent,

-and-

Travis Michael Lewis,

Respondent-Appellant.

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APPEAL OF FINAL JUDGMENT OF THE
CIRCUIT COURT, BAYFIELD COUNTY,
HONORABLE JOHN P. ANDERSON, PRESIDING
CASE NO. 23-FA-41

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# PETITIONER-RESPONDENT'S BRIEF

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## STATEMENT OF ISSUES

Did the trial court err as a matter of law by concluding that the Petitioner-Respondent adequately traced the identity of assets excluded from the marital estate as non-marital property?

ANSWERED BY THE TRIAL COURT – NO

Did the trial court erroneously exercise its discretion by awarding the parties' dog to the Petitioner-Respondent?

ANSWERED BY THE TRIAL COURT – NO

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The briefs fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost to the litigants.

Publication of the decision is not warranted. The issues involve no more than the application of well-settled rules of law to a recurring fact situation, and no reason appears for questioning or qualifying the controlling authorities.

## STATEMENT OF THE CASE

This is an appeal of a final judgment of the Circuit Court for Bayfield County, the Honorable John P. Anderson presiding. The Petitioner-Respondent, Kelly Ann Lewis ("Kelly") initiated divorce proceedings against the Respondent-Appellant, Travis Michael Lewis ("Travis") to terminate their marriage. A contested trial to the court was conducted on March 1, 2024, the Honorable John P. Anderson presiding.

On April 19, 2024, the trial court entered its Findings of Fact, Decision Regarding Property Division and Order which was incorporated into the court's Findings of Fact, Conclusions of Law and Judgment of Divorce entered on April 29, 2024 ("Judgment"). It is from this Judgment that Travis appeals.

## STATEMENT OF FACTS

Assuming the issues on review remain as addressed in Travis' initial brief, there is no significant disagreement on the facts of the case. Under those circumstances, Kelly accepts those statements of fact set forth in Travis' initial brief, and supplements them with those facts identified in this section and within the argument section of this brief.

If Travis were to argue on appeal that the "character" of Kelly's inherited properties had changed such that they were transmuted into marital property, this brief would include a more detailed Statement of Facts. However, Travis' initial brief indicates that he is contesting the trial court's decision only in relation to its determination that Kelly adequately traced the "identity" of the inherited property – and not whether any facts or circumstances had caused the "character" of the inherited property to lose its exempt status. Kelly reserves the right to submit a sur-reply brief addressing the relevant facts in detail in the event it is determined by the Court that she must, in fact, address the "character" issue on appeal.

1) There are no improvements on the real estate holdings titled in Kelly's name other than the homestead property. [Ex 1, R-52, R-App. 349-50; Ex 4, R-55, R-App. 351-52; Ex 5, R-56, R-App. 353-59; R-114, pp. 124-25, 127-28, R-App. 224-25, 227-28].

2) Travis is unaware of the extent to which the use of the homestead property may extend upon the remainder of Kelly's property. [R-114, p. 127, R-App. 227].

3) Exhibit 14 is an overhead map depicting the all real estate holdings at issue. Travis testified as to the location of the driveway on the map and the location of places on the map where the parties stored personal property. [R-114, pp. 196-98, R-App. 296-98].

4) Travis testified that located on the homestead property are a garage, a shed that's called a barn, a moveable storage container, a boiler and a couple of outbuildings – all located within approximately 200 yards of the house. [R-114, pp. 210-11, R-App. 310-11].

5) Exhibit 8 is the 2023 tax bill for the homestead property. [Ex 8, R-59, R-App. 360; R-114, p. 57, R-App. 157]. It reflects an assessed value of $151,000.

6) Travis testified that, because of all the needed repairs, the homestead was not worth $160,000, and the parties would be lucky if they received $100,000 from a sale of the homestead property. [R-114, pp. 123, 163, R-App. 223, 263].

7) Travis further testified that he did not contest the homestead's assessed value of $151,000. [R-114, p. 177, R-App. 277].

8) Travis testified that a total of $40,000-$50,000 was received for logging Kelly's real estate holdings between 2020 and 2022, and that the proceeds were used to buy silver and a tractor. [R-114, p. 184, R-App. 284].

9) The silver and tractor owned by the parties were allocated between the parties as personal property. [R-68, pp. 14-15, A-App. 16-17].

10) Kelly used $1,600 in inherited funds to purchase two dogs, including the dog, Heidi. [R-114, pp. 71, 113 R-App. 171, 213; R-68, p. 9, A-App. 11].

11) Kelly denied gifting the dog, Heidi, to Travis. [R-114, p. 113, R-App. 213].

12) The word "dog" appears six (6) times in the trial court's decision. [R-68, pp, 9, 14, 16, A-App. 11, 16, 18]. At no time did the trial court reference the dog, Heidi, as non-marital property.

13) The trial court awarded the dog along with its award of the homestead property. The trial court determined that the dog was to be awarded to the party to whom the homestead property was awarded. [R-68, pp, 9, 14, 16, A-App. 11, 16, 18].

14) The trial court found that the "Petitioner's gifted and inherited property that has retained its separate and distinct character includes all of the land surrounding the parties' homestead." [R-68, p. 16, P-App. 18].

15) The trial court found that "none of the actions of petitioner showed a donative intent to convert her trust or the unimproved land to property subject to division." [R-68, p. 12, A-App. 14].

## ARGUMENT

### I. THE TRIAL COURT DID NOT ERR IN DETERMINING THAT THE PETITIONER-RESPONDENT SUFFICIENTLY TRACED THE IDENTITY OF THE REAL ESTATE AS NON-MARITAL PROPERTY.

The Petitioner-Respondent ("Kelly") was able to establish the identity of all real estate owned as her individual property. Had she not stipulated to a finding that the homestead property was marital, there is a substantial likelihood that the trial court would have found that no portion of the real property titled in Kelly's name was marital. The record establishes that each and every parcel of real property was inherited by Kelly and remained titled solely in her name. The trial court found that Kelly paid the mortgages off with gifted or inherited funds, paid for the improvement of the 1.85 acres with inherited funds, paid for maintenance and upkeep with inherited funds and paid the taxes on the property with inherited funds. [R-68, pp. 2-3, A-App. 4-5]. The trial court found that any financial contribution of Travis was insignificant. [R-68, p. 2, A-App. 4]. Absent her stipulation, it would appear unlikely that any portion of the real estate titled in Kelly's name would have been considered "marital." Such a determination would have also rendered unavailable to Travis the argument presented on appeal in relation to the remainder of Kelly's individual, inherited property.

Were it not for her generosity, it is likely that Kelly would not have been required to compensate Travis for any interest in the "marital homestead," and

would not find herself as a respondent on appeal. In this sense, Kelly is a victim of her own generosity.

Travis relies heavily on the Court of Appeals decision in *Derr v. Derr*, 2005 WI App 63, 280 Wis. 2d 681, 696 N.W.2d 170. The Court therein engaged in significant analysis of the process by which a court is to address the relevant issue on appeal.

> ¶ 14 In our case law addressing whether property is subject to division under WIS. STAT. § 767.255(2)(a), we often speak of "identity" and "character" as if they constitute a complete two-pronged analysis. The following language is typical:
>
> The party seeking exclusion of inherited or gifted property must prove that it has retained its character and identity. Once the recipient of inherited property has met these requirements, the opposing party has the opportunity to establish by sufficient countervailing evidence the property is not inherited, or has otherwise lost its exempt status because its character or identity has not been preserved.
>
> *Krejci*, 266 Wis.2d 284, ¶ 32, 667 N.W.2d 780 (citations omitted); see also *Spindler*, 207 Wis.2d at 338, 558 N.W.2d 645; *Friebel v. Friebel*, 181 Wis.2d 285, 298, 510 N.W.2d 767 (Ct.App.1993). However, as set forth below, the "identity" and "character" inquiries do not comprise a test. Instead, they are labels for two distinct inquiries—tracing and donative intent—that may or may not fully resolve the divisible status of property at the time of a divorce.
>
> *Derr v. Derr*, 2005 WI App 63, ¶ 14, 280 Wis. 2d 681, 698–99, 696 N.W.2d 170, 178.

Here, Travis has conceded the character issue. He presented the following argument in his Brief:

> A gift remains separate from the marital estate and is not divisible if the inherited or gifted property retains its character and identity. *Derr v. Derr*, 696 N.W. 2d 170, 176 (Wis. App. 2005). Identity and character are not a two-part test- but an inquiry and analysis into tracing and donative intent. *Derr* at 176. **Here, the court failed in the identity portion of the analysis**.
>
> [App. Br. 5] (Emphasis supplied).

Travis argues that "the law does not require Respondent-Appellant to trace the nature of the parcels. Instead, the law requires Petitioner-Respondent to trace the nature of the parcels, and she failed to do so." [App. Br. 11].

Travis confuses identity with character. Kelly was required to trace only the identity of the parcels – not their nature or character. Tracing the identity of the parcels required Kelly to do nothing more than to present evidence that the properties had always remained titled in her name and to present Deeds to the Court identifying her as the property owner and legally describing the parcels. She did so. Tracing does not apply to donative intent or character. It applies only to the identity of the contested property.

Once again, Travis argues that "[i]dentity and character are not a two-part test- but an inquiry and analysis into tracing and donative intent. *Derr* at 176. Here, the court failed in the identity portion of the analysis." [App. Br. 5]. Despite paying lip service to the concepts of the "nature" or "character" of the real estate, Travis' Brief does not address the issue of donative intent. There is concern that Travis may now attempt to address the issue in his reply brief. Consistent with its practices and policies, the court should not consider issues raised by an appellant for the first time in a reply brief. *See Matter of Bilsie's Est.*, 100 Wis. 2d 342, 346 n2, 302 N.W.2d 508, 512 n2 (Ct. App. 1981).[1]

On the issue of identity, the Court of Appeals stated in *Derr*:

> ¶ 15 The "identity" inquiry "addresses whether the gifted or inherited asset has been preserved in some present identifiable form so that it can be meaningfully valued and assigned." *Brandt*, 145 Wis.2d at 411, 427 N.W.2d 126. Thus, the "identity" inquiry is purely a matter of tracing; it is the job of determining the value and source of an asset or the value and source of a part of an asset.
>
> [I]f nothing but tracing is disputed, tracing alone may resolve whether property is divisible. For example, if parties to a divorce dispute whether an asset was purchased with non-divisible funds, but agree that if it was the asset is non-divisible, tracing alone resolves the dispute.
>
> *Derr v. Derr*, 2005 WI App 63, ¶ 16, 280 Wis. 2d 681, 700, 696 N.W.2d 170, 178–79.

[1] In the event the Court does not consider the donative intent issue to have been waived, the Petitioner-Respondent requests an opportunity to file a sur-reply brief, as the issue was not addressed in the Appellant-Respondent's Initial Brief.

Such is the case here. Tracing alone determines whether the disputed property is divisible. The Court of Appeals addressed identity analysis in *Popp v. Popp*, 146 Wis. 2d 778, 432 N.W.2d 600, (Ct. App. 1988).

> Identity inquires "whether the gifted or inherited asset has been preserved in some present identifiable form such that it can be meaningfully valued and assigned." Id. at 411, 427 N.W.2d at 132. We view an identity determination as a conclusion of law dependent upon underlying factual findings. Whether the facts as determined fulfill a legal conclusion presents a question of law which we review de novo. *Oshkosh N.W. Co. v. Oshkosh Library Bd.*, 125 Wis.2d 480, 485, 373 N.W.2d 459, 462 (Ct.App.1985). Moreover, the evidence on this question is undisputed and thus a question of law is presented; we are not bound by the trial court's resolution of such an issue. *Id.* Richard's gifted stocks are clearly identifiable, having remained titled solely in his name, and were readily valued. We are thus satisfied that their identity has been preserved.
>
> *Popp v. Popp*, 146 Wis. 2d 778, 787–88, 432 N.W.2d 600, 602–03, (Ct. App. 1988).

The issue, then, is whether Kelly's gifted or inherited assets have been preserved in some present identifiable form such that they can be meaningfully valued and assigned. It is undisputed that Kelly inherited all real estate holdings and that, at the time of the divorce, the properties continued to be titled solely in her name. The trial court found that "[t]he real estate that was gifted or inherited, other than the marital residence, has kept its separate status and was never retitled to include the name of respondent." [R-68, p. 7, A-App. 9]. The court further found that the best evidence of value of the real estate holdings was the real estate tax assessment statements presented to the court as exhibits. It determined that the values of the various parcels was the assessed fair market value identified on the assessments. [R-68, pp. 2-3, A-App. 4-5]. No evidence was presented by Travis to contest these valuations, and Travis specifically testified that he did not contest that the homestead property was worth more than its assessed value. [R-114, p. 177, R-App. 277].

In *Derr*, the Court noted that in some cases, tracing is so obvious that it is barely mentioned. The Court stated:

> ¶ 18 Frequently in our case law, tracing either is a non-issue or is so obvious that it is barely mentioned. For example, in *Spindler*, 207 Wis.2d 327, 558 N.W.2d 645,

> we gave the tracing inquiry short-shrift: "It is not seriously disputed that the cottage possesses the same physical form it had when it was gifted to Fredric and can be easily valued." Id. at 339, 558 N.W.2d 645; see also id. at 334–36, 339–40, 558 N.W.2d 645 (cottage owned by one spouse remained fully non-divisible where non-owning spouse's efforts to maintain and improve the property did not significantly add to its value and court accepted as true expert testimony that the entire appreciation in value was attributable to increased value of the land alone).
>
> *Derr*, 2005 WI App 63, ¶ 18.

There is no reason for the Court to address Kelly's real estate differently here. The real estate has the same physical form that it had when inherited by Kelly and can be easily valued. Travis questions the reasonableness of utilizing the assessed fair market value for tax purposes, but he is in no position to complain. Travis was free to obtain appraisals of the real estate. He chose not to. In relation to the homestead property, Travis testified that, because of all the needed repairs, it was not worth $160,000, and the parties would be lucky if they received $100,000 from a sale of the property. [R-114, pp. 123, 163, R-App. 223, 263].

Further, Wisconsin courts have upheld the utilization of tax values even when presented with an appraisal. In *Schwegler v. Schwegler*, 142 Wis. 2d 362, 417 N.W.2d 420 (Ct. App. 1987), the trial court chose to disregard the opinion of an appraiser and to instead utilize the assessed fair market value.

> Here, Herman would characterize the broker's appraisal as "uncontradicted" because it was not challenged by another appraisal. However, evidence of one type may be contradicted by evidence of another type, as recognized in *Ashraf*[2] by the broad phrase "something in the case." The tax assessment was "something in the case" which contradicted the broker's appraisal.
>
> The trial court was therefore at liberty to disregard the broker's appraisal in favor of the tax assessment. We cannot conclude that its valuation is against the great weight and clear preponderance of the evidence. *Holbrook v. Holbrook*, 103 Wis.2d 327, 334, 309 N.W.2d 343, 347 (Ct.App.1981).
>
> *Schwegler v. Schwegler*, 142 Wis. 2d 362, 368–69, 417 N.W.2d 420, 424 (Ct. App. 1987).

[2] *Ashraf v. Ashraf*, 134 Wis.2d 336, 397 N.W.2d 128 (Ct.App.1986).

Travis also argues that the trial court erred in determining that the seven parcels inherited by Kelly had remained titled in her name, were readily identifiable and were easily valued. He argues:

> In their decision the court presumed that the parcels retained their form when it stated: "---it is relatively easy to trace the properties in question to an indivisible asset. All the land gifted to petitioner has remained in her name alone and has not been retitled to include the respondent's name." (P. 12, paragraph 4, Property Division Order. App Page 014.) This ignores the fact that the parties did not use the properties as seven separate parcels.
>
> [App. Br. 6].

It is irrelevant whether the parties used the properties as seven separate parcels. Use of the property is not a factor in determining identity. Travis cites no authority to the contrary. The Court should disregard this argument as undeveloped.

### A. THE TRIAL COURT DID NOT IMPROPERLY SHIFT THE BURDEN OF PROOF TO THE APPELLANT-RESPONDENT.

Travis argues that the trial court improperly shifted the burden of proof to him on the issue of identity. The crux of Travis' argument is set forth on pages 10-11 of his initial Brief:

> While the court is correct in finding the extent of the boundaries of the occupied property could not be determined, it erred as a matter of law by making up an increased value for the homesite. The caselaw here does not authorize an equitable shoot from the hip solution. What the court did is make up a value for the house and adjoining land based upon speculation and what the court deemed equitable The court made this error from a lack of understanding of the burden of proof required here. The court correctly quoted the language that the Petitioner-Respondent has the burden of proof to trace the asset's identity. The court provided the relevant language regarding the fact that Petitioner-Respondent has the burden of proof to trace the assets' identity in its ruling. The language quoted is as follows:
>
> > "The party seeking exclusion of inherited or gifted property must prove that it has retained its character and identity. Once the recipient of inherited property has met these requirements, the opposing party has the opportunity to establish by sufficient countervailing evidence the property is not inherited, or has otherwise lost its exempt status because its character or identity has not been preserved. (citation omitted). *Derr v. Derr*, 2005 WI App 63, ¶ 14, 280 Wis. 2d 681, 698, 696 N.W.2d 170, 178. (Paragraph 4, page 12 of the Court's Property Division Order, App. Page 014.)

> But in the following soliloquy with Respondent-Appellant the court expressed the Respondent-Appellant needed to prove that the boundary lines of the homestead property were ambiguous:
>
> > "MR. LEWIS: Your Honor, I don't know the -- the exact parcels of what's what, but since our yard has increased, it is now into some of those parcels.
> >
> > THE COURT: That might be, but you're going to have to prove it. So, continue." (T. 7 P. 127, lines 12-16)
> >
> > However, the law does not require Respondent-Appellant to trace the nature of the parcels. Instead, the law requires Petitioner-Respondent to trace the **nature** of the parcels, and she failed to do so. The court does not have the authority to switch the burden of proof based on equity. (Emphasis supplied).
> >
> > [App. Br. 7-8].

Travis' argument misses the mark. He again conflates the identity of the property with its character. They are two separate things. "Nature" is a synonym for the noun "character."[3] Establishing that the character of the property had changed required Travis to establish that Kelly intended that the real property be held as marital property. It was his burden to establish donative intent.

It was Kelly's burden of proof only to establish the identity of the real property as gifted or inherited property. She did so. As a result, the burden of proof then shifted to Travis to "establish by sufficient countervailing evidence the property . . . lost its exempt status because its character or identity has not been preserved." (citation omitted). *See Derr v. Derr*, 2005 WI App 63, ¶ 14, 280 Wis. 2d 681, 698, 696 N.W.2d 170, 178. The trial court specifically found that "Respondent's argument fails because none of the actions of petitioner showed a donative intent to convert her trust or the unimproved land to property subject to division." [R-68, p. 12, A-App. 14].

Travis acknowledges that "[w]hen Petitioner-Respondent acquired the seven parcels they each had separate legal descriptions with separate parcel ID #s. Each

[3] https://www.oxfordlearnersdictionaries.com/us/definition/english/character

of the parcels carried a separate tax assessed value, so if they retained the same form would each be valued separately." [App. Br. 9]. Notwithstanding, he argues that:

> The gifted property is no longer distinct as the homestead extends into the gifted property, but no testimony established how much and how that affected value. It is not Respondent-Appellant's job to make Petitioner-Respondent's case. Here, she failed to provide a way for the court to meaningfully value her gifted parcels and on the record provided did not give evidence of what the gifted parcels looked like now. [App. Br. 8].

Travis fails to understand the trial court's ruling. The trial court did not determine that there was any change to the makeup of the seven parcels of real estate owned by Kelly. In fact, the trial court specifically found that all of the real estate parcels remained the same as when acquired by Kelly by gift or inheritance, and that the parcels were readily identifiable. The trial court found "[i]t remains easy to trace the gifted unimproved land, the Merrill Lynch account and the irrevocable trust to its original gifted origin." [R-68, p. 13, A-App. 15].

The trial court did not find that the identity or physical makeup of the homestead or any other parcel had changed. It found that the value of the homestead parcel was enhanced by the ability of the homestead property owner to make use of a small portion of adjoining, separately owned parcels. The trial court found:

> The Court believes the marital residence has a higher value, because it enjoys the benefit of using additional land. The Court, therefore, believes the land value without improvements is really $17,200 rather than $8,600. In making this finding, the Court is not concluding that the vacant land has lost its character as separate gifted property, but rather, that the existence of the adjoining land enhances the value of the marital homestead.
>
> . . .
>
> The Court believes that the marital residence has a value of $168,900, which incorporates the Court's belief that the use of the inherited land enhances the value of the marital home.
>
> [R-68, pp. 3-4, A-App. 5-6].

Paragraph 6 of the trial court's Findings of Fact included in its written decision entered on April 19, 20024 reads as follows:

> In 1997, prior to the parties' marriage, petitioner was gifted 43 acres of unimproved land, which either adjoined or was very near her home (Exhibit 4). This property has remained in the name of petitioner ever since and has not been retitled to

> include respondent's name. At the time of the final hearing, the real estate tax statement indicated that this parcel had an assessed value of $73,000.

This is the adjoining parcel into which Travis argues the curtilage of the homestead property extends (See ECF 65/Exhibit 14). The per acre price of the parcel as of the date of divorce was just under $1,698. The trial court found that the value of the homestead property was enhanced by $17,900. The trial court did not find that the acreage of the homestead property had increased. It merely found that its value was enhanced by the adjoining property. However, in terms of acreage, the enhanced value determined by the trial court would equate to over 10.5 acres of the adjoining property.

In his testimony, Travis acknowledged that located on the homestead property are a garage, a shed that's called a barn, a moveable storage container, a boiler and a couple of outbuildings – all located within approximately 200 yards of the residence. [R-114, pp. 210-11, R-App. 310-11].

The perimeter of a 10.5 acre square is approximately 2705.2 feet. Each side of the square would be 676.3 feet, or 225.43 yards. Hypothetically speaking, if the trial court had applied the best evidence and found that the size of the homestead parcel exceeded 1.85 acres, it could not have found that the parcel had been extended by any more than a 10.5 acre square. A 10.5 acre square already extends the boundary of use beyond that attested to by Travis by 25.43 yards. If anything, such a determination would be overly generous to Travis when considering the undisputed testimony that the curtilage of the homestead extended approximately 200 yards from the house. That said, such a determination would not have been unreasonable. An additional 25 yards would be a reasonable cushion to account for possible underestimation of the scope of the alleged curtilage.

While we do not have the benefit of any mathematical calculations that the trial court may have made, any theoretical calculations would be consistent with the undisputed evidence and well within the discretion of the trial court.

### B. RESPONDENT-APPELLANT HAS WAIVED THE ARGUMENT THAT THE CHARACTER OF THE REAL ESTATE HAS BEEN TRANSMUTED.

Travis addressed the issue of donative intent in relation to his arguments relating to the dog, Heidi. (*See* App. Br. 9-10). He clearly understands the need to address this issue in related to gifted or inherited property. Despite this knowledge, he failed to present any such argument in relation to the real property at issue in this action. Travis must be deemed to have waived any argument in relation to transmutation of the character of the real property.

While he did not address the argument in his initial brief, before the trial court Travis did raise the issue of logging on Kelly's inherited lands as evidence of intent to hold the properties jointly. Because it is not presented in his initial brief, that argument should not be considered on appeal. However, even if the Court were to address it, the joint use of logging proceeds does not transmute the character of the underlying property. The Court of Appeals addressed this issue in *Popp v. Popp*, 146 Wis. 2d 778, 432 N.W.2d 600 (Ct. App. 1988). The Court found that:

> Regardless of the manner in which Richard managed the corporate and family finances, there is no evidence that the PCT stock was transmuted. Nor is there any evidence of the requisite donative intent (actual or constructive) on Richard's part. *See id*. at 410–11, 427 N.W.2d at 132. Richard kept the stocks titled solely in his name and did nothing which expressly or impliedly indicated that he wished or intended to gift these shares to Diana or convert them to marital property.
>
> *Popp v. Popp*, 146 Wis. 2d 778, 789, 432 N.W.2d 600, 603 (Ct. App. 1988).

The trial court in Popp found that use of proceeds derived from separately owned stock to benefit the family transmuted the character of the property. The Court of Appeals addressed the issue and found:

> The trial court found that Richard exercised the powers derived from his stock ownership to financially benefit the marital and family unit. This resulted, the court concluded, in a transmutation of the PCT stock. We have no quarrel with the court's factual findings. However, we disagree with its conclusion.
>
> We conclude that the exercise of powers derived from exempt property for the benefit of a marital or family unit does not serve to transmute the underlying exempt property to marital property. Were the law otherwise, every gifted or

> inherited business entity would be transmuted to marital property where the financial benefits acquired therefrom were applied for the well-being of the marital unit. Rather, the law is that the character of the exempt property itself must be changed in some way. Id at 410, 427 N.W.2d at 132. Therefore, we conclude that the trial court erred when it concluded that Richard's gifted PCT stocks had been transmuted to marital property.
>
> *Popp v. Popp*, 146 Wis. 2d 778, 790, 432 N.W.2d 600, 604 (Ct. App. 1988).

The parallels to *Popp* are clear – "the exercise of powers derived from exempt property for the benefit of a marital or family unit does not serve to transmute the underlying exempt property to marital property." *Id.* Here, the use of the proceeds from logging Kelly's inherited property does not serve to transmute the underlying exempt property to marital property.

Once again, any transmutation argument should be disregarded as waived. To the extent the Court may consider the argument, it must be rejected as inconsistent with controlling legal authority.

## II. THE TRIAL COURT DID NOT ERR IN AWARDING THE DOG TO THE RESPONDENT-PETITIONER.

Travis has created a legal issue that does not exist in relation to the dog, Heidi. The trial court did not award the dog to Kelly on the basis that it was purchased with her separate, inherited funds – despite the fact that that the dog was purchased with her separate, inherited funds. [R-68, p. 9, A-App. 11]. However, it was not upon this basis that the trial court awarded the dog to Kelly. The trial court's findings in relation to the dog are as follows:

> The petitioner acquired two dogs with inherited money. One of the dogs died. The surviving dog, Heidi, is at the marital home and will be awarded to the party who will be awarded the marital home.
> [R-68, p. 9, A-App. 11].
>
> There is not much guidance on how to decide who gets the marital home in situations like this, but in this case, the equities lie in favor of the petitioner. Petitioner stands a much better chance of being able to buy out respondent and, considering she will have all the adjoining land and all the other considerations in this case, it makes sense to award the marital home to petitioner. The dog goes with the home. Petitioner agreed in court to pay respondent $800 for the dog.
> [R-68, p. 14, A-App. 16].

> Petitioner must pay respondent the sum of $80,107.65, plus $800 for the dog Heidi, on or before Friday, May 31, 2024. [R-68, p. 16, A-App. 18].

While the trial court found that Kelly paid for the dog(s) with her inherited funds, it did not find that the dog was her separate property. The trial court specifically noted twice that the dog was to be awarded to the party receiving the disputed residence, noted that Kelly agreed to pay Travis for the dog and ordered that Kelly was required to pay Travis $800 for the dog. The trial court treated the payment for the dog independent of the balancing payment owed by Kelly in relation to the division of marital property.

Travis testified that he was not working, did not have meaningful income (R-114, pp. 202-204, R-App. 302-304), and had no place to live if the trial court removed him from the marital homestead. [R-144, p. 244, R-App. 344]. Further, the trial court was aware that Travis was convicted in Bayfield Case No. 22 CF 36 and likely knew that he would be required to start serving a 90-day jail sentence on August 16, 2024. [See R-68, p. 9, A-App. 11]. A 90-day jail sentence is inconsistent with being able to care for a dog.

Under the circumstances, it was reasonable and within the discretion of the trial court to award the dog to the party who was awarded the homestead property.

Further, Travis received and accepted $800 in consideration for the dog. This payment was separate and distinct from the amount Kelly was required to pay in order to equalize the division of marital property. [R-68, p. 16, A-App. 18].

There is nothing in the record to suggest that Travis refused the consideration paid by Kelly for the dog. His acceptance of this consideration should be considered an accord and satisfaction, inconsistent with contesting the trial court's determination on appeal.

Ultimately, the trial court determined that it was most appropriate for the dog to be awarded to the party who would reside in the homestead property. The trial court awarded the dog to Kelly primarily because she was awarded the residence at

which the parties had raised it. The trial court's determination cannot be considered an erroneous exercise of discretion.

## CONCLUSION

On the basis of those documents of record and the above arguments, the Petitioner-Respondent, Kelly Ann Lewis, respectfully requests the Court to affirm the Order of the Circuit Court on review.

Dated this 10th day of December, 2024.

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## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font.

The length of this brief is 5,547 words.

Dated: December 10, 2024.

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